THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. IV.

CONTRACT—CROPS

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TABLE OF ABBREVIATIONS

OF THE NAMES OF THE

PRINCIPAL REPORTS CITED.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876—1890).
Arn.	Arnold. C. P.
Arn. & H.	Arnold and Hodges. Q. B.
Asp. M. C.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election
Barnard Ch.	Barnardiston. Ch.
Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell, C. C.	Bell. Crown Cases.
Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
Br. & B.	Broderip and Bingham. C. P.
Br. & Lush.	Browning and Lushington. Adm.
Bro. C. C.	Brown. Ch.
Bro. P. C.	Brown. Cases in Parliament.
Buck	Buck. Bky.
Bull. N. P.	Buller's Law of Nisi Prius.
Bulst.	Bulstrode. K. B.
Bunb.	Bunbury. Ex.
Burr.	Burrows. K. B.
Burr. S. C.	Burrows. Settlement Cases.

[1891] Ch. .....Law Reports, Chancery (1891 onwards).
C. B. .....Common Bench Reports.
C. L. R. ....Common Law Reports (1853—1855).
C. P. D. .....Law Reports, Common Pleas Division (1875—1880).
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Ch. Cas. .....Cases in Chancery.
Ch. Cas. Ch. .. ..Choice Cases in Chancery.
Ch. D. .....Law Reports, Chancery (1876—1890).
Ch. Pre. .....Precedents in Chancery.
Ch. Rep. .....Reports in Chancery.
Chit. .....Chitty. Bail Court.
Cl. & F. ... .Clark and Finnelly. H. L.
Co. Rep. .....Coke. K. B.
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Colles .....Colles' Cases in Parliament.
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Comb. .. ..Comberbach. K. B.
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C. & J. .....Crompton and Jervis. Ex.
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C. M. & R. .....Crompton, Meeson and Roscoe. Ex.
Con. & L. .....Connor and Lawson. Ch. (Ireland).
Cooper .....Cooper. Ch.
Ct. of Sess. Cas. ....Court of Session Cases (Scotland).
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Cox .....Cox. Ch.
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Curt. .....Curteis. Eccl.

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Dav. & M. .....Davison and Merivale. Q. B.
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Deac. & C. .....Deacon and Chitty. Bky.
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De G. .....De Gex. Bky.
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El. & El. . . . . .Ellis and Ellis. Q. B.
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Ex. . . . . .Exchequer Reports (1848—1856).
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F. & F. . . . . .Foster and Finlason. N. P.
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H. & N. . . . . .Hurlstone and Norman. Ex.
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Hag. Adm. . . . . .Haggard. Adm.
Hag. Cons. . . . . .Haggard. Consistory.
Hag. Ecc. . . . . .Haggard. Eccl.
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Hardr. . . . . .Hardres. Ex.

Hare .....Hare. Ch.
Hawk. P. C. .....Hawkins's Pleas of the Crown.
Hay. & J. ....Hayes and Jones. Ex. (Ireland).
Hayes .....Hayes. Ex. (Ireland).
Hob. ....Hobart. K. B.
Hodges .....Hodges. C. P.
Hog. .....Hogan. Rolls (Ireland).
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Hopw. & C. .....Hopwood and Coltman. Registration.
Hopw. & P. .....Hopwood and Philbrick. Registration.
Hurl. & W. .....Hurlstone and Walmsley. Ex.

Ir. C. L. R. .....Irish Com. Law (1850—1866).
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Ir. Eq. R. ....Irish Equity Reports.
[1894] Ir. R. ..... .Irish Law Reports (1894 onwards).
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Ir. R. Eq. .....Irish Equity (1866—1878).

J. & H. .....Johnson and Hemming. Ch.
J. & W. .....Jacob and Walker. Ch.
J. Kelyng .....Sir J. Kelyng. Crown Cases.
J. P. .....The Justice of the Peace.
Jacob .....Jacob. Ch.
Jenk. .....Jenkins. Ex.
Jo. & Lat. .....Jones and Latouche. Ch. (Ireland).
Johns. .....Johnson. Ch.
Jones .....Jones. Ex. (Ireland).
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Jur. .....The Jurist.

K. & G. .....Keane and Grant. Registration.
K. & J. ....Kay and Johnson. Ch.
Kay ....Kay. Ch.
Keb. ..... .Keble. K. B.
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Keilw. ... .Keilway. K. B.
Kel..... ..... Kelyng, Sir John. K. B.
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Knapp ... .Knapp. P. C.
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L. J. Ch. .....Chancery.
,, Bk. .....Bankruptcy.
,, C. P. .....Common Pleas.
,, Ex. .....Exchequer.
,, M. C. .....Magistrates' Cases.
,, Q. B. .....Queen's Bench.
,, P. C. .....Privy Council.
,, P. & M. .....Probate and Matrimonial.
,, P. .....Probate, Divorce, and Admiralty.
,, Adm. .....Admiralty.
,, Ecc. .....Ecclesiastical.

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L. R. A. & E.	
L. R. C. C.	
L. R. H. L. Sc.	
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Latch	Latch. K. B.
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Lev.	Levinz. K. B.
Lewin, C. C.	Lewin. Crown Cases.
Lit. Rep.	Littleton. C. P.
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M. C. C.	Moody. Crown Cases.
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M. & M.	Moody and Malkin. Nisi Prius.
M. & P.	Moore and Payne. C. P.
M. & Rob.	Moody and Robinson. Nisi Prius.
M. & S.	Maule and Selwyn. K. B.
M. & Sc.	Moore and Scott. C. P.
M. & W.	Meeson and Welsby. Ex.
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Mac. & G.	Macnaghten and Gordon. Ch.
M'Cle.	M'Cleland. Ex.
M'Cle. & Y.	M'Cleland and Young. Ex.
Macq. H. L.	Macqueen. H. L.
Madd.	Maddock. Ch.
Man. & G.	Manning and Granger. C. P.
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Marshall	Marshall. C. P.
Meg.	Megone. Company Cases.
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Moll.	Molloy. Ch. (Ireland).
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Mont. & Ayr.	Montagu and Ayrton. Bky.
Mont. & B.	Montagu and Bligh. Bky.
Mont. & C.	Montagu and Chitty. Bky.
Mont & M'Ar.	Montagu and M'Arthur. Bky.
Mont. D. & D.	Montagu, Deacon, and De Gex. Bky.
Moore	Moore. C. P.
Moore Ind. App.	Moore. Indian Appeals.
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Morrell	Morrell. Bky.
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Ph. ..... Phillips. Ch.
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Pop. .....Popham. K. B.
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R..... .....The Reports, 1893—1895.
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W. W. & D. ... .. .Wilmore, Wollaston and Davison. K. B.
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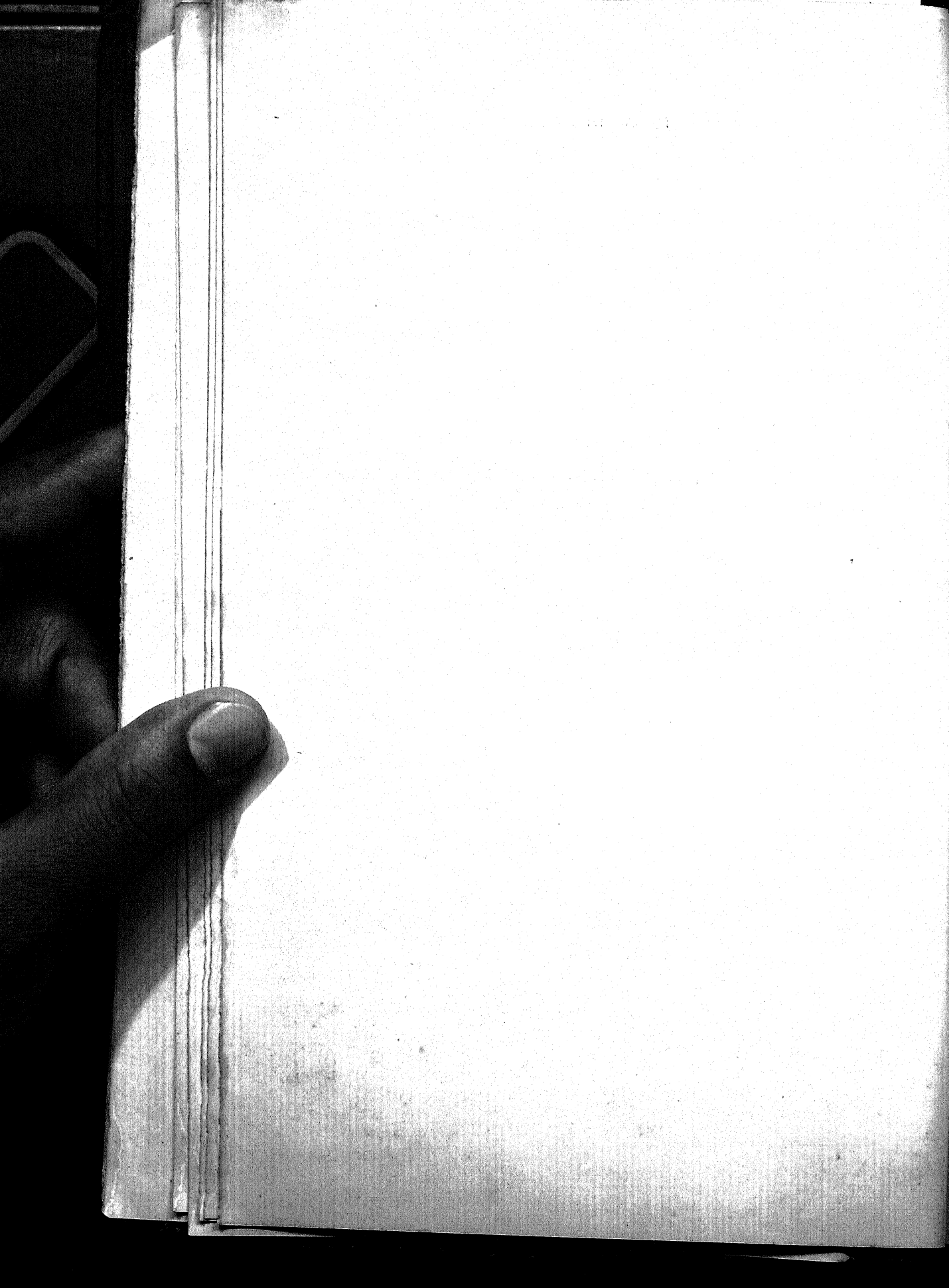

The Digest

OF

ENGLISH CASE LAW.

CONTRACT.

[By J. RITCHIE.]

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K. WITH AGENT, &C.—*See* PRINCIPAL AND AGENT.

L. ON SALE OF GOODS.—*See* SALE OF GOODS.

M. ON SALE OF LANDS.—*See* VENDOR AND PURCHASER.

N. DAMAGES FOR BREACH.—*See* DAMAGES.

O. STAMPING.—*See* EVIDENCE.

A. FORMATION OF CONTRACT.

1. AGREEMENT.

a. Offer.

i. *What is.*

Advertisement—Offer of Reward.]—Where a reward is offered by handbill to any person who should disclose facts leading to a conviction for a felony, the first person who gives the information is entitled to the reward, and the motive of such person in giving the information is not material. *Williams* v. *Carwardine*, 1 N. & M. 418; 4 B. & Ad. 621; 5 Car. & P. 566; 2 L. J., K. B. 101.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," published the following advertisement:—"100*l.* reward will be paid to any person who contracts the increasing epidemic, influenza, after having used the ball three times daily for two weeks" in a certain specified manner; "1,000*l.* is deposited with the A. Bank, showing our" (the defendants') "sincerity in the matter." The plaintiff, on the faith of this advertisement, purchased from a chemist one of the defendants' smoke balls, and used it in the manner required, and then contracted influenza:—Held, that the advertisement was an offer to contract; that by the performance of the conditions therein contained, the plaintiff had accepted the offer, and thereby created a contract with the defendants; that, having regard to the character of the transaction, no notification of acceptance of the offer was necessary; that there was consideration moving from the plaintiff; and, consequently, there was a binding contract by the defendants to pay the 100*l.* *Gerhard* v. *Bates* (2 E. & B. 476) discussed. *Carlill* v. *Carbolic Smoke Ball Co.*, 62 L. J., Q. B. 257; [1893] 1 Q. B. 256; 4 R. 176; 67 L. T. 837; 41 W. R. 210; 57 J. P. 325—C. A.

On the 29th May the defendant instructed his printers to print handbills offering a reward of 25*l.* to the person who should give information to a superintendent of police, leading to the conviction of the perpetrator of a certain crime. The plaintiff, a police officer, on the same morning, before the instructions to print the handbills had been given by the defendant, had communicated the desired information to C., a fellow police officer, with instructions to forward it to the superintendent, and C. thereupon communicated the information, in accordance with the rules of the force, to his own immediate superior officer, L., who sent it on the same evening to the superintendent, whom it reached in due course on the following morning, the 30th May, after the time when the said handbills had been delivered to and had been distributed by him to the neighbouring police-stations:—Held, that the plaintiff was entitled to the reward, C. and L., through whom such information was conveyed to the superintendent, being the plaintiff's agents to convey, and not the superintendent's agents to receive the message. *Gibbons* v. *Proctor*, 64 L. T. 594; 55 J. P. 616.

See further cases sub tit. ADVERTISEMENT.

—— **Of Sale.**]—The advertisement of a sale without reserve:—Held, to create a binding contract between the auctioneer and the highest bidder that the goods should be knocked down to him. *Warlow* v. *Harrison*, 1 El. & El. 295.

An advertisement by an auctioneer that a sale of certain articles would take place on a certain day:—Held, not to bind the auctioneer to sell the articles, nor to indemnify persons who had come to attend the sale. *Harris* v. *Nickerson*, 42 L. J., Q. B. 171; L. R. 8 Q. B. 286; 28 L. T. 414; 21 W. R. 635.

Statement of Minimum Price by Vendor.]—The mere statement by a vendor of the lowest price at which he will sell certain real estate contains no implied contract to sell it at that

price to the persons making the inquiry. *Harvey* v. *Facey*, 62 L. J., P. C. 127; [1893] A. C. 552; 1 R. 428; 69 L. T. 504; 42 W. R. 129—P. C.

H. telegraphed to F., "Will you sell B. property? Telegraph lowest cash price." F. replied by telegram, "Lowest price for B. property 900*l*." H. thereupon by telegram agreed to buy for that sum:—Held, that there was no completed contract; the respondent would be bound as to the lowest price he would accept, but no further. *Ib.*

Announcement of Examination for Scholarship.]—An announcement that an examination for a scholarship will be held does not imply a condition that the scholarship will be given to the competitor obtaining most marks. Consequently there is no contract on which such competitor can sue the trustees of the scholarship. *Spencer* v. *Harding* (L. R. 5 C. P. 561) followed. *Rooke* v. *Dawson*, 64 L. J., Ch. 301; [1895] 1 Ch. 480; 13 R. 269; 72 L. T. 248; 43 W. R. 313; 59 J. P. 231.

Vague and Indefinite Offers.]—*See* Uncertain Contracts, infra, D. 1. h.

ii. *Communication of.*

Necessity for.]—A person who does work for another without the knowledge or consent of that other cannot sue for the value. T. was engaged to command L.'s ship. He threw up his command during the expedition but helped to work the vessel home, and then claimed reward for services thus rendered:—Held, that he could not recover. See *Taylor* v. *Laird*, 1 H. & N. 266; 25 L. J., Ex. 329.

Receipt.]—The delivery of a receipt containing terms of the contract constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document, or otherwise informs himself of its contents or not. To this general rule there are, however, the following exceptions:—(1) The nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a new acknowledgment of an agreement, not intended to be varied by special terms. (2) In case of fraud. (3) Where the document is misleading, and does actually mislead the person who takes it. (4) An exception has been suggested of conditions unreasonable in themselves, or irrelevant to the main purpose of the contract.—Per Stephen, J., in *Watkins* v. *Rymill*, infra.

—— **Delivered to Customer—Incorporation of Conditions exhibited upon Premises.**]—The defendant was keeper of a repository for the sale on commission of horses and carriages. The plaintiff delivered to him a wagonette to be sold, and took from him a printed form which contained a receipt for the wagonette, followed by the words, "Subject to the conditions as exhibited upon the premises." By one of the conditions exhibited upon the premises the defendant had power to sell any property sent to his repository which remained over one month unless all expenses were previously paid. The plaintiff did not read this receipt, but put it in his pocket without noticing it. The defendant having sold the wagonette in the exercise of the power of sale in the conditions, the plaintiff brought an action to recover its value, and at the trial, the jury, having been directed that the question was whether the defendant had or had not given the plaintiff reasonable notice of the conditions, found a verdict for him:—Held, that the jury had been misdirected, for the condition was not unreasonable, and, having regard to the circumstances, there was nothing to take the case out of the general rule that if a document in a common form is delivered by one of two contracting parties to and accepted without objection by the other, it is binding upon him, whether he informs himself of its contents or not, and that judgment ought to be entered for the defendant without a new trial, for there was no evidence upon which the jury could have properly found for the plaintiff. *Zunz* v. *S. E. Ry.* (L. R. 4 Q. B. 539); *Henderson* v. *Stevenson* (L. R. 2 H. L. Sc. 470); and *Burke* v. *S. E. Ry.* (5 C. P. D. 1) considered. *Watkins* v. *Rymill*, 52 L. J., Q. B. 121; 10 Q. B. D. 178; 48 L. T. 426; 31 W. R. 337; 47 J. P. 357.

Notice relieving Owner of Tug against Negligence of Servants.]—Where the owners of a tug gave notice that they would not be answerable for any loss or damage occasioned to any tow by any negligence or default of them or their servants, and such notice was brought to the knowledge of the owners of the tow, and the latter was lost through the tug taking more vessels than she could properly manage, and more than were allowed by regulations made under the Piers and Harbours Act, 1847 (10 & 11 Vict. c. 27), and the Great Yarmouth Port and Haven Act, 1866:—Held, that the owners of the tug were exempt from liability. *The United Service*, or *Cole* v. *Great Yarmouth Steam Tug Co.*, 53 L. J., P. 1; 9 P. D. 3; 49 L. T. 701; 32 W. R. 565; 5 Asp., M. C. 170—C. A.

A master of a steam-tug, of which the defendant was owner, was employed by the plaintiff to tow his smack out of a harbour. In so doing, the smack was stranded through the negligence of the master. The plaintiff had on previous occasions hired the defendant's steam-tug, and on paying the charge had received a receipt upon the back of which was printed a notice that the defendant would not be answerable for damage occasioned by any supposed negligence of his servants:—Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts. *Symonds* v. *Pain*, 6 H. & N. 709; 30 L. J., Ex. 256.

Ticket—Conditions.]—If in the opinion of the jury a passenger receiving a ticket from a shipping company does not see or know that there are any conditions thereon, he is not bound by the conditions. If he knew there was any writing on the ticket it is a question of fact whether he had reasonable notice that the writing contained conditions, and he is or is not bound thereby according as he had such notice or not. *Parker* v. *S. E. Ry.* (2 C. P. D. 416), approved. *Richardson* v. *Rowntree*, 63 L. J., Q. B. 283; [1894] A. C. 217; 6 R. 95; 70 L. T. 817; 58 J. P. 493; 7 Asp. M. C. 482—H. L. (E.)

Non-Disclosure of Circumstances which may Excuse Non-Performance.]—The existence of a

contract is a question independent of circumstances which may excuse its non-performance. If terms proposed by two parties to each other in themselves constitute a complete contract by which the one party is to do for the other a definite work at a certain time, and to receive a specified rate of remuneration, it is not the less a binding contract, which will subject the party who was to do the work to an action for not doing it, because at the time the terms were accepted something remained to be disclosed (as to the nature of the work, &c.) upon which it might depend whether there might not be a legal justification for refusing to perform it. *Lara* v. *General Apothecaries' Co.*, 26 L. J., Ex. 225.

iii. *Lapse or Revocation.*

Lapse—Unreasonable Time.]—A proposal on one side, not answered by the other until after a delay of some months, and then not assented to, but some months after acceded to, is no evidence of a contract. *Emmott* v. *Riddell*, 2 F. & F. 142.

Where an application is made for shares, the directors are bound to allot them within a reasonable time, or the allottee may refuse to accept them and recover back the deposit, whether he has withdrawn his application or not. *Ramsgate Hotel Co.* v. *Montefiore*, 4 H. & C. 164; 35 L. J., Ex. 90; 12 Jur. (N.S.) 455; 13 L. T. 715; 14 W. R. 335.

An allotment on 23rd November of shares applied for on 8th June, is not made within a reasonable time. *Ib.*

Revocation — Valid before Acceptance.] — Where a defendant offered to purchase a house from the plaintiff, and to give him six weeks for a definite answer:—Held, that before the offer was accepted, the defendant might retract it at any time during the six weeks. *Routledge* v. *Grant*, 4 Bing. 653; 1 M. & P. 717; 3 Car. & P. 267; 6 L. J. (O.S.) C. P. 166; 29 R. R. 672.

The defendant, on the 19th of August, 1853, contracted to purchase of the plaintiff a parcel of chassum waste silk, "to arrive, in all probability, in January and February next; but further particulars will be furnished respecting the name of the ship or ships in the next mail, or on receipt of the next after that." The second mail after the 19th of August arrived in London on the 19th of September; no name of any ship was then communicated to the defendant; and on the 18th of January, 1854, the defendant wrote: "We give you one week from this day's date to give to us the name of the ship which the 20,000 lbs. of chassum are on board; and in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last." To this the plaintiff replied on the same day: "I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. chassum to your contract of 19.8.53, by informing you that it has already arrived, and that you will receive invoice in due course." On the 19th the defendant wrote: "Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the chassum has been shipped, and this is the information which we now again call for; but as you say the chassum has arrived, there is no occasion for the delay of a week in giving the information which we now ask for in the course of to-morrow; in default of which, we shall act as indicated in our letter of yesterday." The names of two ships were given on the 24th and 25th of January:—Held, that the defendant's offer to renew the contract not having been in terms accepted by the plaintiff, the defendant was at liberty to retract it, and that his letter of the 19th of January was a sufficient retractation. *Gilkes* v. *Lemino*, 4 C. B. (N.S.) 485; 4 Jur. (N.S.) 537; 6 W. R. 620.

An offer to guarantee moneys to be advanced to a third party on discount, to a certain extent, "for the space of twelve calendar months," is countermandable within that time. *Offord* v. *Davies*, 12 C. B. (N.S.) 748; 31 L. J., C. P. 319; 9 Jur. (N.S.) 22; 6 L. T. 579; 19 W. R. 758.

—— **Invalid after Acceptance.**]—A company advertised for tenders for the supply of stores for a period of twelve months. The defendant sent in a tender to supply the stores required for the period named, at certain fixed prices, "in such quantities as the company's storekeepers might order from time to time," and the company accepted his tender:—Held, that there was a sufficient consideration for the defendant's promise to supply the goods, although there was no binding contract on the part of the company to order any. *G. N. Ry.* v. *Witham*, 43 L. J., C. P. 11; L. R. 9 C. P. 16; 29 L. T. 471; 22 W. R. 48.

Two of the plaintiffs were the legal owners of a leasehold interest in a house, and claimed 37*l.* from the defendant for the use and occupation of it during the three last months of their term. They authorised him to pay this amount to another of the plaintiffs, who was owner of the reversion. She called on the defendant, who expressed his willingness to pay her the money, though he did not make any actual tender of it, but she refused to receive it and demanded more. The plaintiffs then sued the defendant for the use and occupation, and claimed 238*l.* The defendant paid 37*l.* into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more. *Gretton* v. *Mees*, 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

Held, also, that the defendant was entitled to the costs of the action from the time of the payment into court. *Ib.*

Communication of Revocation—Necessity for.] —The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40*s.* per ton, nett cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 P.M. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 P.M. found a purchaser for the iron, sent a telegram at 1.34 P.M. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs

brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent. The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiffs' telegram was sent at 9.42 A.M. how prices would range during the day :—Held, that in the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that, although the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs ; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was therefore maintainable. *Cooke* v. *Oxley*, infra, discussed. *Stevenson* v. *McLean*, 49 L. J., Q. B. 701 ; 5 Q. B. D. 346 ; 42 L. T. 897 ; 28 W. R. 916.

—— **By Letter posted before but received after Acceptance.**]—An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered. By a letter of the 1st of October the defendants wrote from Cardiff offering goods for sale to the plaintiffs at New York. The plaintiffs received the offer on the 11th and accepted it by telegram on the same day, and by letter on the 15th. On the 8th of October the defendants posted to the plaintiffs a letter withdrawing the offer. This letter reached the plaintiffs on the 20th :—Held, that the withdrawal was inoperative, a complete contract binding both parties having been entered into on the 11th of October when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose was withdrawn. *Byrne* v. *Van Tienhoven*, 49 L. J., C. P. 316 ; 5 C. P. D. 344 ; 42 L. T. 371 ; 44 J. P. 667.

M. applied in writing for shares in a company, and forwarded a deposit. After a letter of allotment was posted to M., but before it was received, he became aware of an alteration in the prospectus, and wrote withdrawing his application. Negotiations subsequently took place between M. and the chairman of the company, who was authorised by the directors to arrange a compromise with M., as the result of which an agreement was come to that M.'s name should be removed from the register. A petition to wind up the company was then presented, and a few days afterwards there was a meeting of the company, at which the directors resolved that the allotment of shares to M. should be cancelled :—Held, that as M.'s letter of repudiation was not received until after the letter of allotment was posted, M. became a shareholder, but that a binding compromise, releasing him from his contract, had been concluded before the commencement of the winding-up, and that therefore he was not liable to be fixed on the list of contributories. *Scottish Petroleum Co., In re, Maclagan's case*, 51 L. J., Ch. 841 ; 46 L. T. 880.

Where an offer is made in such circumstances that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance, the acceptance is complete as soon as it is posted ; but this doctrine does not apply to the revocation or modification of an offer. *Henthorn* v. *Fraser*, 61 L. J., Ch. 373 ; [1892] 2 Ch. 27 ; 66 L. T. 439 ; 40 W. R. 433—C. A.

The defendants handed to the plaintiff, at their office in Liverpool, an offer in writing to sell him certain real property in Birkenhead, where he resided. On the following day the plaintiff's solicitor wrote by his direction accepting the offer. After the letter was posted, but before it reached its destination, the plaintiff received through the post a withdrawal of the offer :—Held, that the acceptance was complete before the offer was withdrawn. *Ib.*

—— **Where held Unnecessary.**]—A., having proposed to sell goods to B., gave him a certain time at his request to determine whether he would buy them or not ; B., within the time, determined to buy them, and gave notice to A. :—Held, that A. was not liable for not delivering them, for B. not being bound by the original contract there was no consideration to bind A. *Cooke* v. *Oxley*, 3 Term Rep. 653 ; 1 R. R. 783.

A. and B. being together, B. offered goods to A. at a certain price, and gave A. three days to make up his mind. Before the three days expired B. offered the goods to C. A. cannot declare against B. as upon an absolute bargain. *Head* v. *Diggon*, 3 M. & Ry. 97 ; 7 L. J. (O.S.) K. B. 36.

On Wednesday A. signed and delivered to B. a memorandum in these words :—"I hereby agree to sell to B. certain freeholds for 800*l.*" Then followed a postscript, also signed by A. :—"This offer to be left over until Friday, nine o'clock A.M." On Thursday A. entered into a contract to sell the freeholds to C. On Friday morning, before nine o'clock, B., who had become aware that A. had entered into a contract for the sale of the property to C., but had received no notice of such contract from A., handed to him a written acceptance of the offer, which A. refused to receive, saying that the property was already sold. On a bill by B. for specific performance :—Held, that the memorandum signed by A. was a mere offer, which he was entitled to withdraw at any time before acceptance ; that it was too late for B. to accept the offer after he had become aware that A. had entered into a contract to sell the property to another person, and that the bill must therefore be dismissed with costs. *Dickinson* v. *Dodds*, 45 L. J., Ch. 777 ; 2 Ch. D. 463 ; 34 L. T. 607 ; 24 L. T. 594—C. A.

A person to whom a written offer to sell an estate has been made cannot turn the offer into a binding contract by accepting it after he has heard that the person making the offer has sold the property to somebody else, although there has been no formal retractation of the offer. *Ib.*

b. Acceptance.

i. *Generally.*

Contract requires Two Parties.]—A contract requires two parties to it, and a man in one character can with difficulty contract with himself in another character. *Collinson* v. *Lister*, 20 Beav. 356.

Acceptance—Must be Absolute and Unconditional.]—Where letters are produced to prove an agreement, the answer to the written proposal

must unequivocally and expressly accept the terms proposed, without the introduction of new matter. *Holland* v. *Eyre*, 2 Sim. & S. 194.

An agreement is the result of the mutual assent of two parties to certain terms; and if it is clear that there is no consensus, what may have been written or said becomes immaterial. *Ely (Marchioness), In re*, 4 De G., J. & S. 638.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorised, there exist all the materials which a court of equity requires to make a legally-binding contract. *Ib.*

But where to a proposal or an offer an assent was given subject to a provision as to a contract:—Held, that the stipulation as to the contract was a term of the assent, and there was no agreement independent of that stipulation. *Ib.*

There must be mutuality in a contract to render it binding. *Staines* v. *Wainwright*, 8 Scott, 280; 6 Bing. (N.C.) 174; 9 L. J., C. P. 107. *And see cases* sub. iii. infra.

—— **Contract dates from.**]—Semble, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made. *Dickinson* v. *Dodds*, 45 L. J., Ch. 777; 2 Ch. D. 463; 34 L. T. 607; 24 W. R. 594.

Want of Mutuality—When no bar to Performance.]—Where a contract is made which both parties to it know at the time cannot be carried out without the act or consent of a third party, and that act or consent is done or given by the third party within a reasonable time, and he does nothing inconsistent with such act or consent, want of mutuality at the time of contract is no bar to its performance. *Blackburn Union* v. *Brooks*, 26 W. R. 57.

ii. *Communication of.*

Binding when sent through Post.]—The defendant applied for shares in the plaintiff company. The company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:—Held, by Baggallay and Thesiger, L. JJ., Bramwell, L. J., dissenting, that the defendant was a shareholder. *British and American Telegraph Co.* v. *Colson*, infra, overruled. *Household Fire Insurance Co.* v. *Grant*, 48 L. J., Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858—C. A.

When an offer is made by letter sent through the post, and is accepted by letter also sent through the post, the contract is made at the moment that the letter of acceptance is put into the post. *Imperial Land Co. of Marseilles, In re, Harris's case*, 41 L. J., Ch. 621; L. R. 7 Ch. 587; 26 L. T. 781; 20 W. R. 690.

H. made an offer to take shares by a letter sent from Dublin to London by post on the 5th of March. At 4 A.M. on the 16th of March, a letter of allotment was posted in London, directed to H. in Dublin. On the 16th March, at a later hour in the day, a letter was posted by him in Dublin withdrawing his offer. Both letters were delivered on the 17th of March:—Held, that he was bound. *Ib.*

A. applied for shares in a company. Shares were allotted on the 15th March, 1866, and the letter of allotment posted on the 16th, but owing to the applicant having omitted to add the name of the post town "Dublin" to his address, the letter miscarried, and was returned to the company, who immediately forwarded it through the brokers at Dublin on the 20th of March. The letter was delivered on the 21st, but in the meantime the applicant had written on the 20th a revocation of his application for shares, and subsequently repudiated the allotment and demanded a return of his deposit. No steps were taken by A. to have his name removed from the register of shareholders, and calls made by the company were not enforced against him:—Held, that the miscarriage of the first letter of allotment being caused by the incorrect address furnished by A. himself, the contract was complete at the time when, but for A.'s fault, the letter would have been delivered. *Imperial Land Co. of Marseilles, In re, Townsend's case*, 41 L. J., Ch. 198; L. R. 13 Eq. 148; 25 L. T. 692; 20 W. R. 164.

Held, also, that the letter posted on the 20th of March was posted within a reasonable time, and was a good notice of allotment; and that A. was a contributory. *Ib.*

When an application for shares in a company has been sent by post, the contract to take shares is complete and binding from the moment that the letter announcing the allotment is put into the post, whether such letter subsequently reaches the allottee or not. *Imperial Land Co. of Marseilles, In re, Wall's case*, 42 L. J., Ch. 372; L. R. 15 Eq. 18.

A proposed contract is not binding on the proposer until its acceptance by the other party has been communicated to him, and posting a letter communicating the acceptance to him is not sufficient to make it binding on him if he does not in fact receive the letter. *British and American Telegraph Co.* v. *Colson*, 40 L. J., Ex. 97; L. R. 6 Ex. 108; 23 L. T. 868.

—— **Notwithstanding Posting of Revocation.**]—See *Byrne* v. *Van Tienhoven; Scottish Petroleum Co., In re;* and *Henthorn* v. *Fraser*, supra, cols. 9, 10.

—— **Reply by Return.**]—On the 22nd November, 1871, the plaintiff wrote to the defendants, asking their lowest price for 800 tons of iron, delivered at P., at the rate of 200 tons per month, March, April, May, and June, 1872; to which, on the 24th November, they replied:—"We beg to offer you 800 tons at 69*s.* per ton delivered at P., and waiting your reply by return, remain," &c. The plaintiff did not reply by return, but on 27th November wrote to the defendants as follows:—"Your price is high; if I made the quantity 1,200 tons, delivery 200 tons a month for the first six months of next year, I suppose you would make the price lower." In answer to this the defendants, on 28th November, wrote as follows to the plaintiff:—"In reply to yours of yesterday we are willing to make you an offer of further 400 tons, 200 tons in January, 200 tons in February, at the same price we quoted you in ours of the 24th inst., though the rate of freight will, doubtless, be higher then than that of the following months. Let us have your reply by return of post as to whether you accept our offers of, together, 1,200 tons." No reply was actually sent by return, but on the same day, the 28th November, the plaintiff wrote and posted a

letter to the defendants :—"You can enter me 800 tons on the terms and conditions named in your favour of the 24th inst., but I trust you will enter the other 400 tons, making in all 1,200 tons, referred to in my last, at 68*s*." These two letters crossed each other in the course of post, and on the 29th November the defendants replied to the plaintiff's letter of the 28th, that they could not "book his order for 1,200 tons at less than 69*s*., and even that offer they could only leave on hand for reply by to-morrow before 12 o'clock." The plaintiff did not reply within that time, and subsequently the defendants declined on that ground to deliver any iron at all to him, whereupon he brought this action for breach of contract, contending that, at all events, there was a binding contract for 800 tons :—Held, that there was no contract to deliver the 800 tons, as the plaintiff did not accept the defendants' offer of the 24th November, his letter of the 28th November being too late for that purpose ; and the defendants' offer of the 1,200 tons was only open until noon on the 30th, and was not accepted within that time. The defendants' letter of the 28th November was one offer of 1,200 tons, and not two separate offers of 800 and 400 tons. *Tinn* v. *Hoffmann*, 29 L. T. 271—Ex. Ch.

"Reply by return of post" does not mean exclusively "reply by letter by return of post." A reply by telegram or by verbal message, or by any means, not later than a letter sent by post would reach its destination, would equally satisfy the requisition. *Ib.*

In an action for the breach of an agreement in not delivering coals, a letter from the defendant, containing the terms of the contract between him and the plaintiff, concluded by stating, as to the proposition therein contained, that it was desirable that he should have an answer per return, as he could have a vessel to charter at the price stated, which would not wait any longer for the defendant's answer ; and, failing her, he feared he should not be able to get another ; and there was no averment in the declaration that the plaintiff had sent an answer per return :—Held, that this amounted to a mere request, and formed no part of the contract, and consequently that the plaintiff was entitled to recover. *Johnson* v. *King*, 2 Bing. 270 ; 9 Moore, 482.

A letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract ; an answer, posted on the day of receiving the offer, is sufficient. *Dunlop* v. *Higgins*, 1 H. L. Cas. 381 ; 12 Jur. 295.

A contract is accepted by the posting of a letter declaring its acceptance. *Ib.*

A person putting into the post a letter declaring his acceptance of a contract offered has done all that was necessary for him to do, and is not answerable for casualties occurring at the post-office. *Ib.*

By Letter in answer to Telegram.]—An acceptance of the terms of a contract must on the face of it include an acceptance of all the terms offered. An offer by telegram is presumptive evidence that a prompt reply is expected, and an acceptance by letter may be evidence of such unreasonable delay as to justify a withdrawal of the offer. *Quenerduaine* v. *Cole*, 32 W. R. 185.

Misdirection.]—A contract is complete upon the posting by one party of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding such letter never reaches its destination. *Duncan* v. *Topham*, 8 C. B. 225.

A., by letter, offered to sell B. certain specified goods, receiving an answer by return of post ; the letter being misdirected, the answer notifying the acceptance of the offer arrived (two days later than it ought to have done) on the day following that when it would have arrived if the original letter had been properly directed. A. sold the goods to a third person :—Held, that there was a contract binding the parties, from the moment the offer was accepted, and that B. was entitled to recover against A in an action for not completing his contract *Adams* v. *Lindsell*, 1 B. & Ald. 681 ; 19 R. R. 415.

Time.]—A purchaser offered a price for an estate, and the vendor, by a letter sent by post and received by the purchaser the day after it was put into the post-office, accepted the offer :—Held, that the vendor was bound by the contract from the time when he posted his letter, although it was not received by the purchaser until the following day. *Potter* v. *Sanders*, 6 Hare, 1.

iii. *Qualified.*

Does not make Binding Contract.] — The plaintiff, who proposed to enter the service of the defendant, a calico printer, as salesman, on the 21st of September wrote as follows :—"Referring to my conversation with you, I have now the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms, viz., a list of merchants to be regularly called on by me to be made, and corrected as occasion requires. My salary for the year to be 120*l*., and in addition a commission of ½*d*. per piece on all sales effected or orders taken by myself, &c. If the terms herein specified are in accordance with your ideas, kindly confirm them by return, and I will prepare to enter on my duties at your warehouse on Monday morning next." The defendant on the following day replied :—"Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes ; but I think we are quite agreed on all. We shall therefore expect you on Monday." Then followed this postscript :—"I have made a list of customers, which we can consider together" :—Held, that these two letters did not constitute a binding contract in writing, the defendant's answer not being an absolute and unqualified acceptance of the plaintiff's offer. *Johnson* v. *Appleby*, 43 L. J., C. P. 146 ; L. R. 9 C. P. 158 ; 30 L. T. 261 ; 22 W. R. 515.

The defendant applied by letter to a projected railway company for one hundred shares, undertaking to accept the same or any less number, and to pay the deposits. He received a letter of allotment for sixty shares. This letter was headed "Not transferable." In an action by the company against him to recover the amount of the deposits :—Held, that there was no binding contract, the proposal being absolute and the acceptance conditional, it containing a qualification that the contract was not to be transferable. *Duke* v. *Andrews*, 5 Railw. Cas. 496 ; 2 Ex. 290.

A. wrote to B. on the 15th of July, proposing a partnership, saying, "As to the time, I certainly should wish it by the end of August." To this B. answered on the 16th, "I am ready to accede to your proposal. With regard to time, if you could possibly defer my coming until the second

week in September, it would suit much best, as our season in August is at the height." On the 19th A. again wrote, "The time is very important, and ought not to be later than August":—Held, that these letters did not constitute an absolute agreement; and that the judge, having left it to the jury to determine whether B.'s letter of the 16th of July was a positive acceptance of A.'s proposal of the 15th, was a misdirection. *Cheveley* v. *Fuller*, 13 C. B. 122.

The defendant, on 20th November, 1851, wrote to plaintiffs in these terms:—"I agree to supply you with coals for three years from this date, at 4*s.* 6*d.* per ton. This offer to extend to your whole consumption." On the same day the plaintiffs answered the above in these terms:—"We agree to take our whole consumption of coals from you for three years next ensuing, commencing from 1st October, 1851":—Held, that the second letter was not an unqualified acceptance of the terms contained in the first, and that therefore there was no contract in writing. *Haworth* v. *Barnes*, 2 C. L. R. 783; 2 W. R. 375.

The first of the above letters having been put in, and it having been elicited in cross-examination that an answer to it in writing had been sent:—Held, that parol evidence was not admissible to show parol acceptance of the terms contained in the first letter. *Ib.*

When it appears from the correspondence between the parties that some of the terms of an agreement have been arrived at, but that others remain unsettled, there is no contract between the parties, and consequently, there can be no part performance. *Bertel* v. *Neveux*, 39 L. T. 257.

C. made a written proposal to D. for the exchange to him of a new engine for an old one, with 10*l.* and a ton of iron. D. afterwards verbally assented to these terms, with the exception of the ton of iron; and in the course of the conversation advised C. to remove the fittings at once, and subsequently told him that he could not allow the engine to remain on his premises beyond quarter-day. Before quarter-day, C. sold the old engine to the plaintiff, but refused to let the plaintiff have it, alleging that the bargain was (as the written proposal rather imported), that it was not to be removed until the new engine was completely fitted up, and that this had not been done. In an action against D. for conversion of the old engine, the judge told the jury that it was for them to consider, under all the circumstances, whether or not the contract between C. and D. was for an immediate transfer of the old engine, and if so, to find for the plaintiff, which they did:—Held, that as the written proposal had not been accepted simpliciter, the real contract was by parol; that the direction was right, and that there was evidence to sustain the verdict. *Stones* v. *Dowler*, 29 L. J., Ex. 122.

A contract stated in a declaration was "five tons of linseed cake, to be delivered within a reasonable time in that behalf." The contract proved was, "I can take the five tons of linseed cake, but it must be put on board directly." Answer, "I shall ship you five tons to-morrow":—Held, that the proof did not support the declaration. *Duncan* v. *Topham*, 8 C. B. 225; 18 L. J., C. P. 310. See also *Ulloch* v. *Reddelieu*, 5 L. J. (o.s.) K. B. 208.

Introduction of New Term.]—A letter allotting shares stated that the allotment-money must be paid on the 21st of March, and punctual payment was requisite, and that the bankers were instructed not to receive payment after that day without interest at 10 per cent.:—Held, that this addition relative to interest was not an introduction of a new term. *Imperial Land Co. of Marseilles, In re, Harris's case*, 41 L. J., Ch. 621; L. R. 7 Ch. 587; 26 L. T. 781; 20 W. R. 690.

The plaintiff sent his horse for sale to a livery stable and there bargained with B., who bid 75*l.* for the horse if sound. The parties, however, did not then come to any final agreement, and the plaintiff left the horse with S., the livery-stable keeper, to see if the defendant would buy the animal, arranging with S. that the latter was not to have any commission on the sale unless a price of 75*l.* or more was paid. A veterinary surgeon having reported a slight unsoundness in the horse, B. wrote to S.:—"When we bid 75*l.* for the horse we did it on the understanding that he should be passed sound; as it is, we think 70*l.* as much as we should give, and therefore you can make that bid for us." S. did so, inclosing B.'s letter to the plaintiff, who wrote in reply:—"As the horse is with you, he shall go at 70*l.* clear to me. I will pay no expenses; you must get what you can of Mr. B. I cannot allow anything off the 70*l.*":—Held, that as the plaintiff by his answer to the defendant's offer stipulated that they should bear expenses to which he as vendor was primâ facie liable, he added a new term to those proposed, and in the absence of an acceptance of that term there was no complete contract between the parties. *Lewis* v. *Pedrick*, 29 L. T. 178.

Where the defendant offered to purchase on certain terms, "possession to be given on or before 25th July," and the plaintiff agreed to the terms, and said he would give possession on the 1st of August:—Held, no acceptance of the defendant's offer. *Routledge* v. *Grant*, 4 Bing. 653; 1 M. & P. 717; 3 Car. & P. 267; 6 L. J. (o.s.) C. P. 166; 29 R. R. 672.

A letter accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit and a day for completing the purchase. No reply was given to this letter:—Held, that there was no complete contract on which to sustain a bill for specific performance. *Honeyman* v. *Marryatt*, 6 H. L. Cas. 112; 26 L. J., Ch. 619; 4 Jur. (N.S.) 17.

When an offer for the sale of an estate is accepted "subject to the title being approved by our solicitors," a new term is introduced, and there being no unconditional acceptance of the offer there is no contract. *Hussey* v. *Horne-Payne*, 47 L. J., Ch. 751; 8 Ch. D. 670; 38 L. T. 543; 26 W. R. 703—C. A. *But see* dicta of Cairns, L. C., *S. C.*, 48 L. J., Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585.

Where there has been by means of letters an offer and an acceptance constituting a completed contract, and specific performance is sought of that contract, the fact that the person seeking specific performance had in letters subsequent to the letters constituting the contract sought to insert a new stipulation, which was resisted by the other party, is not sufficient to show that there had been no complete contract constituted by the prior letters. *Hussey* v. *Horne-Payne* (4 App. Cas. 311) explained. *Bolton* v. *Lambert*, 58 L. J., Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434—C. A.

The defendant by letter offered to sell his business on certain terms to the plaintiffs, which the plaintiffs by letter accepted. On a formal memorandum being submitted to the plaintiffs they added a clause prohibiting the defendant from carrying on a similar business within a certain radius. Subsequent negotiations followed as to this clause, and the defendant declined to complete. The plaintiffs then offered to complete on the original terms in the letters, omitting the disputed clause. In an action by the plaintiffs for specific performance:—Held, that, looking to the subsequent negotiations, there was no concluded agreement constituted by the original letters, and the action was dismissed. *Hussey* v. *Horne-Payne* (4 App. Cas. 311) followed; and the criticism on that case in *Bolton* v. *Lambert* (supra) dissented from. *Bristol Aërated Bread Co.* v. *Maggs*, 59 L. J., Ch. 472; 44 Ch. D. 616; 62 L. T. 416; 38 W. R. 393.

The defendant made an offer by letter to the plaintiff to purchase from him an estate, which offer was accepted by the plaintiff by letter. After this the plaintiff sent to the defendant a formal contract for his approval and signature. This contract contained several new terms, which the defendant struck out. The defendant returned the contract as altered to the plaintiff, saying that he could not agree to the "special conditions." Further negotiations took place between the parties, and ultimately the defendant wrote to the plaintiff declining to go on with the negotiations. The plaintiff thereupon commenced an action against the defendant for the specific performance of the agreement contained in the two letters:—Held, that a complete contract was contained in the two letters of offer and acceptance, and that, as these letters contained all the terms agreed on between the parties, the complete contract could not be affected by subsequent negotiations relating to the new terms introduced by the vendor. *Bellamy* v. *Debenham*, 60 L. J., Ch. 166; 45 Ch. D. 481; 63 L. T. 220; 39 W. R. 257. See *S. C.* in C. A., 60 L. J., Ch. 166; [1891] 1 Ch. 412; 64 L. T. 478; 39 W. R. 257.

A letter purporting to accept an offer for the purchase of land, but enclosing for signature conditions of sale importing new terms into the contract, is a counter offer and not an acceptance. *Crossley* v. *Maycock* (L. R. 18 Eq. 180) followed; *Giblins* v. *North-Eastern Metropolitan District Asylum* (11 Beav. 1) distinguished. *Jones* v. *Daniel*, 63 L. J., Ch. 562; [1894] 2 Ch. 332; 8 R. 579; 70 L. T. 588; 42 W. R. 687.

—— **Enquiry as to Date of Purchase—Request that Fences be Seen to.**]—In answer to a letter by the agent of the defendant containing an offer to sell freehold land, the plaintiff wrote accepting the offer, but added, "I should like to know from what time Mr. Hughes wishes the purchase to date"; also, "You do not mention fences, but I should be obliged if they may be seen to at once, as they really need attention": —Held, that these remarks were not to be treated as part of the bargain, and the letter of the plaintiff was a complete acceptance of the offer. *Simpson* v. *Hughes*, 66 L. J., Ch. 334; 76 L. T. 237—C. A. Affirming 45 W. R. 221.

Omission of Term contained in Offer.]—Two letters may be sufficiently identical to constitute a contract, although the letter of proposal may mention a term which is omitted in the letter of acceptance. *Metzler* v. *Gounod*, 32 L. T. 656.

The defendant signed a letter whereby he guaranteed to the plaintiffs 250 subscriptions to the "Choir" newspaper, of which they were proprietors, in consideration of their giving him the free use of one column of space in such newspaper, and the defendant also undertook to insert the name of the "Choir" as his organ in a foreign newspaper. The plaintiffs signed a letter agreeing to insert the defendant's advertisements in consideration of the subscriptions being guaranteed, but omitting to mention the promise of the defendant as to the foreign newspaper, and afterwards added a postscript to the effect that the payment of the subscriptions should be completed within a certain time:—Held, that the two letters formed a good special contract between the parties, which the addition of the postscript did not invalidate. *Ib.*

A. wrote to B. offering to sell him an estate for 37,500*l.*, or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. B. replied, "I beg to acknowledge the receipt of your letter stating that you are willing to accept 37,000*l.* for the whole of your freehold land at N. I hereby accept your terms as above, and agree to pay you the said sum of 37,500*l.* for your land":—Held, that this was an acceptance of the terms in A.'s letter, including the postscript. *Hussey* v. *Horne-Payne*, 47 L. J., Ch. 751; 8 Ch. D. 670; 38 L. T. 543; 26 W. R. 703—C. A. See also *S. C.*, in H. L. 48 L. J., Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585.

Contract subject to Vendor's Approval.]—At a sale by auction on the 10th of August, 1880 (an announcement of which, indorsed on the particulars and conditions, had the auctioneer's name printed at foot), D. signed a memorandum appended to the particulars and conditions, acknowledging that he had "this day purchased from Mr. Stafford, the vendor, by public auction, subject to his approval, the premises mentioned in the annexed particulars, for the sum of 2..0*l.*, subject to the conditions of sale also annexed hereto"; but there was no signature by the vendor, nor any subsequent adoption of the contract under his hand. At the time of sale D. paid a portion of the purchase-money in cash, and for the balance of the stipulated deposit he gave his I O U. Three days afterwards D. paid a further sum on account of the deposit, and was handed a receipt dated the 13th August, 1880, signed by the auctioneers' clerk, on behalf of "Michael Crooke" (the auctioneer), and acknowledging that he had "received from Mr. Dyas (the purchaser) 30*l.* sterling, which with 20*l.* paid 10th August, makes 50*l.* deposit on his purchase, 84*l.*, Mr. Stafford's property." The vendor's solicitor subsequently wrote to D. recognising the sale, furnished him with copies of the title-deeds, and approved of the draft conveyance to him, which, however, the vendor refused to execute; whereupon D. having brought an action for specific performance:—Held, that there was no agreement enforceable against the defendant, as the contract of the 10th of August having been made expressly "subject to his approval," the memorandum of that date only amounted to a proposal, and did not constitute a note in writing, within the Statute of Frauds; there not being then in fact any contract in

existence that subsequent parol approval by the defendant or his agents could not have the effect of altering the character in which his name appeared in the memorandum, so as to convert it into an authentication of a contract; and that the auctioneer's name at foot of the indorsement on the particulars and conditions merely authenticated the announcement of the sale. *Dyas* v. *Stafford*, 9 L. R. Ir. 520—C. A.

Subject to Approval of Solicitor.]—A., the defendant, wrote to his solicitor, who was also the solicitor of E., the plaintiff:—"You may make Mr. E. an offer of the T. hotel at 150*l.* per annum from Lady-day, 1881; tenant to pay all rates and taxes, except property tax, and do internal and external painting and repairs; the roof and walls to be kept in repair by the landlord. Term, ten years; a proper lease to be drawn up with all proper clauses, and to be approved by me and my solicitor." This letter was forwarded to the plaintiff, who at once wrote and accepted the offer. There was some evidence that the defendant knew the plaintiff was a brewer:—Held, that the words "to be approved by me and my solicitor" did not prevent the letters forming a complete contract, and that the defendant was not entitled to insist on the lease containing a covenant against underletting. *Eadie* v. *Addison*, 52 L. J., Ch. 80; 47 L. T. 543; 31 W. R. 320.

—— **Refusal of Approval.**]—No action lies upon an agreement to buy a lease, and sign a "formal contract" when approved by the purchaser's solicitor, in the event of such solicitor not approving of it, unless the approval is withheld malâ fide or unreasonably. *Bartlett* v. *Greene*, 30 L. T. 553.

Where a contract is made subject to the approval of the solicitor of one party it is an essential condition of the contract that that approval should be given unless the purchaser has acted unreasonably or the solicitor does not act bonâ fide, and in an action to enforce a contract the fact that such consent has not been given is a sufficient answer. *Williams* v. *Edwards*, 2 Sim. 78; 29 R. R. 61.

By a letter which contained all essential terms of a contract, the defendant offered to take a lease of a number of houses from the plaintiff, but there was this provision at the end:—"Such lease to be approved in the customary way by my solicitor." The offer contained in this letter was accepted by the plaintiff. The defendant's solicitor subsequently refused to approve the lease, or to complete:—Held, that there was a binding, and not a conditional, contract, which must be specifically enforced. The meaning of the provision was, that the defendant's solicitor was to see that nothing irregular or unusual was inserted in the formal lease which was to carry out the agreement. *Chipperfield* v. *Carter*, 72 L. T. 487.

—— **Introduction of New Term.**]—See *Hussey* v. *Horne-Payne*, supra.

More formal Agreement to be Drawn up.]—Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced. *Harvey* v. *Barnard's Inn*, 50 L. J., Ch. 750; 45 L. T. 280; 29 W. R. 922. See also *Donnison* v. *Peoples Café Co.*, 45 L. T. 187.

When the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence reference has been made to a more formal agreement, or subsidiary non-essential stipulations, will not deter the court from considering the agreement arrived at by the letters as concluded. *Cayley* v. *Walpole*, 39 L. J., Ch. 609; 22 L. T. 900; 18 W. R. 782.

The owners of land, in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept, and now hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us":—Held, that this was not an unqualified acceptance, and did not make a contract of which specific performance could be enforced as against the purchasers. *Crossley* v. *Maycock*, 43 L. J., Ch. 379; L. R. 18 Eq. 180; 22 W. R. 387.

Where the parties have come to a final agreement, and one of the terms is that such agreement shall be embodied in a formal contract, the agreement may be enforced, even though such formal contract has not been executed. *Rossiter* v. *Miller*, 48 L. J., Ch. 10; 3 App. Cas. 1124; 39 L. T. 173; 26 W. R. 865.

An estate belonging to R. was offered for sale in lots subject to printed conditions of sale, one of which provided that the purchaser should be required to sign a contract embodying the conditions. M. made a verbal offer for the purchase of certain lots in accordance with the conditions. The authorised agents of the vendors wrote to him recapitulating the terms of his offer, and accepting it on behalf of the proprietors, and adding that he had requested the solicitors "to forward to him the agreement for purchase." M. wrote back that, unless he was left free to build or not as he liked, the offer had better be reconsidered. The agent replied that the acceptance was not conditional, and that he was at liberty to do as he thought best. M. afterwards refused to complete the purchase:—Held, that the letters amounted to a binding contract within the Statute of Frauds. *Ib.*

By a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—Held, that there was no final agreement of which specific performance could be enforced against the defendant. *Winn* v. *Bull*, 47 L. J., Ch. 139; 7 Ch. D. 29; 26 W. R. 230.

A. wrote "to confirm" a previous verbal offer of 6,000*l.* for property. B. accepted the offer in writing, coupled with the words, "I will send draft contract in due course":—Held, there was no contract contained in the writings. *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

In reply to a telegram from an intending purchaser offering 1,200*l.* as the purchase-money of lands, with respect to which negotiations for a sale had been previously pending, the vendor telegraphed, "Accept your offer of 1,200*l.*, subject to letter and agreement to be sent to your solicitor." A draft contract of sale was subsequently furnished to the purchaser's solicitor; but, owing to differences as to the details, such as the commencement of the title, registry searches, &c., the treaty was broken off by the vendor:—

Held, that the vendor's acceptance by telegram, being expressly made subject to a further agreement to be entered into between the parties, did not amount to a concluded contract, specific performance of which the intending purchaser was entitled to enforce. *Brien* v. *Swainson*, 1 L. R. Ir. 135.

The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing the purchase was mentioned. The defendant replied in a letter to the agent accepting the terms offered, and adding that he should be ready to pay the deposit-money "on receipt of corrected agreement," and at the same time he wrote to the plaintiff personally, also accepting the terms offered, and adding, "I shall trust to you to give me the best introduction you can during three months and afterwards, if necessary." The plaintiff replied, thanking the defendant for acceding to his terms, and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up, but never signed, and after some further correspondence the defendant refused to complete the purchase: —Held, that as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed. *May* v. *Thomson*, 51 L. J., Ch. 917; 20 Ch. D. 705; 47 L. T. 295—C. A.

The plaintiff and defendant signed a written document whereby the defendant agreed to buy and the plaintiff agreed to sell an estate therein described at a specified price, "subject to a formal contract being prepared and signed by both parties as approved by their solicitors." A correspondence ensued, in the course of which the defendant's solicitor stated that the defendant was "quite firm in adhering to the agreement he entered into" to give a certain sum per acre for the property, which amounted to less than the specified price. A formal contract was prepared in draft, but was not, nor was any other formal contract, signed by the parties or approved by their solicitors. In an action for specific performance of the agreement as modified by the correspondence:—Held, that there was no concluded agreement between the parties which was capable of being specifically enforced. *Winn* v. *Bull* (supra) followed. *Hawkesworth* v. *Chaffey*, 55 L. J., Ch. 335; 54 L. T. 72.

An action was brought by vendors for specific performance. The following telegram had been signed and sent by the purchaser's solicitor to the vendor's solicitor:—"Mr. H. will purchase Stonyrood at the sum named to me as owing to the mortgagees. Will write to-night." A telegram in reply was sent by the vendor's solicitor as follows:—"Telegram with offer received, which I accept as solicitor to the second mortgagees." The purchaser's solicitor then wrote to the vendor's solicitor thus:—"I am in receipt of your telegram accepting Mr. H.'s offer. If I recollect rightly, the amount was some 1,578*l.* Send me the contract, and I will get it signed." It was admitted by the purchaser that his solicitor was his agent, duly authorised on his behalf to send the telegram. Beyond this there was no distinct evidence of agency:—Held, that there was no sufficient note or memorandum in writing to satisfy s. 4 of the Statute of Frauds; that it could not be inferred that the purchaser's solicitor was his agent to write the letter; but even if this could be inferred, the words "send me the contract," &c., showed that it was not the intention of the parties that the letter should constitute a contract between them. *Goodall* v. *Harding*, 52 L. T. 126.

A. and B. agreed to take C. into partnership at a future date, the agreement required by both sides to be drawn up by solicitors. The parties had not considered, and could not afterwards agree upon, several terms of the intended partnership:—Held, that there was no concluded agreement between the parties. *Connery* v. *Best*, 1 Cab. & E. 291.

In July, 1884, P., who was entitled in fee to a beerhouse at B. as trustee, agreed to sell the same to the plaintiffs, but he declined to complete the purchase, and the plaintiffs threatened him with legal proceedings. Subsequently fresh negotiations were entered into for the purchase of the property, and on the 20th December P. authorised his solicitor to sell to the plaintiffs for 1,000*l.* on condition that they relinquished any right of action they might have against him. At that time 1,000*l.* was the best price obtainable for the property. The plaintiffs' solicitors were authorised to make a contract for the plaintiffs. On the 24th P.'s solicitor wrote to the plaintiffs' solicitors, "I now send you for approval draft contract containing the terms on which P. is willing to sell this property to your clients. My client declines to produce an earlier title than that stated as the commencement of the title in the draft contract." The draft contract contained stipulations as to payment of price and commencement of title, but it contained no provision as to the relinquishment of any right of action. The contract was shortly after returned by the plaintiffs' solicitors approved. Upon P.'s refusal to complete, the plaintiffs brought an action against him for specific performance:—Held, that there was no concluded agreement between the parties. Held, also, that the draft contract was not in accordance with the authority given to P.'s solicitor. Whether an agreement in accordance with such authority would have been a breach of trust, quære. *Bushell* v. *Peacock*, 53 L. T. 860.

The fact that a simple acceptance of an offer contains a statement that the acceptor will instruct his solicitor to prepare the necessary documents does not render the acceptance a conditional acceptance. *Crossley* v. *Maycock* (L. R. 18 Eq. 180) approved. *Bolton* v. *Lambert*, 58 L. J., Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434—C. A.

A "rough draft" containing all the essential terms of a contract, and signed by the party to be charged, is a sufficient acknowledgment within the Statute of Frauds, and can be enforced against such party, though a more formal document was intended by the parties to be prepared. *Gray* v. *Smith*, 59 L. J., Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310—C. A.

By a letter, dated the 17th April, 1893, and signed by the plaintiffs, they offered the defendants 145,000*l.* for their business, including "the freehold brewery and premises at Deptford, the forty-six freehold and six leasehold houses

enumerated in the list given to us, the book-debts amounting to 5,000*l.* and the loan 7,800*l.*, and all consumable and rolling stock, fixed and loose plant, horses, drays, carts, and other effects now used in connection with the business." The letter contained the following condition:—"This offer is made subject to our approving a detailed contract to be entered into." The letter also mentioned the date for completion, and referred to the payment of the purchase money in cash and preference and debenture stock of a brewery company to be formed. The defendants accepted the terms contained in the letter by signing it. They also had the letter stamped as an agreement. Subsequently they refused to complete. No company was ever formed. An action was brought by the plaintiffs for specific performance:—Held, that the above letter was not a binding contract between the parties, inasmuch as not only was it expressed on the face of it to be made subject to the parties "approving a detailed contract to be entered into," but also because it was evident that various important details were left to be discussed and agreed on—matters that could not be settled without a further document:—Held, therefore, that specific performance could not be ordered. *Page* v. *Norfolk*, 70 L. T. 781—C. A.

An offer to purchase land contained the words "and if my offer is accepted I will sign contract on the auction particulars." The offer was accepted in writing "subject to contract as agreed," and a draft contract was enclosed:—Held, that there was a concluded agreement, specific performance of which could be enforced. *Filby* v. *Hounsell*, 65 L. J., Ch. 852; [1896] 2 Ch. 737; 75 L. T. 270; 45 W. R. 232.

And see VENDOR AND PURCHASER.

—— **Waiver by Vendor—Specific Performance.**]—An agreement in writing between the plaintiff and the defendant provided that the former was willing to sell to the latter a leasehold house, "subject to the preparation by my' (the plaintiff's) "solicitor, and completion of a formal contract":—Held, that this condition prevented the agreement from being final; that it was not for the benefit of the plaintiff only, and, therefore, could not be waived by him, and, consequently, that he could not enforce specific performance of the agreement. *Hawksley* v. *Outram* ([1892] 3 Ch. 359) distinguished. *Lloyd* v. *Nowell*, 64 L. J., Ch. 744; [1895] 2 Ch. 744; 13 R. 712; 73 L. T. 154; 44 W. R. 43.

—— **Question of Intention.**]—W. was owner of G., leased to M., under whom R. occupied it for some years. In 1849, R. applied to W. for a lease of G. to himself from 1852, when the original one to M. would expire. W. referred R. to C., his agent, and between them there were interviews and correspondence, which resulted in the specification of terms, which were sent as instructions by C. to W.'s solicitor to prepare a lease. Both W. and C. denied that the one had given, or the other received, authority to conclude a binding agreement, though some evidence on the part of R. went to show that the terms for the intended lease had been finally settled so as to constitute an agreement:—Held, that there was no concluded binding agreement. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 804.

If contracting parties agree on terms of which there is sufficient evidence, but contemplate in addition a more formal document, it becomes a question of intention merely whether they intend it as a memorial of the terms already agreed on, or as the instrument by which alone they meant to be bound. *Ib.*

—— **Altering Draft Lease.**]—The defendant having proposed to take a lease of premises for the term of seven years, a draft lease was prepared, to which the defendant made some objections. He ultimately took it away, to be settled by his solicitors. His solicitors returned the draft to the plaintiff's solicitors, with the following letter:—"We have seen our client, and have altered the draft lease in accordance with his instructions. We trust there will be no impediment to prevent an early completion, and shall be glad to receive the draft as soon as you can, that we may engross the counterpart." The plaintiff's solicitors replied, returning the draft and engrossment of the lease and counterpart, stating that, according to the practice, where there is no definition on the subject, the lessor's solicitor invariably prepares both lease and counterpart:—Held, that there was no evidence of any contract binding the defendant to take the lease, and no memorandum of any contract sufficient for that purpose, within the 4th section of the Statute of Frauds. *Forster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; 7 Jur. (N.S.) 998.

G. on 25th November signed a letter addressed to B.'s agent, whereby G. agreed to buy the lease of a house of B. for a certain price, the purchase to be completed before Christmas then next, and "a formal contract to be signed" by G. "when prepared" by the solicitors of B., and "when approved" by the solicitors of G. A draft agreement prepared on behalf of B. was materially altered by the solicitors of G., and B.'s solicitors declining to accept such alterations, the bargain went off:—Held, that no action was maintainable upon G.'s letter. *Bartlett* v. *Greene*, 30 L. T. 553.

—— **Agreement for Lease - Mere Proposal.**]—A memorandum of an agreement for a lease for twenty-one years was signed by the intended lessee, but not by the lessor, and named referees. The lessor's agents prepared a draft lease, and wrote to the lessee, saying they hoped on a certain day to have the agreement prepared and ready for inspection; to this the lessee replied by a letter, making an appointment, and hoping all would be satisfactorily arranged. The lessee refused to complete:—Held, that there was an agreement sufficiently signed by the lessor, but that the agreement imported a proposal merely, and was not an unconditional agreement. *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; 2 Jur. (N.S.) 433; 4 W. R. 531.

—— **Parol Negotiations.**]—Where, after a parol contract, before the parties separate, one asks that he may have a note of it, and the other writes out a note or memorandum of it, which purports to contain the contract, and does contain all the essential elements of it, the latter must be taken to contain the terms of the contract, and the previous parol contract cannot be referred to. *Bromley* v. *Johnson*, 5 L. T. 715; 10 W. R. 303.

If there are parol negotiations, which are afterwards reduced into writing, the writing must be looked to as showing the final arrangement. *Sinclair* v. *Stevenson*, 2 Bing. 514; 1 Car. & P. 582.

—— **Whether Equivalent to New Term.**]—When an offer in writing is accepted in writing, the mere reference in the document accepting the offer to the preparation of a more formal contract does not amount to the introduction of a new term. *Bonnewell* v. *Jenkins*, 47 L. J., Ch. 758; 8 Ch. D. 70; 38 L. T. 81; 26 W. R. 294—C. A.

B. wrote to estate agents, in whose hands J. had placed a leasehold property for sale:—"In reference to Mr. J.'s premises, I think 800*l.* for the lease, fixtures, fittings, &c., is about what I should be willing to give. Possession to be given me within fourteen days from date," &c. The agents, having received authority from J. to accept the offer, replied:—"We are instructed to accept your offer of 800*l.* for these premises, and have asked Mr. J.'s solicitor to prepare contract":—Held, that the reference to the preparation of a formal contract did not prevent the two letters from constituting a binding contract. *Ib.*

An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language. *Lewis* v. *Brass*, 3 Q. B. D. 667; 37 L. T. 738; 26 W. R. 152—C. A.

Details to be Embodied.]—A vendor and purchaser had agreed by parol upon the sale of a house at a specified price. The purchaser, by arrangement, wrote a letter to the vendor confirming his offer, repeating the terms, and requesting a reply. The vendor's solicitor replied, stating that he was instructed to carry out the sale of the house according to the purchaser's letter, but adding, "there are some details to be embodied in a contract of sale which I will prepare and forward for your approval and signature":—Held, that the latter words, as to details to be embodied, qualified the otherwise unconditional acceptance of the offer in the purchaser's letter, and that there was not a sufficient memorandum in writing within the 4th section of the Statute of Frauds. *Ball* v. *Bridges*, 30 L. T. 430; 22 W. R. 552.

Signatures to be Affixed.]—It is a general principle that when parties enter into any agreement, and the understanding is, that it is to be reduced into writing, or if it is already in a written form, that it is to be signed before it is acted upon, or is to take effect, it is not binding upon them until it is so written or signed. *Boyd* v. *Hind*, 25 L. J., Ex. 246.

The defendants and T. were partners in a colliery, and in October, 1835, the defendant signed an agreement with the plaintiff, purporting to be made between the defendants and T. of the one part, and the plaintiff on the other part, by which they of the first part agreed to supply the plaintiff with coals from the colliery for a term of three years, to commence on the 1st July, 1837; the instrument contained a stipulation, by the parties of the first part, for a lease to the plaintiff of a wharf. At the date of the agreement the parties were acting under a similar one, which would expire on the 1st July, 1837, and was executed by T. also, but T. never signed the agreement in question, and on being asked to do so in July, 1837, refused. There was also evidence that the plaintiff had treated this agreement as not binding:—Held, in an action by the plaintiff against the defendants on the agreement, that it was a question for the jury, whether the parties intended the instrument to be binding only on the condition of T. signing it. *Latch* v. *Wedlake*, 3 P. & D. 499; 11 A. & E. 959; 9 L. J., Q. B. 201.

"Subject to Final Arrangements."]—In an action against a defendant for the breach of a contract to go as surgeon on board an Australian emigrant vessel, the letter, containing the terms proposed by the plaintiffs, required the defendant to remit them one-third of the passage-money. The defendant's acceptance of the proposal was in these words:—"I will accept the appointment of surgeon to your vessel, on the terms you propose"; and he added, "I expect to be in London Saturday or Monday, when I will call on you, and make final arrangements":—Held, that the jury was warranted in finding that the contract was complete, so as to bind the defendant, though he did not remit the money required, or call to make final arrangements. *Richards* v. *Hayward*, 2 Scott (N.R.) 670; 2 Man. & G. 574; 10 L. J., C. P. 108.

Matter to be Arranged by Agent.]—The agents of A., who had a lease of premises, No. 22, Belgrave Road, to dispose of, wrote to B. as follows:—"We have been requested by Mrs. B. to find her a lodging-house in this neighbourhood; and we forward for your approval particulars of two which we think most likely to suit." Inclosed were particulars of two houses, one of which was No. 22, Belgrave Road, the terms for which were stated to be:—Premium, 250 guineas; rent, 80*l.*; and certain fixtures and planned furniture to be taken at a valuation. B. replied as follows:—"I have decided on taking No. 22, Belgrave Road, and have spoken to my agent, Mr. C., of, &c., who will arrange matters with you if you will put yourselves in communication with him. I leave town this afternoon; so, if you have occasion to write to me, please address to Cirencester":—Held, that these two letters did not constitute a complete agreement binding on the defendant. *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102; 23 W. R. 389.

By Tender.]—The guardians of the poor of a place, with a view to obtaining tenders for meat for the use of the workhouse, issued an advertisement, stating that they would receive tenders for the supply of the workhouse with meat for three months, from thirty to fifty stone, more or less, per week (describing the sort of meat); that sealed tenders were to be sent to the clerk of the guardians, and that all contractors would have to sign a written contract after the acceptance of the tender. The defendant wrote to the guardians to say that he proposed to supply the workhouse with meat, according to advertisement, for the ensuing three months, at sixpence per pound. This tender was accepted, and the defendant was informed that he was appointed butcher; but, immediately afterwards, he wrote to the guardians to say that he declined the appointment:—Held, that as a written contract was to be executed, the acceptance of the tender did not form a binding contract, so as to

render the defendant liable for refusing to supply the workhouse with meat in accordance with his tender. *Kingston-upon-Hull (Governors, &c.)* v. *Petch*, 10 Ex. 611; 3 C. L. R. 196; 24 L. J., Ex. 23.

A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification), and an acceptance (also specifying no limitation or qualification), is a contract for the whole. *Thorn* v. *Public Works Commissioners*, 32 Beav. 490.

The defendants advertised that offers would be received for old Portland stone of Westminster Bridge. The plaintiff made an offer for the stone of a particular quality, which was accepted:—Held, that this was a contract for the purchase of all the stone of that quality. *Ib.*

Qualification should be Clearly Stated.]—When a contract is composed of an offer by letter and an acceptance of the offer by letter, if the offer is clear and unambiguous, and the party who answers it wishes to add to it any condition or qualification, the onus rests upon him of stating clearly and precisely what that condition or qualification is; if the answer, though ambiguous, is capable of being construed as an acceptance, pure and simple, of the offer, the party making the offer is justified in acting upon it in that sense. *English and Foreign Credit Co.* v. *Arduin*, 40 L. J., Ex. 108; L. R. 5 H. L. 64.

Conditional or Absolute Acceptance.]—A., the agent of an intending purchaser of leaseholds, wrote to B., the vendor's agent, that he "could give him 50*l.* for the lease, plant, &c., if accepted at once." B., in reply, asked A. to allow the offer to remain open for twenty-four hours, in order that he might submit it to his employer. On the following day he wrote to A., "I am directed to accept your offer of 50*l.* for the lease, &c. . . . I shall be here at 11 to 11.30 to-morrow morning to sign contract." A. did not reach B.'s office until twelve o'clock. B. had waited for him until a quarter to twelve, and then sold the property to a third party:—Held, that the letters constituted a binding contract, and specific performance was enforced against the vendor. *Branson* v. *Stammers*, 28 W. R. 180.

c. Inferred from Circumstances or Conduct.

Circumstances.] — Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted. *Ford, Ex parte, Chappell, In re*, 55 L. J., Q. B. 406; 16 Q. B. D. 307.—Per Esher (Ld.), M.R.

Wherever a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him. *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131; 3 L. T. 784; 9 W. R. 376.

Conduct.]—Where the plaintiff sent goods to the defendant's house, and defendant kept part of them, it was held that he was liable on an implied contract to pay the value of the goods. *Hart* v. *Mills*, 15 M. & W. 85, 87; 15 L. J., Ex. 200.

The defendant ordered of the plaintiff a publication, to be delivered in monthly parts. He received eight parts, and then refused to receive more. No action could be brought upon the original contract owing to the Statute of Frauds, but it was held that there was a promise to pay for the parts received. *Mavor* v. *Pyne*, 3 Bing. 285, 288; 11 Moore, 2; 2 Car. & P. 91.

—— **When Insufficient.**]—A., having a horse to sell, agreed to let B. have him for thirty guineas, if he liked him, and that he should take him a month on trial: B. accordingly took him, and kept him about a fortnight, and then told A. he liked the horse, but not the price, and A. desired him, if he did not like the price, to return the horse; B., however, kept him ten days more, and then returned him; but A. refused to receive him, and brought an action on the contract for thirty guineas, the price of the horse:—Held, that he could not maintain such action. *Ellis* v. *Mortimer*, 1 Bos. & P. (N.R.) 257.

D. & Co. were manufacturers of light fabrics, of which the patterns were supplied by their own artists. Every spring and autumn they introduced new patterns into the English market, and after the season was over, they were in the habit of selling their surplus stock at a greatly reduced price, but always for the purpose of having it shipped to foreign countries, where its sale at the reduced price could not affect their home trade. G., plaintiffs' agent, accordingly sold some lots of such surplus stock to P., at Manchester, as he alleged, upon the express understanding and agreement that the goods were to be shipped by P. to the United States and the West Indies, and were not to be sold in the home market. It appeared that P. obtained a longer than the usual term of credit in the transaction, as plaintiffs stated, at P.'s request, on the ground that he could not sooner get the money from abroad in return for the goods. Upon a bill for specific performance, and praying for an injunction to restrain P. from selling the goods in England:—Held, that the evidence of the contract was insufficient, and that the proper remedy in such a case was at law. *Dollfus* v. *Pickford*, 2 W. R. 204.

Acting on Terms.]—Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either. *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 666.

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the prices mentioned in it, amounted to sufficient to show the adoption of the writing previously altered and sent, and to constitute it a valid contract. *Ib.*

The onus of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. *Ib.*

E. & Co. being indebted to the plaintiffs, who were bankers, the defendants, by a writing expressed to be made between the plaintiffs and the defendants, in consideration of the agreement thereinafter contained on behalf of the plaintiffs

agreed that they would pay all moneys which then were or at any time should be due from E. & Co. to the plaintiffs, not exceeding 35,000*l.*, by instalments of 3,000*l.* a year, for five years, and two subsequent annual instalments of 10,000*l.*; and in consideration the plaintiffs agreed that they would not charge more than five per cent. interest to E. & Co.; and when all debts of E. & Co., except 15,000*l.*, should have been paid, would grant them a full release. This agreement was signed by the defendants, and handed by them to the plaintiffs, who had pressed for it. The plaintiffs had acted upon, but never executed it:—Held, that the agreement was binding upon the defendants, notwithstanding that it had not been executed by the plaintiffs. *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; 28 L. J., Ex. 122.

Differences having arisen between B., a shareholder, and the managing director of a registered company, and the other directors, the board, at a duly constituted meeting, came to the following resolution:—"The board is willing to accept Mr. B.'s resignation, and to pay him the proportion of salary due, say in round numbers, 150*l.*, and at the same time the members of the board will jointly relieve him of his shares, and guarantee him against all calls thereon. The directors, being desirous that this matter should be definitely settled, request that Mr. B. will reply to the offer now made to him by the next board day, the 4th of September; unless the terms of agreement proposed are accepted by that date, the directors are to be no longer bound by them. (Signed) T. A., Chairman." B. replied within the time mentioned:—"I accept your offer. It may be arranged as speedily as you can wish, and, in fact, I accept the offer as one to be at once carried out, and on receiving the guarantee as to the shares, in which I presume your chairman, Mr. C., concurs, and advice that the sum fixed is paid in to my account at L., my resignation shall be at once forwarded." At a meeting of the directors, the board, by a minute, accepted B.'s resignation, and requested the secretary to get the guarantee prepared by the solicitors, and to take other steps to carry out the negotiation:—Held, that the resolutions and letters constituted a complete agreement, and bound the directors individually who were present when the offer was made; and that B. having resigned, and been compelled to pay calls on his shares, might maintain an action against the directors for not indemnifying him, although no guarantee was tendered for execution. *Barker* v. *Allan*, 5 H. & N. 61; 29 L. J., Ex. 100; 6 Jur. (N.S.) 23; 1 L. T. 167; 8 W. R. 127.

——**Draft Agreement "Approved."**—The word "approved," written by one of the parties at the end of a draft agreement, must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. *Brogden* v. *Metropolitan Ry.* supra.

B. had for some years supplied a railway company with coals. At last it was suggested by B. that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the company and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the company, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper. Coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the company, there were explanations and excuses given by B., and the contract was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and B. denied that there was any contract which bound him in the matter:—Held, that these facts and the actual conduct of the parties established the existence of such a contract, and there having been a clear breach of it, B. must be held liable upon it. *Ib.*

B. was the chief partner in a partnership of three persons. The word "approved," written by him and signed with his name, was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the usual form of signature of the partnership was that of "B. & Sons." *Ib.*

Signing "Turn-Paper."]—Defendants having purchased a cargo of coals on board a ship lying in the port of London, signed, in conjunction with the factor who sold the coals, and in the usual course, a turn-paper, addressed to the shipmeter, who was thereby directed to unload after a certain rate per working day, at a certain dock; and on the following day the captain, having arrived at the dock, gave notice to the dockmaster that he was ready for unloading. In consequence, however, of there being already several vessels at the dock entitled to precedence, the unloading of the ship was delayed:—Held, in an action for demurrage by the shipowner, that the turn-paper, in the absence of any evidence of custom, did not constitute a contract, nor was it evidence of one, as between the plaintiffs and the defendants, that the unloading should commence immediately upon the arrival of the ship at the appointed place. *Shadforth* v. *Cory*, 32 L. J., Q. B. 78; 9 Jur. (N.S.) 910. Affirmed, 32 L. J., Q. B. 379; 8 L. T. 736; 10 W. R. 919—Ex. Ch.

d. Unaccepted Proposals.

To Pay Salary.]—A., the manager of a theatre, by letter, proposes to B., an actor, an engagement at 2*l.* per week, determinable by a month's notice. B. performs under this proposal. Notice is given by letter to B. to determine the employment, unless B. will consent to a reduction of salary. In a third letter, A. writes:—"I have received your letter, and upon reconsideration will give you the same terms, 2*l.*, for the summer season":—Held, that the first and third letters contained merely proposals, and that as no agreement was constituted between the parties, until those proposals had been expressly accepted or tacitly acquiesced in by B., the correspondence was admissible in evidence without an agreement stamp. *Hudspeth* v. *Yarnold*, 9 C. B. 625; 19 L. J., C. P. 321; 14 Jur. 578.

To Pay Debt of Third Party.]—A declaration stating that J. being indebted to the plaintiff in a certain sum, the defendant, by his agent, wrote to the plaintiff as follows:—"Without

prejudice to any proceedings you may think proper to take, Mr. A. (the defendant) offers to pay a composition of 7s. in the pound on your account against his nephew, on your giving proper indemnification to both. In the event of your accepting the offer I will thank you to forward me the particulars of your account, in order that the same may be properly examined"; and that the plaintiff accepted the offer, and thereupon forwarded the particulars of his account; and although he has always been ready and willing and offered to give a proper indemnification, yet the defendant has not paid the composition:—is bad, as not showing any binding contract, but a mere offer to pay. *Cope* v. *Albinson*, 8 Ex. 185; 22 L. J., Ex. 37.

R., a nephew of defendant, being indebted to plaintiff, defendant wrote a series of letters to plaintiff, on which plaintiff relied to prove the guarantee on which the action was brought. In the first, on 8th November, 1861, he wrote, "I have no doubt I can send R. money to pay on Tuesday next, November 12th; just give him time, and I will see you don't lose a shilling by him." On 6th December he wrote, saying, "I really don't know what to do for the best, but something shall be done, so that you shall have your money; I hope I shall be able to get some in, and discharge your bill as soon as possible; you shall hear from me this day week without fail. I have been disappointed, but you shall be paid." And on 8th February, 1862, he wrote, "I received a letter from your solicitor requesting payment of 25*l*. You are aware that this is all loss to me. I am sorry to say I am still liable to other claims upon me; under these circumstances I hope you will be as favourable as you can. I think if I make an effort to pay 15*l*. to you for my release from this transaction, I will do so at once, as you will then have R. to sue for the balance":—Held, that the above letters were mere unaccepted proposals, and did not constitute a sufficient promise binding within the terms of the Statute of Frauds. *Newport* v. *Spivey*, 7 L. T. 328.

Per Channell, B.:—When a guarantee is given for the debt of another, it is accepted by the party to whom it is given, the consideration for it being an agreement by him to forbear payment for the required time; but there was nothing of that sort here. *Ib.*

To Insure—After Avoided Agreement.]—The plaintiff, through J., his insurance broker, effected an insurance on the ship B., then on her voyage from Newcastle to Genoa, from the 21st of January, 1857, to the 20th of January, 1858; the policy was subscribed by the defendant on the 19th of January for 3,000*l*. On the 15th, the plaintiff received a letter from the captain, informing him that the vessel had been on shore on the coast of Spain on the 2nd of January, and had sprung a leak, and was forced to go into port for repairs. The plaintiff sent the letter to J., but he did not inform the defendant of the circumstance, and he first heard of it on the 22nd, from an entry in the Casualty Book at Lloyd's, made that day from particulars supplied by the plaintiff. The defendant immediately wrote the following letter to J.—"Understanding that the steamer B. had been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." J. did not answer this letter, nor communicate it to the plaintiff. The ship was repaired, and fit for use on the 2nd of April. In October she was totally lost:—Held, that the fact of the vessel having been aground was material to the risk, and that its non-communication to the defendant avoided the policy, and that the defendant's letter of the 22nd of January did not in law or fact create a fresh contract of assurance from the time the repairs were effected, for, at the utmost, the letter was a mere unaccepted proposal. *Russell* v. *Thornton*, 6 H. & N. 140; 30 L. J., Ex. 69; 6 Jur. (N.S.) 1080; 8 W. R. 615—Ex. Ch.

2. Statute of Frauds.

See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

a. Generally.

Utility.]—Lord Nottingham's opinion "that the Statute of Frauds is so wise and beneficial to the public, that it deserved a subsidy," adopted. *Popham* v. *Eyre*, Lofft. 786.

Not Retrospective.]—A demurrer to a bill exhibited subsequently to the Statute of Frauds, for the performance of a parol agreement prior, overruled, the statute not being retrospective. Statutes restrictive of the common law receive a restrictive construction. The Statute of Frauds originated with Lord Nottingham. *Ash* v. *Abdy*, 3 Swanst. 664.

Does not invalidate Contract.]—A contract which is not enforceable by reason of the provisions of the Statute of Frauds, s. 4, nevertheless is an existing contract and is not void altogether, and a fresh contract cannot be implied from acts done in pursuance of it. *Britain* v. *Rossiter*, 48 L. J., Ex. 362; 11 Q. B. D. 123; 40 L. T. 240; 27 W. R. 482—C. A.

The contract mentioned in s. 4 of the Statute of Frauds is not absolutely void if not in writing, as required by the statute, that section relating to the mode of procedure, and not to the contract itself. Consequently such parol contract, though made in a foreign country, where it is good and capable of being enforced, cannot be sued on in this country. *Leroux* v. *Brown*, 12 C. B. 801; 22 L. J., C. P. 1; 16 Jur. 1021; 1 W. R. 22.

Defence of.]—A defence founded on the Statute of Frauds cannot now be raised by demurrer. *Catling* v. *King*, 46 L. J., Ch. 384; 5 Ch. D. 660; 36 L. T. 526; 25 W. R. 550—C. A. S. P., *Morgan* v. *Worthington*, 38 L. T. 443.

The statute if relied on must be pleaded. *Towle* v. *Topham*, 37 L. T. 308.

b. Sufficiency of Note or Memorandum.

i. *Generally.*

Substantial Compliance Sufficient.]—The substance of the Statute of Frauds being complied with in the material parts, the forms have never been insisted upon where an agreement has been reduced to a certainty. *Welford* v. *Beazley*, 3 Atk. 503.

A "rough draft" containing all the essential terms of a contract, and signed by the party to

be charged, is a sufficient acknowledgment within the Statute of Frauds, and can be enforced against such party, though a more formal document was intended to be drawn up. *Gray* v. *Smith*, 59 L. J., Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310—C. A.

Sealing Unnecessary.]—Sealing not necessary to bring an agreement out of the Statute of Frauds. *Wheeler* v. *Newton*, Pre. Ch. 16.

When made.] — A memorandum in writing of a contract, to satisfy the Statute of Frauds, must have been made before action brought. *Bill* v. *Bament*, 9 M. & W. 36; 11 L. J., Ex. 81.

A note or memorandum of a contract for the purposes of s. 17 of the Statute of Frauds must, in order to be available in an action on the contract have been in existence when the action was commenced. *Lucas* v. *Dixon*, 58 L. J., Q. B. 161; 22 Q. B. D. 357; 37 W. R. 370—C. A.

A note or memorandum in writing, made subsequently to, but evidencing a previous parol contract, is sufficient, within s. 4. *Bradford* v. *Roulston*, 8 Ir. C. L. R. 468.

Must be of Complete Agreement.]—The memorandum or note of an agreement required by s. 4 of the Statute of Frauds must be a memorandum of an agreement complete at the time the memorandum is made. *Hanly* v. *Asprey*, 49 L. J., Ch. 216; 13 Ch. D. 855; 28 W. R. 347.

A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land:—Held, not to be a memorandum of a completed agreement. *Ib.*

And see cases, supra, 1 b.

ii. *Names or Description of Parties.*

Vendor.]—In order to satisfy the requirements of the Statute of Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity. *Potter* v. *Duffield*, 43 L. J., Ch. 472; L. R. 18 Eq. 4; 22 W. R. 585.

Where a memorandum of agreement did not contain the name of the vendor, but his name was referred to in a subsequent letter written by the purchaser:—Held, that this was a sufficient reference within the Statute of Frauds. *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; 2 Jur. (N.S.) 433; 4 W. R. 531.

During parol negotiations for the purchase of an estate, the vendor wrote to the purchaser's solicitor, proposing that the solicitor's client should advance a sum to pay off a mortgage on the property. After further parol negotiations as to the terms, they were agreed upon by parol, and the vendor signed and handed to the purchaser a written statement of the particulars of the property and of the price. On the following day he signed and addressed to the purchaser a letter containing the following passages: "I am about to relet the land at P. for another year, concluding you will agree to it. . . . The Lady-day rents will be mine, and the Michaelmas yours":—Held, that the signed statement of particulars was not a sufficient memorandum in writing, the purchaser's name not being mentioned in it, and that the defect was not supplied by the correspondence. *Skelton* v. *Cole*, 1 De G. & J. 587.

On the sale of real estate by auction the particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed "that the vendor on his part should in all respects fulfil the conditions of sale mentioned in the particulars." On a bill for specific performance by the purchaser:—Held, that on the particulars and memorandum there was a sufficient description of the vendor within s. 4 of the Statute of Frauds. *Sale* v. *Lambert*, 43 L. J., Ch. 470; L. R. 18 Eq. 1; 22 W. R. 47.

An agreement for the sale of real estate did not disclose the name of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon:—Held, that the vendors were sufficiently described to satisfy the Statute of Frauds. *Commins* v. *Scott*, 44 L. J., Ch. 563; L. R. 20 Eq. 11; 32 L. T. 420; 23 W. R. 498.

A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the Statute of Frauds. *Catling* v. *King*, 46 L. J., Ch. 384; 5 Ch. D. 660; 36 L. T. 526; 25 W. R. 550—C. A.

If, in a contract for sale, the vendor is described simply as "proprietor," "owner," "mortgagee," or the like, the description is sufficient to satisfy the requirements of the Statute of Frauds; but not so if he is described as "vendor," or "client," or "friend" of a named agent, or as "solicitor to the vendor," even where the solicitor is himself the vendor and is described in the contract as "A. B., solicitor to the vendor." *Jarrett* v. *Hunter*, 56 L. J., Ch. 141; 34 Ch. D. 182; 55 L. T. 727; 35 W. R. 132; 51 J. P. 165.

Semble, a mere reference in a condition of sale to a conveyance or other document of title relating to the property, the name or description of the vendor not being stated in the condition, is not sufficient to import its contents into the contract so as to satisfy the requirements of the Statute of Frauds, even if such conveyance or other document, does show who is the vendor. A contract, which under the Statute of Frauds is invalid through not naming or sufficiently describing the vendor, is not rendered valid by the fact that the purchaser knew, at the time he entered into the contract, who the vendor was. *Ib.*

The memorandum which was at the foot of the particulars and conditions stated that V. & Son were agents for the "vendor," who was described as "vendor" throughout the conditions. The particulars stated that the sale was by direction of the "owner." The eighth condition, by mistake, stated that the vendor was a trustee for sale:—Held, that although the word "owner" was by itself a sufficient description of the vendor, the subsequent mistake was fatal, and the vendor was not sufficiently designated. *Butcher* v. *Nash*, 61 L. T. 72.

A purchaser undertook, in writing, to buy land at a certain price, and to complete within a certain time; but the vendor was not named in

the writing, although there was a reference to a certain firm by name as the vendor's agents, and a provision that "the landlord" should be considered as an outgoing tenant. Subsequently, the purchaser wrote a letter to the vendor's agents with reference to the payment of the purchase-money and the execution by "Mr. C. . . . ." of "the deeds":—Held, that there was no sufficient identification of the vendor in writing in the original document, and the subsequent letter did not so clearly refer to the original document as to supply the deficiency and satisfy the requirements of the Statute of Frauds (29 Car. 2, c. 3). *Coombs* v. *Wilkes*, 61 L. J., Ch. 42; [1891] 3 Ch. 77; 65 L. T. 56: 40 W. R. 77.

Where a written offer to purchase land is made to an agent whose name, but not that of his principal, appears in the offer, and the agent accepts on behalf of his principal, naming him, it is sufficiently shown in writing who the contracting parties are to satisfy the requirements of the Statute of Frauds. *Filby* v. *Hounsell*, 65 L. J., Ch. 852; [1896] 2 Ch. 737; 75 L. T. 270; 45 W. R. 232.

Mortgagee—Solicitors to "Proposing Lender."]—Upon a contract for a mortgage of land, the solicitor for the intending mortgagor wrote a letter in which he said that he had called on "the solicitors to the proposing lender, and had arranged the proposed loan":—Held, not to be a sufficient description of the intended mortgagee to satisfy s. 4 of the Statute of Frauds. *Pattle* v. *Anstruther*, 4 R. 470; 69 L. T. 174; 41 W. R. 625—C. A.

Lessor—"Sir."]—The defendant wrote and signed a letter beginning with the word "Sir," and offering to take the lease of a theatre for a fixed term at a fixed rent. This letter was delivered to W., for delivery to the lessor. W. delivered it, and as lessor's agent wrote and sent to the defendant a letter containing an acceptance of the offer by the owner: but this letter was not signed by the defendant nor referred to in any subsequent writing of his. The lessor brought an action for specific performance:—Held, that the lessor being only described as "sir" in any writing signed by the defendant, there was no binding contract under the Statute of Frauds, and the action was dismissed with costs. *Williams* v. *Jordan*, 46 L. J., Ch. 681; 6 Ch. D. 517; 26 W. R. 230; and see *Donnison* v. *People's Café Co.*, post, col. 40.

"The Tenant"—Inference.]—By a memorandum of agreement the plaintiff agreed to let a certain brickfield for five years, "the tenant" to pay a certain rent and royalty. Only the name of the plaintiff appeared in the body of the agreement, but it was signed by the defendant and plaintiff:—"Held, that it could not be reasonably inferred that the defendant signed the agreement in any other capacity than that of tenant, and therefore so far as regarded the Statute of Frauds the agreement was valid. *Stokell* v. *Niven*, 61 L. T. 18—C. A.

Person for whom Guarantee Intended.]—A defendant wrote, signed, and handed to T. and O. the following document: "Sir, I beg to inform you that I shall see you paid to the sum of 800*l.* for the ensuing building which you undertake to build for Messrs. T. and O., Thomas Lake." He intended it to be handed over by T. and O. as a guarantee to J., who was then negotiating with T. and O. to erect for them the building referred to. T. and O., however, having agreed with the plaintiff, instead of J., that the plaintiff should erect the building, delivered the document to the plaintiff, without the defendant's knowledge or authority. The defendant afterwards heard of and ratified this delivery. The plaintiff, having erected the building, sued the defendant on the document, as a guarantee:—Held, that the document was not a sufficient written agreement, or note or memorandum thereof, by the defendant, to answer for the debt or default of T. and O.; inasmuch as the name of the person for whom the document was intended did not in any way appear upon the face of it, so that it did not contain the names of both the parties to the contract. *Williams* v. *Lake*, 2 El. & El. 349: 29 L. J., Q. B. 1; 6 Jur. (N.S.) 45; 1 L. T. 56; 8 W. R. 41.

iii. *Identification of Property.*

Admission of Parol Evidence.]—A vendor of leasehold premises wrote a letter to her solicitor stating: "I have closed with Mr. W. for this place":—Held, a sufficient memorandum in writing within the Statute of Frauds, and that parol evidence was admissible to show what "this place" was. *Waldron* v. *Jacob*, Ir. R. 5 Eq. 131.

Parcels—Extrinsic Evidence.]—A written agreement to sell and purchase "twenty-four acres of land at T." must be taken to refer to land belonging to the vendor, and is a sufficient description within the Statute of Frauds to make extrinsic evidence admissible for the purpose of identifying the land. *Plant* v. *Bourne*, 66 L. J., Ch. 643; [1897] 2 Ch. 281; 76 L. T. 820; 46 W. R. 59—C. A.

Connecting Documents.]—H. agreed to sell to O. a freehold estate for 2,375*l.*, and signed a memorandum which contained all the essentials of the contract except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards O., pursuant to the contract, sent H. a cheque of 375*l.* as a deposit and in part payment of the 2,375*l.*, and H. replied by letter: "I beg to acknowledge receipt of cheque value 375*l.*, on account of the purchase money for the F. estate":—Held, that parol evidence was admissible to explain the circumstances under which the letter was written, and that, as such evidence connected the letter and the memorandum, the two documents read together constituted a sufficient memorandum within the Statute of Frauds. *Oliver* v. *Hunting*, 59 L. J., Ch. 255; 44 Ch. D. 205; 62 L. T. 108; 38 W. R. 618.

The plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, butcher. Pinxton, and deposit paid at close of sale," and he also signed this receipt: "Pinxton, March 29th, 1880. Received of A. Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The Statute of Frauds was set up in defence. The conditions contained no description of the pro-

perty sold, but posters had been put up describing the property to be sold on the 29th of March at the Sun Inn :—Held, that the word "purchased" was enough to connect the receipt with the conditions of sale, though not with the poster. That the description in the receipt and conditions was sufficient to satisfy the Statute of Frauds. *Shardlow* v. *Cotterell*, 51 L. J., Ch. 353 ; 20 Ch. D. 90 ; 45 L. T. 572 ; 30 W. R. 143 —C. A.

Land indefinite—Land belonging to Another—Agency.]—A proposal had been made that the two plaintiffs should buy a triangular field of about three acres, and that the defendant should buy half an acre of it from them. One of the plaintiffs and the defendant met on the field; the defendant wished to have a piece in one of the angles, and the plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards the same plaintiff wrote to the defendant asking her to let them have a letter agreeing to purchase the half acre she had selected for 350*l*. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for 350*l*. The plaintiffs did not obtain a contract with the owner of the land for the purchase until the 4th of November, which was three months afterwards. On the 13th of November the defendant threatened to withdraw, and on the 20th of November her solicitors wrote that she did withdraw from the contract :—Held, that the small element of uncertainty in the measurement of the land might be disregarded, and that the parties must be considered as having determined the exact piece of land to be taken ; that the second letter contained a sufficient reference to the first ; and that the two letters formed a valid contract within the Statute of Frauds, and that, though the two plaintiffs were the purchasers of the land, and the letters forming the contract passed between the defendant and one only of the plaintiffs, he must under the circumstances be considered as agent for the other as well. *Wylson* v. *Dunn*, 56 L. J., Ch. 855 ; 34 Ch. D. 569 ; 56 L. T. 192 ; 35 W. R. 405 ; 51 J. P. 452.

iv. *Time.*

For Commencement of Term.]—An executory agreement for a lease does not satisfy the Statute of Frauds unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion. *Jaques* v. *Millar* (6 Ch. D. 153) overruled. *Marshall* v. *Berridge*, 51 L. J., Ch. 329 ; 19 Ch. D. 233 ; 45 L. T. 599 ; 30 W. R. 93 ; 46 J. P. 279—C. A. See also *May* v. *Thomson*, 20 Ch. D. 705.

The plaintiff offered to take a lease of furnaces from the defendant, conditionally upon his being able to make arrangements with other persons as to ore. A loosely-drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. The defendant, understanding that the lease was to begin immediately, offered possession to the plaintiff at once, but the plaintiff refused to take it as he had not yet made arrangement for ores, and continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, and the plaintiff commenced his action for specific performance :—Held, that although where an agreement is clear the court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement he cannot get specific performance on the footing of the opposite construction. *Ib.*

A paper in these terms, "I agree to let the premises in G. L., containing three stables, &c., for the same rent, and subject to the same conditions that I hold them myself," even though ratified by the proposed lessee, as it does not state the duration of the term, does not contain enough to constitute a memorandum within the Statute of Frauds. *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78 ; 6 Jur. (N.S.) 1215 ; 3 L. T. 69 ; 8 W. R. 750.

A lessee, D., wrote to his landlord's agents, asking for an extension of his term for twenty-one years from the termination of his present lease, and offering a premium. The landlord wrote to his agents declining D.'s offer, but adding, "As the lease will not run out for the next two years, I think there is plenty of time to think over the matter. However, if Mr. D. is very urgent, I will consent to grant him a lease for twenty-one years at 50*l*. a year, and a premium of 100*l*." The latter part of the letter was communicated to D., who accepted the offer :—Held, that D. was entitled to a lease for twenty-one years at a rent of 50*l*. a year, and a premium of 100*l*., commencing from the expiration of his existing lease. *Wood* v. *Aylward*, 58 L. T. 662—C. A.

An agreement in writing between A. and B., that on paying 20*l*. B. was to get possession of a farm of land, and also a lease for twenty-one years, at the yearly rent of 16*l*. a year ; and that B., on giving up possession at the end of twenty-one years, having done no injury, was to get his money returned :—Held, to constitute a valid agreement for an executory demise for twenty-one years from the date of the payment of the 20*l*. *Erskine* v. *Armstrong*, 20 L. R. Ir. 296—C. A.

Where an agreement in writing for a lease for a term of years did not expressly state the date at which the term was to commence, but contained a reference to circumstances from which such date could be clearly ascertained :—Held, sufficient to satisfy the Statute of Frauds, and specific performance of the agreement was decreed. *Phelan* v. *Tedcastle*, 15 L. R. Ir. 169.

The plaintiff made a proposal in writing to the defendant as follows :—June 7th, 1886, to rent same (i.e. licensed house), with fixtures, &c., at 2*l*. 10*s*. a week. This tenancy to be for two years certain. The plaintiff to have the option of purchase at any time within that term, at a sum of 1,200*l*. to give solvent security in the sum of 500*l*. for the preservation of the retail licence attached to said premises, and for payment of above weekly rent. The defendant accepted the above proposal in the following terms :—"I accept the within proposal, provided Mr. M. C. is the security." An action being brought by the plaintiff to recover possession of the premises, and for specific performance, the statement of claim alleged that M. C. was

ready and willing to become security, as the defendant was aware, and that the plaintiff went into possession of the premises under the proposal and continued therein until the defendant resumed possession. The defendant pleaded (inter alia) the Statute of Frauds :—Held, that the proposal and acceptance did not satisfy the requirements of the statute, as no date was fixed expressly or by reference from which the term was to run; also that the acceptance was conditional, and that as performance of the condition was not averred, the documents could neither constitute a present demise nor a complete agreement, entitling the plaintiff to specific performance. *White* v. *McMahon*, 18 L. R. Ir. 460.

An agreement for a lease of a public-house, dated 1st April, provided for a term of three years with an option to renew for another seven years, and for possession to be given "within one month from this date" :—Held, that the commencement of the term could be collected from the agreement as a whole, and that the day possession was given—a fact on which evidence was admitted—was the date from which the lease was to commence, and consequently that there was a valid contract. *Marshall* v. *Berridge* (19 Ch. D. 233) discussed and applied. *Lander and Bagley's Contract, In re*, 61 L. J., Ch. 707; [1892] 3 Ch. 41; 67 L. T. 521.

Where a tenant agreed to surrender an existing lease in consideration of his lessors granting him a new lease, but no date was fixed for the surrender or for the commencement of the new term, such agreement cannot be specifically enforced. *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535; 8 R. 279; 69 L. T. 228; 42 W. R. 200.

On the 28th March, 1894, the plaintiff and defendant signed a memorandum of agreement, by which the defendant was to take an underlease of a house on certain terms. The date from which the underlease was to commence was omitted in this agreement, but it was understood by the parties, at the time, that it was to be the 7th April, 1894. This date was specifically agreed to in writing by subsequent letters :—Held, that there was a contract made on the 28th March, 1894, sufficiently evidenced in writing to satisfy the Statute of Frauds. *White* v. *Hay*. 72 L. T. 281.

For giving Possession on Assignment—Name of Vendor or Sufficient Description.]—Plaintiff was the lessee of vaults in the city of London, under a lease granted by the Mayor and Corporation of London and the Mercers' Company. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the house agents acting for the plaintiff a letter in which he said that the directors thereby offered to purchase the vaults for 2,500*l.* cash, and to take over a mortgage for 3,500*l.* on the lease, these terms to include the lease, goodwill, fixtures, &c. The house agents answered as follows : "In reply to your letter of the 7th inst. we are now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor." Differences subsequently arose respecting the time when possession should be given, and eventually the plaintiff brought an action against the defendants claiming damages for breach of contract :—Held, that no binding contract had been entered into, first, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the Statute of Frauds; and, secondly, because the letters mentioned only what was the property to be purchased and the price to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solicitor in the ordinary way. *Donnison* v. *People's Café Co.*, 45 L. T. 187—C. A.

For Payment—Quality of Goods.]—Where a broker employed by the seller alone, effects a contract by means of a note sent to and accepted by the purchaser, a variation between this note and a note sent by the broker to the seller is immaterial. Letters not containing any reference to the quality or the time for payment of goods sold as agreed upon, do not constitute a sufficient memorandum of a contract to satisfy the Statute of Frauds. *McCaull* v. *Strauss*, 1 Cab. & E. 106.

Omission to state Sale by Sample.]—The defendants purchased at an auction certain lots of maize, the property of the plaintiffs, the bulk of which was in store. In an action for not removing the maize within the time mentioned in the conditions of sale, and to recover the loss upon a re-sale, the plaintiffs and the auctioneer deposed that the sale was by sample, and it appeared that samples had been exhibited at the auction, but the entry in the auctioneer's book of the sales to the defendant omitted to state that the sale was by sample :—Held, that the sale having been in fact by sample, the entry in the auctioneer's book omitted a material term of the contract in not stating that the sale was by sample, and therefore was not a sufficient memorandum of the contract under the Statute of Frauds. *McMullen* v. *Helberg*, 6 L. R., Ir. 463—C. A.

The plaintiffs having, subsequently to the auction, furnished the defendant with an invoice of the lots sold, stating the quantities, prices, and places where stored, accompanied by a letter referring to such invoice, and requesting payment, the defendant replied by a letter signed by him, in which he acknowledged the receipt of the invoice, and offered to accept the plaintiffs' draft at three months for the amount, and to give them a lien on the goods in the meantime :—Held, that the letters were affected with the same infirmity as the entry in the auctioneer's book, and did not constitute a sufficient memorandum of the contract under the Statute of Frauds. *Ib.*

Lease of Quarry—As Lessee might Direct.]—A., to whom the owner of a quarry had agreed to grant a lease, agreed on behalf of himself and all persons interested to sell the quarry to B., and "that the lease agreed to be granted by the lessor should be granted as B. might direct." B. having refused to complete the purchase, A. brought an action for specific performance, and in his statement of claim stated his agreement with the owner of the quarry as well as the memorandum of agreement with B., and alleged that B. was aware of the nature of A.'s interest in the quarry, and had accepted the title. B. demurred, on the ground that the memorandum was not sufficient within the Statute of Frauds :—Held, that it was sufficient, but that a defence founded on the Statute of Frauds could not since the Judicature Acts be

raised by demurrer. *Morgan* v. *Worthington*, 38 L. T. 443.

v. *Consideration.*

Disclosing.]—An agreement was made and signed between the plaintiff and A., the daughter of defendant, by which, in consideration of deposit money paid by the plaintiff in part of the consideration, A. agreed to sell to the plaintiff her interest in a public-house, conditionally, that if the plaintiff was not accepted as tenant by the landlord upon the terms on which she then occupied, the deposit money should be returned and the agreement cancelled. At the same meeting between the parties, but after the agreement had been signed, the following memorandum was written on the back of the agreement, and signed by the defendant:—"I hereby undertake that my daughter, A., shall perform all the covenants and conditions named in the annexed agreement, and hold and consider myself responsible for her":—Held, that the whole formed one transaction, and the memorandum and agreement might be read together; and, therefore, there was disclosed a sufficient consideration for the defendant's promise to satisfy the Statute of Frauds. *Coldham* v. *Showler*, 3 C. B. 312; 2 Car. & K. 261; 15 L. J., C. P. 261; 10 Jur. 562.

The defendant being solicitor for a purchaser of real estate, who had made default, wrote to the solicitor of the plaintiff, who was the vendor, in the following terms:—"To save the purchaser from danger of entire destruction of his credit, there appears to be no alternative but for me to undertake to settle the purchase. After long consideration I very reluctantly undertake to settle it within two months if that will be satisfactory to your client":—Held, that this expressed a promise conditional on the plaintiff's accepting the offer, and was therefore a memorandum of a contract in consideration that the plaintiff would accept the offer, sufficiently showing the consideration to satisfy s. 4 of the Statute of Frauds. *Powers* v. *Fowler*, 4 El. & Bl. 511.

A memorandum that A. had paid to B. 50*l*. as a deposit, in part payment of 1,000*l*. for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared, is not a sufficient agreement in writing. *Wood* v. *Midgley*, 5 De G. M. & G. 41; 23 L. J., Ch. 553; 2 W. R. 301.

An agreement by B. to serve only for a twelve-month, and so on from twelve-month's end to twelve-month's end, and to give twelve-month's notice to quit, is bad under the Statute of Frauds, as showing no consideration moving from the master, and no consideration can be inferred from the implied promise of the master to pay sufficient wages. *Sykes* v. *Dixon*, 1 P. & D. 463: 9 A. & E. 693; 8 W. W. & H. 120; 8 L. J., Q. B. 102.

—— **Marriage — Matter of Inference.**]—In order to satisfy the Statute of Frauds, the consideration for a contract need not appear in express terms in the memorandum, but it will be sufficient if any person of ordinary capacity must infer from a perusal of the memorandum what was the consideration—and the only consideration—for the promise. The inference must be well grounded, and must necessarily be collected from the terms of the memorandum, and mere conjecture will not suffice. The court would not, therefore, infer that marriage was the consideration for a promise by a father to give his daughter an annuity and a sum of money at his death, which was contained in a letter addressed to a person who was not a member of the family, but who subsequently married the daughter. *Hawes* v. *Armstrong* (1 Scott, 661) followed and applied. *Eyre, In re, McAnbrew* v. *Norris*, 13 R. 674; 72 L. T. 585; 43 W. R. 538.

vi. *Several Documents.*

Connection of.]—Two distinct written instruments cannot be coupled together so as to constitute a sufficient memorandum of a contract within the Statute of Frauds, unless, on the face of them, they appear to be necessarily connected with each other. *Smith* v. *Dixon*, 3 Jur. 770.

If there is a signed paper, signed by an agent duly authorised thereto, which paper, though agreeing to do something, leaves the subject-matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 804.

The contract so constituted by the act of A.'s duly authorised agent will be binding on A., though the second paper may have been sent by the agent to A.'s solicitor, to put it into form, provided that the agent and the person with whom he was dealing agreed that it should be sent for that purpose, but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form. *Ib.*

One paper referring to another in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words, "I agree to let the premises in G. L., containing three stables, &c., for the same rent, and subject to the same conditions that I hold them myself." even though ratified by the proposed lessee, as it did not state the duration of the term, it did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute. *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78; 6 Jur. (N.S.) 1215; 3 L. T. 69; 8 W. R. 750.

—— **Reference to Invoice—Refusal to Accept.**]—A. having sold some cheeses and candles to B. sent him an invoice of the goods. B. returned the invoice with a note, signed by him, on the back to the following effect:—"The cheese came to-day, but I did not take them in, for they are very badly crushed. So the candles and cheese are returned":—Held, that the contents of the invoice were sufficiently referred to by the note on the back of it, and that the two together constituted a sufficient memorandum in writing of the bargain to satisfy the Statute of Frauds. *Wilkinson* v. *Evans*, 1 H. & P. 552; 35 L. J., C. P. 224; L. R. 1 C. P. 407; 12 Jur. (N.S.) 600: 14 W. R. 963.

A verbal contract was entered into at Liverpool for the sale of a cargo of deals at a price exceeding 10*l*. The deals were conveyed by a carrier designated by the purchaser to the carrier's wharf at Manchester, and an advice note was sent to the purchaser, which contained

a description of the deals corresponding with the description in the invoice. The purchaser twice inspected the deals at the wharf, and then wrote across the advice note and signed the following statement, "Refused. Not according to representation." Ten days after the arrival of the deals the purchaser notified his refusal to the vendor:—Held, first, that there was no sufficient connection between the advice note and the invoice to constitute a memorandum in writing of the contract; secondly, that there was no acceptance within the Statute of Frauds. *Page* v. *Morgan* (15 Q. B. D. 228) distinguished. *Taylor* v. *Smith*, 61 L. J., Q. B. 331; [1893] 2 Q. B. 65; 67 L. T. 39; 40 W. R. 486—C. A.

A letter signed by the defendant cancelling a contract, and referring to an enclosed invoice which contained all the terms of the contract, is a sufficient note or memorandum within the 17th section of the Statute of Frauds. *Elliott* v. *Dean*, 1 Cab. & E. 283. Affirmed in C. A.

—— **Letter containing Name of One Party only—Enclosed in Envelope.**]—An envelope, addressed to a vendee and received by him, enclosing a letter which set out the terms of the contract, but in which the name of the vendor only appears, is sufficiently connected with the enclosure to be admitted in evidence in order to prove a memorandum in writing of the contract within the meaning either of s. 4 of the Statute of Frauds or of s. 4 of the Sale of Goods Act, 1893. *Pearce* v. *Gardner*, 66 L. J., Q. B. 457; [1897] 1 Q. B. 688; 76 L. T. 441; 45 W. R. 518—C. A.

—— **Guarantee.**]—In 1879 the defendants wrote to the plaintiff, by letter dated September 15: "Burton, Balderson. Dear Sir,—We hereby guarantee the safety of the above investments;" and by letter dated September 16: "We acknowledge to have received from you the sum of 710*l.* as under: a mortgage on the estate at T., the property of Mr. Burton, 360*l.*; a mortgage on the estate at F., the property of Mr. Balderson, 350*l.*" The plaintiff A. advanced to Burton on mortgage of the estate at T. the sum of 360*l.*, through the defendants. In 1891 the plaintiff A. conveyed and transferred to the plaintiff B., in consideration of 300*l.*, the benefit of the mortgage. In 1896 the plaintiffs sued the defendants to recover the sum of 360*l.* from them as guarantors of the mortgage:—Held, (1) that the two letters could be read together, and were a sufficient memorandum of the contract within s. 4 of the Statute of Frauds; (2) that the defendants guaranteed that the loan would be repaid; and (3) that the plaintiff B. could not sue upon the guarantee, and the plaintiff A. could recover only 60*l.* *Sheers* v. *Thimbleby*, 76 L. T. 709—C. A.

—— **Previous Parol Contract.**]—Two or more documents which do not refer to each other, but do refer to the same parol contract, and which, when taken together, contain all the terms of the parol contract, may together constitute a sufficient memorandum within the Statute of Frauds. On the 22nd of September, 1882, the defendant verbally agreed with the plaintiff to sell him her share in certain property, for 200*l.*, and signed and gave to him the following receipt: "Sept. 22nd, 1882. Received of J. Studds one pound of my share in the Barrett's Grove property the sum of two hundred pounds." No time was fixed for completion, and no abstract was delivered, and on the 19th of March, 1883, the defendant wrote to plaintiff: "Mr. Studds,—Sir,—If the balance of 199*l.* on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement (made 22nd of Sept., 1882) not any longer binding":—Held, that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the Statute of Frauds, s. 4. *Studds* v. *Watson*, 54 L. J., Ch. 626; 28 Ch. D. 305; 52 L. T. 129; 33 W. R. 118.

Held, also, that even if the word "balance" was not sufficient to connect the two documents, yet that, as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read together, and together constituted a good memorandum within the statute. *Ib.*

See also *Wylson* v. *Dunn*, supra, col. 37.

Bought and Sold Notes — Variation.]—A broker having bought for defendant part of a cargo of fruit, lying at a wharf belonging to one owner, was desired by defendant to buy some more, and bought, on the same day, another part of the same cargo, lying at the same wharf, but belonging to the plaintiff, and he sent sold notes of each lot to each owner, but one bought note of the whole to defendant, all three notes being signed by himself as broker. Defendant having refused to accept the fruit:—Held, in an action for not accepting the parcel bought of plaintiff, that even if evidence of a custom, in such cases, to send one bought note was admissible, yet, that as the bought and sold notes varied there was no contract with plaintiff within the Statute of Frauds. *Fisenden* v. *Lery*, 11 W. R. 259. And see *Cowie* v. *Remfry*, 5 Moore, P. C. 232; 3 Moore, Ind. App. 448; 10 Jur. 789.

Reference to Document containing Terms of Agreement.]—The plaintiff had signed a memorandum setting forth the terms of a contract by which the plaintiff agreed to let a carriage to the defendant for the period of a year. The defendant in a subsequent letter to the plaintiff signed by him referred to "our arrangement for the hire of your carriage." There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff:—Held, that the defendant's letter sufficiently referred to the document containing the terms of the contract to constitute a good memorandum of the contract within the Statute of Frauds, s. 4. *Cave* v. *Hastings*, 50 L. J., Q. B. 575; 7 Q. B. D. 125; 45 L. T. 348. See also *Boydell* v. *Drummond*, 11 East, 141; 2 Camp. 157; 10 R. R. 450; post, col. 64.

The defendant entered into a verbal agreement with the plaintiff to grant him the lease of a house for a term of years. A draft for the proposed lease was furnished by the plaintiff's solicitor to the defendant's solicitors, and returned by them approved of on behalf of the defendant. The defendant subsequently wrote a letter to the plaintiff complaining that the lease had not been engrossed. Upon the defendant declining to carry out the agreement, the plaintiff applied for a decree for specific performance:—Held, that the letter contained a sufficient reference to the draft of the lease to admit parol

evidence to show that there was such a draft, and thus to connect the draft with the letter signed by the defendant; and that these papers so connected constituted a sufficient writing to satisfy the requirements of the Statute of Frauds. *Craig* v. *Elliott*, 15 L. R., Ir. 257.

Upon a sale of lands by auction, a written contract, indorsed on the conditions of sale, was signed by the purchaser only: letters were subsequently written by the vendor to the purchaser's attorney, distinctly referring to the contract, and insisting upon the completion of the purchase:—Held, that this contract and the letters together constituted a sufficient note or memorandum, to enable the vendee to sue the vendor for the expenses of investigating the title, upon such title being found defective. *Dobell* v. *Hutchinson*, 5 N. & M. 251; 3 A. & E. 355; 1 H. & W. 394; 4 L. J., K. B. 201.

In an action for specific performance of a contract to sell real estate, the purchaser relied on several letters taken together as constituting a sufficient memorandum in writing signed by the vendor's authorised agent, into whose hands the property had been put for sale by the vendor. The last letter was written by the vendor's agent to the vendor's solicitor, and contained the essential terms of the contract other than the amount of the purchase-money, which, however, was specified in earlier letters written to the vendor in the name of the agent with his authority by the agent's clerk. There was nothing on the face of the last letter to show that the agent was referring to the former letters written by his clerk:—Held, that parol evidence was not admissible to connect the documents, and that, therefore, there was no sufficient memorandum in writing within the Statute of Frauds. *Potter* v. *Peters*, 64 L. J., Ch. 357; 72 L. T. 624.

Although a signed document, not containing the terms of an agreement therein referred to, but referring to another written (but unsigned) document, which does contain these terms, may be connected with the later documents by parol evidence so as to take the case out of the Statute of Frauds, the answer of the defendant, wherein the statute is pleaded and insisted on, cannot be made use of for this purpose: and a reference to "the agreement which your client alleges he entered into" in a signed document, is not a sufficient acknowledgment of the existence of an agreement at all, to take the case out of the statute. *Jackson* v. *Oglander*, 2 H. & M. 465; 13 L. T. 936; 13 W. R. 936.

Memorandum Incorporating Part of Deed.]—Action on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for S. & Co., to secure payment of moneys advanced to them by the plaintiff, and that S. & Co. paid all moneys due from them to the plaintiff, for which the judgment was to be such security. Replication, that a deed was made between S. & Co. and the plaintiff, whereby, after reciting the judgment and various unsettled accounts between S. & Co. and the plaintiff, it was witnessed that, for the sake of winding up the transactions, S. & Co. and the plaintiff agreed that the plaintiff should advance to a banking company 800*l.*, guaranteed by him on behalf of S. & Co., and should also advance to S. & Co. 200*l.*, and that 1,000*l.* should be the debt thenceforth due from S. & Co., which should be payable, with interest, and that the agreement should be without prejudice to the judgment against the defendant; that before execution of the deed by the plaintiff, in consideration that he would execute it, and would advance the 800*l.* and 200*l.*, the defendant promised the plaintiff that the judgment should remain as a security for the payment of the 1,000*l.* and interest, that the plaintiff executed the deed, and advanced the 800*l.* and 200*l.*, but that S. & Co. had not repaid the same. At the trial the plaintiff gave in evidence the following memorandum, which was signed by the defendant and another security before the plaintiff executed the deed: "We hereby consent to the within deed being executed by and between the parties thereto, and that the same shall be without prejudice to the plaintiff's rights and remedies under his judgment against us, and that the judgment shall remain in full force and effect." This memorandum had been annexed to the deed, but was detached and sent to the defendant, who signed it without seeing the deed:—Held, that assuming this was a transaction within the 4th section of the Statute of Frauds, which semble it was not, then it was a sufficient memorandum in writing to satisfy the statute, since the document signed by the defendant incorporated so much of the deed as formed the consideration and promise. *Macroy* v. *Scott*, 5 Ex. 907; 20 L. J., Ex. 90.

vii. *Alteration.*

In Writing.]—The plaintiffs agreed in writing with the defendant to let him a public-house from year to year, with an option for him to call on them to grant him a lease for twenty-eight years, and a stipulation that if he sold such lease for more than 1,200*l.* he should give the plaintiffs half the difference. The plaintiffs subsequently granted him a lease differing from that agreed to be granted in the following particulars:—It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* There was no covenant, as had been agreed, against assignment without the lessors' consent, nor binding the lessee to take his beer of the plaintiffs. Some other covenants burthensome on the defendant which had been agreed for were omitted. These alterations were arranged by parol only. The defendant sold the lease for 2,500*l.* The plaintiffs sued upon the agreement for half the difference between that sum and 1,200*l.* The jury found that the stipulation as to dividing the surplus remained in force or was renewed:—Held, that the effect of the alteration of the original terms agreed upon between the parties was that the old agreement was dissolved, and a new one made incorporating such parts of the old agreement as the parties did not choose to alter; and that as such new agreement related to land, and was not in writing within the 4th section of the Statute of Frauds, it could not be enforced by action. *Sanderson* v. *Graves*, 44 L. J., Ex. 210; L. R. 10 Ex. 234; 33 L. T. 269; 23 W. R. 797.

The terms of a written contract for the sale of goods falling within the operation of the Statute of Frauds cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing. *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L. J., Ex. 125.

An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtors of their respective claims, being an agreement to pay the debt of another, is within the 4th section of the Statute of Frauds, and cannot, in the absence of fraud, be varied by a subsequent parol agreement. *Emmet* v. *Dewhurst*, 3 Mac. & G. 587; 21 L. J., Ch. 497; 15 Jur. 1115.

Date.]—In a written contract within s. 17 of the Statute of Frauds, to deliver on a certain day, goods of a fluctuating value, to be paid for by bill at three months from delivery, the time of delivery is the essence of the contract, and any agreement to substitute another day must be in writing. *Stead* v. *Dawber*, 2 P. & D. 447; 10 A. & E. 57; 9 L. J., Q. B. 101.

An indorsement on an agreement extending the time of performance amounts to a fresh agreement. *Bacon* v. *Simpson*, 3 M. & W. 78.

A contract for the sale of goods exceeding 10*l.* in value having been reduced to writing, and signed so as to be binding on the parties, it was subsequently agreed verbally between them that the times of commencing and concluding delivery should be respectively a fortnight later than the times for commencing and concluding delivery fixed in the written contract:—Held, that by the 17th section of the Statute of Frauds, this latter agreement, not being in writing, could not be allowed to be good for any purpose, and therefore that the previous contract remained unaffected by it, and could be enforced in all its terms. *Noble* v. *Ward*, 4 H. & C. 149; 36 L. J., Ex. 91; L. R. 2 Ex. 35; 15 L. T. 672; 15 W. R. 520—Ex. Ch.

By bought and sold notes signed by brokers acting both for the buyer and seller, the last of which was dated April 25th, A. bought of B. 500 tons of iron, the delivery to extend over three months. None of the iron was delivered by the 25th July. A correspondence ensued between the brokers and the seller's agent until February following, from which a jury might properly come to the conclusion that the buyer waited for the delivery of the iron at the request of the seller; he then went into the market and bought, the price of iron being higher than at the end of July:—Held, that as the buyer had not bound himself to wait, there was no alteration of the contract within the Statute of Frauds, and therefore for the breach of the contract he might recover from the seller the difference between the contract price of iron and the market price in February. *Ogle* v. *Vane* (*Earl*), 7 B. & S. 855; 36 L. J., Q. B. 175; L. R. 2 Q. B. 275; 15 W. R. 564. Affirmed on appeal, 9 B. & S. 182; 37 L. J., Q. B. 77; L. R. 3 Q. B. 272; 16 W. R. 463—Ex. Ch.

Place.]—Under a contract required by the Statute of Frauds to be in writing, goods were sold, to arrive by a certain ship, to be taken from the quay. The purchaser afterwards verbally consented to the goods being delivered from the quay:—Held, in an action for non-delivery of the goods, that such consent did not support a plea of rescission of the contract. *Moore* v. *Campbell*, 10 Ex. 323; 2 C. L. R. 1084; 23 L. J., Ex. 310.

Additions.]—Where the contract is for the sale of goods to be manufactured, and alterations or additions are made in the progress of the work, such alterations or additions need not be made the subject of a distinct contract in writing. *Hoadley* v. *Maclaine*, 4 M. & Scott, 340; 10 Bing. 482; 3 L. J., C. P. 162.

Rescission.]—*See* infra, E. 1.

viii. *What Documents amount to.*

Telegram.]—See *Goodwin* v. *Francis*, L. R. 5 C. P. 121; and *McBlain* v. *Cross*, 25 L. T. 804, post, col. 55.

Bill of Exchange—Contract of Suretyship.]—Where the contract between a creditor, debtor and surety is contained in a bill of exchange, in an action by the creditor against the surety on the bill no other evidence save the bill is required to satisfy the Statute of Frauds, if the obligation appearing on the face of the bill is the precise obligation the surety has agreed to undertake. *Holmes* v. *Durkee*, 1 Cab. & E. 23.

Recital in Will.]—A recital in a will is a sufficient note or memorandum in writing of contract within s. 4 of the Statute of Frauds. *Hoyle, In re, Hoyle* v. *Hoyle*, 62 L. J., Ch. 182: [1893] 1 Ch. 84; 2 R. 145; 67 L. T. 674; 41 W. R. 81—C. A.

Affidavit.]—An affidavit made in chancery is a sufficient writing within the statute. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 155.

Receipt.]—E., holding a lease of four cottages, agreed to underlease them to D. for the whole term, less a reversion of a few days, and signed the following receipt:—"Received of D. 10*l.* as part purchase-money of 390*l.* of four cottages" (describing them), "the lease and counterpart to be paid for by Mr. D.":—Held, that the receipt was not a sufficient memorandum to satisfy the Statute of Frauds. *Dolling* v. *Evans*, 36 L. J., Ch. 474; 15 L. T. 604; 15 W. R. 394.

Receipts signed by the party sought to be charged, which partly disclosed the nature of the agreement:—Held, not sufficient to take the case out of the statute. *Caddick* v. *Skidmore*, 3 Jur. (N.S.) 1185.

—— **By Auctioneer's Clerk Three Days after Sale—Name Printed.**]—A receipt given by the auctioneer's clerk to D. three days after the auction and signed by the clerk, acknowledging payment of part of the purchase-money for "Lot 4, Mr. John Stafford's property," is not such a memorandum in writing as would bind the vendor within s. 4 of the statute. Semble, that the name of the auctioneer printed on the back of the particulars and conditions of sale is sufficient to bind the vendor. *Dyas* v *Stafford*, 7 L. R., Ir. 590. Affirmed, 9 L. R., Ir. 520—C. A.

Entry in Broker's Book.]—A. agrees with B.'s broker for 500*l.* stock; the broker, according to usage, made an entry of this agreement in his pocket-book; it being no otherwise reduced into writing, is within the Statute of Frauds. *Mussell* v. *Cooke*, Pre. Ch. 533.

The entry of sale made in the broker's book is not, of necessity, to be treated as the only evidence of a contract to satisfy the Statute of

Frauds. Therefore where the terms of a contract of sale were entered in the broker's book, and not signed by him, but he delivered to the parties the bought and sold notes, embodying the terms of the entry, and signed these notes, it was held that the parties were bound. *Goom* v. *Afflalo*, 6 B. & C. 117; 9 D. & R. 148; 5 L. J. (O.S.) K.B. 31.

Entry in Rent Roll.]—R. agreed to become tenant of certain premises to one S., who instructed an agent, J., to prepare a lease. J. caused his clerk to make an entry in his rent-roll of "lease for 200 years, from 25th March, 1880; yearly rent 100*l*." S. died, and the lease was never made; but R. went into possession, and expended 3,000*l*. on the premises:—Held, a sufficient agreement for a lease, and specific performance was decreed. *Sullivan's Estate, In re*, 23 L. R. Ir. 255.

Communications to Third Persons.]—On bill for specific performance of parol agreement to let lands, evidence that defendant had suffered his wife to receive money from the plaintiff in consideration of fines (he being incapable of receiving them), and had written a letter to a third person acknowledging the demise, and stating that he was ready to make leases:—Held, sufficient to take case out of statute. *Hartley* v. *Wilkinson*, 1 Ridgw. L. & S. 357.

Agreement by letter to third person to sell sufficient to take case out of statute. *Seagood* v. *Neale*, 1 Stra. 426.

The executrix of a lessee agreed to sell to A. the residue of her term (except a day) and the fixtures on the premises for 400*l*. This agreement was entered into by the executrix without advice, and there was no written memorandum of it except by a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l*. A., on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l*. as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A. for the whole term, wanting a day:—Held, that the landlord was entitled to a specific performance of his agreement, not only against the executrix, but against A. *Goodwin* v. *Fielding*, 4 De G. M. & G. 90.

Quære, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the Statute of Frauds, &c. *Ib.*

—— **Agent.**]—Defendant having orally instructed R. to buy a particular mare for him from the plaintiffs, R. wrote to defendant stating that he had bought the mare of the plaintiffs for 42*l*., and asking for a cheque. In answer to this, defendant wrote to R.:—"I only returned home yesterday evening or I should have at once answered your first letter, and sent you a cheque for the mare which you were kind enough to buy for me." There was no communication between defendant and plaintiffs, nor was the mare ever received by defendant. In an action by plaintiffs for the price of the mare:—Held, that the above letters were a sufficient "memorandum of the bargain" to satisfy s. 17 of the Statute of Frauds. *Gibson* v. *Holland*, 1 H. & R. 1; 35 L. J., C. P. 5; L. R. 1 C. P. 1; 11 Jur. (N.S.) 1022; 13 L. T. 293; 14 W. R. 86.

A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase-money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of the same for his sister, if C. approved of it. B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with a remark that it was "a great price":—Held, that C. must be considered the agent of A., and that as he had signed the contract acknowledging the receipt of the purchase-money, A. was bound to perform the agreement. *Field* v. *Boland*, 1 Dr. & Wal. 37.

Promise not Addressed to Anyone—Payment by Instalments.]—A. verbally promised to give 20,000*l*. to the Jubilee Fund of the Congregational Union, and also filled up and signed a blank form of promise, not addressed to any one, but headed "Congregational Union of England and Wales—Jubilee Fund," whereby he promised to give 20,000*l*., in five equal annual instalments of 4,000*l*. each, for liquidation of chapel debts. A. paid 12,000*l*. to the fund within three years after giving the promise, and then died, leaving the last two instalments of 4,000*l*. each unpaid and unprovided for:—Held, that there was no enforceable contract, on the ground that there was no sufficient memorandum in writing to satisfy the Statute of Frauds. *Hudson, In re, Creed* v. *Henderson*, 54 L. J., Ch. 811; 33 W. R. 819.

Letter of Solicitor.]—An intended vendor of freehold property, who had bought under stringent special conditions, instructed her solicitor, in conformity with his own advice, to sell the property subject to the same or similar conditions as or to those under which she had bought. Acting under this limited authority, the solicitor gave the necessary instructions by letter to a house-agent, whom at a personal interview on the same day he expressly forbade to sign anything, saying that any contract would have to be prepared by the solicitor's firm. An intended purchaser, by letter handed to the agent, agreed to give the price which the agent was authorised to accept (not, however, simply accepting the terms of the prior letter), and at the same time requested an acceptance of this offer by the agent in writing, a request to which the agent declined to accede, giving as his reason the prohibition under which he was from entering into any contract. The intended vendor at this stage of the proceedings repented of her intention to sell, but was willing to proceed if the solicitor was of opinion that she could not honourably recede. A personal interview having taken place between him and the intended purchaser, who declined to give up the intended purchase, the solicitor wrote to the intended purchaser a letter saying that his firm were instructed to proceed with the sale, and adding that the draft contract was being prepared, and would be forwarded for approval. Disputes having subsequently arisen, and the intended purchaser having filed a bill for specific performance:—Held, first, that at the date of the letter of the intended purchaser to the agent no contract was in existence, and that that letter, coupled with the prior letter of the solicitor to him, did not amount to a sufficient memorandum

in writing of the terms of a contract. *Chinnock* v. *Ely* (*Marchioness*), 4 De G. J. & S. 638; 11 Jur. (N.S.) 329; 12 L. T. 251; 13 W. R. 597.

Held, secondly, that the letter of the solicitor to the intended purchaser was no recognition of the fact that there had been a complete sale, and did not amount to an acceptance of the terms stated by the intended purchaser in his letter to the agent, but merely to either a conditional acceptance of the intended purchaser's terms, subject to a draft contract being agreed to, or an expression of unwillingness to continue the interrupted negotiation, and for that purpose to prepare a form of agreement. *Ib.*

Held, thirdly, that if the letter of the solicitor of the intended purchaser had had the effect which the court decided that it had not, it would not have been binding on the intended vendor, as being beyond the authority vested by her in her solicitor. *Ib.*

At a sale of land by auction on the 9th of May, 1872, premises were knocked down to the defendant. An agreement as to the contract was attached to the conditions of sale, and signed by the plaintiff, but not by the defendant, in consequence of his being too drunk to sign. On the 10th of May the defendant's solicitor, after seeing the defendant, wrote to the plaintiff's solicitor a letter to the following effect: "I have been instructed by Mr. Baxter (the defendant) to prepare his title to the property which he purchased last evening. My client proposes to take possession forthwith if the vendor will consider such taking possession as without prejudice to his right to object to the title. Please send me the abstract of title and copy conditions when ready":—Held, that the letter was not a sufficient memorandum in writing to satisfy the Statute of Frauds, s. 4. *Matthews* v. *Baxter*, 28 L. T. 669; 21 W. R. 741.

W. entered into a verbal agreement with S. to sell him an inn called the "Lion Inn" for 950*l.* On the following day W.'s solicitor wrote to S.'s solicitor: "W. has been with us to-day, and stated that he had arranged with your client S. for the sale to the latter of the 'Lion Inn' for 950*l.* We therefore send herewith draft contract for your perusal and approval":—Held, that this letter was not such a note or memorandum of an agreement as is required by the Statute of Frauds. *Smith* v. *Webster*, 45 L. J., Ch. 528; 3 Ch. D. 49; 35 L. T. 44; 24 W. R. 894—C. A.

c. Signature.

Essential.]—There must be a signing, either by an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman. *Selby* v. *Selby*, 3 Mer. 2; 17 R. R. 1.

Position of.]—Provided the name is inserted in an instrument, in such a manner as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with and it does not matter in what part of the instrument the name is found. *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13.

The signature must be inserted in such a manner as to govern or have the effect of authenticating the whole instrument. *Caton* v. *Caton*, 36 L. J., Ch. 886; L. R. 2 H. L. 127; 16 W. R. 1.

Name in Body of Instrument.] — The secretary of a company entered into a contract with the plaintiff, on behalf of the company, to supply them with coals. The contract was made out by the secretary, approved of by the company, and transmitted to the plaintiff, and by him altered and returned; and the alterations having been assented to by the company, a fair copy of the agreement was finally made by the secretary, and sent again to the plaintiff. The agreement contained in the body of it the names of all the parties to be charged, and, at its foot, the clause "In witness whereof we have hereto set our hands," &c., but it was never signed by any one. The contract had been acted upon by both parties, until it was violated by the defendant:—Held, that the plaintiff could not sue upon it, as it was not signed in pursuance of the 4th section of the Statute of Frauds. *Hubert* or *Herbert* v. *Turner*, 4 Scott (N.R.) 486; 3 Man. & G. 743; Car. & M. 351; 11 L. J., C. P. 78; 6 Jur. 194.

The names in the body of the document are inserted there of necessity, to make the document sensible, and cannot be used over again to satisfy the requirements of the statute, that there shall be a signature by the parties to be charged or their agents.—Per Tindal, C.J. *Ib.*

The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in such a manner as to govern, or to have the effect of authenticating, the whole instrument. *Caton* v. *Caton*, 36 L. J., Ch. 886; L. R. 2 H. L. 127; 16 W. R. 1.

The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within the meaning of the Statute of Frauds. *Stokes* v. *Moore*, 1 Cox, 219; 1 R. R. 24.

—— **"I, A. B., agree."**]—An agreement in the handwriting of the party, beginning "I, A. B., agree to sell," though not signed by the vendor, is good within the Statute of Frauds. *Knight* v. *Crockford*, 1 Esp. 189; 5 R. R. 729. See *Hubert* v. *Turner*, supra.

—— **In Third Person.**]—J. R. Bridges, having five freehold houses, but no other property, in Cable Street, Liverpool, agreed to sell them to J. Bleakley for 248*l.*, and thereupon drew up the following memorandum in his own handwriting: "July 26, 1839. John Bleakley agrees with J. R. Bridges to take the property in Cable Street for 248*l.* 10*s.*":—Held, that the agreement was sufficiently signed by the vendor. *Bleakley* v. *Smith*, 11 Sim. 150.

If the defendant himself writes the agreement for the purchase of a leasehold house, and states his own name in the third person as "Mr. A. B. has agreed," this is a good contract within the Statute of Frauds, though he does not otherwise sign the agreement. *Propert* v. *Parker*, 1 Russ. & M. 625.

Whether a note written in the third person, "Mr. T. proposes," &c. (making an offer to purchase), being accepted, amounts to a contract in writing signed within the Statute of Frauds, quære. *Morison* v. *Turnour*, 18 Ves. 175.

Initials.]—Semble, that a signature by initials

to a contract or a memorandum is sufficient. *Chichester* v. *Cobb*, 14 L. T. 433.

An agreement between an author and a bookseller, by which the latter is to be paid an annuity for life, without any apparent consideration, and without any signature other than the initials of the parties, is void under the Statute of Frauds. *Sweet* v. *Lee*, 3 Man. & G. 452; 4 Scott (N.R.) 77; 5 Jur. 1134.

Illiterate Person making Mark.]—An agreement annexed to conditions of sale by auction to which D., an illiterate person, had put his mark is sufficiently signed within the statute. *Dyas* v. *Stafford*, 7 L. R. Ir. 590. Affirmed, 9 L. R. Ir. 520—C. A.

There must be a signing, either by an actual signature of the name, or something intended by the writer to be equivalent to a signature; as a mark by a marksman. *Selby* v. *Selby*, 3 Mer. 2; 17 R. R. 1.

"Your Affectionate Mother."]—A letter from a mother to her son, beginning "My dear Robert," and concluding "Your affectionate mother," is not signed so as to constitute a binding agreement on the part of the mother," within the intent of the Statute of Frauds.

"Approved by me, J. S."]—Quære, whether the words "approved by me, J. S.," affixed to certain memoranda, by way of approval of an arrangement in which the party is interested, is a signing within the Statute of Frauds. *Parker* v. *Smith*, 1 Coll. 608.

Alteration of Draft.]—A. alters the draft with his own hand; this is not a signing to take it out of the Statute of Frauds, though the seller afterwards executes a conveyance, and being in Middlesex it is caused to be registered. *Hawkins* v. *Holmes*, 1 P. W. 770.

Acting on Unsigned Agreement.]—Acting on an unsigned agreement may render it binding. *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 666. S. P., *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; 28 L. J., Ex. 122; *Barber* v. *Allen*, 5 H. & N. 61; 29 L. J., Ex. 100; 6 Jur. (N.S.) 23; 1 L. T. 167; 8 W. R. 127.

Reference Incorporating]—A parent by his agent, on the marriage of his daughter, entered into an engagement in writing with her intended husband, in which his name was written, but not signed:—Held, that a letter written by the parent after the marriage, referring to the memorandum as stating the terms of the engagement, was either a sufficient agreement, signed by the party within the Statute of Frauds, or a sufficient recognition of the use made of his name in the memorandum. *De Bert* v. *Thompson*, 3 Beav. 471; 12 Cl. & F. 45.

Though an agreement is not signed, the party is bound by a letter containing the terms, which by the contents can be connected and identified with the agreement. *Coles* v. *Trecothick*, 9 Ves. 250; 1 Smith, 233; 7 R. R. 167.

The absolute beneficial owner of land vested in a trustee wrote a letter to the mother of her infant grandson. The letter was signed with the writer's initials. Inclosed in the same envelope, but on a separate piece of paper, was another document in the handwriting of the same person, and headed "Supplement." This document was not signed in any way. It commenced thus: "I had quite omitted to tell you," but it contained no other reference to the letter, and the letter in no way referred to it. It was alleged that the "supplement" contained a declaration of trust of the land in favour of the infant:—Held, that the "supplement" was not signed so as to satisfy the Statute of Frauds. *Kronheim* v. *Johnson*, 47 L. J., Ch. 132; 7 Ch. D. 60; 37 L. T. 751; 26 W. R. 142.

You cannot by words of reference bring up a signature, and give it a signification and effect different from that which the signature has in the original place where it is found. *Caton* v. *Caton*, 36 L. J., Ch. 886; L. R. 2 H. L. 127; 16 W. R. 1.

Where, therefore, the name of the party against whom specific performance in equity was sought to be enforced appeared in different parts of the paper, but only in such a way that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of a promise or an undertaking:—Held, that the paper did not constitute a contract signed within the provisions of the Statute of Frauds. *Ib.*

Contract for land within s. 4 of Statute of Frauds, by letter signed by vendor combined with his proposal by note to third person specifying price. *Western* v. *Russell*, 3 Ves. & B. 187; 13 R. R. 178.

Printed.]—A letter containing proposed terms of a contract between A. B., the sender, and the sendee, written out by the sender, upon paper bearing a printed heading, "Memorandum from A. B.," was held to be a sufficient note in writing to charge A. B. A memorandum of a contract is sufficiently signed within s. 4 of the Statute of Frauds if it contains the terms of the contract and the name of the party charged, and is given by him to the other party under circumstances which show a recognition of the name as it stands for his own. *Tourret* v. *Cripps*, 48 L. J., Ch. 567; 27 W. R. 706.

Semble, that the name of the auctioneer printed on the back of the particulars and conditions of sale is sufficient to bind the vendor. *Dyas* v. *Stafford*, 7 L. R. Ir. 590. Affirmed, 9 L. R. Ir. 520—C. A.

Pencil—Condition.]—On the treaty for the under-lease of a house, the agent for plaintiff tendered an unconditional agreement to be signed, to which the defendant attached his name and initials in pencil, subject to the condition of there being nothing unusual in the covenants of the original lease. The defendant subsequently discovered that there was a nuisance which would prevent his occupation of the house, but which was unknown to the plaintiff, and he therefore abandoned the treaty:—Held, that under these circumstances the court would try the case strictly between the parties, and in the absence of actual evidence that the agent had direct or implied authority to accede to the pencil additions, would not bind the plaintiff, and that until the latter had assented to the alterations, the agreement was only a proposal and might be abandoned by the defendant. The bill was dismissed with costs. *Lucas* v. *James*, 7 Hare, 410; 18 L. J. Ch. 329; 13 Jur. 912.

On Telegram Form.]—A., by letter, offered to

buy an estate for a given sum. B. answered by telegram, "Your offer for the L. estate is accepted." The instructions for the message were signed by B., but the telegram received by A. contained merely the names of the sender and receiver written by the company's clerk on the usual printed form:—Held, that this was a sufficient signature by B. *Godwin* v. *Francis*, 39 L. J., C. P. 121; L. R. 5 C. P. 295; 22 L. T. 338.

B. having entered into a contract with C., the brother of the defendant, for the sale of hay, brought an action against the defendant for not accepting. The judge at the trial admitted letters and telegrams signed by C. as evidence against the defendant, and the jury found for the plaintiff:—Held, that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C.'s name, and in the other the name of the defendant was not mentioned as buyer, together constituted a sufficient memorandum of the contract to satisfy the Statute of Frauds, on the ground that the defendant might be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal. *McBlain* v. *Cross*, 25 L. T. 804.

Purpose of.]—A signature to a document which contains the terms of a contract is available for the purpose of satisfying s. 4 of the Statute of Frauds, though put alio intuitu, and not in order to attest or verify the contract. *Jones* v. *Victoria Dock Co.*, 46 L. J., Q. B. 219; 2 Q. B. D. 314; 36 L. T. 347; 25 W. R. 501; and see *Eley* v. *Positive Government, &c., Co.*, 45 L. J., Ex. 451; 1 Ex. D. 20, 88; 34 L. T. 190.

As Witness.]—Where there is a complete agreement in writing, and a person who is a party and knows the contents subscribes as a witness only, he is bound by it, for it is a signing within the Statute of Frauds. *Welford* v. *Beazley*, 3 Atk. 503.

—— **By Clerk.**]—A signature by an auctioneer's clerk, in the character of witness merely, to a contract for the sale of property which is signed by the purchaser alone, is not a sufficient signing of an agreement or memorandum, or note thereof, by an agent of the seller, to satisfy the Statute of Frauds. *Gosbell* v. *Archer*, 4 N. & M. 485; 2 A. & E. 500; 1 H. & W. 31; 4 L. J., K. B. 78.

Of one Party.]—A written proposal containing the terms of a proposed contract signed by the defendant and assented to by the plaintiff by parol is a sufficient agreement within the 4th section. *Smith* v. *Neale*, 2 C. B. (N.S.) 67; 26 L. J., C. P. 143; 3 Jur. (N.S.) 516; 5 W. R. 563. S. P., *Reuss* v. *Picksley*, 4 H. & C. 588; 35 L. J., Ex. 218; L. R. 1 Ex. 342; 12 Jur. (N.S.) 628; 15 L. T. 25; 14 W. R. 924—Ex. Ch.

A contract of purchase (of leasehold property sold by auction) written on the back of the particulars of sale (which contained the names of the owners of the property), and signed by the purchaser only, is a sufficient note or memorandum of the agreement between the parties; the vendor's signature is not essential *Laythorpe* v. *Bryant*, 3 Scott, 238; 2 Bing. (N.C.) 735; 2 Hodges, 25; 5 L. J., C. P. 217.

Semble, the signature of the party to be bound is sufficient to satisfy the Statute of Frauds so as to enable the court to enforce specific performance. *Field* v. *Boland*, 1 Dr. & Wal. 37.

There is no provision in the Statute of Frauds to prevent the specific execution of an agreement signed only by one of the parties. *Ormond* v. *Anderson*, 2 Ball & B. 370; 12 R. R. 103.

An agreement signed by one party only is sufficient to charge him within Statute of Frauds. *Seton* v. *Slade*, 7 Ves. 265; 6 R. R. 124.

Contract for the purchase of tithes not signed by the party chargeable:—Held, under the circumstances, to have been taken out of the Statute of Frauds. *Blachford* v. *Kirkpatrick*, 6 Beav. 232; 12 L. J., Ch. 108.

A. sold houses to B., and a note was made by A. of the agreement, but it was only signed by B. Decreed, that both parties were bound. *Hatton* v. *Gray*, 2 Ch. Ca. 164.

Agreement in writing for sale of estate, binding, though signed only by vendor, and followed up by direction to attorney to prepare proper agreement for both parties to sign. *Fowle* v. *Freeman*, 9 Ves. 351; 7 R. R. 219.

Agreements signed by one party only, enforced against the other. *Hall* v. *Butler*, 1 Eq. Abr. 20.

An agreement may be enforced in equity, although not binding on both parties at the time of its being signed; it is sufficient if signed only by one party and accepted and acted on by the other. *Dowell* v. *Dew*, 1 Y. & Coll. C. C. 344; 12 L. J., Ch. 158; 7 Jur. 117.

Specific performance of a contract, not signed by the party enforcing it. *Backhouse* v. *Mohun*, 3 Swanst. 434; 19 R. R. 252.

The written undertaking of one party will be enforced, although the other party is not mutually bound by writing. *Palmer* v. *Scott*, 1 Russ. & M. 391; Taml. 488; 8 L. J. (O.S.) Ch. 127.

Quære, whether, where a contract signed by one party only, he is not at liberty to recede from it till the other party has done some act to bind himself. *Martin* v. *Mitchell*, 2 J. & W. 428; 22 R. R. 184.

Semble, a contract signed by one party only, may be enforced by the other, as the filing a bill makes it binding on that party. *Ib.* 426.

Semble, under contract by husband and wife for sale of wife's estate, court will not decree him to procure her to join. *Ib.* 425.

If a written agreement is not signed by the defendant, the plaintiff need not give it in evidence, although he has signed it, and it relates to the matter in issue between the parties. *Wilson* v. *Bowie*, 1 Car. & P. 8.

—— **Variance between Memorandum and Counterpart.**]—The memorandum of a contract for sale of land was signed in counterpart, one copy being signed by "V. and Son, as agents for" C. C., who was the vendor's solicitor. The other copy was duly signed on behalf of the purchaser:—Held, that the latter being a complete memorandum as against the purchaser, the defect in the former was no bar to the vendor's suing for specific performance. *Butcher* v. *Nash*, 61 L. T. 72.

Of Agent.]—Specific performance of a contract concerning land, not decreed on the signature of an agent without authority. *Howard* v. *Braithwaite*, 1 Ves. & B. 202.

An agent not being able to write, held the top of the pen while another person wrote his name to an agreement:—Held, a sufficient signature. *Helshaw* v. *Langley*, 11 L. J., Ch. 17.

A contract for the purchase of land made by an agent in his own name, vests the equitable estate in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol. *Cave* v. *Mackenzie*, 46 L. J., Ch. 564; 37 L. T. 218.

The plaintiffs appointed by parol W. F. M. as their agent to purchase land on their behalf. W. F. M. entered into a contract for the purchase of the land in his own name, and then assigned the benefit of the contract to J. T. M. for valuable consideration. In an action by the plaintiffs against W. F. M. and J. T. M. to establish the agency, the vendor not being a party:—Held, that the appointment of W. F. M. was an agency within s. 4 of the Statute of Frauds, and not a trust or confidence within s. 7, and therefore was not required to be evidenced by writing. *Ib.*

The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:—Held, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4. *Long* v. *Millar*, 48 L. J., C. P. 596; 4 C. P. D. 450; 41 L. T. 306; 27 W. R. 720—C. A.

—— **Clerk.**]—H., head clerk to the defendants, drew up with their authority a letter addressed to them, and containing the terms upon which the plaintiff was to serve them for three years. The plaintiff signed the letter:—Held, that the letter constituted a sufficient compliance with the 4th section of the Statute of Frauds, being a memorandum of the contract signed by the agent of the defendants. *Evans* v. *Hoare*, 61 L. J., Q. B. 470; [1892] 1 Q. B. 593; 66 L. T. 345; 40 W. R. 442; 56 J. P. 664.

—— **Solicitor.**]—Quære, whether the signature of an attorney to a statement at the foot of a draft agreement, signifying his approval of the draft on behalf of his client, is a signature within the Statute of Frauds. *Thornbury* v. *Bevill*, 1 Y. & Coll. C. C. 554; 6 Jur. 407.

A person who was in treaty for taking the lease of a house, stated in a letter to the owner, that he had authorised his solicitors to settle the terms of the agreement. They subsequently sent the owner a draft agreement signed by them stating that its provisions were approved by their client, who afterwards refused to sign or acknowledge it:—Held, in a suit for specific performance, that the solicitors were agents in what they did and that a defence under the Statute of Frauds failed. *Jolliffe* v. *Blumberg*, 18 W. R. 784.

Secretary of Company.]—An agreement for the sale of leasehold houses, the property of a company incorporated under the Companies Act, 1862, was signed as follows:—"A., secretary for the B. Company, Limited." The Companies Act, 1867, s. 37, sub-s. 2, provides that such an agreement may be signed on behalf of the company by any person acting under the express or implied authority of the company. By the memorandum of association it appeared that one of the objects of the company was to sell houses:—Held, that as selling houses was part of the ordinary business of the company, the secretary in signing was acting under the implied authority of the company; and that, therefore, the agreement was sufficient to satisfy the Statute of Frauds. *Beer* v. *London and Paris Hotel Co.*, L. R. 20 Eq. 412; 32 L. T. 715.

—— **Agent's Clerk.**]—Vendor is bound by signature of agent's clerk, thus: "Witness E. P. for Mr. S. agent for the seller," upon evidence of assent; but clerks in general have no authority to bind the principal. *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith, 233; 7 R. R. 167.

—— **Auctioneer's Clerk.**]—A direction by the purchaser at a sale of lands by auction to the auctioneer's clerk to fill up the memorandum annexed to the conditions of sale constitutes such clerk a person "lawfully authorised within the meaning of section 4 of the Statute of Frauds, and such memorandum so filled up by the auctioneer's clerk with the name of the purchaser, although not signed by the latter, complies with the requirements of the statute." *Sims* v. *Landray*, 63 L. J., Ch. 535; [1894] 2 Ch. 318; 8 R. 582; 70 L. T. 530; 42 W. R. 621. And see *Dyas* v. *Stafford*, 7 L. R. Ir. 590. Affirmed, 9 L. R. Ir. 520.

d. Promise of Executor or Administrator.

See EXECUTOR.

e. Debt, Default, or Miscarriage of Another.

See PRINCIPAL AND SURETY.

f. Agreement in consideration of Marriage.

What is.]—M. had given a bond and warrant of attorney to secure the repayment of a sum of money. Judgment had been entered up, but not executed; the bond and warrant of attorney came into the possession of L., as personal representative of the original obligee. She was on terms of affectionate friendship with M., and often said that he had been unfairly treated, in being made to enter into these securities. L. had in early life received from the father of M. a conveyance of some property in India; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees. In truth, the money consideration was, if any, a debt of 1,200 rupees; the rest was a purely voluntary gift, and no money whatever passed when the conveyance was executed. M. was about to marry, and when his marriage was in contemplation, discussions arose about the bond and warrant of attorney. M.'s father had told L. that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed, which would put an end to the conveyance of this Indian property as a voluntary conveyance made without consideration. In his depositions he said that L. promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the con-

veyance. Other evidence was given of directions by her, that she had abandoned the claim, and of a promise, often repeated, that she would never trouble M. about it:—Held, that this promise, if it constituted a contract, was not a contract made in consideration of marriage, so as to bring it within the words of the Statute of Frauds. *Jorden* v. *Money*, 5 H. L. Cas. 185; 23 L. J., Ch. 865.

Promise to Confer Benefit by Will.]—Prior to a marriage the intended husband and wife caused a settlement of the wife's property to be prepared in accordance with a memorandum in the husband's handwriting; but before its execution the husband verbally promised the wife that if she would forego the settlement he would give her the same benefits by his will. In accordance with this promise, he, immediately after the marriage, executed a will to that effect prepared before the marriage. Upon his death, some years afterwards, that will was not forthcoming, but a later will was found disposing of the property in a different manner:—Held, that there was no contract within the Statute of Frauds binding the husband to make a will, or any fraud or part performance to take the case out of the statute. *Caton* v. *Caton*, 35 L. J., Ch. 292; L. R. 1 Ch. 137; 12 Jur. (N.S.) 171. Affirmed on appeal, 36 L. J., Ch. 886; L. R. 2 H.L. 127; 16 W. R. 1.

P. V., shortly before his marriage with the plaintiff, wrote her a letter, in which occurred the following passage: "And now, my dearest Lizzie, as life is very uncertain at my time of life, and as you are of all the world the person I love best, I hereby will and bequeath to you, after my death, the eight cottages in Peckham's Walk, occupied by Charles Warren and Edward Neath and others. You will keep this letter as a proof of my intention, in case of any sudden change occurring to me, rendering me incapable of, or not in a state of mind fit for, the performance of so important a document, and making null and void any former will and bequest I may have made previously. I am doing this, my dearest, as a temporary provision for you in case of any emergency . . . I am your future husband in its most holy sense.—P. V." Another part of the will contained a reference to the wedding-ring, of which the plaintiff then apparently had the custody. After the marriage P. V. died, leaving a will whereof the defendants were executors and trustees. By this will the eight cottages were not left to the plaintiff. The plaintiff claimed a declaration that P. V. duly contracted with her to leave to or to settle upon her the eight cottages, and that by virtue of the letter the plaintiff was entitled to them in equity. The court held that the letter did not satisfy the requirements of the Statute of Frauds with respect to a memorandum, either as to the statement of consideration or a promise:—Held, on appeal, that no contract had been intended, that the writer had mistakenly thought that he was making a gift, and that the judgment must be affirmed. *Vincent* v. *Vincent*, 56 L. T. 243—C. A.

Memoranda Sufficient.]—A written memorandum after marriage of a prior agreement is sufficient within the 29 Car. 2, c. 3, s. 4. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 156.

Subsequent to Marriage—Evidence.]—A letter subsequent to the marriage, authorising the husband to draw for interest due on a bond which was never executed, cannot prevail as evidence of a promise, which, if subsequent to the marriage, is void as nudum pactum. *Randall* v. *Morgan*, 12 Ves. 67; 8 R. R. 289.

Part Performance.]—*See* infra.

And see HUSBAND AND WIFE.

g. Interest in Lands.

Agreement for Lease—In Consideration of Share of Crops.]—A. agreed with B. to let him land rent free on condition that A. should have a moiety of the crops: such an agreement need not be in writing. *Poulter* v. *Killingbrick*, 1 Bos. & P. 397. See *Waddington* v. *Bristow*, 2 Bos. & P. 452; (N.R.) 355.

—— **Contract to Let Dock.**]—A corporation, being the owner of a graving dock, issued regulations for its use, that the dock would "be let to parties requiring the same for the repair of vessels" at certain rates; that a book would be kept by the borough treasurer for the entering of the names of vessels intended for repair, and that as far as practicable priority would be given to vessels in the order of entry. A sum of three guineas was to be paid to the borough treasurer on entering each vessel, which "entrance money, and the right of turn for the use of the dock," were to be forfeited if the vessel did not take her turn at the specified time; and the corporation was to have a lien for dockage upon the vessel, with a power to detain the vessel for the same. In an action by a shipowner against the corporation for not allowing his vessel, for which the entrance fee had been paid, to enter such dock in her turn, according to these regulations:—Held, that the contract for the use of the dock did not amount to an interest in land within s. 4 of the Statute of Frauds, and that it did not require to be under seal. *Wells* v. *Kingston-upon-Hull Corporation*, 44 L. J., C. P. 257; L. R. 10 C. P. 402; 32 L. T. 615; 23 W. R. 562.

—— **To Let Furnished Lodgings.**]—A contract to let furnished lodgings is a contract for an interest in land. *Edge* v. *Strafford*, 1 C. & J. 391; 1 Tyr. 293. S. P., *Inman* v. *Stamp*, 1 Stark. 12; 18 R. R. 740.

Secus, as to board and lodgings. *Wright* v. *Stavert*, 2 El. & El. 721; 29 L. J., Q. B. 161; 8 W. R. 413.

Contract to Procure Assignment of Lease.]—A contract to procure for a person the assignment of a lease of a house is a contract for an interest in or concerning land within the Statute of Frauds (29 Car. 2, c. 3), s. 4, and must therefore be in writing, although it is made by one who has not the lease himself, or any interest under it. *Horsey* v. *Graham*, 39 L. J., C. P. 58; L. R. 5 C. P. 9; 21 L. T. 530; 18 W. R. 141.

Agreement as to Improvements.]—A landlord, who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to com-

mence from the quarter preceding the completion of the work :—Held, that the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party ; for that it was not a contract for any interest in or concerning lands within the statute ; nor was it, according to that statute, an agreement "not to be performed within one year from the making there," no time being fixed for the performance on the part of the landlord. *Donellan* v. *Read*, 3 B. & Ad. 899 ; 1 L. J., K. B. 269.

In consideration that A., who was tenant of premises under a parol agreement for a seven years' lease, would give up immediate possession to B., in order that B. might enter thereon as tenant, and also as a compensation for improvements made by A. on the premises, and for the value of articles left thereon by A., B. agreed to pay A. 100*l.* A. accordingly relinquished and gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A., and B. afterwards in part performance of the agreement on his part paid A. 51*l.* In an action by A. to recover the balance of the 100*l.* :—Held, that the contract, in respect of which he sued, was not a contract for the sale of an interest in or concerning lands. *Kelly* v. *Webster*, 12 C. B. 283 ; 21 L. J., C. P. 163 ; 16 Jur. 838.

Agreement as to Alterations.]—The plaintiffs agreed in writing with the defendant to let him a public-house from year to year, with an option for him to call on them to grant him a lease for twenty-eight years, and a stipulation that if he sold such lease for more than 1,200*l.* he should give the plaintiffs half the difference. The plaintiffs subsequently granted him a lease differing from that agreed to be granted in the following particulars :—It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* There was no covenant as had been agreed, against assignment without the lessor's consent, nor binding the lessee to take his beer of the plaintiffs. Some other covenants burthensome on the defendant which had been agreed for were omitted. These alterations were arranged by parol only. The defendant sold the lease for 2,500*l.* The plaintiffs sued upon the agreement for half the difference between that sum and 1,200*l.* The jury found that the stipulation as to dividing the surplus remained in force or was renewed :—Held, that the effect of the alteration of the original terms agreed upon between the parties was that the old agreement was dissolved, and a new one made incorporating such parts of the old agreement as the parties did not choose to alter ; and that as such new agreement related to land, and was not in writing within s. 4 of the Statute of Frauds, it could not be enforced by action. *Sanderson* v. *Graves*, 44 L. J., Ex. 210 ; L. R. 10 Ex. 234 ; 33 L. T. 269 ; 23 W. R. 797.

Agreement to Repay Loan out of Rent.]—A customer, in July, borrowed 200*l.* from his bankers upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, and the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorised and requested the tenant, when his Michaelmas rent became due, to pay 200*l.* to the bankers. The letter contained no reference to the loan, and did not show that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt upon an act of bankruptcy committed in August :—Held, that as the rent was an interest in land, the agreement was one which by virtue of s. 4 of the Statute of Frauds, could not be proved by parol evidence, and that, therefore, the letter could alone be looked at. And that the letter amounted only to a revocable authority to pay the rent to the bankers, and that it was revoked by the bankruptcy. *Hall, Ex parte, Whiting, In re*, 48 L. J., Bk. 79 ; 10 Ch. D. 615 ; 40 L. T. 179 ; 27 W. R. 385—C. A.

Contract to Furnish.]—An agreement by which A., in consideration of B. hiring a house for him, agrees to furnish the same house, relates to an interest in land, and must be in writing. *Mechelin* v. *Wallace*, 2 N. & P. 224 ; 7 A. & E. 49 ; 6 L. J., K. B. 217.

—— **Fixtures.**]—The plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures therein, and to make alterations and improvements in the house ; and the defendant agreed to take the house and pay for the furniture and fixtures and alterations :—Held, an agreement relating to an interest in land. *Vaughan* v. *Hancock*, 3 C. B. 766 ; 16 L. J., C. P. 1.

Tenant's fixtures of over 10*l.* in value having been sold by the tenant's trustee in bankruptcy to the plaintiff and resold by him to the defendant, who was landlord of the premises :—Held, that no memorandum of this latter sale was necessary under the Statute of Frauds, it being neither a sale of an interest in land, under s. 4 of the Statute of Frauds, nor of goods and chattels under s. 17. *Lee* v. *Gaskell*, 45 L. J., Q. B. 540 ; 1 Q. B. D. 700 ; 34 L. T. 759 ; 24 W. R. 824. And see *Sleddon* v. *Cruikshank*, 10 M. & W. 71 ; 16 L. J., Ex. 61. *Lanyon* v *Toogood*, 13 M. & W. 27 ; 13 L. J., Ex. 273.

Machinery Affixed.]—Machinery affixed to a building is land within the meaning of the Statute of Frauds. *Jarvis* v. *Jarvis*, 63 L. J., Ch. 10 ; 8 R. 361 ; 69 L. T. 412 ; 1 Manson, 199.

Right of Shooting—Taking away Game.]—A grant of a right to shoot and take away a part of the game killed is a grant of an interest in land and within the Statute of Frauds. *Webber* v. *Lee*, 51 L. J., Q. B. 485 ; 9 Q. B. D. 315 ; 47 L. T. 215 ; 30 W. R. 866 ; 47 J. P. 4—C. A.

Agreement to Charge Hereditaments.]—An agreement to charge hereditaments with the value of property which has been lost through the wrongful act of a third person must be in writing, as being within the 4th section of the Statute of Frauds ; but it may be taken out of the Statute by a deposit of title-deeds. *Whitmore* v. *Farley*, 43 L. T. 192 ; 28 W. R. 908. And see *S. C.*, in C. A., 45 L. T. 99 ; 29 W. R. 825 ; 14 Cox, C. C. 617. See also *Alderson* v. *Maddison*, in C. A., 50 L. J., Q. B. 466 ; 7 Q. B. D. 174 ; 45 L. T. 334 ; 29 W. R. 556. And in H. L., 52 L. J., Q. B. 737 ; 8 App. Cas. 467 ; 49 L. T. 303 ; 31 W. R. 820.

Advance of Money on Security.]—An agreement to advance money on the security of land is an agreement which requires to be in writing by s. 4 of the Statute of Frauds. *Mounsey* v. *Rankin*, 1 Cab. & E. 496.

Declaration of Trust.]—A. verbally agreed to bid for B. at an auction of a house; the house was bought and the deposit paid by A. In an action by B. against A. to have it declared that A. was his agent and trustee:—Held, that although under s. 4 of the Statute of Frauds an agency might be established by parol, s. 7 applied, by which all declarations of trusts of lands, tenements, &c., must be proved by some writing. *James* v *Smith*, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396. Affirmed on other grounds, 65 L. T. 544—C. A.

Sale of Building Materials.]—A contract for the sale of building materials to be taken down and removed by the purchaser is a contract for the sale of an interest in land within s. 4 of the Statute of Frauds. *Marshall* v *Green* (1 C. P. D. 35) discussed and distinguished on this point. *Lavery* v. *Purssell*, 57 L. J., Ch. 570; 39 Ch. D. 508; 58 L. T. 846; 37 W. R. 163.

An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land within the Statute of Frauds (21 Car. 2, c. 3), and must be in writing, signed by the parties. *Caddick* v. *Skidmore*, 3 Jur. (N.S.) 1185.

Partnership.]—Where a partner agrees to retire from a partnership, the assets of which include an interest in land, and it is an essential term of the agreement that the retiring partner shall assign his share in the assets, the contract is within s. 4 of the Statute of Frauds, and must be in writing. *Gray* v. *Smith*, 59 L. J., Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310—C. A.

Contract for Purchase of Debentures—"Floating Security."]—The sale of debentures in a company that create a "floating charge" on its property consisting in part of leaseholds is a contract for the sale of an interest in land within s. 4 of the Statute of Frauds. *Driver* v. *Broad*, 63 L. J., Q. B. 12; [1893] 1 Q. B. 744; 4 R. 411; 69 L. T. 169; 41 W. R. 483—C. A.

See also cases sub tit. VENDOR AND PURCHASER.

h. Not Performable within a Year.

Where Possibility of Performance.]—That part of the 4th section of the Statute of Frauds, which requires agreements not to be performed within a year to be in writing and signed, does not apply to cases in which the performance may, by possibility or accident, be extended beyond that period; it is to be confined to cases where the agreement is not to be performed and cannot be carried into execution within that space of time. *Ridley* v. *Ridley*, 34 Beav. 478; 34 L. J., Ch. 462; 11 Jur. (N.S.) 475; 12 L. T. 481; 13 W. R. 763.

Therefore, when A. agreed by parol, for valuable consideration, to leave C. a certain amount by his will, and he died fourteen years after the agreement:—Held, that the Statute of Frauds did not apply *Ib.*

Where an agreement is to be performed on a contingency; which may happen within the year after it is made, and it does not appear on the face of the agreement that it is to be performed after the year, it does not fall within the statute; where, therefore, a debtor to the plaintiff stated to the plaintiff's solicitor, on being applied to for payment, that he, the debtor, could not pay then or during his lifetime, but that he had provided for payment by his will, and directed his executors to pay:—Held, to be binding on the executors, although there was no promise in writing by the testator to pay. *Wells* v. *Horton*, 12 Moore, 176; 4 Bing. 40; 2 Car. & P. 383; 5 L. J. (O.S.) C. P. 41; 29 R. R. 498.

—— **By one Party.**]—Where by the terms of a contract one party can perform his part of it within a year, a subsequent request by the other party that such performance should be postponed till after a year does not bring the case within s. 4 of the Statute of Frauds, although such request be acceded to. *Beran* v. *Carr*, 1 Cab. & E. 499.

An agreement whereby all that is to be done by the plaintiff, constituting one entire consideration for the defendant's promise, is capable of being performed within a year, and no part of what the plaintiff is to do constituting such consideration is intended to be postponed until after the expiration of the year, is not within the 4th section of the Statute of Frauds, notwithstanding the performance on the part of the defendant is or may be extended beyond that period. *Smith* v. *Neale*, 2 C. B. (N.S.) 67; 26 L. J., C. P. 143; 3 Jur. (N.S.) 516; 5 W. R. 563.

Publication of Book in Parts—Sufficient Contract.]—If it appears to have been the understanding of the parties to a contract at the time, that it was not to be completed within a year, though it might and was in fact in part performed within that time, it is within the statute; and if not in writing signed by the party to be charged, it cannot be enforced against him. And his signature in a book entitled "Shakspeare subscribers, their signatures," not referring to a printed prospectus, which contained the terms of the contract, and which was delivered at the time to the subscribers to the "Boydell Shakspeare," cannot be connected together, so as to take the case out of the statute, as such connection could only be established by parol evidence. *Boydell* v. *Drummond*, 11 East, 142; 2 Camp. 157; 10 R. R. 450.

But where a party agreed to take a work which was to be published in twenty-four numbers, at intervals of two months, and after receiving several numbers refused to take any more, though he had notice from the publisher that the others were ready for him if he would send for them; and the plaintiff, the assignee of the publisher, who had become bankrupt, sued him for the value of the whole. The jury having found a verdict for the plaintiff for the price of the numbers received by the defendant, the court refused to disturb it, although it was contended that the contract was entire and void under the 4th section of the Statute of Frauds, it not having been reduced into writing, or to be performed within a year. *Mavor* v. *Pyne*, 11 Moore, 2; 3 Bing. 285; 2 Car. & P. 91; 4 L. J. (O.S.) C. P. 36; 28 R. R. 625.

Hire for more than a Year—Determinable

within.]—An agreement to hire a carriage for more than one year, determinable by the custom of the trade, at any time, upon payment of a year's hire, is an agreement not to be performed within one year from the making thereof, and must be signed by the party to be charged therewith. *Burch* v. *Liverpool* (*Earl*), 4 M. & Ry. 380; 9 B. & C. 392.

To Leave by Will]—An agreement to leave money by will need not be in writing although uncertain as to the time of performance. *Fenton* v. *Emblers*, 3 Burr. 1278; 1 W. Bl. 353. S. P., *Ridley* v. *Ridley*, 34 Beav. 478: 34 L. J., Ch. 462: 11 Jur. (N.S.) 475; 12 L. T. 481; 13 W. R. 763. And see *Alderson* v. *Maddison*, 52 L. J., Q. B. 737; 8 App. Cas. 467; 49 L. T. 303; 31 W. R. 820.

Partnership.]—But an agreement to enter into partnership for ten years must. *Williams* v. *Jones*, 7 D. & R. 548; 5 B. & C. 108; 29 R. R. 181.

Contract of Service.]—A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year within the meaning of the Statute of Frauds, s. 4. *Cawthorne* v. *Cordrey* (13 C. B. (N.S.) 406) distinguished. *Britain* v. *Rossiter*, 48 L. J., Ex. 362; 11 Q. B. D. 123; 40 L. T. 240; 27 W. R. 482.

A contract for a year's service to commence at a subsequent day, is a contract not to be performed within the year, and must be in writing; therefore, no action can be maintained for the breach of a verbal contract made on the 27th May, for a year's service to commence on the 30th June following. *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; 19 R. R. 442.

A., on the 20th July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year; B. took the proposals and went away, and entered into A.'s service on the 24th of July:—Held that this was a contract on the 20th, not to be performed within the space of one year from the making. *Snelling* v. *Huntingfield* (*Lord*), 1 C. M. & R. 20: 4 Tyr. 606; 3 L. J., Ex. 232.

The plaintiff agreed on a Sunday to serve defendant for a year, the service to commence on the Monday. On the Monday the plaintiff, with the knowledge and consent of the defendant, commenced the service, and received 20*l.* on account:—Held, in an action for a wrongful dismissal within the year, in which an objection was taken that there was a contract for a year's service to commence on a future day, that the jury might infer a new implied contract on the Monday for a year's service from that day. *Cawthorn* v. *Cordery*, 13 C. B. (N.S.) 406: 32 L. J., C. P. 152.

By a parol agreement defendant agreed with plaintiff to serve him for a year from a future day, and that the service thenceforth should continue, subject to be determined by three months' notice. After the expiry of the year, defendant quitted plaintiff's service without notice:—Held, that plaintiff might maintain an action for this breach of their agreement, notwithstanding the Statute of Frauds. *Collis* v. *Botthamley*, 7 W. R. 87.

But a contract for service for more than a year, but subject to determination within the year on a given event, is within s. 4 of the Statute of Frauds, and must therefore be in writing. *Dobson* v. *Collis*, 1 H. & N. 81; 25 L. J., Ex. 267; 4 W. R. 512.

A. entered the service of B. under a written agreement as follows:—"I agree to receive you as clerk in my establishment in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, viz., for the first year 70*l.*, for the second 90*l.*, for the third 110*l.*, for the fourth 130*l.*, and 150*l.* for the fifth and following years that you may remain in my employment":—Held, that the agreement was one that, by the Statute of Frauds, was required to be in writing: that there being a precise stipulation for yearly payments, evidence was not admissible to show that at or after the time the letter containing it was sent by B. to A., it was verbally agreed that the salary should be paid quarterly, and that the facts of the payments having usually been made quarterly, did not vary the rights of the parties under the agreement. *Giraud* v. *Richmond*, 2 C. B. 835; 15 L. J., C. P. 180; 10 Jur. 360.

—— **Incomplete Contract.**]—Six persons signed a document purporting to be the basis of a partnership to last for three years and to commence at a subsequent date. By the terms of the document the interest in the partnership was to be divided into thirty-six shares. J. R. was to hold twelve shares, and E. R., F. H., H. R., and A. S. T. were each to hold six shares, and B. T. was to receive a salary of 500*l.* per annum. H. R. objected to this arrangement, and wished that he himself should hold seven shares, and that J. R. should hold eleven. On signing the document, H. R. wrote before his signature to the document the words, "Excepting clause as to shares." A. S. T. insisted that H. R. should hold only the same number of shares in the partnership as he did. A correspondence ensued with reference to the terms of the partnership; and, ultimately, A. S. T. withdrew his objection by letter. H. R. never assented to the provision that he should hold only six shares. J. R., E. R., F. R., and H. R. having afterwards refused to take A. S. T. into partnership unless he would consent to be a salaried partner only, A. S. T. brought an action for breach of the terms of the document:—Held, that the document set forth an agreement not to be performed within a year, within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and that as there was no complete agreement in writing, signed by the parties to be charged thereby, no action would lie for a refusal to perform the terms of the document. *Tomkins* v. *Randell*, 19 W. R. 413.

—— **Reference to other Documents.**]—A company incorporated under the Companies Act, 1862, entered into negotiations with the plaintiffs to employ them as managers for five years. A draft agreement was prepared and submitted to them; they objected to some of its terms, and thereupon the directors of the company wrote out a paper modifying the draft agreement in some particulars, but concluding with the words "all other provisions as in draft." The plaintiffs agreed to the draft agreement as modified by this paper. The secretary of the company entered in the minute book a resolution that the plaintiffs having signified their willingness to undertake "the management of the company's

works upon the terms of the draft agreement submitted to them by the board, it was resolved that the agreement be engrossed in duplicate, signed, sealed and executed." At the next meeting of the directors of the company the chairman signed the resolution pursuant to the Companies Act, 1862, s 67:—Held, that there was a valid contract within the Statute of Frauds, s. 4, by the company to employ the plaintiffs during five years: for the terms of the service were completely ascertained when they assented to the draft agreement as modified by the paper, and it was immaterial that the directors of the company intended the contract as finally arrived at to be afterwards "engrossed in duplicate, signed, sealed, and executed;" and the draft agreement and the paper modifying it might be identified by parol as the draft agreement referred to in the resolution entered in the minute book: and although the signature of the chairman was affixed to the minute book for the purpose of verifying the accuracy of the entry therein contained, pursuant to the Companies Act, 1862, s. 67, it nevertheless operated as an admission of the contract contained in the draft agreement and the paper, and was sufficient to satisfy the Statute of Frauds, s. 4. *Jones* v. *Victoria Graving Dock Co.*, 46 L. J., Q. B. 219; 2 Q. B. D. 314; 36 L. T. 347; 25 W. R. 501.

—— **Appointment to Clerkship of House of Peers.**]—Action for specific performance of a parol promise by defendant to procure plaintiff to be made deputy to defendant's son, as clerk of the House of Peers, or otherwise to provide for him, in consideration of plaintiff's insisting upon and soliciting in procuring a reversionary grant of that place for defendant's son, which defendant now enjoyed. Defendant pleaded the Statute of Frauds, because not in writing, and not to be performed within one year; and also the Statute of Limitations, that the promise was made above six years before the bill filed. Both pleas allowed. *Reynolds* v. *Cowper*, 5 Vin. Abr. 524, pl. 47.

—— **Appointment to Curacy—Payment of Stipend.**]—A declaration, after reciting the existence of a society for promoting the employment of additional curates in populous places, in order to provide a fund for contributing to the maintenance of additional clergymen in those parishes within the dioceses of England and Wales most requiring such assistance, and that the society had made annual grants in pursuance of such objects, by quarterly payments to the several incumbents, for the use of the stipendiary curates of such parishes, upon a proper application made to the society by the incumbent, through the bishop of the diocese, and by him sanctioned and forwarded to the society on behalf of the curate, approved by the bishop, and by him licensed, and that the defendant was incumbent of such parish, stated, that in consideration that the plaintiff would, in case the bishop of the diocese should approve of and license him, undertake the office of stipendiary curate of the parish and perform the duties and reside there; that the defendant duly nominated the plaintiff to the bishop as stipendiary curate, for the approval and license of the bishop, and promised the plaintiff that in case the bishop should approve of and license the plaintiff, to employ the plaintiff as curate, and so long as he should so continue, under the license of the bishop and to reside in the parish, to allow and pay the plaintiff the whole income arising from the money in the hands of the governors of the bounty of Queen Anne, in respect of the curacy, and to take all necessary measures for payment of the annual grant from the society, by renewing the application on behalf of the plaintiff, according to the rules and regulations of the society, through the bishop of the diocese, by forwarding the same to the bishop, to be by him sanctioned and forwarded to the society, and to receive the same as long as it should be paid for the use of the plaintiff:—Held, that the agreement was within the Statute of Frauds, as not being to be performed within a year from the making thereof. *Roberts* v. *Tucker*, 3 Ex. 632.

Held, also, that the following document, signed by the defendant, was not such a memorandum or note in writing as satisfied the statute:—"I, A. B., the perpetual curate of St. B., of C., in the E. diocese of L., nominate H. R. (the plaintiff) to the curacy of St. B., and I propose to allow him, for his stipend, 70*l.* per annum, granted by the society for promoting the employment of additional curates in populous places (so long as it continues to be paid), and the whole interest of 2,600*l.* in the hands of the governors of Queen Anne's bounty, appropriated to the augmentation of the perpetual curacy of St. B." *Ib.*

—— **Clause in Articles of Association insufficient.**]—A solicitor sued a joint stock company for breach of contract, alleging in his declaration that it was agreed between him and them that he should be employed by the company as and appointed by the company to the office of solicitor of and for the company, upon the terms that the company would, so long as he should continue to act as and hold the office of solicitor to the company, employ him to transact all the legal business of the company for the usual fees and charges, and that he should not be removed from his office unless for misconduct. In the articles of association, which were prepared by the solicitor, there was a clause that "Mr. W. E. shall be the solicitor for the company, and shall transact all the legal business of the company for the usual fees and charges, and shall not be removed from his office except for misconduct." The articles were signed by seven persons, who became directors. The solicitor held shares in the company. For some time after the incorporation of the company he was employed by them to transact all their business, and his name alone appeared in the prospectus as the solicitor to the company. Subsequently other solicitors were also employed, and their names appeared in the prospectus together with his name, although he protested against their appointment. Finally, the company ceased to employ him, which was the breach of contract declared on:—Held, that there was no evidence to support the declaration, for the contract, if any, was one not to be performed within the space of one year, and was therefore within s. 4 of the Statute of Frauds, and there was no memorandum in writing to satisfy the terms of the section, because the articles, made alio intuitu, formed a contract only between the members of the company inter se, and not between the company and the plaintiff. *Eley* v. *Positive Government Security Life Assurance Co.*, 45 L. J., Ex. 58; 1 Ex. D. 20; 33 L. T. 743; 24 W. R. 252. Affirmed, 45 L. J., Ex. 451; 1 Ex. D. 88; 34 L. T. 190; 24 W. R. 338.

—— **Restraint of Trade.**]—The statement of claim alleged that in 1866 the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within five miles of D.; and that on the expiration of the three years he continued in the plaintiff's employment on the like terms (except as to the period of employment) till 1877. Breach, that in 1877 the defendant left the plaintiff, and carried on business as a tailor in D. The statement of defence alleged that the contract was not in writing as required by the Statute of Frauds:—Held, on demurrer, by Hawkins, J., that the contract amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff; and was, therefore, prima facia not to be performed within a year, and therefore fell within s. 4 of the Statute of Frauds. *Davey* v. *Shannon*, 48 L. J., Ex. 459: 4 Ex. D. 81; 40 L. T. 628; 27 W. R. 599.

See also MASTER AND SERVANT.

To Maintain Persons.]—A parol agreement to maintain a child known to be about five years old until she is able to do for herself, is an agreement not to be performed within a year within the meaning of the Statute of Frauds, although determinable within the year by the happening of a collateral event. *Farrington* v. *Donohoe*, Ir. R. 1 C. L. 675; 14 W. R. 922.

An agreement to keep, maintain, and clothe A. during his life, and supply him with grass for two sheep during the same period, is not within the 4th section of the Statute of Frauds, and does not require to be in writing. *O'Sullivan* v. *Murphy*, 14 W. R. 407—Ex. Ch.

A contract for the maintenance of a child at the defendant's request, to enure "so long as the defendant shall think proper," is a contract upon a contingency, the performance of which is not necessarily to take place beyond the space of a year, and, therefore, not within the 4th section of the Statute of Frauds. *Souch* v. *Strawbridge*, 2 C. B. 808; 15 L. J., C. P. 170; 10 Jur. 357.

A husband and wife having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children and to indemnify the husband against any debts contracted by her. An action having been brought in the county court by the wife against the husband for six weeks' arrears of maintenance under the agreement:—Held, that the agreement was not an agreement "not to be performed within one year" within the 4th section of the Statute of Frauds, and, therefore, need not be in writing. *Davey* v. *Shannon*, (4 Ex. D. 81) not followed. *McGregor* v. *McGregor*, 57 L. J., Q. B. 591; 21 Q. B. D. 424; 37 W. R. 45; 52 J. P. 772—C. A. Affirming 58 L. T. 227.

And see *Knowlman* v. *Bluett*, infra, col. 72.

Novation.]—C. & Co., manufacturers of fuel, entered into a contract for three years, determinable within the first year, and if continued longer, at six months' notice, with P. & Co. for the supply of small coal, not less than 100 tons a day, at 3*s.* 6*d.* a ton, to be delivered at the tip of the colliery, into waggons to be provided by C. & Co.; payment to be made monthly by bills. The coal was delivered in pursuance of the contract, when a company was formed to carry on the business which had been carried on by C. & Co. After that time the coal was supplied by P. & Co. to the company, on the terms of the contract, and the bills for payment were drawn upon and accepted by the company. The contract stipulated that it might be determined on six months' notice. Afterwards the company gave notice to determine the contract at the expiration of six months. P. & Co. continued to deliver 100 tons of coal a day at the tip of the colliery; but the company not providing waggons for its removal, it was stacked by P. & Co. in an adjacent field, and notice given to the company. The company having become bankrupt, P. & Co. claimed to prove against them for the amount of the coal so stacked:—Held, that the proof must be disallowed, as the contract between P. & Co. and the company, being one that could not be performed within a year, ought to have been in writing, and as it was not, it was void. *Pentreguinea Fuel Co., In re, Acraman, Ex parte*, 4 De G. F. & J. 541; 31 L. J., Ch. 741; 8 Jur. (N.S.) 706; 7 L. T. 84; 10 W. R. 656.

Contractor—Share in Profits of Undertaking.]—An agreement entered into by a contractor to share in the profits of an undertaking for making a canal, although the contract is not capable of being completed within a year, is not such an agreement as by the Statute of Frauds is required to be in writing, but may be proved by parol evidence. *M'Kay* v. *Rutherford*, 6 Moore, P. C. 414; 13 Jur. 21.

Sale of Practice.]—The following memorandum was made between the plaintiff and the defendant and signed with their respective initials: "Dict. of Practice. 80*l.* per annum for five years, commencing Michaelmas, 1828; 60*l.* per annum for the rest of Mr. Lee's life, if he survives the five years, payable in either case quarterly, the first payment, Michaelmas, 1828; Mr. Lee to separate the practices, K. B. and C. P.:"—Held, that parol evidence was admissible to explain the document; but that, inasmuch as it appeared to be a memorandum of a contract that was not to be performed within a year, and no consideration was stated on the face of it, it came within the 4th section of the Statute of Frauds, and was therefore not capable of being enforced by action. *Sweet* v. *Lee*, 3 Man. & G. 452; 4 Scott (N.R.) 77; 5 Jur. 1134.

Agreement to Lend Money—Calls.]—By an act of parliament trustees were created for building a bridge, and it provided that persons who should agree to lend money towards carrying the act into execution should pay the same to the treasurer of the trustees as they should direct. In an action against a party, who had agreed to lend 25*l.*, for non-payment of calls:—Held, that an agreement to lend the 25*l.* might be inferred from a paper signed by him, which referred to an engagement to subscribe a sum therein set against his name, coupled with proof of payment by him of an earlier call corresponding to that on the 25*l.*, and of his taking a receipt for a call on a loan of that sum; and that such agreement was not within s. 4 of the Statute of Frauds, though a prospectus had previously issued stating that

the whole sum would not be, nor was it, called for within a year. *Miles* v. *Bough*, 3 Railw. Cas. 668; 3 G. & D. 119; 3 Q. B. 845; 12 L. J., Q. B. 74: 8 Jur. 81.

Agreement to Abandon Proceedings—Defence to Action.]—An agreement to abandon threatened proceedings which might otherwise be brought at any time within six years, is, if followed in fact by an abstention from proceedings, a contract which is performed by one of the parties within one year, and consequently is not such a contract as is required by sect. 4 of the Statute of Frauds to be in writing. That section does not require that an agreement which is set up as a defence to an action should be in writing. *Miles* v. *New Zealand Alford Estate Co.*, 54 L. J., Ch. 1035; 32 Ch. D. 266; 53 L. T. 219; 34 W. R. 669.

Agreement not in Writing—Evidence on quantum meruit.]—Plaintiff by the first count of his declaration alleged that by an agreement between himself and defendant, in consideration that plaintiff would serve defendant as his clerk for three years, defendant agreed to pay him 60*l.* and averred performance of all conditions, and assigned as breach the non-payment by defendant of the 60*l.* The second count was for wages payable by defendant to plaintiff for work done by plaintiff as defendant's clerk:—Held, that although the agreement not being one to be performed within a year, came within s. 4 of the Statute of Frauds, and so, not being in writing could not be sued upon under the first count, yet it was evidence on quantum meruit of the value of plaintiff's services and might be referred to and taken into consideration by the jury as the rule or measure of damages under the second count, and as showing the estimate which defendant himself had put upon plaintiff's services. *Searisbrick* v. *Parkinson*, 20 L. T. 175; 17 W. R. 467.

i. Contract Executed or Partly Performed.

Contract not Performable within a Year.]—The services of a clerk had been continued for some years. In an action for dismissing him before the end of a current year:—Held, that the agreement need not be in writing. *Beeston* v. *Collyer*, 4 Bing. 309; 2 Car. & P. 607; 12 Moore, 552; 5 L. J. (o.s.) C. P. 180; 29 R. R. 576.

—— **Sale of Patent.**]—The plaintiff assigned letters patent to H. & N., who covenanted to pay him a sum by instalments extending over several years, provided that if, at the expiration of twelve months from the date of the deed, they should not approve of the patent, and should give notice of their disapprobation and of their intention to sell the patent, then the payment of the first instalment should be suspended; and if, having given such notice, they should, within six months, sell the patent, the covenant should cease. The deed was executed by N., but there was no signature of H., but only a seal for him in the usual way. H. & N. attempted to work the patent, but, being dissatisfied with it, sent the plaintiff a notice, signed by both, referring to the deed, and in the terms of the proviso:—Held, that the contract having been performed on one side within a year, the case was not within s. 4 of the Statute of Frauds, inasmuch as that enactment applies only to contracts not to be performed on either side within the year. *Cherry* v. *Heming*, 4 Ex. 631; 19 L. J., Ex. 64.

—— **Contract to Support.**]—The father of seven illegitimate children agreed with their mother verbally to pay her 300*l.* per annum, by equal quarterly instalments, for so long as she should maintain and educate them. At the time of making the promise the eldest child was about fourteen years old. For several years the mother maintained and educated the children, and the father paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The mother still continued to maintain and educate the children, and in May, 1873, brought an action for two and a-half years' arrears:—Held, that, the consideration being executed, she was entitled to recover as for "money paid at the father's request," at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within a year." *Knowlman* v. *Bluett*, 43 L. J., Ex. 151; L. R. 9 Ex. 307; 32 L. T. 262; 22 W. R. 758—Ex. Ch.

Interest in Land.]—The equitable doctrine of part performance has not been confined to contracts for an acquisition of an interest in land. Probably it applies to all cases in which the court would entertain a suit for specific performance if the contract had been in writing. A verbal agreement for an easement may be enforced where there has been part performance, whether it is or is not within s. 4 of the Statute of Frauds. And semble it is within the section. *Britain* v. *Rossiter* (11 Q. B. D. 123) discussed. *McManus* v. *Cooke*, 56 L. J., Ch. 662; 35 Ch. D. 681; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708.

The doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to the provisions of the Statute of Frauds, s. 4, was made enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by the Judicature Act, 1873. *Britain* v. *Rossiter*, 48 L. J., Ex. 362; 11 Q. B. D. 123; 40 L. T. 240; 27 W. R. 482.

Where a contract which by reason of its relating to land, and so being within the Statute of Frauds, cannot be enforced by action, has been performed by one party, and the benefit thereof accepted by the other, the former can recover on the implied contract arising out of such performance, and it is immaterial whether the express contract has or has not been rescinded. *Savage* v. *Canning*, Ir. R. 1 C. L. 434; 16 W. R. 133.

The general principle as to the circumstances under which a part performance of a parol contract relating to land will be regarded as sufficient to take it out of the operation of the Statute of Frauds is accurately stated in the judgment in *Alderson* v. *Maddison* (7 Q. B. D. at p. 178):—Held, also, by Baggallay, L.J., that the illustration which is there given of such general principle that "payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute" is rightly qualified by the following words, which are there stated, "unless it is shown that the payment was made in respect of the particular land, and the particular interest in the land, which is the subject of the parol agreement," those qualifying words being used to cover such a case as *Nunn* v. *Fabian* (L. R. 1 Ch. 35). *Humphreys* v. *Green*

52 L. J., Q. B. 140 ; 10 Q. B. D. 148 ; 48 L. T. 60 : 47 J P. 244—C. A.

Semble, per Brett, L.J., that *Nunn* v. *Fabian* (L. R. 1 Ch. 35) is not an authority for those qualifying words, and that mere payment of part, or even of the whole, of the purchase-money will not be sufficient under any circumstances to exclude the operation of the statute. *Ib.*

The plaintiff as heir-at-law of an intestate claimed the title-deeds of the intestate's farm, of which the defendant had taken possession on his death The defendant counter-claimed for a declaration that she was entitled to a life estate in the farm, and to retain the title-deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life by his promise, which was a verbal one, to make a will leaving her a life estate in his farm, if and when it became his property :—Held, that neither the continuance of the defendant in the service of the intestate, nor the fact that the latter had executed a document which he intended to operate as a will in the defendant's favour, but which failed to take effect from want of proper attestation, was any evidence of a sufficient part performance of the parol agreement between the intestate and the defendant, upon which the defendant's counter-claim was based, to exclude the operation of the Statute of Frauds, and therefore that s 4 of that statute was an answer to the counter-claim *Alderson* v. *Maddison*, 50 L. J., Q. B. 466 ; 7 Q. B. D. 174 ; 45 L. T. 334 ; 29 W. R. 556—C. A. Affirmed in H. L., 52 L. J., Q. B. 737 ; 8 App. Cas. 467 ; 49 L. T. 303 ; 31 W. R. 820 ; 47 J. P. 821.

When a person has contracted for the purchase of land by an agreement, the terms of which are partly written and partly verbal, and has obtained possession upon performance of the written terms, to attempt to retain possession and refuse to perform the verbal terms amounts to a fraud. *Jervis* v. *Berridge*, 27 L. T. 436. Affirmed, 42 L. J., Ch. 518 ; L. R. 8 Ch. 351 ; 28 L. T. 481 ; 21 W. R. 395.

A. signed a contract for the purchase of land from B., and on the same day transferred the benefit of the contract to C. by a memorandum in which some of the terms of the transfer were not expressed. C. entered into possession under the memorandum, but refused to perform the terms which were not expressed therein. A. filed a bill for cancellation of the memorandum, alleging that C.'s conduct amounted to fraud ; and C. on demurrer contended that he was not guilty of fraud, inasmuch as under the Statute of Frauds the unwritten terms of the transfer were not binding upon him :—Held, that C.'s contention could not be sustained. *Ib.*

Per Lord Selborne :—The observation stated in *Jervis* v. *Berridge*, that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846 ; 8 App. Cas. 311 ; 41 L. T. 1 ; 27 W. R. 585.

Whether a deposit of title-deeds, in pursuance of a contract to charge real estate, is a sufficient part performance to take a case out of the Statute of Frauds, quære. *Whitmore* v. *Farley*, 45 L. T. 99 ; 29 W. R. 825 ; 14 Cox, C. C. 617—C. A.

The bankrupt, being indebted to a banking company, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, and who held the title-deeds. The mother afterwards died, and the title-deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told the bankrupt that he had possession of the deeds, and that he held his (the bankrupt's) one fifth for the bank. The bankrupt expressed his assent :—Held, that the company had not a valid equitable mortgage of the bankrupt's share in the farm, for there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute. *Broderick, Ex parte, Beetham, In re*, 56 L. J., Q. B. 635 ; 18 Q. B. D. 766 ; 35 W. R. 613—C. A.

In consideration of B. and C. agreeing to execute a conveyance of property, part of their father's estate, to a purchaser, A. verbally promised to leave them as much as they would get under their father's will :—Held, that the case did not come within s 4 of the Statute of Frauds, and that A.'s estate was bound to make good the promise. *Ridley* v *Ridley*, 34 Beav. 478 : 34 L. J., Ch. 462 ; 11 Jur. (N.S.) 475 ; 12 L. T. 481 ; 13 W. R. 763. See also *Fenton* v. *Emblers*, 3 Burr. 1278 ; 1 W. Bl. 353.

Of Verbal Agreement for Lease.]—A landlord having verbally agreed with his tenant to grant him a new lease at an increased rent, the tenant laid out money on the premises, and paid one quarter's rent at the increased rate :—Held, that the case was taken out of the statute. *Nunn* v. *Fabian*, 35 L. J., Ch. 140 ; L. R. 1 Ch. 35 ; 11 Jur. (N.S.) 868 ; 13 L. T. 343.

F. was tenant to C., with a promise of a lease for twenty-one years, from September, 1851, to September, 1872, at the rent of 84*l.* 16*s.* Afterwards C. entered F.'s name in his rent-book as tenant of 128 acres at 16*s.* an acre, at the yearly rent of 102*l.* 8*s.*, less 4*l.* for county cess—98*l.* 8*s.* "Tenure thirty-one years from September, 1872, at rent of 16*s.* per acre, allowed 4*l.* for county cess—98*l.* 8*s.*" To which was added the following remark :—"F.'s tenure ceased September, 1872. Mr. C. agreed to give a lease of thirty-one years at 16*s.* per acre, and to take the old rent for one year, ending September, 1873, in consequence of failure of potato-crop." F. continued in possession, and paid the increased rent from September, 1873. The entry in the rent-book was in C.'s handwriting. In an action after C.'s death by his son, as the owner of C.'s estate, against F. to enforce specific performance of an agreement to take a lease for thirty-one years :—Held, that the continuance in possession of F., and payment of the increased rent, being upon the evidence referable solely to the agreement of 1872, were acts of part performance to take the case out of the Statute of Frauds *Nunn* v. *Fabian* (L. R. 1 Ch. 35) followed. *Conner* v. *Fitzgerald*, 11 L. R., Ir. 106.

Where a new letting at an altered rent is made to a tenant in possession, under a pre-existing

tenancy, the payment by the tenant, and the acceptance by the landlord, of the altered rent, if shown to have been paid and accepted on foot of the new tenancy, is a sufficient part performance to enable either party to sustain an action for specific performance of the contract for such new tenancy. *Ib.*

The plaintiff, who was proposing to enter into business as a milliner, was induced by C. to abandon the project, C. promising her verbally that she should occupy a leasehold house of C.'s during her (the plaintiff's) life, the plaintiff to pay the ground rent, rates and taxes, and maintain herself by letting lodgings. The plaintiff thereupon abandoned the idea of the millinery business, and entered into possession of C.'s house, and continued there for several years until C.'s death, paying the ground rent, rates and taxes. C. bequeathed the house to P., who brought an action of ejectment against the plaintiff, who thereupon filed a bill to restrain the action:—Held, that there had been a part performance of the verbal contract between the plaintiff and C. sufficient to take the case out of the Statute of Frauds. *Coles* v. *Pilkington*, 44 L. J., Ch. 381; L. R. 19 Eq 174; 31 L. T. 423; 23 W. R. 41.

The payment of an increased rent, draining and planting, done by the tenant in pursuance of a concluded parol agreement with his landlord for a lease, are a sufficient part performance to take the case out of the Statute of Frauds. *Howe* v. *Hall*, Ir R. 4 Eq. 242.

But where the rent of neighbouring tenants had been increased at the same time as plaintiff's, the sum expended on improvements was small, and such as a tenant from year to year might have prudently expended, and the tenant had on different occasions given different versions of the agreement, the court, not being satisfied on the evidence that a concluded agreement had been proved, refused specific performance after the landlord's death. *Ib.*

M., a tenant of L., was offered a lease of certain lands, and a written agreement was produced for a term of thirty-one years, at 38*l.* rent, and tendered to her for signature. M. objected to 38*l.* as a mistake for 33*l.* Whereupon L.'s agent said that M. should have the farm for 33*l.*, and wrote a memorandum upon the agreement that M. said her rent was 33*l.* M. then signed the agreement. She paid the 33*l.* and continued in possession for six years, when L. commenced an action to enforce specific performance of the agreement at the rent of 33*l.*:—Held, that there was a complete agreement, partly written and partly verbal, for a lease at the rent of 33*l.*; and that the circumstance of M. being permitted to continue in possession after the expiration of her lease, and the payment of rent by her at the agreed amount, constituted part performance sufficient to take the case out of the Statute of Frauds, and to entitle L. to a decree for specific performance. *Lanyon* v. *Martin*, 13 L. R. Ir. 297.

The plaintiff orally agreed to let a piece of waste ground to the defendant for three successive bank holidays; the defendant was to have exclusive possession of the ground on those days, and to pay 45*l.* for the use of the ground, paying an instalment of 15*l.* for each of the three days. The defendant entered and occupied the land on the first of the three days, and after entry paid the first instalment of 15*l.*; he refused to occupy the ground on the other two days, or to pay to the plaintiff the balance of the rent. In an action by the plaintiff to recover the two remaining instalments, the defendant contended that the claim was barred by virtue of s. 4 of the Statute of Frauds:—Held, that there having been an entry for the purpose of occupation under an agreement for a single letting (although the period of the agreed letting was not continuous) at a single rent, and a payment of rent on account of the entry, the plaintiff's right to recover the balance was not affected by the fact that the agreement was not in writing, and the Statute of Frauds afforded no defence to the claim. *Smallwood* v. *Sheppards*, 64 L. J., Q. B. 727; [1895] 2 Q. B. 627; 73 L. T. 219; 44 W. R. 44.

Possession by a lessee continued after, though taken previously to, a parol agreement for a lease exceeding three years, is a sufficient act of part performance to take the case out of the Statute of Frauds, provided the continuance in possession is unequivocally referable to the agreement. *Hodson* v. *Heuland*, 65 L. J., Ch. 754; [1896] 2 Ch. 428; 74 L. T. 811; 44 W. R. 684.

The making of alterations in premises by the intended landlord under a verbal agreement to let:—Held, not to be a part performance, taking the case out of the Statute of Frauds. *Whittick* v. *Mozley*, 1 Cab. & E. 86.

Agreement in Consideration of Marriage.]—A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband expended money upon the property:—Held, sufficient part-performance to take the case out of the Statute of Frauds. *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; 22 L. J., Ch. 419; 17 Jur. 196.

A father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold and was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of 110*l.*, which fell due shortly afterwards:—Held, that the verbal promise to give the house having been established, the possession took the case out of the Statute of Frauds; that the contract was to give the house free from incumbrances; and that the 110*l.* was payable out of the father's estate. *Ungley* v. *Ungley*, 46 L. J., Ch. 854; 5 Ch. D. 887; 37 L. T. 52; 25 W. R. 733—C. A.

The plaintiff on his son's marriage gave him the lease of a certain house under a parol agreement; the son lived therein for eighteen months, and paid the rent to the landlord:—Held, sufficient part performance to take the case out of the Statute of Frauds, and specific performance was granted free from an incumbrance created by the plaintiff subsequently to the marriage. *Ungley* v. *Ungley*, supra, followed. *Sharman* v. *Sharman*, 4 R. 124; 67 L. T. 834—C. A.

Before the marriage of A. and B. B.'s father verbally promised to pay his daughter 300*l.* a year, and in consequence of that promise and representation, as was alleged, A. and B. married,

Upon the father's refusal to pay this sum :—Held, that as the promise was not in writing it could not be enforced, and that the marriage was not a part performance of such a parol agreement. *Johnstone* v. *Mappin*, 60 L. J., Ch. 241 ; 64 L. T. 48.

A parol agreement before marriage that money of the intended wife at the bank shall be hers for her separate use, followed by the wife's dealing with it with the husband's knowledge, and the husband not interfering :—Held, to amount to a gift to the wife for her separate use. *Ruth, Ex parte, Whitehead, In re*, 54 L. J., Q. B. 240 ; 14 Q. B. D. 419 ; 52 L. T. 597 ; 33 W. R. 471 ; 49 J. P. 450—C. A.

Subsequent marriage is not part performance of a parol contract in consideration of marriage. Acts of part performance by the party sought to be charged will not prevent the operation of the statute. *Caton* v. *Caton*, 35 L. J., Ch. 292 ; L. R. 1 Ch. 137 ; 12 Jur. (N.S.) 171. Affirmed on appeal, 36 L. J., Ch. 886 ; L. R. 2 H. L. 127 ; 16 W. R. 1.

Guarantee.]—A plaintiff having distrained for rent in arrear, goods which the tenant was at the time about to sell, agreed with the defendants to deliver up the goods, and permit them to be sold by one of the defendants for the tenant, upon the defendants joint undertaking to pay to the plaintiff all such rent as should appear due to him from the tenant ; and he thereupon delivered up the distress :—Held, that this agreement was not within the Statute of Frauds. *Edwards* v. *Kelly*, 6 M. & S. 204 ; 18 R. R. 349.

Where an agent, who received instalments of annuities for his principal, paid over instalments he had not received, and charged commission on them :—Held, that the agreement, to be responsible to his principal for the annuities need not be in writing, as the contract was executed when he paid over the money he had received. *Shaw* v. *Woodcock*, 7 B. & C. 73 ; 5 L. J. (O.S.) K. B. 294 ; 31 R. R. 158.

Sale and Delivery.] — A contract for the making and sale of bricks above 20*l.*, to be delivered within a year from the time when according to the defendant's evidence, the contract was completed, by a letter of his in answer to a parol proposal, is valid, there having been a part-acceptance and payment on account. *Catling* v. *Perry*, 2 F. & F. 140.

After a parol agreement for the sale of goods deliverable by successive consignments at a certain price, a memorandum in writing was drawn up omitting the price ; several consignments were accepted and paid for :—Held, in an action for non-delivery of the remainder, that there had been part performance, and that parol evidence was admissible to prove the price. *Jeffcot* v. *North British Oil Co.*, Ir. R. 8 C. L. 17.

j. Other Matters.

Informal Deed.]—An instrument in terms intending to be a conveyance of lands, but which, not being by deed, cannot operate as such, is an agreement. *Rex* v. *Ridgwell*, 6 B. & C. 665 ; 9 D. & R. 678.

One Term within.]—When a special oral contract is entered into, if the part to be performed by the defendant involves several terms, one of which falls within the provisions of the Statute of Frauds, the contract cannot be enforced by the plaintiff if the defendant relies on the statute. *Savage* v. *Canning*, Ir. R. 1 C. L. 434 ; 16 W. R. 133.

Creation of Trust.]—The Statute of Frauds is not available as a defence to a suit to establish a trust where it would be fraud to deny the trust. *Haigh* v. *Kaye*, 41 L. J., Ch. 567 ; L. R. 7 Ch. 469 ; 25 L. T. 675 ; 20 W. R. 597. S. P., *Marlborough (Duke), In re, Davis* v. *Whitehead*, 63 L. J., Ch. 471 ; [1894] 2 Ch. 133 ; 70 L. T. 314 ; 42 W. R. 456. *Lincoln* v. *Wright*, 28 L. J., Ch. 705 ; 7 W. R. 350.

Licences.]—A contract for the sale of an interest in land, without a note in writing, may operate as a licence, so as to excuse the entry of a purchaser on the land ; but it cannot be made available in any way as a contract. *Carrington* v. *Roots*, 2 M. & W. 248 ; 6 L. J., Ex. 95 ; 1 Jur. 85.

A. agreed with B. that, for a valuable consideration, B. might dig and carry away cinders from a cinder-tip in land alleged to be the property of A. B. having been denied access to the cinders :—Held, that the fact of the instrument not being under seal was no answer to an action for the breach of the agreement. *Smart* v. *Jones*, 15 C. B. (N.S.) 717 ; 33 L. J., C. P. 154 ; 10 Jur. (N.S.) 678 ; 10 L. T. 271 ; 12 W. R. 430.

A. verbally agreed with B. to allow him to open a quarry, and erect a limekiln, and work the same, on land of which A. was tenant, provided that B. would pay for any damage which might be done to the land by erecting and working the limekiln and quarry. An action being brought to recover such damages :—Held, that this was an agreement to pay for surface damage only, and not for an interest in land ; and, therefore, that it was not rendered void by the 4th section of the Statute of Frauds. *Griffiths* v. *Jenkins*, 10 Jur. (N.S.) 207 ; 9 L. T. 732 ; 12 W. R. 533.

Liability of Advertiser.]—The liability of a party who advertises generally a reward for information to any one not named in the advertisement, who shall first give the information asked for, is a liability at common law, and not a contract within the Statute of Frauds. *Williams* v. *Byrnes*, 1 Moore, P. C. (N.S.) 154 ; 2 N. R. 47 ; 9 Jur. (N.S.) 363 ; 8 L. T. 69 ; 11 W. R. 487.

Agreement set up as Defence.]—Sect. 4 of the Statute of Frauds does not require that an agreement which is set up as a defence to an action should be in writing. *Miles* v. *New Zealand Alford Estate Co.*, 54 L. J., Ch. 1035 ; 32 Ch. D. 266 ; 53 L. T. 219 ; 34 W. R. 669.

Earnest, what is.]—See *Howe* v. *Smith*, 53 L. J., Ch. 1055 ; 27 Ch. D. 89 ; 50 L. T. 573 ; 32 W. R. 802 ; 48 J. P. 773—L.JJ.

k. Sale of Goods.

See SALE OF GOODS.

3. CAUSES VITIATING AGREEMENT.

Mistake.]—*See* MISTAKE.

Fraud.]—*See* infra, col. 82, and FRAUD.

Duress.]—*See* DURESS.

B. PARTIES TO CONTRACTS.

1. CAPACITY OF.

a. Intoxication.

Contract, when Void, or Voidable.]—An agreement by a person in a state of complete intoxication is void. *Pitt* v. *Smith*, 3 Camp. 33; 13 R. R. 741.

A publican cannot recover for beer furnished to third persons, by the order of an individual who has previously become intoxicated by drinking in his house. *Brandon* v. *Ord*, 3 Car. & P. 440.

To an action by indorsee against indorser of a bill, a plea, that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding and the use of his reason, as to be unable to comprehend the meaning, nature or effect of the endorsement, or to contract thereby, of which the plaintiff at the time of the indorsement had notice, is a good answer. *Gore* v. *Gibson*, 13 M. & W. 623; 14 L. J., Ex. 151; 9 Jur. 140.

In an action on an alleged contract to purchase land to recover loss and expenses on a resale:—Held, that if the purchaser was, at the time he signed the contract, so drunk as not to know the nature of the acts he was doing, the contract was void, whether or not the seller knew his condition at the time, though his knowledge of it may be material in regard to damages. *Hawkins* v. *Bone*, 4 F. & F. 311.

Principles upon which the court acts in suits to set aside deeds on the ground of the intoxication of the grantor. *Nagle* v. *Baylor*, 3 Dr. & War. 60.

The contract of a man, too drunk to know what he is about, is voidable only and not void, and therefore capable of ratification by him when he becomes sober. *Matthews* v. *Baxter*, 42 L. J., Ex. 73; L. R. 8 Ex. 132; 28 L. T. 169; 21 W. R. 389.

Contract, when enforced.] — Although the court will not compel performance of a contract obtained from a person in a state of intoxication; yet where, after a contract fairly entered into with a man addicted to drinking to sell to the plaintiff leasehold premises for 735*l.*, another person, with notice of this contract, within a few days prevailed on the vendor to sell and execute an assignment thereof to him for 760*l.*, the court decreed specific performance of the first contract. *Shaw* v. *Thackray*, 1 Sm. & G. 537; 17 Jur. 1045.

Where, in a suit for specific performance of an agreement, the defence set up was, incapacity at the time of executing it, on the ground of intoxication:—Held, that it could not assist in getting rid of the agreement on the mere ground of intoxication, no fraud being alleged. *Ib.*

Family compromise favoured, if reasonable, and upon a doubtful right, even in the strongest case, as where one party was drunk at the time. *Stockley* v. *Stockley*, 1 Ves. & B. 30; 18 Ves. 30. See also *Stapilton* v. *Stapilton*, 1 Atk. 2.

The circumstances that the vendor had not the assistance of a professional adviser, and that the contract was made while he was drinking with the purchaser's solicitor, the evidence not going to show that he was intoxicated:—Held, not sufficient ground for refusing specific performance, there having been no design on the purchaser's part to keep the vendor from employing a solicitor, and the price being fair. *Lightfoot* v. *Heron*, 3 Y. & Coll. 586.

Agreement, if reasonable, and to settle family disputes, and no unfair advantage, not to be set aside because the party was drunk, or paternal authority exercised. *Cory* v. *Cory*, 1 Ves. 19. *See also* 18 Ves. 30.

Fraud, Effect of.]—So a lease obtained by fraud and imposition from a person who was intoxicated is void. *Butler* v. *Mulinhall*, 1 Bligh, 137.

General rule that a court of equity will not assist a person who has obtained, or wishes to get rid of, an agreement, or deed, on the mere ground of intoxication. Exceptions, where any contrivance was used, or any unfair advantage made of his situation, or that extreme state of intoxication depriving a man of his reason, which at law would invalidate a deed. *Cook* v. *Clayworth*, 18 Ves. 12.

A court of equity will not decree specific performance of an agreement more favourable to the plaintiff than to the defendant, involving hardship upon the defendant, and damage to his property, if he entered into it without advice or assistance, and there is reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and its consequences. *Vivers* v. *Tuck*, 1 Moo. P. C. (N.S.) 516; 9 L. T. 554.

A suit for specific performance of a partnership agreement, prepared and written by the plaintiff, dismissed, and the plaintiff left to his remedy (if any) at law for damages for non-performance; the defendant, an illiterate man, being at the time of the execution of the agreement considerably in liquor, without professional advice, and without knowledge of its nature and consequences, which were highly favourable to the plaintiff, and the agreement with respect to the property affected by it being moreover vague and obscure. *Ib.*

Lease set aside with costs; as obtained by the contrived and habitual intoxication of the lessor, immediately on his coming of age, at a very inadequate rent; and acts of confirmation held not sufficient. *Say* v. *Barwick*, 1 Ves. & B. 195.

"Although," says Coke, "he who is drunk is for the time non compos mentis, yet his drunkenness does not extenuate his act or offence, nor turn to his avail: but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, or any other thing that concerns him." *Anon.*, 4 Co. 125. S. P., *Johnson* v. *Medlicott*, cited in *Osmond* v. *Fitzroy*, 3 P. W. 129, n.

Secus, if it be through the contrivance of the party obtaining the deed or advantage to be derived or suffering from the act complained of. Semble, *Ib.*

Surprise and Mistake.]—The plaintiff and the defendant, farmers occupying their own small farms, which adjoined each other, met at ten o'clock at night at a public-house, where the plaintiff drew out an agreement between the de-

fendant and himself for the sale and purchase of forty-five acres of land for 2,000*l.* The agreement, which was almost illegibly written, was executed by both parties and attested by two witnesses, and a cheque for 200*l.* deposit was drawn by the plaintiff on a plain piece of paper. This was the next day exchanged for one drawn on the banker's ordinary form. No abstract was asked for for nearly four months, and three months after that the defendant asked for a copy of the contract, and he then objected that he had only thirty-five acres to sell, and was so drunk when he entered into the agreement that he did not know what he was doing, and he offered to sell for the 2,000*l.*, or give up the agreement and return the deposit. This was refused, and an abatement claimed in respect of the ten acres short, and a bill filed for specific performance:—Held, that on the evidence the defendant was incapable of contracting at the time, and the circumstances were such as to bring the case within the rule of surprise and mistake, and bill dismissed with costs. *Cox* v. *Smith*, 19 L. T. 517.

Where Contract Unreasonable.]—A contract, unreasonable in itself, entered into by an habitual drunkard when in a state of excitement, from excessive drinking, almost amounting to madness, with a person who at the time held him in a complete subjection, will be set aside in equity. It is not necessary in such a case to establish actual madness. *Wiltshire* v. *Marshall*, 14 L. T. 396; 14 W. R. 602.

b. Weak Intellect.

Condition—Direction to the Jury.]—On a question whether a deed was void in law, on the ground of unsoundness of mind in the person by whom it was executed, the judge directed the jury that the question for them to try was, whether J. S. was a person of sound mind or not; and that to constitute such an unsoundness of mind as should avoid a deed at law, the person executing such a deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity, the jury was at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. To this direction a bill of exceptions was taken, upon the ground that the judge refused to tell the jury that, in order to avoid the deed at law, the unsoundness of mind must amount to that which constitutes idiotcy, according to the strict legal definition of an idiot:—Held, that this direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions. *Ball* v. *Manner*, 3 Bligh (N.S.) 1; 1 Dow & Cl. 880.

Bill Drawn by Person of Weak Intellect.]—If a person perfectly imbecile in mind is imposed upon, and induced to sign a promissory note, which is drawn in an unusual form, such note is bad even in the hands of an indorsee. *Sentance* v. *Poole*, 3 Car. & P. 1.

Contract for Necessaries.]—A lunatic may contract for necessaries suitable to his degree, and an action will lie against him, notwithstanding an inquisition of lunacy, for the amount. *Bagster* or *Barter* v. *Portsmouth (Earl)*, 7 D. & R. 614; 5 B. & C. 170; 2 Car. & P. 178.

If it appears that he has been imposed upon, it might be otherwise. *Ib.*

Therefore, where a person of rank ordered carriages suitable to his condition, and the coachmaker supplied them bonâ fide and without fraud, and they were actually used by the party:—Held, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered. *Ib.*

Old Law as to Pleading.]—It was formerly held that no person could, in defending an action, be allowed to stultify himself; and therefore a defendant could not, in action for work and labour, set up his own insanity as a defence, unless he had been imposed upon by the plaintiff in consequence of his mental imbecility. *Brown* v. *Jodrell*, 3 Car. & P. 30; M. & M. 105. S. P., *Levy* v. *Baker*, M. & M. 106, n.

See further, LUNATIC.

c. Fraudulent Advantage.

Medical Adviser.]—At the trial of an action by the executors of G. to recover the amount of a gift of money made by G. to her medical man, it was admitted that, when the gift was made, the relation of patient and medical man existed between G. and the defendant, and that G. had no independent advice of any kind. In answer to questions left to them by the judge, the jury found that there had been no undue influence in fact, or fraud, on the part of the defendant; and that, after the relation of patient and medical man had come to an end between G. and the defendant, and after any effect produced by it had been removed, she intentionally adhered to what she had done. The judge was not asked to leave, and did not leave, to the jury the question whether G., when she made the gift, or subsequently, knew that it was revocable, and he entered judgment for the defendant upon the findings:—Held, that as the effect of the findings was that G., after the relation and influence had ceased, deliberately determined she would not revoke the gift, whether or not it was revocable, the judgment was rightly entered. *Mitchell* v. *Homfray*, 50 L. J., Q. B. 460; 8 Q. B. D. 587; 45 L. T. 694; 29 W. R. 558—C. A.

A patient executed instruments, whereby he secured to his surgeon an annuity of 100*l.* during his life, in consideration that he would live with him, and give him the benefit of his professional assistance during his life. Four days before the execution of these instruments, the surgeon called in an eminent physician to visit the patient, who stated to the surgeon his opinion that the patient could not recover, nor live long; and, about the same time, he expressed to a witness in the cause that the patient could not live more than a month or six weeks. These instruments could not be maintained, even if the patient was of sound mind and capable of business. *Popham* v. *Brooke*, 5 Russ. 8. S. P., *Gibson* v. *Russell*, 2 Y. & C. (N.C.) 104.

An agreement obtained by a surgeon from a deceased patient was set aside, upon the ground that the court was satisfied that the patient never did agree to or intend to direct what, in the alleged agreement, he was represented as agreeing to and

directing; and that his signature, if genuine, must have been obtained by fraud, or under such circumstances as rendered it the duty of a court of equity to protect the patient and his estate from being prejudiced by it. This relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another. *Dent* v. *Bennett*, 4 Mylne & C. 269.

A court of equity will relieve against an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past and future services, was to be paid 25,000*l.* after the death of the latter. The court was also of opinion that the agreement was void at law, as it was an inducement to the medical adviser to accelerate his patient's death. *Dent* v. *Bennet*, 7 Sim. 539; 3 Jur. 99.

Religious Influence.]—The grant of an annuity fraudulently obtained by a person having a spiritual ascendency over a woman who was under a state of religious delusion, was set aside upon principles of public policy. *Norton* v. *Relly*, 2 Eden, 286.

A voluntary settlement by a widow upon a clergyman and his family was set aside, as being obtained by undue spiritual influence, and abuse of confidence in the situation of agent undertaking the management of the affairs of a person of weak mind. *Huguein* v. *Baseley*, 14 Ves. 273.

Gift by a person of weak intellect of her whole fortune to a person who had acquired great influence over her mind, by making her and others believe that he sustained a supernatural character, held invalid. *Nottidge* v. *Prince*, 2 Giff. 246; 29 L. J., Ch. 857; 6 Jur. (N.S.) 1066; 8 W. R. 742.

No person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been imposed against the exercise of such influence. *Ib.*

Extent of Principle.]—It is incumbent upon persons who receive benefits from others towards whom they stand in a confidential relation, to show that they had competent and independent advice, and this general principle is not affected by the age or capacity of the persons conferring the benefits, or the nature of the benefits conferred. But this principle does not extend to interfere with mere trifling gifts, without proof, not only of influence derived from the confidential relation, but of mala fides, or of undue or unfair exercise of the influence. (Commented on in *Mitchell* v. *Homfray*, supra.) *Rhodes* v. *Bate*, 35 L. J., Ch. 267; L. R. 1 Ch. 252; 12 Jur. (N.S.) 178; 13 L. T. 778; 14 W. R. 292.

A., a widow, aged seventy-five, within nine days after first seeing B., who claimed to be a spiritual medium, was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of B., to adopt him as her son, and transfer 24,000*l.* to him; to make her will in his favour; afterwards to give him a further sum of 6,000*l.*; and also to settle upon him, subject to her life interest, the reversion of 30,000*l.* (these gifts being made without consideration, and without power of revocation):—Held, that the relation proved to have existed between them implied the exercise of dominion and influence by B. over A.'s mind; and consequently, that as B. had failed to prove that these voluntary gifts were the pure, voluntary, well-understood acts of A.'s mind, they must be set aside. *Lyon* v. *Home*, 37 L. J., Ch. 674; L. R. 6 Eq. 655; 18 L. T. 451; 16 W. R. 824.

Where an aged, illiterate, and a weak-minded man, not absolutely incapable of managing his own affairs, but in such a state of mental incapacity as to make it necessary that he should have protection and advice, executed a deed of conveyance of his property for a grossly inadequate consideration, a court of equity, on a bill by the heiress and her husband, declared that the deed must be set aside as an absolute conveyance, and stand as a security only for money advanced by the purchaser, and properly expended by him on the property. *Longmate* v. *Ledger*, 6 Jur. (N.S.) 481; 2 L. T. 256; 8 W. R. 386.

A debtor induced a lady, to whom he was engaged, to become security for a debt. After the marriage, she insisted that she had been imposed upon:—Held, that the only duty of the creditor (who was aware of the relation between the parties) towards the lady was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security. *Cobbett* v. *Brock*, 20 Beav. 524.

d. Other Cases.

Monks—Nuns.]—Quære, whether an assignment of property by a nun, in pursuance of a vow made on entering the convent, is valid. *Fulham* v. *MacCarthy*, 1 H. L. Cas. 703; 12 Jur. 757.

A nun is not civiliter mortua, nor incapable of holding property. *Metcalfe's Will, In re*, 2 De G. J. & S. 122; 33 L. J., Ch. 308; 10 Jur. (N.S.) 287; 10 L. T. 78; 12 W. R. 538; 3 N. R. 657.

Deaf and Dumb.]—Deaf and dumb persons may enter into the contract of marriage, and the presumption is in favour of the validity of such a marriage, and of the capacity of the parties to contract, and the onus of proof is upon those who would impeach the marriage. *Harrod* v. *Harrod*, 1 Kay & J. 4; 18 Jur. 85; 2 W. R. 612.

Where an instrument of guarantee was signed by a man who was blind and deaf, but it was shown that the contents were fully submitted to his consideration by persons around him who could communicate with him by means of his fingers; it appearing, also, that an alteration was made in the instrument in consequence of a rational and properly expressed wish of his, and the allegation that the signature had been obtained by fraud and misrepresentation having totally failed, the guarantee was upheld against his estate. *Vickers* v. *Bell*, 9 L. T. 600. *S. C.*, 10 Jur. (N.S.) 376; 3 N. R. 624; 10 L. T. 77; 12 W. R. 589—L.JJ.

See also *Harfall, In re*, 6 Man. & G. 732.

Infancy.]—*See* INFANT.

2. Personal Contracts.

What are.]—Plaintiff's intestate bought a coach of the defendant, and gave him bills for the price, and agreed that he (the defendant) "do have and hold a claim upon the coach until the debt be paid":—Held, that this agreement operated only as a personal licence from the in-

testate to the defendant to take the coach if the bills were not paid, but was not a bar to an action of trover by the administrator. *Howes* v. *Ball*, 7 B. & C. 481; 1 M. & R. 288; 6 L. J. (O.S.) K. B. 106; 31 R. R. 256.

A., a coachmaker, entered into an agreement to furnish B. with a carriage, for the term of five years, at twenty-five guineas a year from the time of the contract. C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years, the partnership between A. and C. was dissolved, A. having assigned all his interest in the business, and in the contract in question to C.; and the business was afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved, and that C. had become the purchaser of the carriage then in B.'s service. The latter answered that he would not continue the contract with C., and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought by A. and C. against B. for the two payments, which, according to the term of the contract, would become due during the last two years of its continuance:—Held, that the action was not maintainable, the contract being personal, and A. having transferred his interest to C., and having become incapable of performing his part of the agreement. *Robson* v. *Drummond*, 2 B. & Ad. 303; 9 L. J. (O.S.) K. B. 187.

Specific Performance of.]—Specific performance will not be enforced of an agreement for personal services. *White* v. *Boby*, 37 L. T. 652: 26 W. R. 133—C. A.

W. agreed with L. to sing at his theatre during a certain period of time, and not to sing elsewhere without his written authority:—Held, on a bill filed to restrain her from singing for a third party, and to grant an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the court would not interfere to prevent the violation of the negative stipulation. *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871.

An opera singer, by an agreement dated only as to the year 1870, agreed to sing at a theatre for the whole London season and nowhere else in the kingdom of Great Britain pendant l'année 1871, without the written consent of the employer. The salary did not extend beyond the season which ended on the 5th August. On motion for an injunction to restrain him from singing elsewhere after the season was over but during 1871:—Held, that the court would not under the circumstances grant an injunction on an interlocutory application. *Mapleson* v. *Bentham*, 20 W. R. 176.

An actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of the engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere. *Montague* v. *Flockton*, 42 L. J., Ch. 677; L. R. 16 Eq. 189; 28 L. T. 580; 21 W. R. 668. See also *Bettini* v. *Gye*, and *Poussard* v. *Spiers*, infra, col. 117.

A patentee entered into an agreement with A. to purchase exclusively from him all such quantities of a particular article as should be used according to the patent processes in the manufacture of a certain product, which product the patentee agreed to sell to A. exclusively. A., on the other hand, agreed to supply the patentee with all such quantities of the first-mentioned article as should be required, and to purchase from him all the particular product. On a bill by A. for specific performance:—Held, that the court had no jurisdiction to compel performance by A. of the positive part of the agreement, and that it would not therefore interfere by injunction to restrain the patentee from buying from or selling to other parties than A. *Hills* v. *Croll*, 14 L. J., Ch. 444.

Effect of Death upon.]—The retainer of an attorney is determined by the death of his client. *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J., Ex. 239.

Where a contract is for personal services, the death of the person who is to render those services determines the contract for the future, but it does not rescind it ab initio, or take away any right of action already vested or accrued. *Stubbs* v. *Holywell Ry.*, 36 L. J., Ex. 166; L. R. 2 Ex. 311; 15 W. R. 869.

In contracts for personal services, it is an implied condition that the death of either party shall dissolve the contract. *Farrow* v. *Wilson*, 38 L. J., C. P. 326; L. R. 4 C. P. 744; 20 L. T. 810; 18 W. R. 43.

A. was hired by P. to serve as farm bailiff, at weekly wages, with other advantages, and a residence in a farmhouse; the service to be determinable by a six months' wages. P. died:—Held, that P.'s personal representative was not bound to continue A. in her service, or pay him six months' wages. *Ib.*

A. agreed with B. that he would endeavour to sell a picture belonging to B., and that if he succeeded in selling it, B. should pay him 100*l.* B. died before the picture was sold. In an action against his administratrix, upon this agreement, the count alleged that in pursuance of the agreement, A. did, before and after the death of B., endeavour to sell, and after his death he did, in consequence of such endeavours, succeed in selling the picture, which sale was confirmed by the administratrix, and that she refused to pay the money:—Held, that the count disclosed no cause of action; inasmuch as the authority from B. to A. to sell the picture was revoked by his death, and his administratrix's confirmation of the sale, in the absence of an allegation that she was aware of the existence of the contract between A. and B., was no adoption of the contract by her so as to make her liable to pay the money. *Campanari* v. *Woodburn*, 15 C. B. 400; 3 C. L. R. 14; 24 L. J., C. P. 13; 1 Jur. (N.S.) 17; 3 W. R 59.

Privity—Shareholder and Promoter.]—A count that the defendant and others had formed a mining company upon a principle known as a société anonyme, in Spain, the capital of which was divided into 96,000 shares of 1*l.* each, out of which 12,000 were to be appropriated to the public at 12*s.* 6*d.* per share, free from all further calls; that the defendant, being one of the original promoters and a managing director of the company, in offering the 12,000 shares to the public, had guaranteed and promised to the bearers of the 12,000 shares, at 12*s.* 6*d.* per share, a minimum annual dividend of 33*l.* per cent. payable half-yearly, on each of such shares, and that the guarantee and promise should

remain in force until the 12*s.* 6*d.* per share should be repaid to bearers of the 12,000 shares; and that plaintiff afterwards became and was the purchaser and bearer of 2,500 of the 12,000 shares at 12*s.* 6*d.* each, and took the same on the faith of the guarantee and promise. Breach that the defendant had not paid to the plaintiff the half-yearly dividends, nor had repaid to the plaintiff 12*s.* 6*d.* on each of the said shares—is a bad count, as it shows no promise by the defendant to the plaintiff, nor any consideration for the promise. *Gerhard* v. *Bates*, 2 El. & Bl. 476; 1 C. L. R. 868; 22 L. J., Q. B. 364; 17 Jur. 1097; 1 W. R. 383. See also *Empress Engineering Co., In re*, 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342—C. A. *Rotherham Alum and Chemical Co., In re, Peace, Ex parte*, 25 Ch. D. 103; 32 W. R. 131—C. A. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452—C. A.

Authority to bind Third Party.]—A. agreed with B. and C. to pave the streets in the parish of D.; B. and C., on behalf of themselves and the rest of the parish, agreed to pay A.: the agreement was lodged in the hands of B. A. shall have his remedy against B. and C., and they must resort to the rest of the parish. *Meriel* v. *Wymondsold*, Hardr. 205.

—— **Entire or Divisible Contract.**]—A principal authorised a broker at Liverpool to underwrite marine policies for him "not exceeding 100*l.* by any one vessel." The broker underwrote a policy for 150*l.* At Liverpool it was notorious that there was generally a limit fixed between the principal and the broker, though this limit was not disclosed to the public:—Held, that the agent had no authority to underwrite for 150*l.*, and that the contract being indivisible, the assured could recover nothing from the principal in respect of the policy. *Baines* v. *Ewing*, 4 H. & C. 511; 35 L. J., Ex. 194; L. R. 1 Ex. 320; 14 L. T. 733; 14 W. R. 782.

—— **Ratification by Principal of Acts of Agent.**]—*See* PRINCIPAL AND AGENT.

3. ASSIGNEES.

Effect of an Agreement to Assign.] — An agreement to assign a contract only places the assignee in the position of the assignor, subject to, not freed from, his obligations under the contract. *Shaw* v. *Foster*, 42 L. J., Ch. 49; L. R. 5 H. L. 321; 27 L. T. 281; 20 W. R. 907.

Performance by Assignee sufficient.]—The plaintiffs, a waggon company, by agreement in writing let the defendants a number of railway waggons for a term of years at an annual rent, the agreement providing that the plaintiffs, their executors or administrators, should during the term keep the waggons in repair. Pending the agreement an order was made for the winding-up of the plaintiff company under the supervision of the court, in pursuance of a resolution previously passed by the company, and liquidators were appointed, who joined the company in assigning the benefit of the contract to another company, upon the terms that such company should perform the stipulations by the assignors contained in the original contract. The assignees took over the repairing stations of the plaintiffs and the staff of workmen employed by them, and were always ready and willing to execute all necessary repairs to the waggons:—Held, that the defendants had no defence to an action for rent, upon the ground that the plaintiffs had incapacitated themselves from performing their contract; for, first, the voluntary liquidation of the company was immaterial, the liquidators having power under the Companies Act, 1862, ss. 95, 131, to continue the letting of the waggons; and, secondly, the repair of the waggons by the company to whom the contract was assigned was a sufficient performance by the plaintiffs of their agreement to repair. *British Waggon Co.* v. *Lea*, 49 L. J., Q. B. 321; 5 Q. B. D. 149; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.

Where a contract to supply work and materials has been transferred, and the party entitled to the benefit of the contract has acquiesced in the transfer, and suffered the work to be completed by the transferee, such party cannot refuse payment on the ground of the informality or insufficiency of the act of transfer. *Falle* v. *Le Sueur*, 12 Moore, P. C. 501; 7 W. R. 707.

Substituted Performance.]—A. contracted with appellant for the performance of certain work at a price agreed upon, and W. became surety to appellant for performance of the contract by A. The contract contained a provision that, if the contractor should become bankrupt, the employer might require the surety to proceed with the work. A. became bankrupt before completion of the work, and the appellant gave notice to W. to proceed with the work, which W. completed:—Held, that the official assignee under the bankruptcy of A. was entitled to sue for the price of the work so completed by W., it being a substituted performance of the original contract by A. *Cohen* v. *Sandeman*, 40 L. T. 370—P. C.

Contract running with Property—Privity.]—A patentee assigned letters patent to A. and B., who covenanted with him that they, their executors, administrators, and assigns, would use their best endeavours to introduce the invention by granting licences, or working the patent, or selling it, and that the patentee should be entitled to receive 5*l.* per cent. of all net profits, whether arising from royalties, sale, or otherwise, which should be received by A. and B., or the survivor of them, or the executors, administrators of the survivor, their or his assigns, and that an account of profits should be rendered yearly to the patentee, and his share of the profits paid to him by A. and B., or the survivor of them, and the executors or administrators of such survivor, their or his assigns, with a proviso that after a sale had been made of the patent the interest of the patentee in the profits should cease, and a final account be taken. A. and B. had taken the assignment with a view of forming a company to work the patent. The company was formed and the patent made over to them. The patentee sued the company for an account of profits. The company demurred on the ground that there was no privity between them and the plaintiff, and that the plaintiff's right, if any, was against A. and B.:—Held, that the plaintiff could sue the company for an account of profits, for that the stipulations of the assignment to A. and B. amounted to a contract that the owners for the time being of the patent should account for and pay to the

plaintiff a share of profits, unless a sale within the meaning of the deed was effected, and that no person taking the patent with notice of this contract could refuse to give effect to it. *Werderman* v. *Société Générale d'Electricité*, 19 Ch. D. 246—C. A.

4. RIGHT OF THIRD PARTY TO SUE.

No stranger to the consideration can sue, per Parke, B., in *Jones* v. *Robinson*, 1 Ex. 454, at p. 456. See also per Wightman, J., in *Tweddle* v. *Atkinson*, 1 B. & S. 393, at p. 398.

A stranger to the consideration can maintain no action. *Crow* v. *Rogers*, Strange, 592.

One who is no party to a contract cannot sue in respect of the breach of duty arising out of the contract. *Alton* v. *Midland Ry.*, 19 C. B. (N.S.) 213; 34 L. J., C. P. 292; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.

To enable one who is not a party to a contract to claim to enforce it, he must either be named in it, or clearly designated as the person for whose benefit it is made. *Peddle* v. *Brown*, 3 Macq. H. L. 65; 3 Jur. (N.S.) 895; 5 W. R. 871.

To entitle a third person not named as party to a contract to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract. *Gandy* v. *Gandy*, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803—C. A.

A debtor of plaintiff transmitted a sum to defendant, who being afterwards informed that it was to be paid to plaintiff, said that he would so pay it. These statements were communicated to plaintiff by defendant's authority:—Held, that, on his failing to pay, plaintiff might sue him for money had and received. *Lilly* v. *Hays*, 5 A. & E. 548.

By Statute.]—A provision in an act of parliament may enable an outsider to sue. There is in such cases a statutory obligation, of which the person named can take the benefit—an action for debt on a statute being a well-known old form of action at common law; but an agreement between A. and B. that B. shall pay C. gives C. no right of action against B. I cannot see that there is in such a case any difference between equity and common law; it is a mere question of contract — per Lindley, L.J. *Rotherham Alum and Chemical Co., In re*, 53 L. J., Ch. 290; 25 Ch. D. 111; 50 L. T. 219; 32 W. R. 131.

Action by Members of Committee of Church Fund against others.]—An action was brought by five of the members of a church building committee on behalf of themselves and the other members of the committee, against a former member, claiming an account of all moneys received and paid by him in respect of the church building fund during the period of his membership. The fund was raised by voluntary contributions; seventeen persons having constituted themselves into a committee to receive subscriptions for the purpose of improving the parish church and to apply the moneys thus collected:—Held, that the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against the others. *Strickland* v. *Weldon*, 54 L. J., Ch. 452; 28 Ch. D. 426; 52 L. T. 247; 33 W. R. 545.

C. THE MATTER OF CONTRACTS.

1. CONSIDERATION.

a. Sufficiency.

i. *Generally.*

Detriment or Benefit.]—Any act which is a detriment to the plaintiff is a sufficient consideration for a promise to pay money. *Williamson* v. *Clements*, 1 Taunt. 523.

The following agreement shows a sufficient consideration moving from the plaintiff by way of detriment to him, in giving up the security of the debtor, C., for 150*l.*, at the defendant's request:—"I undertake, on behalf of Mr. P. (the plaintiff), in consideration of Mr. D. (the defendant) having this day given me an undertaking to procure Mr. W.'s cheque or note in favour of Mr. P. for 150*l.* on account of a debt due from Mr. C. to Mr. P., that Mr. C. shall have credit for that sum in his accounts with Mr. P., and that Mr. W. shall stand in the place of Mr. P. to that amount; and I undertake that Mr. P. shall not personally dispute Mr. W.'s right to deduct that sum from the accounts owing by the colliers of the B. C. colliery to Mr. C." *Peate* v. *Dicken*, 1 C. M. & R. 422; 5 Tyr. 116.

A declaration stated that the sheriff had taken the plaintiff's goods in execution, under a writ issued on a judgment entered up on a warrant of attorney, and thereupon, in consideration that the plaintiff would give to the defendant two warrants of attorney, the defendant promised to cause the goods to be re-delivered:—Held, that a sufficient consideration appeared to support the promise. *Radford* v. *Smith*, 6 D. P. C. 381; 3 M. & W. 254; 1 H. & H. 44.

A declaration stated that the defendant, being in possession of some mortgage deeds, of which R. was desirous to obtain an assignment by the payment of 500*l.*, the plaintiff consented, at R.'s request, to accept bills to that amount drawn by R., upon his procuring the defendant to deliver the mortgage deeds to the plaintiff as a security; that the defendant, in consideration of the plaintiff's accepting the bills, undertook to deliver the deeds to him, upon his paying him the amount of the bills:—Held, a sufficient consideration for the promise. *Tipper* v. *Bicknell*, 3 Bing. (N.C.) 710; 4 Scott, 462; 3 Hodges, 98; 6 L. J., C. P. 194.

A declaration, that, in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh divers boilers of the plaintiff, the defendant promised to give them up to the plaintiff in the same condition as at the time of such consent; and that by such consent the defendant weighed them, and breach, contains a good consideration for the promise. *Bainbridge* v. *Firmstone*, 1 P. & D. 2; 8 A. & E. 743; 1 W. W. & H. 600.

Semble, that a declaration, stating that the plaintiff, being about to proceed to N., paid money to the defendants in London, that they might cause it to be paid to him at N. on a certain day; that the defendants received the money for that purpose from the plaintiff, and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at N., discloses a sufficient consideration for the promise. *Shillibeer* v. *Glyn*, 2 M. & W. 143; 2 Gale, 212; 6 L. J., Ex. 21.

Any benefit to the assignee of a contract or any loss to the assignor is a valuable consideration, and therefore the sale of an alleged claim

against a railway company for services rendered, which, though not admitted, was not rejected by them, is a sufficient consideration to support an action for the purchase money. *McGreery* v. *Russell*, 56 L. T. 501—P. C.

Procuring Administration.]—The statement of a consideration that A., at his own expense, would procure an administration, and furnish evidence to enable R. to receive certain dividends, will not support a promise to pay over the dividends when received. *Parker* v. *Baylis*, 2 Bos. & P. 78. See *Gorsuch* v. *Cree*, 8 C. B. (N.S.) 574; 2 L. T. 567; 8 W. R. 543.

Accession of Third Party.]—In order to facilitate the making of an agreement, for which there was sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became a party thereto:—Held, that as the agreement was such as the plaintiff would not have made unless the defendant had acceded, there was a sufficient consideration for the defendant's promise. *Bailey* v. *Croft*, 4 Taunt. 611.

So, the defendants having received a benefit by the permission of the plaintiffs, is a good consideration. *Davis* v. *Morgan*, 6 D. & R. 42; 4 B. & C. 8; 28 R. R. 193.

A plaint alleged that by an agreement between G. of the one part, and M. and T. of the other part, reciting that G. was possessed of a farm of the value of 196*l.*, which he wished to divide between M. and T., it was agreed between the parties that, in consideration of G. handing over to T. the farm, T. undertook and promised to pay M. 98*l.*:—Held bad, as it did not appear that any consideration moved from M. His intervention in the agreement was held not sufficient to enable him to maintain an action upon it. *M'Conbray* v. *Thomson*, Ir. R. 2 C. L. 226; 16 W. R. 367.

A declaration stated that P. owed the plaintiff 13*l.*, and that in consideration thereof, and that P., at the plaintiff's request, had promised to work for him at certain wages, and also, in consideration of P. leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the 13*l.*, and that P. had performed his part of the agreement. Judgment was arrested, because the plaintiff was a stranger to the consideration. *Price* v. *Easton*, 4 B. & Ad. 433; 1 N. & M. 303; 2 L. J., K. B. 51.

If two parties for valuable consideration enter into a contract, of which one of the stipulations is solely for the benefit of a third person, who is a stranger to the contract, and from whom no consideration moves, it is not competent to either of the contracting parties afterwards to object to that stipulation. *Davenport* v. *Bishopp*, 2 Y. & Coll. C. C. 451; 12 L. J., Ch. 492; 7 Jur. 1077.

Transfer of Bargain.]—The plaintiff agreed with C. for the purchase of certain houses; the defendant agreed to give the plaintiff 40*l.* for his bargain; the houses were afterwards, at the plaintiff's request, conveyed to a nominee of the defendant:—Held, that the transfer of the bargain was a sufficient consideration for the promise of the defendant. *Price* v. *Jeaman*, 7 D. & R. 14; 4 B. & C. 525; R. & M. 195.

Indemnity—Time.]—A. having paid to B. the whole of a demand claimed by B., but part of which was due to C., B. afterwards engaged to indemnify A. against any claim by C., this promise is supported by a sufficient consideration, although it was made after the payment of the money. *Suffield* (*Lord*) v. *Bruce*, 2 Stark. 175; 19 R. R. 697.

Advertisement.]—A company advertised for tenders for the supply of stores for a period of twelve months. The defendant sent in a tender to supply the stores required for the period named, at certain fixed prices, "in such quantities as the company's storekeeper might order from time to time;" and the company accepted his tender:—Held, that there was a sufficient consideration for the defendant's promise to supply the goods, although there was no binding contract on the part of the company to order any. *G. N. Ry.* v. *Witham*, 43 L. J., C. P. 1; L. R. 9 C. P. 16; 29 L. T. 471; 22 W. R. 48.

A. offered a reward to whoever could give such information as would lead to the conviction of a felon. A constable and police-officer of the district where the felony was committed gave such information:—Held, that his having given the information was a good consideration for a promise by A. to pay the reward. *England* v. *Davidson*, 11 A. & E. 856; 3 P. & D. 594; 4 Jur. 1032.

Agreement to enter into an Agreement with Third Party.]—A. contracts with B. that he will enter into a binding agreement with C., B.'s landlord, for a lease at a given rent for such a term and upon such conditions as the landlord shall approve; and B. agrees, upon such lease being granted, to surrender his existing lease. Upon A.'s refusal to perform his agreement, B. is entitled to recover damages against A. for breach of contract. *Foster* v. *Wheeler*, 57 L. J., Ch. 871; 38 Ch. D. 130; 59 L. T. 15; 37 W. R. 40—C. A.

Performance of Agreement with Third Party.]—The performance of an act which a person has agreed with another to perform, is a good consideration to support a contract with a third person, if the latter derives a benefit from the performance. *Scotson* v. *Pegg*, 6 H. & N. 295; 30 L. J., Ex. 225; 3 L. T. 753; 9 W. R. 280.

Relationship.]—Mere blood relationship is not a sufficient consideration in law to support an assumpsit. A stranger to the consideration cannot sue on a contract, although there is privity by blood between him and the contracting parties, and the contract was made for his benefit. *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L. J., Q. B. 265; 8 Jur. (N.S.) 332; 4 L. T. 468; 9 W. R. 781.

Moral Obligation.]—A moral obligation to pay is sufficient consideration to sustain a proof. *De Grouchey, Ex parte, Butler, In re*, 3 Mont. & Ayr. 27; 2 Deac. 79; 6 L. J., Bk. 3.

Deed—Substituted Contract.]—An agreement not to call for the performance of a deed, and to substitute other terms for some of the matters provided for by the deed, is a good consideration for a promise to perform such substituted contract, even although the deed is not thereby released. *Nash* v. *Armstrong*, 10 C. B. (N.S.) 259; 30 L. J., C. P. 286; 7 Jur. (N.S.) 1060; 9 W. R. 782.

I O U—Previous Indenture Reciting Payment.]—A. agreed to sell and assign to B. certain judgments obtained by A. against C.; an indenture assigning the judgments was prepared, which recited that the price had been paid. The price had not in fact been paid; but shortly after the execution of the indenture, B. gave A. an I O U for the amount of the price:—Held, that the giving of the I O U might be treated as part of the transaction just as if it had been given at the very moment of executing the indenture, and that, therefore, there was a sufficient consideration for the giving of the I O U to entitle A. to recover to the amount mentioned in it from B. *Berry* v. *Story*, 2 C. L. R. 815; 2 W. R. 240.

Agreement to procure Bills to be Discounted—Application of Process.] — A declaration, stating that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange, and to which the plaintiff was entitled, and of which the defendant was holder, but not for value, the defendant promised the plaintiff that if he should succeed in procuring the bills, or either of them, to be discounted, he would apply the proceeds in a given way; and that the defendant succeeded in procuring the bills to be discounted, but that he failed to apply the proceeds as agreed, discloses a sufficient consideration for his promise. *Hart* v. *Mills*, 4 C. B. (N.S.) 371; 27 L. J., C. P. 218.

Desire of a Testator—Repairs of Leaseholds.] —In an action by the widow of a testator against the executor, on an agreement to convey a house to the plaintiff, the consideration stated was, that the plaintiff agreed to pay to the defendant 1*l.* a year towards the ground-rent payable in respect of the house and other premises adjoining, and also to keep the house in repair. By the agreement, after reciting a dying declaration by the testator, of his desire that his wife should have the house for her life, and the willingness of the executor to carry the same into effect, it was witnessed, that, in consideration of such desire, and of the premises, the plaintiff agreed, &c. Provided nevertheless, and it was agreed and declared, that the plaintiff should pay, &c., and keep the house in repair (as in the declaration stated). The testator had built several houses, in respect of which a ground-rent was due, but it did not appear what covenants he had entered into for repairs:—Held, first, that there was a legal consideration for the contract; secondly, that the motive for entering into a contract need not be stated in the declaration; and thirdly, that there was no variance between the statement and the proof of the consideration. *Thomas* v. *Thomas*, 2 G. & D. 226; 2 Q. B. 851; 11 L. J., Q. B. 104; 6 Jur. 645.

Promise by Heir to pay Portions.]—Under certain circumstances, verbal promises will bind men in equity to the performance of them, as where a son promised his father to pay his sisters' portions if he would not, by will, direct timber to be felled to raise them. *Dutton* v. *Poole*, 1 Vent. 318.

Promise by Devisee to pay Interest on Legacy.]—An undertaking contained in a letter from A., devisee of real estate, to B., a legatee, to pay interest upon her legacy, which was charged upon the estate according to the rate fixed by an order of court, provided B. would join in a sale:—Held, to be upon sufficient consideration, it appearing that several expensive suits in which A. was engaged would thereby be terminated, and the estate bettered; and such undertaking not being waived, by no notice having been taken of it in a subsequent agreement to sell, a specific performance was decreed. *Griffith* v. *Sheffield*, 1 Eden, 73.

—— **To Grant Annuity.**]—So where a devisee of land promised to pay an annuity, if testator would not charge it by his will. *Oldham* v. *Lichfield*, 2 Vern. 506; 2 Freem. 284.

Promise by Legatee of Chattel Real, on being let into Possession, to pay Legacy charged thereon.]—A farmer, upon the marriage of his eldest son J., assigned part of his farm, held under a yearly tenancy, and farming stock, in trust for J.; but continued until his death to reside on and manage the farm, J. and the other members of his family residing with him. By his will, which was duly admitted to probate, J.'s father bequeathed to J. the whole of the farm, charged with certain legacies, including 20*l.* to E. After the testator's death, and before the grant of probate, his executors asked J., in presence of E., if he would go into possession of the whole farm and pay the legacies, to which J. assented, and went into possession of the whole farm. In an action by E. against J. for the amount of his legacy as due on an account stated, the jury found that J. promised to pay the sum claimed in consideration of being allowed by the executors to take and keep his father's property under the will, subject to the legacies:—Held, that there was sufficient consideration for J.'s promise to pay the legacy; that a personal action lay for the amount against J.; and that E. was entitled to judgment. *Barry* v. *Barry*, 28 L. R., Ir. 45.

Votes at Charity Election.]—The plaintiff and defendant were both subscribers to a charity, the objects of which were elected by the subscribers who had votes proportioned in number to the amount they had subscribed. They expressly agreed that if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favoured, the defendant would at the next election give twenty-eight votes for such object of the charity as the plaintiff should then favour:— Held, that there was a legal consideration for the defendant's promise, and that the agreement was not void, as against public policy. *Bolton* v. *Maddan*, 43 L. J., Q. B. 35; L. R. 9 Q. B. 55; 29 L. T. 505; 22 W. R. 207.

Manager of Mutual Insurance Society.]—The manager of a mutual insurance association, having no parliamentary power to sue on behalf of the members, claimed to sue upon a contract with him personally, the declaration being to the effect that the defendant was a member of the association, and caused himself to be insured by a policy therein, and the plaintiff, in consideration of the defendant agreeing to comply with the rules annexed to the policy, subscribed the policy on behalf of the members of the association. Averments that, by the rules (in certain events which happened), additional percentages on the premium were to become payable by the defendant, to be drawn for as the committee might determine; that manager's drafts for per-

centages should be accepted by members and punctually paid when due, and that upon the percentages becoming payable the committee directed the manager to draw upon the defendant for the percentages, and that the plaintiff was the manager and did so draw, and all conditions were fulfilled. Breach, that the defendant had not accepted the drafts nor paid the percentages:—Held, that the declaration was bad in substance as disclosing no consideration on the part of the plaintiff. *Evans* v. *Hooper*, 45 L. J., Q. B. 206; 1 Q. B. D. 45; 33 L. T. 374, 24 W. R. 226—C. A.

Married Woman.]—A widow during her husband's lifetime lent to the defendant 20*l.*, derived from funds belonging to her in her own right. Two days after her husband's death, the defendant gave her an I O U for that amount, and subsequently promised that if she would let the matter remain over, he would pay the debt and interest; she did not inform the defendant that his offer was accepted, but waited more than three years, and then brought an action for the debt and interest:—Held, that she was entitled to succeed; for though it might be doubtful whether in point of law the money lent was hers or her husband's, yet the giving of the I O U after his death by the defendant was evidence that she was entitled to sue in her own right, and that the forbearance to prosecute a doubtful claim was a good consideration for a promise, and that by not suing for more than three years she had, in effect, communicated to the defendant her acceptance of his offer. *Wilby* v. *Elgee*, 44 L. J., C. P. 254; L. R. 10 C. P. 497; 32 L. T. 310.

Agreement to Procure Charter.] — A shipbroker agreed with a shipowner to procure him a charter of a vessel, in consideration of the shipowner chartering the same.—Held, in an action by shipowner against shipbroker for breach of contract, that there was a good consideration for the shipbroker's promise. *Gliddon* v. *Brodersen*, 1 Cab. & E. 197.

Ship's Captain—Interest in Loading.]—A declaration that the defendant was possessed of a ship, and the plaintiff was a master mariner having interest in N. for loading a vessel; and it having been proposed that the defendant should give the plaintiff the command of the ship, for a voyage to the West Indies and back, it was agreed, that in consideration of the plaintiff having interest in N. for loading a vessel, the defendant would give the plaintiff the command of the ship, with the understanding that the plaintiff would use all possible exertions for the benefit of the ship and owners; and that for such services the defendant would pay the plaintiff 8*l.* per month during the command by the plaintiff, and other sums during the voyage, with outward and homeward primage. That the defendant gave the plaintiff the command of the ship, and that he set out on the voyage, and carried and delivered an outward cargo; that the plaintiff arrived at N., and finding that a homeward cargo could not be obtained without disadvantage, he proceeded to R., and then took in a homeward cargo, and delivered the same at London, and there resigned the command to the defendant, who accepted the same; that, from the time when the command was given to him till he so resigned it, the plaintiff used all possible exertions for the benefit of the ship and owners. Breach, non-payment by the defendant of the moneys due to the plaintiff:—Held, that the declaration imported a sufficient consideration and that the plaintiff, having taken the command of the ship, might maintain the action. *Mills* v. *Blackall*, 11 Q. B. 358; 17 L. J., Q. B. 31; 12 Jur. 93.

Resignation of Post—Agreement to reappoint.]—Where the defendant, having purchased certain shares of an East Indiaman, commanded by the plaintiff, and chartered by the East India Company for four voyages, proposed to the plaintiff that he should resign the command in favour of the defendant's nephew, upon receiving in exchange the command of another ship, then chartered for one voyage, and to which the plaintiff assented, and the company acceded to the exchange: and it was agreed that, in case the defendant's nephew died or resigned before the expiration of the four voyages, the plaintiff should succeed him; and, as a further inducement to the plaintiff to resign the command of the ship chartered for the four voyages, the defendant undertook to procure a beneficial alteration in the destination of the other, chartered for one voyage only; and the person who negotiated the affair on the part of the plaintiff undertook, without the plaintiff's knowledge, to pay the defendant a certain sum, if the plaintiff should refuse to resign; and the exchange was ultimately approved of by the company, and the destination of the latter vessel altered; and the plaintiff and defendant's nephew sailed on their respective voyages, and the former became bankrupt on his return from his voyage, and the nephew died in the course of his second voyage; and the defendant, having refused to appoint the plaintiff to succeed him, was sued for a breach of the agreement:—Held, that there was a sufficient consideration for the defendant's agreement, whereon to found such an action. *Richardson* v. *Mellish*, 9 Moore, 435; 2 Bing. 229; 1 C. & P. 241; R. & M. 66; 3 L. J. (o.s.) C. P. 265; 27 R. R. 603.

Implied Undertaking to keep Document.]—A. was a judgment creditor of C.; B. wrote to A. a letter in the following terms (so far as is material):—"If C. leaves in your hands the order of Messrs. F., drawn upon Messrs. R., for 250 eight per cent. preference shares, &c., I will obtain, within one month from this date, with the sanction of C., a loan for him of 1,000*l.* upon said order, and pay that sum to you against the delivery of said order." C. left the order in A.'s hands, and sanctioned the proposal contained in the letter. A. then wrote to B. as follows:—"C. brought me your letter on the 27th, and he has given me his written sanction to your obtaining the loan of 1,000*l.* for him referred to in that letter, and we shall be glad to hear that everything is in order":—Held, that, assuming A.'s letter to B. to be a final acceptance of the offer contained in B.'s letter to A., there was consideration moving from A. to support B.'s promise, such consideration being the implied undertaking on the part of A. when he received the order to keep it till required for the purpose of being handed over to the person who would advance the 1,000*l.* on its security. But held also, that A.'s letter to B. was not an acceptance of the offer contained in B.'s letter to A., and that the two letters did not therefore constitute a contract. *Harston* v. *Harvey*, 1 C. & E. 404.

Sale of Goodwill by Bankrupt and Trustee.]—If a bankrupt join with his trustee in selling the goodwill and business previously carried on by the bankrupt, and agrees with the purchaser not to carry on a similar business within a prescribed district, such agreement is binding on him, for there is good consideration for the defendant's promise in the payment, on the faith of that promise, by the purchasers to the trustee, and he can be restrained from so doing. *Burton and High Peak Co.* v. *Mitchell*, 1 Cab. & E. 527.

Acceptance of Smaller Amount than Sum due in Discharge.]—*See* ACCORD AND SATISFACTION and sub-tit. (c.) Forbearance to sue, &c., infra.

Admissibility of Evidence to add to Consideration Expressed.]—By an agreement in writing G. agreed that Y. should receive all the money that was then due, and which should become due to G. upon the winding-up of the Barnstaple Second Annuitant Society, Y. paying to G. out of such money the sum of 100*l.* The consideration was stated to be "In consideration of a sum of money this day paid," &c.:—Held, that evidence was admissible to show that in addition to the consideration expressed there was another consideration, namely, that Y. should vote for the winding-up of the society. *Barnstaple Second Annuitant Society, In re*, 30 L. T. 424.

Agreement to make Satisfaction for Neglect of Duty.]—A scrivener who was employed to examine into a title fails in his duty, by neglecting to make a thorough inquiry, &c., whereby his client is a sufferer; afterwards the scrivener agrees to make him satisfaction another way. This agreement decreed in specie, though urged that there was no consideration. *King* v *Withers*, Pre. Ch. 19.

ii. *Nuda Pacta.*

Principles.] — As to promises within the doctrine of nudum pactum, see *Rann* v. *Hughes*, 7 Term Rep. 350, n.; 4 Bro. P. C. 27.

A mere accord not being a ground of action is not a sufficient consideration to support assumpsit. *Lynn* v. *Bruce*, 2 H. Bl. 317; 3 R. R. 381. See *Reeves* v. *Hearne*, 2 Gale, 4; 1 M. & W. 323; 5 L. J., Ex. 156.

An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded could never have been enforced at law, though not barred by any legal maxim or statute provision *Wennall* v. *Adney*, 3 Bos. & P. 247; 6 R. R. 780.

A pecuniary benefit, voluntarily conferred by one person upon, and accepted by, another, is not such a consideration as will support an action on an express promise by the latter to support the former. *Eastwood* v. *Kenyon*, 11 A. & E. 438; 3 P. & D. 276; 9 L. J., Q. B. 409; 4 Jur. 1081.

No relief in chancery on nudum pactum. *Anon.*, Cary, 5.

Relationship.]—Blood relationship is no consideration. *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L. J., Q. B. 265; 8 Jur. (N.S.) 332; 4 L. T. 468; 9 W. R. 781.

Acceptance — Implied Promise.]—A declaration by the plaintiffs, K. and M., alleged that the defendant agreed to accept four bills of exchange for the payment of 450*l.* each, the price of shares sold by the plaintiffs to him, and that the defendant promised to pay the sums of money for which such bills were to be given at the times when the bills should become due, and that in pursuance thereof the defendant accepted a bill drawn by J. upon him, for payment to the order of K. and M. of 450*l.* on a day mentioned, and that the bill was so drawn and made payable at the request of the plaintiffs, and without any consideration in respect of K. and M. being the payees, and was afterwards endorsed by the payees to J., to hold as the agent of the plaintiffs, and on their account, and whilst it was so held, the bill was wrongfully destroyed by the defendant. The declaration then alleged that although the time when the bill was due had elapsed, and the defendant had notice of the premises, he had not paid the bill:—Held, that the declaration disclosed no cause of action, there being no other promise by the defendant than the promise to pay the party entitled to the bill. *Jungbluth* v. *Way*, 1 H. & N. 71; 25 L. J., Ex. 257.

Transfer of Valueless Shares.]—An agreement to accept a transfer of railway shares on which nothing has been paid is not nudum pactum, but a contract which may be specifically enforced in equity. *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L. J., Ch. 784; 4 Jur. (N.S.) 984; 6 W. R. 810.

The purchase of a share in mines, which proved to be a bubble, or money paid for effecting illegal insurances, are not such considerations as will support a bill of exchange in equity. *Brown* v. *Marsh*, Gilb. Eq. Rep. 154. S. P., *Mather, Ex parte*, 3 Ves. 373.

Disclosure of Interest in Property.]—Where property is in the hands of trustees for the parties entitled to it, and there is no adverse claim after the death of the parties in possession, a communication to one of the cestuisque trustent in remainder of his interest in the property is not a consideration upon which a conveyance of a portion of the property can be sustained as the sale of a secret; for in such a case the disclosure is a nullity. *Reynell* v. *Sprye*, 8 Hare, 222; 21 L. J., Ch. 633.

Note given by Trustee of Lost Fund.]—Where the testator, in the well-founded belief that he was liable to make good a fund acknowledged to be held by him in trust for the payee, and lent to a party without security, and who died insolvent, gave a note for the amount, expressed to be "for value received":—Held, not a nudum pactum, or mere gift; and all evidence of actual consideration failing, from the death of parties, the court allowed the claim in proof against the testator's estate. *Burkitt* v. *Ransom*, 2 Coll. 395; 15 L. J., Ch. 174; 10 Jur. 193.

Note in Trust for Unborn Child.]—A mother gives a promissory note to a trustee for the benefit of a child of which she is enceinte; this not sufficiently nudum pactum for the court to allow a demurrer to a bill by the child and the trustee, to have it carried into execution. *Seton* v. *Seton*, 2 Bro. C. C. 610.

Agreement between Surety and Creditor—Subsequent Loan.]—By an agreement between bankers, a customer and a surety, the surety

guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, and simultaneously with it a second agreement was entered into between the bankers, the customer and surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of attorney, and the customer became bankrupt:—Held, that the agreement to issue execution was not nudum pactum. *Watson* v. *Allcock*, 4 De G. M. & G. 242; 22 L. J., Ch. 858; 17 Jur. 568; 1 W. R. 399.

Agreement with Promoters—Mere Present.]—The plaintiff, being a person of influence with a foreign government, agreed with the defendant to exert himself to obtain from that government the concession of making a railway in the foreign country to the defendant and M. Two other persons having, however, also applied for a concession of the same line, it was agreed that the competing parties should amalgamate, and articles of agreement were executed by which all the parties should take on themselves the construction of the line, and that 35,600*l.* should be attribué to the plaintiff, in free shares of the société anonyme which was to be formed, for the care and trouble which he had had up to the date of the agreement, and which he might yet have to take, up to the complete organisation of the society. The company was never formed, and no shares ever issued:—Held, that this was only an arrangement of the amount which the promoters of the scheme were willing to award to the plaintiff as a present; that there was no consideration for a binding promise on their part to give him the shares either for his past services, which were not rendered on any stipulation of payment or allotment of shares in the events which had happened, or in the anticipated services which were not contracted for to be rendered by the plaintiff. *Pourtales Georgia (Count)* v. *Morris*, 7 C. B. (N.S.) 588; 29 L. J., C. P. 208; 6 Jur. (N.S.) 705; 2 L. T. 284.

Promise to give Sum to Charity.]—A. promised to give 20,000*l.* to a fund of the Congregational Union, and paid certain instalments of the amount, but died leaving 8,000*l.* unpaid and unprovided for. The union claimed that sum from A.'s executors, alleging that they had been led by A.'s promise to contribute larger sums to churches than they would otherwise have done, that money had been given and promised by other persons in consideration of A.'s promise, and that the committee of the union had incurred liabilities in consequence of A.'s promise:—Held, that, the promise was without consideration. *Hudson, In re, Creed* v. *Henderson*, 54 L. J., Ch. 811; 33 W. R. 819.

Promise to pay Administrators Equitable Assets.]—C., in consideration of a loan of 400*l.*, mortgaged lands in fee to W. & Co. in trust to sell the same, and, after repaying themselves the money advanced, to pay over the surplus to his executors or administrators: before any sale was effected, C. died, having devised all his real and personal estates to trustees, whom he also appointed his executors, to sell the same and pay debts and discharge incumbrances: in the lifetime of these trustees, W. & Co., the original mortgagees, sold the estate, and paid over the surplus into the hands of the attorney or agent of the testator's trustees and executors: before the money was disposed of, the trustees and executors, and also their attorney, died, the latter leaving the defendant his executor. The plaintiffs took out administration de bonis non, with the will of C. annexed, and sued the attorney's executor for money had and received:—Held, that an express promise by the defendant to pay the plaintiffs the money in question was a nudum pactum, they having no title to it in a court of law; and that the action was not maintainable, as the money in the defendant's hands was equitable and not legal assets. *Clay* v. *Willis*, 2 D. & R. 539; 1 B. & C. 364; 1 L. J. (O.S.) K. B. 144.

Re-indorsement of Bill for Negotiation only.]—Where A., after drawing a bill of exchange on B., who accepted it, indorsed it to C., who reindorsed it to A., in pursuance of an agreement (without consideration) that he should do so as a security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable:—Held, that the agreement to indorse was void, for want of a consideration. *Britten* v. *Webb*, 3 D. & R. 650: 2 B. & C. 483; 2 L. J. (O.S.) K. B. 118.

Bailment.] — Bailment, sans consideration, countermandable. *Anon.*, Cary, 9.

Relinquishment by affidavit of right to Chattel.]—If G. and B. claim a chattel, and G. says if B. will make an affidavit that the property is his he will relinquish all his right thereto, and B. makes an affidavit to that effects. Semble, that it is not conclusive against G.'s right of property. *Gornet* v. *Ball*, 3 Stark. 160.

To Collect Debts and Guarantee.]—So, where A. agreed in writing, that, in consideration that B. would appoint him to receive a sum of money for a lace machine (agreed for between B. and C.), he would take the machine and pay the balance, should there be any default on the part of C.; and C. did make default:—Held, that this agreement or promise was void for want of a consideration. *Bates* v. *Cort*, 3 D. & R. 676; 2 B. & C. 474.

In Fraud of Bankruptcy Laws.]—A declaration alleged that the defendant was indebted to T. in 200*l.*, and that a commission of bankruptcy had issued against the defendant, and that in consideration of T.'s proving for this 200*l.* against the estate of the defendant, the defendant promised to pay him the 200*l.* after the delay of a few months. Judgment was arrested on the ground that the promise was void for want of a consideration. *Brealey* v. *Andrew*, 2 N. & P. 114; 7 A. & E. 108; W. W. & D. 305; 6 L. J., K. B. 199; 1 Jur. 526.

The bankrupt entered into a deed of composition with his creditors, by which they released him from his debts:—Held, that a promissory note subsequently given to a creditor for the remainder of the debt was a nudum pactum. *Hall, Ex parte*, 1 Deac. 171; 2 Mont. & Ayr. 513.

A promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, is not a good consideration to

support a contract. *Bracewell* v. *Williams*, L. R. 2 C. P. 196; 12 Jur. (N.S.) 1004; 15 L. T. 215; 15 W. R. 130.

And see BANKRUPTCY.

b. Past or Executed.

Revival of Express Promise.]—A mere moral consideration will not support an express promise. An express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute. *Eastwood* v. *Kenyon*, 11 A. & E. 438; 3 P. & D. 276; 9 L. J., Q. B. 409; 4 Jur. 1081.

—— **Promise to Pay at Future Day.**]—An executed consideration, whereon the law implies a promise to pay on request (as upon an account stated), is not sufficient to support a promise to pay at a future day. *Hopkins* v. *Logan*, 5 M. & W. 241; 7 D. P. C. 360; 8 L. J., Ex. 218.

—— **Moved by Request of Promisor.**]—A past consideration, for which the law will not imply a promise, will support a subsequent express promise, in itself unobjectionable, if such consideration is moved by the previous request of the party promising. *Bradford* v. *Roulston*, 8 Ir. C. L. R. 468.

The execution by A., at B.'s request, of a bill of sale of a vessel, to C., is a sufficient consideration to support a subsequent express promise by B. to pay, on C.'s default. *Ib.*

—— **Exhausted before Promise.**]—A declaration stated, that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse, at a certain price, the defendant promised the plaintiff that the horse was sound and free from vice, but that it was vicious:—Held, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise, but that no express promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of the sale, the only implied promise was to deliver the horse, and that after the sale, therefore, there was no consideration for the subsequent express promise of warranty. *Roscorla* v. *Thomas*, 2 G. & D. 508; 3 Q. B. 234; 11 L. J., Q. B. 214; 6 Jur. 929.

A plaintiff declared on an agreement by the defendant, which recited that an estate had been mortgaged by W., since deceased; that the plaintiff had joined in a bond as a collateral security for the mortgage-money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of W.'s affairs, had repaid the plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgage property when sold, and in the meantime to appropriate the rents of the premises to the payment of the same sum as that for which the plaintiff had a lien on the premises; that the defendant requested the plaintiff to release and convey his interest to A. and H., and that he had done so, reserving to himself a lien on the property. The declaration stated that, in consideration of the plaintiff having paid the money, and having released and conveyed all his interest to A. and H., reserving to himself the lien, the defendant agreed to pay him the remainder of the sum so paid by him:—Held, that the declaration was bad, as it disclosed no consideration for the defendant's promise. *Kay* v. *Dutton*, 2 D. & L. 291; 8 Scott (N.R.) 495; 7 Man. & G. 493; 13 L. J., C. P. 183; 8 Jur. 910.

—— **Promise Equivalent to Warranty.**]—A declaration, that, in consideration that the plaintiff did, through placing confidence in the defendants that they were acting fairly by the plaintiff in recommending the plaintiff to purchase of the defendants, on their recommendation, 211 pockets of hops at 63*s.* the cwt., purchase of the defendants the hops at that price, the defendants promised the plaintiff that they were not abusing the confidence of the plaintiff in recommending the purchase of the hops at that price; and that the plaintiff, relying on the promise, did, through placing confidence in the defendants, purchase of the defendants, on their recommendation, the hops at the price; whereas the defendants did abuse, in this, that the hops were not worth the price:—Held, in arrest of judgment, that the declaration disclosed both a good consideration and a good promise; for that it sufficiently appeared that the purchase was contemporaneous with the promise; and it must be taken, after verdict, that the promise was express, and not one sought to be implied from the mere fact of there being a contract of purchase and sale between the plaintiff and defendants. *West* v. *Jackson*, 16 Q. B. 280; 20 L. J., Q. B. 240; 15 Jur. 990.

c. Forbearance to Sue, and Compromise of Claims.

Whether nudum pactum.]—Where a creditor demands, and a debtor promises, security for an existing debt, the forbearance to sue implied on the part of the creditor is a sufficient consideration to prevent the transaction from being nudum pactum. *Alliance Bank* v. *Broom*, 2 Drew. & Sm. 289; 5 N. R. 69; 34 L. J., Ch. 256; 10 Jur. (N.S.) 1121; 11 L. T. 332; 13 W. R. 127.

A promise by a defendant to pay a judgment debt obtained against him, in consideration that the plaintiff would stay execution thereon, is no ground to raise an assumpsit. Otherwise, if the promise is by a third person. *Anon.*, Cowp. 129.

Where a plaintiff declared that A., since deceased, was indebted to him so much, and that after his death, in consideration that he, at the instance of the defendant, would forbear and give day of payment of the debt (not stating to whom he was to forbear), the defendant promised:—Held, to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff; and unless there was some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. *Jones* v. *Ashburnham*, 4 East, 455; 1 Smith, 188.

A letter written by the agent of a bond creditor to the principal obligor, giving him eighteen months further time to pay the bond, upon consideration of his paying off at once the interest in arrear, and keeping down the interest

to accrue in future, is a mere promise without consideration, and not binding. *Tucker* v. *Laing*, 2 K. & J. 745.

A declaration stated that K. was indebted to a firm; that the plaintiff had been appointed by the court of chancery receiver of the debts of the firm, whereby K. became liable to pay the plaintiff when requested; that, in consideration of the premises, and that the plaintiff, as such receiver, would give K. two months' time to pay, the defendant promised to pay, in case K. omitted to do so within that time. Breach, that K. omitted, and that the defendant never paid:—Held, that a sufficient authority appeared for the plaintiff to contract and sue, and a sufficient consideration for the defendant's promise. *Willatts* v. *Kennedy*, 8 Bing. 5; 1 M. & Scott, 35.

What amounts to Agreement to forbear.]—A banker required security from his customer for an overdrawn account. The customer, by letter, promised to hypothecate certain goods, but upon being asked for the delivery warrants, he refused to carry out his promise. Upon a bill to enforce the promise:—Held, that, from the nature of the transaction, some forbearance to sue on the part of the creditor must be assumed to have taken place, and that this was sufficient to prevent the promise to hypothecate from being nudum pactum. *Alliance Bank* v. *Broom*, 2 Drew. & Sm. 289; 34 L. J., Ch. 256; 5 N. R. 69; 10 Jur. (N.S.) 1121; 11 L. T. 332; 13 W. R. 127.

A count stated that, at the time of writing the letter and making the contract therein, the claims of the plaintiff in the first, third and fourth counts, which were for not returning railway shares, and for converting and detaining certificates of shares, had accrued in manner and form as therein expressed, and the defendant ought to have paid or satisfied the plaintiff for and in respect of those claims; that the defendant had from time to time requested the plaintiff to give him time and to forbear and grant him indulgence for the payment or satisfaction of those claims, which the plaintiff had done; and that the defendant, being insolvent and unable to pay or satisfy those claims and to obtain further time, wrote to the defendant as follows:—"That I have wronged you in not having (because incapable) repaid or returned that which you lent me [meaning and referring to loans, the certificates mentioned in the first count] it was useless for me to deny; but how I wronged you in feeling, seeing that I have ever, as I do now, entertain for you the sincerest gratitude and regard, I know not, beset as I am by difficulties on every side not resulting from extravagance but from bad fortune. I know how worthless are promises of reparation; how wholly disregarded are entreaties for indulgence, yet will I say that the most anxious endeavour of every future day shall be to prove my regard and gratitude in the only way which the world esteems the proof by restoring to you all I owe":—Held, that the letter showed no request for forbearance, nor any consideration for a fresh promise to pay by the defendant what he was already liable to pay, and if it did amount to a fresh promise to pay it was a promise without consideration. *Deacon* v. *Gridley*, 15 C. B. 295; 3 C. L. R. 129; 24 L. J., C. P. 17; 3 W. R. 27.

Forbearance to sue, on the part of an assignee of a bond, is a good consideration for a parol promise by the obligor to pay by instalments, and to give a warrant of attorney to enter up judgment for the whole in case of any default in payment of any instalment. *Martin* v. *Burn* 2 N. & P. 297; 7 A. & E. 19; W., W. & D. 508.

Executed or Executory.]—In consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against another person, the defendant promised to pay the debt on a certain day; averment, that the plaintiff did suspend the proceedings. The agreement was as follows:—"The plaintiff having, at my request, consented to suspend proceedings, &c.":—Held, that as the request must have preceded the consent to suspend proceedings, the contract was properly declared on as an executory contract; secondly, that the consideration for the promise was good, as it must be taken as a consent to suspend proceedings, at least until the day the defendant was to pay the debt; and thirdly, that, after verdict, the averment that the plaintiff had suspended proceedings was sufficient, without specifying for what period. *Payne* v. *Wilson*, 7 B. & C. 423; 1 M. & Ry. 708; 6 L. J. (O.S.) K. B. 197.

Contract to take less than Sum due.]—An agreement between judgment debtor and creditor that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment is nudum pactum, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment. *Pinnel's Case* (5 Rep. 117 a), and *Cumber* v. *Wane* (1 Str. 426), followed. *Foakes* v. *Beer*, 54 L. J., Q. B. 130; 9 App. Cas. 605; 51 L. T. 833; 33 W. R. 233—H. L. (E.)

An agreement to take, in lieu of arrears of income, in respect of a life interest, recoverable in equity, a certain sum, less than the estimated amount of such arrears, recoverable at law, is, in equity, void for want of consideration, and will not be supported. *Lovett* v. *Hankins*, 13 L. T. 521; 14 W. R. 216.

See also cases sub tit., ACCORD AND SATISFACTION.

—— **Withdrawal of Plea.**]—The withdrawal by a defendant of a plea of infancy, whether true or false, is a sufficient consideration for an agreement on the part of the plaintiff to accept a smaller in satisfaction of a greater sum. *Cooper* v. *Parker*, 15 C. B. 822; 3 C. L. R. 710; 24 L. J., C. P. 68; 1 Jur. (N.S.) 281.

Payment of smaller Sum than Amount due in Satisfaction.]—A. being indebted to B. in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B. a cheque for 100*l.*, payable on demand, which B. accepted in satisfaction:—Held, a good accord and satisfaction. *Goddard* v. *O'Brien*, 9 Q. B. D. 37.

Joint and Separate Debts.]—A parol agreement is sufficient to convert a separate into a joint debt, such an agreement not being a promise to answer the debt of another within the Statute of Frauds, but the creation of a new debt in consideration of the former being extinguished. *Lane, Ex parte*, De Gex, 300; 16 L. J., Bk. 4.

The acceptance by a creditor of the sole and

separate liability of one of two or more joint debtors, is a good consideration for an agreement to discharge all the other debtors from liability. *Lyth* v. *Ault*, 7 Ex. 669 ; 21 L. J., Ex. 217.

Agreement not to sue for Nullity of Marriage.]—In a petition by husband against wife praying that the marriage celebrated between them might be declared null and void on the ground of her incapacity, the respondent pleaded that she and the petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity : and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if the respondent committed a breach of the agreement the petitioner should be entitled to proceed in this court for a declaration of nullity. Averment that there had been no breach of the agreement on the part of the respondent :—Held, that the respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement although not by deed was therefore a bar to a petition for declaration of nullity. *Aldridge* v. *Aldridge*, or *A.* v. *M.*, 58 L. J., P. 8 ; 13 P. D. 210 ; 59 L. T. 896 ; 37 W. R. 240.

Agreement to avoid wrongful Arrest.]—A declaration stated that an action was depending at the plaintiff's suit against D. ; that D. was arrested and in the sheriff's custody by virtue of a capias, indorsed for bail for a debt ; that costs had been incurred by the plaintiff in the prosecution of the action ; and that thereupon, in consideration that the plaintiff would discharge D. out of custody, the defendant promised to pay the plaintiff the debt, interest, and costs in the action against D. ; and that the plaintiff discharged D. Breach, non-payment. Plea, that there was not any claim or demand, or cause of action, against D. in respect of which the plaintiff could, or was entitled to recover in the action ; that he, by discharging D., did not give up or part with any available remedy, as he well knew ; that the arrest and proceedings were colourable only, and were not commenced for the purpose of trying any doubtful or contested question of fact :—Held, that the declaration disclosed a sufficient consideration ; and that the plea was no answer, as it did not show that the arrest was fraudulent or illegal. *Smith* v. *Monteith*, 2 D. & L. 358 ; 13 M. & W. 427 ; 14 L. J., Ex. 22 ; 9 Jur. 310.

Payment, Postponement of—Undertaking not Enforceable.]—The defendant entered into an undertaking to pay 200*l.* which was supposed to be, though not in fact, enforceable. He subsequently gave a promissory note to postpone payment of this sum :—Held, that the note was given for good consideration. *Kingsford* v. *Oxenden*, 55 J. P. 789—C. A.

Compromise of Unfounded Claim.]—The compromise of a disputed claim made bonâ fide is a good consideration for a promise, even although it should ultimately appear that the claim was wholly unfounded. *Callisher* v. *Bischoffsheim*, 39 L. J., Q. B. 181 ; L. R. 5 Q. B. 449 ; 18 W. R. 1127.

Forbearance to prosecute a bonâ fide claim is a valid consideration for a contract although the claim is, in fact, unfounded. *Ockford* v. *Barelli*, 25 L. T. 504 ; 20 W. R. 116.

A niece went through the ceremony of marriage with her uncle ; at that time, unknown to her, his wife was living, but she soon afterwards died, and the niece, from the time of her marriage, lived with her uncle as his wife until he died intestate ; she then claimed rights as his widow, believing herself entitled thereto, and in consideration of her forbearing to prosecute those rights, the sons of the former marriage promised to make over to her one-third part of the property of the deceased :—Held, that there was a sufficient consideration for their promise. *Ib.* And see *Wilby* v. *Elgee*, 44 L. J., C. P. 254 ; L. R. 10 C. P. 497 ; 32 L. T. 310.

Trustees under a local act called on defendant, who was agent of the owner of certain houses, to pay certain expenses chargeable under the act on the owner. The defendant told the trustees that he was not owner, but that B. was, and that it was B. who was liable. The trustees bonâ fide, believing the defendant to be personally liable, threatened to take proceedings against him to enforce payment ; on which he, notwithstanding he knew that he was not really liable, the trustees consenting to take a less amount than their claim by instalments, gave them notes to meet the instalments. The trustees having sued the defendant on the notes :—Held, that there was good consideration for them, and that the trustees were entitled to recover. *Cook* v. *Wright*, 1 B. & S. 559 ; 30 L. J., Q. B. 321 ; 4 L. T. 704.

Forbearance to sue is a good consideration only when the forbearing party has a right to sue in his own name either at law or in equity. *Graham* v. *Johnson*, 38 L. J., Ch. 374 ; L. R. 8 Eq. 36 ; 21 L. T. 77 ; 17 W. R. 810.

A defence to an action of assumpsit alleging that the plaintiff never had any cause of action against the defendant at the time of the commencement of the action which had been compromised, and thence and until and at the time of the promise, as he well knew, is sufficient. *Wade* v. *Simeon*, 2 C. B. 548 ; 3 D. & L. 587 ; 15 L. J., C. P. 114 ; 10 Jur. 412.

Compromise of Intended Action.]—A bonâ fide compromise of a real claim is a good consideration, whether the claim would have been successful or not. *Cook* v. *Wright* (supra) ; *Callisher* v. *Bischoffsheim* (supra) ; and *Ockford* v. *Barelli* (supra), approved, and the observations in *Banner, Ex parte* (17 Ch. D. 480, 490), by Lord Esher, M.R., on the authority of these cases, dissented from by the court. *Miles* v. *New Zealand Alford Estate Co.*, 55 L. J., Ch. 801 ; 32 Ch. D. 266 ; 54 L. T. 582 ; 34 W. R. 669—C. A.

A shareholder in a company made an equitable mortgage of his shares in favour of the plaintiff as security for an advance, and the plaintiff gave the company notice of his charge ; after the date of the notice the shareholder gave a written guarantee to the company. The guarantor was not only a shareholder, but he was also a director of and the vendor to, the company. The guarantee was given at a general meeting of the shareholders, after an angry discussion had taken place, but it did not appear that any resolution was passed at such meeting with reference to it. It was, that a minimum dividend should be paid to the shareholders

yearly during ninety years: and that the guarantor should pay sums sufficient to make up that minimum in every year in which the company had not earned it. There was no consideration for the giving of the guarantee upon the face of the instrument, but it was found by the court that it was, in fact, given in consideration of an agreement come to at the general meeting of the shareholders, to abandon proceedings in contemplation against the guarantor. But it was held, upon appeal (Bowen, L.J., dissentiente), that there was no sufficient evidence of any intended claim by the company or the shareholders against the guarantor, or any contract binding the company to abandon such claim, and accordingly that there was no consideration to support the guarantee:—Held, by Bowen, L.J., that upon the evidence proceedings had, in fact, been threatened, and were dropped in consequence of the guarantee; and that this was sufficient consideration to support it. *Ib.*

Forbearance to Sue Third Party.]—For the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly at the rate of 5 per cent. per annum until the amount was paid. The plaintiff having forborne to sue for several years:—Held, that, the plaintiff having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note although there was no contract by the plaintiff to forbear from suing. *Crears* v. *Hunter* or *Burnyeat*, 56 L. J., Q. B. 518; 19 Q. B. D. 341; 57 L. T. 554; 35 W. R. 821—C. A.

Forbearance by the plaintiff, at the defendant's request, to enforce a fi. fa. against the goods of a third person for 60*l.* is a valid consideration for the defendant's promise to pay the plaintiff 107*l.* in seven days. *Smith* v. *Algar*, 1 B. & Ad. 603; 9 L. J. (o.s.) K. B. 79. S. P., *Pullen* v. *Stokes*, 2 H. Bl. 312.

Staying Proceedings.]—A declaration stated that two actions had been commenced by the plaintiff against the defendant, and were then depending, and that it was agreed between them that the actions should be settled, and all proceedings therein stayed, and that the defendant should pay to the plaintiff 40*l.* in respect of costs, and 236*l.* damages. That the plaintiff did wholly cease to prosecute the actions, and had thence continually hitherto stayed all proceedings therein. Breach, non-payment of these sums:—Held, that the staying of the actions was a sufficient consideration for the promise of the defendant; and that there was a sufficient averment of performance of the agreement by the plaintiff, inasmuch as the court would interfere if any further step was taken by him in the actions. *Crowther* v. *Farrer*, 15 Q. B. 677; 20 L. J., Q. B. 298; 15 Jur. 535.

Settlement of Action no Bar.]—When an agreement has been entered into between the plaintiff and defendant in a cause, that the cause shall be settled by the payment of a sum of money to the plaintiff by the defendant, and the defendant afterwards refuses to perform his part of such agreement, the pendency of the original action is no bar to a new action on the agreement to settle. *King* v. *Pinsonneault*, 41 L. J., P. C. 42; L. R. 6 P. C. 245; 32 L. T. 174; 23 W. R. 576.

—— **Where Doubt as to Legal Rights.**]—Abandoning a suit, instituted to try a question in respect of which the law is doubtful, is a good consideration for a promise to pay a stipulated sum: therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damages; and the former vessel was detained until bail was given; and, pending such proceedings, the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damages sustained, to indemnify them, and to pay a stipulated sum by way of damages:—Held, that there being contradictory decisions as to the point, whether shipowners were liable for an injury done while their ship was under the control of a pilot required by law, there was a sufficient consideration to sustain the promise of the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge* v. *Dorville*, 5 B. & Ald. 117.

—— **After a Reference.**]—A declaration alleged that while certain differences were pending between the plaintiff and the defendant respecting some claims of the plaintiff to a deduction from 29,700*l.* to which the defendant was entitled, it was agreed between them by deed that that sum should be paid to trustees for the benefit of the defendant, and the matters in difference referred, the costs to abide the event. That the parties afterwards, with the consent of the arbitrator, agreed that on the immediate payment of 200*l.* by the defendant to the plaintiff, in satisfaction of his claims, the reference should cease, and each party pay his own costs. Breach, non-payment by the defendant of this sum:—Held, that the action was maintainable, as there was a sufficient consideration for the new promise. *Smyth* v. *Holmes*, 10 Jur. 862.

—— **Where Claims Unliquidated.**]—A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts, viz. for so much as they deserved to have of the defendant for work done by them as attorneys for him; that they alleged that the debts amounted to 171*l.* 9*s.* 8*d.*, the defendant to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue, and that the debts should be satisfied upon the terms of the defendant agreeing to pay 150*l.*: that the disputes were ended: that the debts were agreed to and fixed at 150*l.*; that the plaintiffs had not made any further claim, and that the debts were satisfied upon these terms. Breach, non-payment of 150*l.*:—Held, that the declaration was bad in not disclosing a sufficient consideration for the defendant's promise to pay the 150*l.* *Bridgman* v. *Dean*, 7 Ex. 199; 21 L. J., Ex. 90.

A declaration that disputes and controversies were pending between the plaintiff and defendant as to whether or not the defendant was indebted to the plaintiff in, to wit, the sum of 173*l.* 2*s.* 3*d.*, for money paid for the defendant by the plaintiff and thereupon, in consideration that the plaintiff would promise the defendant

not to sue the defendant at any time for the recovery of the sum so in dispute between them, and would accept from the defendant 100*l.* in satisfaction and discharge, the defendant promised to pay him 100*l.*:—Held, that the mere existence of disputes and controversies was not a consideration for the defendant's promise to pay, no debt being alleged to be due and no action having been commenced. *Edwards* v. *Bough*, 11 M. & W. 641; 1 D. & L. 304; 12 L. J., Ex. 426; 7 Jur. 607.

A declaration alleging that there were accounts between plaintiff and the defendant which were open and unsettled, and that there were disputes concerning such accounts, and mutual claims by each party; and that it was agreed that they should give up their respective claims upon each other; and thereupon, in consideration that the plaintiff would relinquish and forbear to prosecute all claims which he had against the defendant, he promised the plaintiff an annuity, discloses a sufficient consideration for the promise. *Llewellyn* v. *Llewellyn*, 3 D. & L. 318; 15 L. J., Q. B. 4; 9 Jur. 991.

Where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand is a good consideration for a promise by the plaintiff to stay proceedings, and pay his own costs. *Wilkinson* v. *Byers*, 1 A. & E. 106; 3 N. & M. 853; 3 L. J., K. B. 144. S. P., *Haywood* v. *Mower*, 7 L. T. 562; 11 W. R. 169.

Taking Collateral Security.]—A debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to defer payment on his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and giving a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was never acted upon; but one of the creditors brought an action against the debtor for his demand: the debtor never signed the agreement but appeared to have been willing to perform his part of the engagement:—Held, that the agreement, though not properly an accord and satisfaction, was still a good defence, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, the consideration for which to each creditor was the forbearance of the rest, and as there appeared no failure of performance on the part of the debtor. *Good* v. *Cheeseman*, 2 B. & Ad. 328; 4 Car. & P. 513; 9 L. J. (O.S.) K. B. 234. See *Lewis* v. *Jones*, 6 D. & R. 567; 4 B. & C. 506; 3 L. J. (O.S.) K. B. 270; 28 R. R. 360.

An assignment of property for the purpose of securing debts due, and to be due, with a power of sale upon giving six months' notice, is only a collateral security; and, without a special clause to that effect, does not suspend the remedy by action against the debtor. *Emes* v. *Widdowson*, 4 Car. & P. 151.

Where creditors, in consideration of a debtor assigning all his stock in trade and book debts to a trustee for the benefit of his creditors, agreed to execute releases as soon as the property should realise 238*l.*:—Held, that by this agreement the creditors had still a right of action, though they had taken a security from a purchaser of the stock to the amount of 223*l.* *Wiglesworth* v. *White*, 1 Stark. 218.

A creditor demanding security for a debt, the debtor agreed by letter to hypothecate certain bales of goods in the docks, but subsequently, under advice, refused to deliver the warrants. The creditor filed a bill in equity for a declaration that there was a lien on the goods, for delivery of the goods:—Held, that the effect of the agreement to hypothecate was a forbearance on the part of the creditor. *Alliance Bank* v. *Broom*, 2 Drew. & Sm. 289; 5 N. R. 69; 34 L. J., Ch. 256; 10 Jur. (N.S.) 1121; 11 L. T. 332; 13 W. R. 127.

To an action against maker of a note, payable three months after date, he pleaded that the note was delivered by him to the plaintiff for and on account of a judgment debt recovered by the plaintiff against him; and that, except as aforesaid, there never was any consideration or value for making or delivering the note to the plaintiff:—Held, that the plea was bad, inasmuch as it shewed there was an existing debt, on account of which the note was made, and the giving of the note was evidence of an agreement by the plaintiff to suspend his remedy upon the judgment, which was a sufficient consideration for the note. *Baker* v. *Walker*, 14 M. & W. 465; 3 D. & L. 46; 14 L. J., Ex. 371.

Withdrawal of Petition to Wind up Company.]—A. having presented a petition for winding-up a company, V. & Co. signed the following guarantee:—"In consideration of your withdrawing the petition you have presented for winding up the company called John King & Co., Limited, we agree to pay you all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing for or in reference to the petition. We further agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator, of the principal of your debt of 722*l.*" In an action on the second branch of the guarantee:—Held, that the consideration applied to both promises; that the consideration was the withdrawal of the then pending petition, and not the forbearing for eighteen months to proceed with any petition to wind up the company; and that such a consideration was sufficient to support the promise. *Harris*, v. *Venables*, 41 L. J., Ex. 180; L. R. 7 Ex. 235; 26 L. T. 437; 20 W. R. 974.

Covenant not to Sue.]—*See* DEED AND BOND (RELEASE).

Compromise of Criminal Proceedings.]—*See* infra, col. 180.

d. Of Marriage.

Agreement by Parents.]—Parents of the contracting parties to a marriage mutually agreed in writing, after the marriage, as a mode of giving effect to the verbal promises made before, to provide a marriage portion, and the father of the woman promised to pay 200*l.* to his son-in-law, and the father of the man to pay 100*l.*:—Held, that the son-in-law being a stranger to the consideration could not sue his father-in-law, upon the promise; and that the relation of parent and child did not create any exception to the rule. *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L. J., Q. B. 265; 8 Jur. (N.S.) 332; 4 L. T. 468; 9 W. R. 781.

A. verbally promised to give his daughter 200*l.*, on her marriage with B., if B.'s father would give the like amount. B. told A. that his father would do so. A. then paid the 200*l.*, after which

the marriage was solemnised. B.'s father paid 50*l.* of his 200*l.*, and died leaving B. his executor. B. claimed a right to retain 150*l.* out of his father's assets. The judge of the county court decided in his favour; and an appeal from that decision was dismissed with costs. *Williams* v. *Williams*, 37 L. J., Ch. 854; 18 L. T. 783.

Parol Promise by Relative.]—The fact that a parol promise had been made by a relative of a young lady to her then intended husband that he would "make a suitable provision for her" does not supply a valuable consideration for a bond for 200*l.* passed by him to the husband subsequently to the marriage. *M'Askie* v. *M'Caj*, Ir. R. 2 Eq. 447; 16 W. R. 1187.

Sufficiency.]—A declaration alleging that C. and W. agreed to marry, and in consideration thereof the defendant wrote and sent to W. a letter (setting it out verbatim), "So soon as all pecuniary and necessary arrangements are made to constitute a legal marriage, as proposed, I will be prepared to pay over for your behoof 300*l.*," the letter signed with his initials only, "E. C.;" shows an absolute promise by the defendant, and a good consideration for it. *Chichester* v. *Cobb*, 14 L. T. 433.

A., being about to marry B., the uncle of A. addressed him by letter thus:—"I am glad to hear of your intended marriage with B., and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150*l.* yearly during my life, and until your annual income, derived from your profession of a chancery barrister, shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require".—Held, that the letter contained a good consideration to support an action against the executors of the uncle for arrears of the annuity. *Shadwell* v. *Shadwell*, 9 C. B. (N.S.) 159; 30 L. J., C. P. 145; 7 Jur. (N.S.) 311; 3 L. T. 628; 9 W. R. 163.

An unattested paper signed by A. and by him handed to B. stated that as a mark of his esteem and great friendship he agreed to allow B. 500*l.* a year, and that after his (A.'s) death he had in lieu thereof bequeathed to him 10,000*l.* B. took this document to C., who thereupon consented to the marriage of her daughter with B., such consent having hitherto been withheld on the ground of B.'s want of means. The marriage took place, but no settlement was made by B. on his wife. A. died about six months after signing the paper, having paid B. the first quarter of the allowance of 500*l.* a year. His will contained no provision whatever in favour of B.:—Held, that assuming the consent of C. to her daughter's marriage with B. to have been given on the faith of the engagement contained in the paper, there was no such connection between A.'s promise or representation and the consent given by C. as to sustain a claim against A.'s estate. *Dashwood* v. *Jermyn*, 12 Ch. D. 776; 27 W. R. 868.

Release of Promise.]—A contract to grant an annuity, in consideration of the discontinuance of cohabitation, and of the release of an alleged promise of marriage, can be enforced in equity. *Keenan* v. *Handley*, 2 De G. J. & S. 283; 10 Jur. (N.S.) 906; 10 L. T. 800; 12 W. R. 1021.

Marriage on Faith of Representations—Specific Performance.]—Previously to the marriage of the plaintiff and his wife, C. W., negotiations for a settlement of her property had been going on, and on the 14th January, 1878, M., a connection of C. and trustee of her property, wrote to the plaintiff: "I trust to you that all will be done as we should desire, and if from any cause you are tempted to marry before the settlements are signed, you will before the wedding write a letter to our solicitors contracting to settle on C. all her fortune coming to her eventually." On the 16th January the plaintiff accordingly wrote to the solicitor: "In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to Miss W.'s fortune being settled on herself." The marriage took place next day without any settlement or any further agreement or articles having been signed:—Held, that the marriage must be presumed to have taken place in reliance by C. W. upon the plaintiff's letter, and that there was a contract to settle C. W.'s property signed by the parties to be charged. Reference accordingly to chambers to settle a proper settlement. *Viret* v. *Viret*, 50 L. J., Ch. 69; 17 Ch. D. 365, n.; 43 L. T. 493

Promise by Letter to Settle superseded by subsequent Settlement.]—The father of a lady wrote to her intended husband that he and his wife had determined to settle on their daughter 2,000*l.*, and that in addition she would have 2,000*l.* on her mother's death, and at least as much on her father's death. Eleven months afterwards the marriage took place; and on that occasion a formal agreement for a settlement of 2,000*l.* was executed, the letter not being in any way referred to. The mother died sixteen years and the father died twenty-five years after the marriage. The husband then claimed from the father's estate 4,000*l.* under the promises contained in the letter:—Held, that the letter had, under the circumstances, been superseded by the agreement for a settlement, and claim disallowed. *Badrock, In re, Kingdon* v. *Tugert*, 17 Ch. D. 361; 43 L. T. 688; 29 W. R. 278.

2. Warranty.

Implied from Intention of Parties.]—An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have—Per Bowen, L.J. *The Mooreock*, 58 L. J., P. 73; 14 P. D. 64; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373.

As to Fitness of Articles supplied to perform Services.]—The plaintiff, a master mariner, contracted with the defendants for a lump sum to be paid him by the defendants, to take a certain specified steam-tug of the defendants, towing six sailing barges, from Hull to the Brazils, the

plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steam-tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been:—Held, by Brett and Cotton, L.JJ., that as the contract related to a specified vessel, there was no implied undertaking by the defendants that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract. *Robertson* v. *Amazon Tug and Lighterage Co.*, 51 L. J., Q. B. 68; 7 Q. B. D. 598; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. C. 496—C. A.

Held, contra, by Bramwell, L.J., that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. *Ib.*

Of Fitness of Goods for Shipment.]—When the owner of a vessel has the opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage. *Acatos* v. *Burns*, 47 L. J., Ex. 566; 3 Ex. D. 282; 26 W. R. 624—C. A.

Of Seaworthiness of Ship for Voyage.]—A shipowner warrants the fitness of his ship when she starts, and not merely that he will honestly and bonâ fide endeavour to make her fit. This rule is not limited to cases in which the shipowner holds himself out as a common carrier. *Kopitoff* v. *Wilson*, 45 L. J., Q. B. 436; 1 Q. B. D. 377; 34 L. T. 677; 24 W. R. 706.

See also SHIPPING.

Of Power to issue Debentures.]—The directors of a railway company which had fully exercised the borrowing powers conferred upon it by its special act, in August, 1864, advertised that they were prepared to receive proposals for loans on mortgage debentures, to replace loans falling due. W. offered a loan of 500*l.*; and his offer being accepted, he in the same month sent his cheque for 500*l.* to the directors, for which he requested that a debenture should be issued to him. In pursuance of a resolution of the directors to that effect, the cheque was handed to the contractor for the works, who had been (but had then ceased to be) the holder of seven debenture bonds for 500*l.* each; and he was requested to transfer one of them to W.: and it was by the same resolution directed "that such bond be on the 1st of October exchanged for a new one." The contractor kept the cheque (which was duly honoured), but was unable to transfer the debenture; and in pursuance of a resolution of the directors of the 5th of October, a new debenture bond for 500*l.* was sealed and sent to the executor of W. A director of the company was a party to each of the above transactions. By a decree of the Court of Chancery of the 14th of February, 1868, the debenture was declared void, as being for a sum in excess of the borrowing powers of the company:—Held, that the director was liable as for a breach of warranty; that the directors had power under the circumstances to issue a debenture, which would be valid and binding upon the company; and that the executor was entitled to recover as against him the 500*l.*, together with interest by way of damages. *Weeks* v. *Propert*, 42 L. J., C. P. 129; L. R. 8 C. P. 427; 21 W. R. 676.

A promoter and managing director of a silver lead ore company issued a prospectus of the company, stating that the promoters did not hesitate to guarantee to the bearers and holders of shares in the company a minimum annual dividend of 33 per cent.:—Held, that he was liable to be sued for fraud by a person who was induced, by the statement, to become a holder of shares in the company, the representation being false, to the knowledge of the defendant, and it having caused damage and loss to the plaintiff. *Gerhard* v. *Bates*, 2 El. & Bl. 476; 1 C. L. R. 868; 22 L. J., Q. B. 364; 17 Jur. 1097; 1 W. R. 383.

And see COMPANY.

Building Society—Power to Borrow.]—A person lent money to a building society, established under 6 & 7 Will. 4, c. 32, and received the following certificate:—"I. P. Benefit Building Society. This is to certify, that R. has this day deposited 70*l.* with the I. P. Benefit Building Society, for a period of three months certain, upon which interest at the rate of 5*l.* per cent. per annum will be allowed." This certificate was signed by the directors. The lender afterwards discovered that the rules of the society did not empower it to borrow money, and sued the directors who had signed the instrument:—Held, that they were personally liable, as the certificate amounted to a warranty on their part that the society had power to borrow money. *Richardson* v. *Williamson*, 40 L. J., Q. B. 145; L. R. 6 Q. B. 276.

On Letting Land.]—There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises. *Erskine* v. *Adeane*, 42 L. J., Ch. 835; L. R. 8 Ch. 756; 29 L. T. 234; 21 W. R. 802.

Demise of Land and Premises.]—There is no implied warranty attached by law to a demise of land or premises, that they are fit for any particular purpose. *Hart* v. *Windsor*, 12 M. & W. 68; 13 L. J., Ex. 129; 8 Jur. 150. S. P., *Sutton* v. *Temple*, 12 M. & W. 52; 13 L. J., Ex. 17; *Surplice* v. *Farnsworth*, 8 Scott (N.R.) 307; 7 Man. & G. 576; 13 L. J., C. P. 215.

And there is no implied duty in an owner of a house, which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and no action will lie against him for an omission to do so, in the absence of an express warranty or active deceit. *Keats* v. *Cadogan* (*Earl*), 10 C. B. 591.

—— **Of Furnished House.**]—In an agreement for the hire of a furnished house, to be occupied from a certain date during a definite period, there is an implied condition or a warranty on the part of the landlord that the premises are reasonably fit for habitation. If they are unfit at the commencement of the term, the tenant does not obtain that for which he contracted, and is therefore entitled to rescind the agreement. *Wilson*

v. *Finch-Hatton*, 46 L. J., Ex. 489; 2 Ex. D. 336; 36 L. T. 473; 25 W. R. 537.

It is an implied condition on the letting of a furnished house that it should be reasonably fit for habitation, and not infested and overrun with bugs. *Smith* v. *Marrable*, 11 M. & W. 5; Car. & M. 479; 12 L. J., Ex. 223. S. P., *Campbell* v. *Wenlock* (*Lord*), 4 F. & F. 716.

One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. *Bird* v. *Greville* (*Lord*), 1 Cab. & E. 317.

See also LANDLORD AND TENANT.

Building according to Plans.]—The plaintiff having inspected certain plans and specifications which had been prepared by an engineer for the defendants, contracted with the latter to build a bridge according thereto. The work was begun, but the mode of erection prescribed by the plans and specifications proved defective, and an alteration was necessarily made under the direction of the engineer, which occasioned great delay in the execution of the work, in consequence of which the plaintiff sustained considerable damage. In an action against the defendants for damages as for a breach of warranty:—Held, that there was no implied warranty on their part that the work could be done in the mode prescribed by the plans and specifications, and that the plaintiff was not therefore entitled to recover. *Thorn* v. *London Corporation*, 45 L. J., Ex. 487; 1 App. Cas. 120; 34 L. T. 545; 24 W. R. 932—H. L.

In Life Policy — "Strictly Temperate."] — See *Thomson* v. *Weems*, 9 App. Cas. 671—H. L. (Sc.)

Stand at Races.]—A man, who causes a building to be erected for viewing a public exhibition and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose; and it is immaterial whether the money is to be appropriated to his own use or not. *Francis* v. *Cockrell*, 10 B. & S. 850; 39 L. J., Q. B. 291; L. R. 5 Q. B. 501; 23 L. T. 466; 18 W. R. 1205—Ex. Ch.

Stability of Stable.]—A livery stable keeper had contracted with a builder to erect a building, of which the lower part was to be a shed intended for the reception of carriages, and the upper part to be used for other purposes. Two carriages and horses were placed under the shed when the lower part of the building had been completed, but while the contractor's workmen were still on the upper floor. The building was blown down by a high wind, and the carriages were injured. It was not disputed that the builder was one whom a careful and prudent person might trust, and that the livery stable keeper had no notice of any negligence on the contractor's part; but it was proposed to prove that, owing to the neglect of the contractor and his workmen, the building was, in fact, unskilfully built and unsafe. The judge ruled that the liability of the livery stable keeper was that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the carriages; and that if, in causing the shed to be built, he did all that a careful man would do, he would be exempt from liability for an event which was caused by the careless or improper conduct of the builder, of which the livery stable keeper had no notice:—Held, that the direction was right, for it could not reasonably be inferred that he had warranted that the shed was reasonably fit for the purpose to which it was applied, inasmuch as this would charge him with a trust beyond what the nature of the thing put it in his power to perform, and although it was reasonable to require him to use due care to ascertain whether the building was secure, and by himself and his servants to take due care to maintain it in a proper state, it would be unreasonable to go further. *Searle* v. *Laverick*, 43 L. J., Q. B. 43; L. R. 9 Q. B. 43; 30 L. T. 89; 22 W. R. 367.

Day of Sailing of Ships.]—C., who resided in Ireland, having applied to emigration agents in London, respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for 65*l*. This letter was written on the fly-sheet of a printed circular headed "Emigration to Australia," and which stated, that ships "will be despatched on the appointed days (wind and weather permitting), for which written guarantees will be given." Then followed a list of ships, in which the "Asiatic" was named as to sail from London on the 15th of August, and from Plymouth on the 25th. In another part of the circular it was stated: "Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." C. engaged a berth on board the ship "Asiatic," and paid the agents a deposit, but no written guarantee was given. The "Asiatic" did not arrive at Plymouth until the 3rd of September, although not prevented by wind or weather. C.'s berth was kept vacant from London to Plymouth:—Held, that the statement in the circular was not a mere representation, but a warranty that the "Asiatic" would sail on the days appointed, and that, as she did not, C. was justified in taking a passage on board another vessel, and was entitled to recover from the agents the amount of the deposit and the expenses he had been put to by the delay at Plymouth. *Cranston* v. *Marshall*, 5 Ex. 395; 19 L. J., Ex. 340. *And see* SHIPPING.

Warranty on Sale of Goods.]—*See* SALE OF GOODS.

On Policies of Insurance.]—*See* INSURANCE—SHIPPING.

On Conveyance of Passengers and Goods.]—*See* CARRIERS.

Authority to Make.]—*See* PRINCIPAL AND AGENT.

3. CONDITION PRECEDENT.

a. Generally.

Construction.]—What is or is not a condition precedent, depends not on merely technical words, but on the plain intention of the parties, to be deduced from the whole instrument. *Roberts* v. *Brett*, 11 H. L. Cas. 337; 34 L. J., C. P. 241; 11 Jur. (N.S.) 377; 12 L. T. 286; 13 W. R. 587.

Going to root of Contract.]—An agreement was entered into by which the defendant engaged the plaintiff to sing and play the principal part in a new opera, "commencing on or about November 14th, at a weekly salary of 11*l.*, and to continue on at that sum for a period of three months, providing the opera shall run for that period. The engagement to be subject to the ordinary rules and regulations of the theatre." The piece was announced for the 28th of November. The plaintiff attended rehearsals till November 23rd, when she was taken ill. On the 25th, finding that she would probably be unable to appear on the 28th, the defendant engaged L. on the terms that she should be ready, and, if the plaintiff could not, should sing on the opening night, and thenceforward till December 25th, at 15*l.* per week. The plaintiff's illness continued, and L. entered upon and fulfilled her engagement. On December 4th, the plaintiff having recovered, offered to take her place, but was refused, and sued the defendant for a breach of contract. The jury found that the non-attendance of the plaintiff on the opening night was not of such material consequence to the defendant as to entitle him to rescind the contract, but that it was of such consequence as to render it reasonable for him to employ another artiste, and that the employment of L. as made was reasonable:—Held, that the latter finding was to the effect that no substitute capable of performing the part adequately could be obtained except on the terms that she should be permanently engaged at higher pay than the plaintiff: and that being so, it followed as a matter of law that the failure on the plaintiff's part to appear on the opening night, went to the very root of the contract, and discharged the defendant. *Poussard* v. *Spiers*, 45 L. J., Q. B. 621; 1 Q. B. D. 410; 34 L. T. 572; 24 W. R. 819.

An agreement between G., director of an opera, and B., a dramatic singer, contained clauses to the following effect. The engagement was to begin on the 30th of March, 1875, and end on the 13th of July. B. was not to sing out of the theatre in the United Kingdom from the 1st of January to the 31st of December, 1875, without the written permission of G. B. agreed to be in London without fail at least six days before the commencement of the engagement for the purpose of rehearsals. B. performed the condition relating to not singing in the United Kingdom after the 1st of January, 1875, but, owing to temporary illness, failed to arrive in England until the 28th of March. G. thereupon refused to employ him, and put an end to the agreement. In an action by B. against G. for refusing to employ him:—Held, that G. was not justified in so refusing, as under all the circumstances of the agreement, the clause binding B. to be in London six days before the 30th of March, was not a condition precedent going to the root of the contract, but only an independent agreement the breach of which might be compensated for by damages. *Bettini* v. *Gye*, 45 L. J., Q. B. 209; 1 Q. B. D. 183; 34 L. T. 246; 24 W. R. 551.

Dependent Conditions.]—Where an agreement specified that advertisements should be inserted to the value of 90*l.* in part payment of goods to be purchased to the amount of 360*l.*:—Held, that the plaintiff was not entitled to recover in respect of the 90*l.* worth of advertisements without taking the 360*l.* worth of goods. *Minshull* v. *Brinsmead*, 1 Cab. & E. 97.

The terms of a contract being as follows: "1st April, 1826, sold W. P. one bale of sponge at 10*s.* a pound, and bought of them yellow ochre at 5*l.* a ton, to be delivered on or before 24th inst." :—Held, that the delivery of the ochre by the 24th to the extent of the price of the sponge, was a condition precedent to the delivery of the sponge. *Parker* v. *Rawlings*, 4 Bing. 280; 5 L. J. (O.S.) C. P. 174.

The defendant having applied to the plaintiff to sell him some fleeces, and agreed at the same time to supply the plaintiff with coarse woollen cloths, called "noils," the following bought note was delivered: "Bought of W. F. A. (the plaintiff) thirty packs of Cheviot fleeces, and agreed (i.e. the plaintiff agreed) to take the under-mentioned noils; also agreed to draw for 250*l.* on account, at three months. Sixteen packs, No. 5. noils, &c." :—Held, that the stipulations in the contract were dependent: and that the plaintiff, who had not delivered the whole of the fleeces, could not maintain an action against the defendant for not delivering the noils, without averring in the declaration, and proving at the trial, that he had delivered, or offered to deliver, the fleeces to the defendant. *Atkenson* v. *Smith*, 14 M. & W. 695; 15 L. J., Ex. 59.

Demurrer to a bill by a contractor against a company, praying relief in the nature of specific performance, allowed, with costs, on the ground that the plaintiff had omitted to perform a material stipulation which was a condition precedent to the performance of the contract by the company. *Douglas* v. *Sidmouth Railway and Harbour Co.*, 13 L. T. 788: 14 W. R. 361.

Independent Promises—Intention.]—A. was the holder of certain bills of exchange accepted by O., and, whilst they were running, A. wrote to B. as follows:—"In consideration of your guaranteeing me that the bills will be paid and retired by O. when due, I engage and bind myself to guarantee unto you 300*l.* towards the payment of Scotch whiskies ordered by F. from you;" and B. wrote to A. acknowledging the receipt of the former letter, and saying, "I guarantee that O. will retire the two acceptances referred to therein, when at maturity, in consideration of your having guaranteed F. to the extent of 300*l.*" :—Held, that these were independent promises, and that it was the intention of the parties that B. should be at liberty to sue A. on the contract, without proving the performance of his (B.'s) part of the contract as a condition precedent. *Christie* v. *Borelly*, 7 C. B. (N.S.) 561; 29 L. J., C. P. 153; 6 Jur. (N.S.) 324; 8 W. R. 542.

Where an action was compromised on terms, one of which was that the defendant should pay the plaintiff 150*l.*, and another that the plaintiff should pay a third party's claim against the defendant:—Held, that the payment of the third party's claim by the plaintiff was not a condition precedent to the plaintiff's right to sue for the 150*l.* *Lockhart* v. *Webster*, 1 Cab. & E. 71.

A contract was entered into between A. and B. whereby A. agreed to pay B. 80*l.* on a day certain, and B. promised to give up certain deeds:—Held, that B. was entitled to recover the 80*l.* after the specified day, although he had not given up the deeds. *Cook* v. *Halsell*, 4 W. R. 252.

Subject to Approval—By Solicitor—Prevented by Party.]—The plaintiff's claim was for commission on the sale of a piece of land by A. to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's solicitor:—Held, that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him as it was unreasonable for him to disapprove. *Clack* v. *Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

See also *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585; and cases supra, col. 19.

—— **Surveyor's Certificate of Houses in accordance with Contract.**]—The respondent advanced money to the appellant on a guarantee to be repaid "on the completion of six houses in accordance with a contract between myself and T." One of the terms of the contract was that the houses were to be built to the satisfaction of a surveyor, and payment was to be made upon his certificate. No such certificate had been given. In an action on the guarantee, brought by the respondent against the appellant, the jury found that as a matter of fact the houses had been completed:—Held, that the respondent was entitled to recover notwithstanding the absence of the certificate. *Lewis* v. *Hoare*, 44 L. T. 66; 29 W. R. 357—H. L. (E.)

By a contract the plaintiffs agreed that they would, during a certain term, supply to the defendants, and that they would take from them, all the coke the defendants' company should require, according to the capacity of certain ovens, provided the coke should be of the best quality, the plaintiffs on their part engaging that the same should be large and of the best quality, and equal to that made from the best coal, and be to the satisfaction of the company's inspecting officer for the time being, and agreeing that the company should have power to refuse to accept coke of inferior quality, or small in its pieces, and to purchase what they might require elsewhere if the plaintiffs did not supply coke of the best quality and equal to that above described, and to the satisfaction of the company's officer, and to charge the plaintiffs with the excess of price beyond the contract price:—Held, that it was a condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke, that it should be to the satisfaction of their inspecting officer. *Grafton* v. *Eastern Counties Ry.*, 8 Ex. 699.

—— **By Metropolitan Board of Works—Inchoate Agreement—Building Agreement.**]—The Metropolitan Board of Works the owners in fee of two adjoining pieces of land, agreed with X. to grant him a lease of one plot on his erecting on the land a building according to certain plans to be approved by the board. The board entered into a similar agreement with W. as to the other plot. X. then agreed with W. for a sublease of the first plot on similar terms. W. subsequently entered into two agreements with a company (formed for the purpose of erecting an hotel) by each of which he contracted to grant them a sublease of one of the two plots on the completion of a building according to the terms of the agreement. Each agreement provided that the company "shall before the 30th October, 1884, cover the ground . . . with a substantial building or part of a substantial building of such class, size, form, elevation, &c., and general character as shall be approved by the board or their superintending architect on their behalf, before the erection of such building is commenced." Another clause provided that the company should forthwith submit for the approval of the board plans of the building to be built by the company, and submit to any modifications required by the board. Another clause provided that "no building shall be commenced before the said plans, &c., shall have been approved by the board as aforesaid." The plans were duly submitted to the board, which was satisfied with them, but declined to grant separate leases of the two plots if one entire building was erected over both, and required that the title to both leases should be vested in one and the same person. W. endeavoured to arrange this, but failed. The company having gone into liquidation, the building not being completed, W. claimed to be admitted as a creditor of the company in respect of damages for the alleged breach of the agreement:—Held, that the approval of the board was a condition precedent to the agreement to build, that the performance of the conditions had not been waived, and that the company were not liable:—Held, on appeal, that there was no condition precedent, but an agreement to erect such particular kind of building as the board should have approved, and that, the board not having approved of any particular kind of building, there was nothing capable of performance, and therefore the company had committed no breach of the agreement. *Northumberland Avenue Hotel Co., In re, Fox's claim*, 56 L. T. 833—C. A.

—— **By Third Party—Evidence of Approval.**]—By an agreement, on the completion of work, a certificate of approval was to be produced, signed by a third person; it appeared on the trial of an action on such agreement, that the bill of charges had been referred to such third person, who signed the following memorandum: "On examining the annexed bill, and considering the circumstances, I am of opinion that a reduction should be made of 12*l.* 11*s.* 6*d.* A. B." A. B. being called as a witness, stated that he disapproved of the work, and would not have signed any certificate of approval. The jury found for the plaintiff, and the court would not disturb the verdict. *De Ville* v. *Arnold*, 10 Price, 21.

Agreement to grant Lease to Nominee of Plaintiff—Statute of Frauds.]—A lessee wrote to his lessor offering to surrender his lease and to take a fresh lease for twenty-one years to a nominee, or to a company which he intended to form, at an increased rent, but otherwise on the same terms as the existing lease; and by a subsequent letter offered to instruct his solicitor to prepare a draft lease. The lessor telegraphed to him in reply to get the lease prepared. Afterwards correspondence took place between the solicitors as to the form of the lease, and the lessee's solicitor prepared a formal agreement. Differences having arisen, the lessor refused to grant the lease, and the lessee brought an action for specific performance of the agreement to grant a lease and for damages. No company had

been formed and no nominee appointed by the plaintiff before the trial of the action:—Held, that assuming that there was a binding agreement for a lease, the formation of a company or appointment of a nominee was a condition precedent, and that the plaintiff could not maintain an action for specific performance of the contract, as he had not performed the condition. *Williams* v. *Brisco*, 22 Ch. D. 441; 48 L. T. 198; 31 W. R. 907—C. A.

But held, also, on the construction of the correspondence, that there was no binding agreement between the parties, and therefore the action entirely failed. *Ib.*

Insurance Policy—Delivery of Particulars.]—By a condition indorsed on a policy of insurance, it was stipulated that, in case of fire, the assured should, within three months, deliver to the secretary of the company full particulars of the loss sustained:—Held, that the delivery of particulars was a condition precedent to the right of the assured to recover for the loss. *Mason* v. *Harvey*, 8 Ex. 819; 22 L. J., Ex. 336.

—— **Prosecution of Servant for Embezzlement.**]—By an agreement and a policy of insurance the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of 1,000*l.*, which he might sustain by reason of any such fraud or dishonesty of A. in connection with his employment by the plaintiff as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under the policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain re-imbursement by the employed or his estate of any money which the company shall have become liable to pay":—Held, by Lords Blackburn and Watson (Lord Selborne, C., diss.), that the prosecution for embezzlement of A. was a condition precedent to the plaintiff's right of action upon the policy. *London Guarantee and Accident Co.* v. *Fearnley*, 5 App. Cas. 911; 43 L. T. 390; 28 W. R. 893; 45 J. P. 4—H. L. (Ir.)

As to Nature of Employment.]—In an action against a defendant for the breach of a contract to go as a surgeon on board of an Australian emigrant vessel, the contract being contained in a series of letters, it appeared that, in the course of the correspondence, the plaintiff represented that the ship was A 1, and of the burden of 490 tons; that the duties of surgeon would be light, as the vessel would not take, of emigrant labourers, over forty, and that the plaintiff would find drugs:—Held, that none of these were conditions precedent that need be noticed in the declaration. *Richards* v. *Hayward*, 2 Scott (N.R.) 670; 2 Man. & G. 574; 10 L. J., C. P. 108.

The defendant was informed during the progress of the agreement, that any appointment the plaintiff might make must be subject to the approval of the South Australian Emigrant Commissioners:—Held, that the approval of the commissioners was not a condition precedent, but, at the most, a condition subsequent, or rather in the nature of a defeasance. *Ib.*

Removal of Staging.]—The Wallasey Local Board, a local board of health under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and an urban sanitary authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), were authorised by the Wallasey Improvement Acts, 1858 and 1861, to acquire and work certain ferries between Liverpool and the Cheshire side of the Mersey, amongst others Seacombe Ferry. In May, 1878, they entered into a contract under their seal with the plaintiff for the removal by dredging of a large quantity of soil from the bed of the river at Seacombe Ferry for 5,000*l.*, the work to be executed under the direction and to the satisfaction of the engineer of the board by a given day, subject to an extension of time (as the engineer might think reasonable) in case the staging on the site to be dredged (which belonged to another contractor) should not be removed in time to enable the plaintiff to complete the work by the day named. The general superintendence of the works connected with their ferries was entrusted by the board to the engineer, subject to the control of a "ferry works committee," appointed under s. 200 of the Public Health Act, 1875, and acting under the powers conferred by that act. The contract between the board and the plaintiff contained a clause that, "if any difference shall arise between the local board and the contractor concerning the work hereby contracted for, or any part thereof, or concerning anything in connection with this contract, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor." In answer to a complaint by the plaintiff on the 15th of January, 1879, that his progress was obstructed by the non-removal of the staging, the engineer wrote, "I note that you are put to extra expense consequent on this delay, and I am prepared to compensate you for it on settlement." This was reported by the engineer to the ferry works committee, with an intimation that, "inasmuch that the plaintiff was not able to complete his contract until the piles had been removed, the board would be liable for the rent of the dredgers until the plaintiff could recommence." The committee thereupon, by a minute which was subsequently confirmed by the board, ordered the engineer to use all speed in the removal of the piles. The staging referred to was not in fact removed until September, 1879, and the plaintiff was put to considerable expense in consequence of this delay, by the detention of his plant and for the hire of dredgers and machinery, &c. The works were completed on the 11th of November. After some correspondence between the plaintiff and the engineer as to the amount due to the former on account of the contract and for delay, the latter gave the plaintiff the following certificate:—"I certify that Mr. George Lawson has completed to my satisfaction the work which he contracted to execute at Seacombe Ferry for the Wallasey Local Board, and that he is therefore entitled to the sum of 500*l.*, being the balance of the sum of 5,000*l.* mentioned in his contract after deducting 4,500*l.* already paid him on account; and I further certify that Mr. George Lawson is entitled to the further sum of 565*l.* 19*s.* 2*d.* for extra work executed by him at Seacombe Ferry in connection with the said contract, being the balance of 1,324*l.* 10*s.*, after deducting 758*l.* 10*s.* 10*d.*,

paid by the Wallasey Local Board at his request for the hire of dredger, tug, hoppers, and insurance; and that such several balances of 500*l.* and 565*l.* 19*s.* 2*d.* are to be received by Mr. George Lawson in full satisfaction of all his claims on the Wallasey Local Board for work executed by him at Seacombe pursuant to the contract and in connection with it." The plaintiff declined to accept those sums in satisfaction but claimed a balance of 2,489*l.* 3*s.* 11*d.* It was admitted that none of the forms prescribed by the Public Health Act, 1875, s. 174, were complied with, that there was no consideration for any contract entered into or action taken by the defendant board except as appeared in the case, and that no document other than the original contract was under the seal of the board:—Held, first, that looking at the terms of the contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend that time as he should think reasonable in case of the non-removal of staging, there was an implied contract on the part of the board that the removal of the staging should not be unreasonably delayed; and that for this breach, if proved, the plaintiff would be entitled to recover damages from the defendants—the proper measure of such damages being the loss which the plaintiff had unavoidably sustained in consequence of such unreasonable delay; secondly, that this was not a difference "concerning a matter in connection with the contract," as to which the decision of the engineer was to be conclusive. *Lawson* v. *Wallasey Local Board*, 11 Q. B. D. 229. Affirmed, 52 L. J., Q. B. 309, n.; 48 L. T. 507; 47 J. P. 437—C. A.

Payment—Completion of Work.]—A man must complete the thing required of him before he can charge for it; therefore, if he executes it in such a manner as that no benefit results to his employer, he is not entitled to any compensation. *Hammond* v. *Holiday*, 1 Car. & P. 384.

—— **Of Solicitors—Reasonable Exertions.**]—By an agreement between the plaintiffs, described as the engineers and solicitors of an intended company to be incorporated by act of parliament, of the one part, and the defendants, as contractors, of the other, it was agreed that, provided the act was obtained, the defendants should carry out the works at a certain price, and that in the event of the act not being obtained, the defendants should pay a sum not exceeding 300*l.* towards the expenses in endeavouring to obtain the act. The plaintiffs expended 300*l.* in endeavouring to obtain the act, but then abandoned the prosecution of the bill on the ground that no one would supply them with funds. The defendants thereupon employed other solicitors, and expended above 300*l.* in trying to get the act passed, but ultimately failed. In an action by the plaintiffs to recover from the defendants the 300*l.*:—Held, that it was a condition precedent to the plaintiffs' right to recover, that they should have used every reasonable exertion to obtain the act; and that having stopped merely from want of funds, they had no claim on the defendants. *Leakey* v. *Lucas*, 14 C. B. (N.S.) 491; 32 L. J., C. P. 289; 10 Jur. (N.S.) 127; 11 W. R. 839—Ex. Ch. S P., *Fishmongers' Co.* v. *Robertson*, 6 Scott (N.R.) 56; 5 Man. & G. 131; 12 L. J., C. P. 185.

—— **Of Contractor—Whether subject to Decision of Surveyor—Construction—Rectification.**]—A contractor made a tender for the execution of certain works, upon the understanding that he should not be bound by the decision of the surveyor as to any addition to or deduction from the amount of his tender, and entered into an agreement with the clerk of the peace acting on behalf of the magistrates for performance of the contract. This agreement provided that in case of any difference the decision of the surveyor was to be final. The bill sent in by the contractor exceeded the amount allowed by the surveyor in his certificate by a large sum. The contractor filed his bill praying payment of the sum due to him, and a declaration that he was not bound by the surveyor's certificate, or, if he was not entitled to such relief, that the agreement might be rectified so as to enable him to recover at law without being concluded by the certificate:—Demurrer to the bill overruled, the court holding that a person executing an agreement on a particular understanding was entitled to have it rectified in equity, if as executed by him it precluded him from proceeding at law. *Simpson* v. *Metcalfe*, 3 W. R. 88.

—— **For Transfer of Interest in Company—Completion of Work by Third Parties.**]—The plaintiff, an engineer, had been professionally concerned in promoting a scheme for converting the Chard Canal into a railway, and three successive acts were obtained for carrying it into effect, but were allowed to expire. The defendant, also an engineer, being desirous of constructing a railway over the same line of country, entered into a negotiation with the plaintiff, the result of which was reduced into writing and signed by the defendant as follows:—"Chard Canal and Railway Company. In consideration of your transferring all the interest you may have in this company, and handing me all the plans, papers, and documents in your possession, I undertake to pay you 600*l.* provided my friends succeed in carrying out the undertaking. The amount, 600*l.*, is to be paid as follows: 300*l.* on the first portion of the land required for the railway being acquired by the company, and the balance out of the three first payments received by me on the foot of the construction account." On the following day the defendant wrote upon the document (signing it), at the plaintiff's suggestion, the following:—"It is understood that the 600*l.* herein is to become payable on the obtaining of the act; one moiety in six months, and the residue in three annual instalments":—Held, that the condition of the friends' success in carrying out the contract ought not to be read as part of the agreement finally arrived at. *Bruff* v. *Conybeare*, 17 L. T. 664—Ex. Ch. Reversing *S. C.*, 13 C. B. (N.S.) 263; 9 Jur. (N.S.) 78.

Completion of Period—Entering into Covenant not to Trade.]—In a tender sent in by the defendants in answer to an advertisement offering a business for sale under the decree of the Court of Chancery, they offered to purchase the stock at a certain price, if the offer should be accepted by the court before a certain day; and if P., one of the partners in the business, would enter into a covenant not to trade, and would perform certain services, in consideration of which they agreed to pay him 100*l.* for the first year. The offer was accepted and P. died within a year of

the agreement, having to the time of his death rendered the services, but not having entered into the covenant, no such covenant having been tendered to him for execution:—Held, that neither the performance of the services for the entire year, nor the execution of the covenant, was a condition precedent to the payment of 100*l*. *Parsons* v. *Evans*, 12 W. R. 743.

Mutual Stipulations for Partnership.]—The plaintiff declared upon articles of partnership entered into between him and the defendant, by which the latter undertook to pay to the credit of the concern 5,000*l*.; the plaintiff undertook to pay 2,000*l*. or thereabouts, and to make arrangements with regard to the premises in which the business was to be carried on: the agreement provided that, if the plaintiff brought in less than 2,000*l*., the residue of that amount should be made up from the profits accruing due to him out of the business; that, after the 2,000*l*. had been so paid, a further sum of 3,000*l*. should be paid by the plaintiff either in money or by the deduction of one-third of his profits; that a licence should be obtained by the plaintiff at his own expense; that a banker's account should be obtained by the plaintiff at his own expense; and that the banker's account should be under the control of the defendant, as well as the employment of the clerks and servants, and the regulation of the general business accounts. The declaration alleged that the defendant had not paid the 5,000*l*. into the concern in pursuance of the agreement. A plea that the plaintiff had not procured the licence, and had not paid the 2,000*l*. into the concern, is bad, the procurement of the licence and the payment of the 2,000*l*. not being conditions precedent to the payment by the defendant of the 5,000*l*. *Kemble* v. *Mills*, 2 Scott (N.R.) 121; 1 Man. & G. 757; 9 D. P. C. 446.

Assignment of Patent—Payment of Fees.]—By an agreement between A. and B., it was agreed that A. should do all acts necessary, except the advance of money, for the purpose of procuring and perfecting certain letters patent, and should, immediately after the same were procured, execute an assignment of one-third share therein to B., and B. agreed to pay all fees and disbursements that might be necessary for procuring the letters patent, enrolling the specification, and otherwise in perfecting the same. By 16 & 17 Vict. c. 5, s. 2, all letters patent shall be made subject to the condition that the same shall be void, and the privileges thereby granted shall cease and determine at the end of three and seven years respectively, unless there be paid before the expiration of the three and seven years respectively two several sums of 50*l*. and 100*l*., as therein mentioned:—Held, that the execution of an assignment by A. was the whole consideration for the undertaking of B. to pay the sums mentioned in that section, and consequently a condition precedent to his right to sue B. for the non-payment thereof. *Hill* v. *Mount*, 18 C. B. 72; 25 L. J., C. P. 190; 4 W. R. 563. See also *Hall* v. *Bainbridge*, post, col. 133.

Assignment of Shares in a Society—Vesting.]—In an agreement between the plaintiff and W., of the one part, and the defendant of the other, in consideration of a sum of money, to be paid in five portions—one to the plaintiff for shares held by him in a society; one to the plaintiff for shares held in the society by T., a stranger to the agreement; one to W., for shares held by him in the society; and one to G., a stranger to the agreement, for shares held by him in the society—the plaintiff and W. agreed that the entire property in the society should vest in the defendant. The plaintiff sued on this agreement, and the defendant pleaded that the shares of G. and T. had not vested in him, and that they had repudiated the contract; that the shares mentioned in the agreement constituted all the shares in the society; and that the substantial part of the agreement was, that all shares of the society should vest in the defendant:—Held, that the plaintiff was not precluded from recovering the proportion of the money for the shares actually delivered by him, and received by the defendant. *White* v. *Beeton*, 7 H. & N. 42; 30 L. J., Ex. 373; 7 Jur. (N.S.) 735; 4 L. T. 474; 9 W. R. 751.

Successive Deliveries—Non-payment for one Delivery.]—The respondents bought from the appellant company 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalments, and in the beginning of February made a further delivery. On the 2nd of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, bonâ fide, under the erroneous advice of their solicitor that they could not, without leave of the court, safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—Held, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance. *Mersey Steel and Iron Co.* v. *Naylor*, 53 L. J., Q. B. 497; 9 App. Cas. 434; 51 L. T. 637; 32 W. R. 989—H. L. (E.)

Declaration, that it was agreed that plaintiff should purchase of defendant 30,000 tons of coal, and that defendant should ship the same on board certain vessels for six months from 1st August, and should load each vessel within twenty-four hours after notice that she was

ready to be loaded at T. docks. Averment, that defendant broke the agreement in this, that he did not load a certain screw steamer as agreed within twenty-four hours after she was ready; and afterwards further broke the agreement, and absolutely refused to perform it, or to ship any more goods for plaintiff as agreed. Plea to the second breach, that before defendant absolutely refused as alleged, plaintiff absolutely refused to pay, according to the agreement, for certain coals that had theretofore been shipped for and delivered by defendant to plaintiff, although requested by defendant to pay for the same according to the agreement, wherefore defendant refused to load until such payment was made:—Held, a bad plea. *Clarke* v. *Burn*, 14 L. T. 439.

Sum Payable on Sale of Works and Assignment of Patent.]—A., having an estate for sale which he conceived might be more advantageously disposed of in connection with a patent right possessed by B., a negotiation took place between them which resulted in the following proposal from B.:—"I give A. full liberty to make use of my patent-right for the jug in his advertisement for the sale of the Arley works, upon the recognised condition, that if the works are sold I am to receive 1,000*l*." This proposal was assented to by A., and the patent was tendered to him; but he required an assignment, and B. not being willing to make an assignment, the negotiation went off. The estate, without the patent right, was afterwards conveyed to a company, which A. was instrumental in forming, and in which he became a shareholder:—Held, that the event upon the happening of which B. was to be entitled to the 1,000*l*. had never happened. *Pelly* v. *Sidney*, 5 C. B. (N.S.) 679; 28 L. J., C. P. 182; 5 Jur. (N.S.) 793.

Execution of Bond to Perform Agreement]—A. covenanted forthwith to procure a vessel and stow a cable on board at a certain wharf, and to have her ready for sea before the 15th of July, 1855, and B. covenanted to provide the cable, and to pay A. 5,000*l*. by instalments: the first instalment of 1,000*l*. to be paid seven days after the arrival of the vessel at the wharf, and the other instalments at other times, with other covenants; and it was mutually agreed that each party should, within ten days after the execution of the agreement, give and execute to the other a bond, with two sureties in 5,000*l*., for the due performance of the covenants on his part. In an action on this agreement, the breach assigned being the non-providing of the cable by B.:—Held, that the giving of the bond was a condition precedent to A.'s right to sue upon the contract. *Roberts* v. *Brett*, 11 H. L. Cas. 337; 34 L. J., C. P. 241; 11 Jur. (N.S.) 377; 12 L. T. 286; 13 W. R. 587.

Covenant against Distress by Superior Landlord.]—To a declaration upon an absolute contract by the defendant to indemnify the plaintiff, his tenant, against the consequences of the non-payment of his rent to the superior landlord, alleging for breach, that, the rent being in arrear, the goods of the plaintiff were seized by the superior landlord, the defendant pleaded, that, at the time of the distress, more was due from the plaintiff to the defendant for rent than the amount distrained for:—Held, no answer, the payment of the rent by the plaintiff not being a condition precedent. *Briant* v. *Pilcher*, 16 C. B. 354; 1 Jur. (N.S.) 1020; 3 W. R. 483.

Renewal of Lease—Covenant for.]—A lease for twenty-one years, granted in pursuance of covenants for renewal, contained a covenant by the lessors that they would "from time to time before the expiration of the term thereby granted, whenever thereunto required by the lessees, and upon receiving from them" a fine of 1,000*l*., grant to the lessees a new lease, the lessees executing a counterpart, and paying the expenses of the lease and counterpart, and paying to the lessors "on the execution thereof respectively" a fine of 1,000*l*.; and every such new lease was to contain a covenant for renewal, "it being the intention of the parties that the lease should be renewable for ever at the option of the lessees, in pursuance of the covenant in the lease." The lease also contained a covenant by the lessees that if they should not "before the expiration of the term avail themselves of the option of requiring a new lease, and on the execution of the new lease pay the fine of 1,000*l*.," then the lessees would, previous to the expiration of the term, perform certain works upon the demised premises, so as at the expiration of the term to render up a good dwelling-house:—Held, that the payment of the fine and the execution of the new lease before the expiration of the existing term were not conditions precedent to the lessees' right to a renewal, but that a requisition by the lessees within the term was a condition precedent, and that a letter from the secretary of a company and of trustees of a guarantee fund, such company and trustees being the persons interested in the lease, written to one of several trustees of one moiety of the freehold being also tenant for life of the other moiety, was a sufficient compliance with this condition to entitle the lessees to renewal. *Lennon* v. *Napper* (2 Sch. & Lef. 682) considered, and not followed. *Nicholson* v. *Smith*, 52 L. J., Ch. 191; 22 Ch. D. 640; 47 L. T. 650; 31 W. R. 471.

Neglect to Grant Lease.]—Agreement that on payment by A. to B. of a certain sum by instalments on certain days, with interest on each instalment, B. will grant a lease of land. A. agreed to accept the lease, but failed to pay any of the instalments or interest:—Held, that the granting of the lease by B. was not a condition precedent to the payments by A. *Baggallay* v. *Pettit*, 5 C. B. (N.S.) 637; 28 L. J., C. P. 169; 5 Jur. (N.S.) 868.

Advance Note.]—A captain of a vessel signed a sailor's advance note, by which he promised that he would, ten days after the vessel had sailed from the port of L., pay 6*l*. to any person who should advance 6*l*. to H., provided he should sail in the vessel from the port. The plaintiff advanced H., on this note, 3*l*. 5*s*. in cash and 2*l*. 15*s*. worth of wearing apparel; but if he had advanced the whole amount in cash, he would have charged a discount of 1*s*. 6*d*. in the pound. H. sailed in the vessel from the port:—Held, that the condition of advancing 6*l*. on the note had been fulfilled, and that therefore after the ten days had expired the holder of the document was entitled to recover the 6*l*. from the captain. *M'Kune* v. *Joynson*, 5 C. B. (N.S.) 218; 28 L. J., C. P. 133; 6 W. R. 658.

Position of Ship.]—By a memorandum of charter-party, dated London it was agreed be-

tween A., therein described as "owner of the good ship or vessel called the M., of 420 tons or thereabouts, now in the port of Amsterdam," and B., that the ship being tight, staunch, strong, and every way fitted and ready for the voyage, should, with all possible despatch, proceed direct to N. In an action by the shipowner against the charterer, for not loading the agreed cargo:—Held, that the words, "now in the port of Amsterdam," amounted to a condition that the ship was there at the time of making the memorandum of charter-party. *Behn* v. *Burness*, 1 B. & S. 877; 31 L. J., Q. B. 73. Reversed on appeal, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur. (N.S.) 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Naming Vessels.]—By a written agreement the plaintiff contracted to sell to the defendant from 300 to 350 bales of whitewashed Donskoy fleece wool, laid down at certain ports in England, "deliverable at Odessa during August then next, to be shipped with all despatch, warranted fair average quality; but should they prove otherwise, to be taken with fair allowance, subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped." To an action for a breach of this contract, by not accepting the wools, the defendant pleaded that the wools were bought, with the knowledge of both parties, for the purpose of reselling in the course of the defendant's business; that wool is an article of fluctuating value, and not saleable, until the names of the vessels in which it was shipped should have been declared, according to the contract; and that the plaintiff had neglected to declare the names of the vessels in which the wools were shipped until after an unreasonable time after they had been shipped:—Held, that the provision in the contract, that the names of the vessels in which the wools were shipped should be declared as soon as they had been shipped, was a condition precedent to the defendant's obligation to accept and pay for them, and, consequently, that the plea was good. *Graves* v. *Legg*, 9 Ex. 709; 2 C. L. R. 1266; 23 L. J., Ex. 228.

Loading and Despatching Vessels.]—A debtor gave to his creditors the following order, addressed to the defendant:—"Please to pay H. & P. (on the 'Royal Oak' being loaded and sailed), out of the advance, 73*l.*; and the defendant signed it. The ship, having loaded, crossed the bar of Sunderland harbour, when the captain left her, and went ashore to get the ship's papers and sign the bills of lading; the ship in the meantime stood off and on, under easy sail, waiting for the captain's return:—Held, first, that the loading and sailing of the ship were conditions precedent to the payment of the money. *Hudson* v. *Bilton*, 6 El. & Bl. 565; 26 L. J., Q. B. 27; 2 Jur. (N.S.) 784.

Held, secondly, that the ship had not sailed. *Ib.*

The plaintiffs, who owned an unfinished steamer at Newcastle, chartered her to the defendants (who knew her state) by a charter-party, which provided "that the ship, being tight, &c., should, with all convenient speed (on being ready), having liberty to take an outward cargo for owner's benefit direct on the way, proceed to Alexandria," and there take a cargo for England. When the time for a trial trip came, the builders objected to her returning to Newcastle on account of the dangerous bar; the plaintiffs therefore put on board ballast and a cargo for London, where she was to be completed, and all defects were to be put right, instead of in Newcastle. The ship arrived in London, was put right, and no delay occurred by these proceedings. She then, on her voyage out, took a cargo to Constantinople, which caused her to arrive at Alexandria a few days later than she otherwise would have done. The defendants refused to furnish a cargo, whereupon the plaintiffs brought an action:—Held, that there had been no breach of any condition precedent by the plaintiffs; that they were entitled to succeed in their action; and that the defendants had their remedy by cross action for any damage that had accrued to them. *M'Andrew* v. *Chapple*, 35 L. J., C. P. 281; L. R. 1 C. P. 643; 12 Jur. (N.S.) 567; 14 L. T. 556; 14 W. R. 891.

Goods to be taken "Ex Quay."]—The terms of a bought note were:—"500 bales of cotton . . . guaranteed October shipment, to arrive from Calcutta to Liverpool, . . . guaranteed fair Bengal. . . . The cotton to be taken ex quay; customary allowances of tare and draft; and the invoice to be dated from date of delivery." The vendors transferred the cotton after its arrival from the quay to a warehouse before they had granted a delivery order to the vendors, and then the vendees refused to accept it. In an action against the vendors for non-delivery:—Held, that the stipulation that the cotton should be taken ex quay was not a condition precedent to the vendees' liability to accept. *Neill* v. *Whitworth*, 18 C. B. (N.S.) 435. Affirmed on appeal, 1 H. & R. 832; 35 L. J., C. P. 304; L. R. 1 C. P. 684; 12 Jur. (N.S.) 761; 14 L. T. 670; 14 W. R. 844—Ex. Ch.

Readiness to Receive.]—A declaration on an agreement "to give yearly free to the plaintiff during three years twenty tons of coals to be put free on board ship at Cardiff for the use of the plaintiff," and a breach, that the defendant did not give the plaintiff yearly, or at any time during the three years, twenty tons of coals, or any coals, free on board ship at Cardiff or elsewhere, is bad, for want of an averment that the plaintiff was ready and willing to receive the coals, and that he had named a ship on which the defendant was to deliver them. *Armitage* v. *Insole*, 14 Q. B. 728; 19 L. J., Q. B. 202; 14 Jur. 619. S. P., *Sutherland* v. *Allhusen*, 14 L. T. 666.

By a contract made between the Eastern Counties Railway Company and the defendant, the defendant was to supply, and the company was to purchase, subject to the terms and to the extent thereinafter mentioned, all the coke that should be required by the company for working their railways between London and Cambridge and London and Colchester. The company engaged to take from the defendant 550 tons and 100 tons of coke weekly during the period of seventeen years: and that if they should require more than those quantities for the working of their railways they would take the same from the defendant, with a proviso, that if they should require less than the stipulated quantities, the supply should be reduced accordingly, upon their giving three months' notice. And the company engaged that so long as the defendant should punctually and duly supply the said coke, and so long as the same should be of the best quality,

they would abstain from buying coke for their railways from any other persons:—Held, that the readiness and willingness of the company to take from the defendant all the coke they required for the purpose of their railways was not a condition precedent to their right to insist upon being supplied with the quantities expressly stipulated for, and consequently, that the fact of the company having bought coke from other persons afforded no answer to an action by them against the defendant for a failure to deliver the quantities contracted for. *Eastern Counties Ry.* v. *Philipson*, 16 C. B. 2; 24 L. J., C. P. 140.

Agreement to forward Goods — Delay in Supplying.]—A railway company agreed with the plaintiff to carry for him, at the rate of 170 tons a day, 30,000 tons of coal from a colliery to London, and to find waggons at the colliery and haul them from York to London, another railway company undertaking to haul the waggons from the colliery to York; and it was further agreed, that the contract was founded on the basis that there should be no unreasonable detention of the waggons by the latter company.—Held, that it was a condition precedent to the defendant's obligation to carry the coal, that there should be no unreasonable delay by the latter company in hauling the waggons. *Johnassohn* v. *G. N. Ry.*, 10 Ex. 434; 3 C. L. R. 192; 24 L. J., Ex. 31; 3 W. R. 62.

To an action for not delivering iron sold by the defendant to the plaintiff, under a contract "to be delivered as required," a plea that the plaintiff did not, within a reasonable time, request the defendant to deliver the iron, is bad, since the defendant was bound to inquire of the plaintiff whether he would have the iron, before he could rescind the contract on the ground that he was not within a reasonable time required to deliver it. *Jones* v. *Gibbons*, 8 Ex. 920; 22 L. J., Ex. 347; 8 W. R. 438.

Failure of Purpose of Contract.]—Projectors of a railway company entered into a treaty with A. (a landowner), whereby the latter agreed not to oppose their bill in parliament, and an agreement was executed by them (as the executive directors of the company), by which the company, upon its incorporation, was to pay to A. 1,000*l.* for land of which he was the freeholder, and which was required for the purpose of making the railway, and 4,000*l.* for residential damage. A stipulation was also made that the company was to make a tunnel through part of his property, and a station was to be erected on another part. The company was incorporated, but not being able to raise sufficient funds no attempt was made to make the railway, and the money subscribed was returned to the shareholders:—Held, that the contract was conditional upon the making of the railway, and therefore that A. was not entitled to the moneys payable thereunder. *Preston* v. *Liverpool, Manchester, and Newcastle Junction Ry.*, 5 H. L. Cas. 605; 25 L. J., Ch. 421; 2 Jur. (N.S.) 241; 4 W. R. 383.

A railway company contracted to purchase premises of P. for making a branch railway for a sum of money payable at the first term of Martinmas or Whitsunday after the company, on obtaining their act, should have begun to make the railway under the powers of such act. The company obtained their act, under which they were empowered to enter upon the premises of P. and to make the line, but they never availed themselves of such power, nor did they commence making the railway:—Held, on proceedings being taken by P. to enforce the agreement, that it was conditional upon the company obtaining the act and beginning to make the railway. *Edinburgh, Perth, and Dundee Ry.* v. *Philip*, 2 Macq. H. L. 514; 3 Jur. (N.S.) 249; 5 W. R. 377.

After Part Performance of Executory Contract.]—By an agreement between the plaintiff and the defendant of the 7th of September, 1867, after a statement of the weekly expenditure and profits of the plaintiff's business as a printer and publisher of a newspaper, it was agreed that, in the event of the business being proved by the books kept by the plaintiff to realise a clear profit of 7*l.* per week, as shown by the above statement, the defendant should pay the plaintiff 50*l.* on the 24th of December, 1867, 50*l.* on the 24th of June, 100*l.* at Christmas, 1868, and 200*l.* within four years from the 25th of December, 1867. In consideration of the premises, the plaintiff agreed to sell to the defendant all the plant and furniture on the premises, and the goodwill of the business, with all the earnings subsequent to the 30th of September, 1867, and the house and premises then occupied by the plaintiff. The defendant, on the 30th of September, 1867, entered into possession of the house, with the plant and furniture, and of the business, which he thenceforward carried on until he afterwards sold it. After the lapse of the four years, the plaintiff brought an action for the instalments, and the defendants sought to set up as a defence that the business was not proved to be worth 7*l.* clear profit per week:—Held, that, assuming that this, if the contract had remained executory, would have been a condition precedent, yet the defendant, having had a substantial part of the consideration, could not now set up the non-performance as a defence. *Carter* v. *Scargill*, L. R. 10 Q. B. 564; 32 L. T. 694.

Contract as to Crown Lands—Warrant from Treasury.]—Under the statutes 57 Geo. 3, c. 97, and 10 Geo. 4, c. 50, the issuing of a special warrant from the Treasury to the Commissioners of Woods and Forests is not a condition precedent to the making of any contract between the commissioners and the purchasers of Crown lands; it is sufficient if a special warrant be obtained before certificates of sale are granted to the purchaser. *Att.-Gen.* v. *Sitwell*, 1 Y. & Coll. 559; 5 L. J., Ex. Eq. 86.

Warrant is granted for nominating two lives to an estate held under the Crown as part of the duchy of Cornwall, but subject to these conditions, viz. provided the estate be perfected in six months after the date of the warrant; that the fine be first paid into the hands of their receiver-general or his deputy, and a certificate of such payment obtained under one of their hands and seals. These conditions not being complied with according to the strict letter of the warrant, it was declared void, and ordered to be vacated. *Moore* v. *Crosse*, 2 Bro. P. C. 241.

b. Time.

Reasonable Diligence.]—Whenever a party to a contract undertakes to do some particular act the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is

silent as to time, the law implies a contract to do it within a reasonable time. *Ford* v. *Cotesworth*, 9 B. & S. 559 ; 38 L. J., Q. B. 52 ; L. R. 4 Q. B. 127; 19 L. T. 634 ; 17 W. R. 282. Affirmed, 10 B. & S. 991 ; 39 L. J., Q. B. 188 ; L. R. 5 Q. B. 544 ; 23 L. T. 165 ; 18 W. R. 1169—Ex. Ch.

Where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, the law implies that each contracts that he shall use reasonable diligence in performing his part. *Ib.*

User of Patent—When Royalty Payable.]—A declaration stated that the plaintiff had obtained a patent for steam-engines ; that the defendant was about to build a steam ship ; that the plaintiff agreed to allow him the use of his patent in the construction of a pair of steam-engines about to be made for the ship, and also to use his patent in engines for any other ships thereafter ; the defendant to pay 2,000*l.*, viz. 1,000*l.* on the 1st August, 1837, and the remainder on the 1st July, 1838 ; and also 5*l.* per horse power for every engine "which should at any time thereafter be made or manufactured, and used on board any other ship of the defendant, in which the principle of the plaintiff's patent should be used or adopted, the same to be paid on the entering into a contract with an engine-maker for the manufacturing of such engine" :—Held, that the 5*l.* per horse power was payable as soon as the defendant entered into a contract with the engine-maker, and that it was payable although the contract with the engine-maker was afterwards rescinded, and no engine on the plaintiff's principle was either used or manufactured ; for the consideration for the promise was the licence to use, and not the user. *Hall* v. *Bainbridge*, D. & M. 333 ; 5 Q. B. 233 ; 13 L. J., Q. B. 5 ; 8 Jur. 171.

—— **When Royalties suspended on Infringement—Notice.**]—Plaintiff being possessed of a patent, granted to defendants the exclusive licence to work it in a certain district, by a deed by which the latter covenanted to pay certain royalties, and to give every information the better to enable the patentee to support the letters patent ; and the patentee covenanted for quiet enjoyment of the patent by the defendants, and that, "in case any person should work the patented processes, the patentee would, at his own cost, commence and carry on all such actions, &c., as should be necessary to establish the validity of the patent and to put a stop to the working of the patented processes by such person ; and that in case the patentee should fail or neglect so to establish or maintain the validity of the patent and to put a stop to the working of the patented processes by such other person, he (the patentee) would not call upon the defendants, nor should the defendants be liable thenceforth to pay any royalty until the patentee should, by authority of law or otherwise, have restrained such person from working under the letters patent" :—Held, that the condition for suspension of payment of the royalties did not come into operation until the patentee had notice of an infringement, and until after the lapse of a reasonable time to allow him an opportunity of instituting proceedings to restrain it. *Henderson* v. *Mostyn Copper Co.*, L. R. 3 C. P. 202.

Agreement with Trustees—Sanction of Court within certain Time.]—By an agreement between the trustees of a marriage settlement, and three of the committee of management of a projected railway company, reciting that a bill for the formation of the railway was pending in the House of Commons, and that the railway was intended to pass through a park which was subject to the settlement ; it was agreed that, if the bill should pass into law in the then present or the next session, the company should, within six calendar months after the passing of the bill, and before commencing the railway on any part of the park and hereditaments, pay the trustees 11,700*l.*, and that in consideration of that sum, the company should have conveyed to them nineteen acres of the land ; the whole of the agreement to be null and void, unless sanctioned by the Court of Chancery in a cause of Lawrence *v.* Porcher, and so much of that agreement as the court should require to be inserted in the act :—Held, that the trustees obtaining the sanction of the court to the agreement within six months after the passing of the bill was a condition precedent to their right to sue for the money. *Porcher* v. *Gardner*, 8 C. B. 461 ; 19 L. J., C. P. 63 ; 14 Jur. 43.

Taking Leaseholds — Due Completion of Alterations]—A. agreed to make alterations in a house, and to complete the whole work necessary by the 14th of June ; B., in consideration of these conditions being fulfilled, agreed to take the house on the 24th of June for three years, with the option of a lease for seven, fourteen, or twenty-one years :—Held, that the completion of the whole work by the 14th of June was a condition precedent to B.'s liability to take the house on the 24th. *Tidey* v. *Mollett*, 16 C. B. (N.S.) 298 ; 33 L. J., C. P. 235 ; 10 Jur. (N.S.) 800 ; 10 L. T. 380 ; 12 W. R. 802.

Forbearance to Sue up to Certain Date.]—The defendant, in consideration of the plaintiff forbearing to take any proceedings against A., guaranteed to the plaintiff the payment of a certain sum on the 13th December then next :—Held, that it was a condition precedent to the plaintiff's right to recover on the guarantee that he did forbear suing A. until the 13th December. *Rolt* v. *Cozens*, 18 C. B. 673 ; 25 L. J., C. P. 254 ; 2 Jur. (N.S.) 1073.

Date of Sailing—Act of God.]—A merchant at Liverpool entered into a charterparty on the following terms :—"It is mutually agreed between the owner of the ship "Zwaan," now at Amsterdam, and to sail thence for Liverpool on or before the 15th of March next, and the charterer, that the ship being tight, staunch, and strong, shall with all convenient speed be made ready, &c." The exception was as follows :—"Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies throughout this charterparty." The ship did not sail from Amsterdam, in consequence of what was admitted to be the act of God :—Held, that notwithstanding the words throughout this charterparty, the sailing of the ship from Amsterdam on the 15th of March was a condition precedent to the obligation of the charterer to take and load the ship. *Crookewit* v. *Fletcher*, 1 H. & N. 893 ; 26 L. J., Ex. 153 ; 5 W. R. 348.

Purchase of Stock.]—In bargains for the purchase of stock, time is of the essence of the

contract. *Doloret* v. *Rothschild*, 1 Sim. & S. 590; 2 L. J. (O.S.) Ch. 125; 24 R. R. 243.

Purchase of Timber.]—In a contract for the purchase of timber time is of the essence of the contract; and if by difficulties improperly raised by the vendor, the timber is prevented from being felled and carried away at the time limited by the agreement, the court will not afterwards enforce the performance of the contract. *Arkwright* v. *Stoveld*, 3 L. J. (O.S.) Ch. 49.

Due Payment of Interest—Further Credit.]—The plaintiff agreed to supply the defendant with a quantity of bricks, upon the following terms:—"Terms of payment, four months' account; and at the end of four months a settlement shall be made, and eight months longer will be given on your paying interest on the amount at the rate of five per cent.: and if a further three months is required, it will be given on your paying the current rate of interest on the amount".—Held, that the payment of interest was not a condition precedent to the defendant's having the eight months' and three months' further credit. *Dodd* v. *Ponsford*, 6 C. B. (N.S.) 324.

Payment of Purchase Money—Sale.]—Decree (upon the answer admitting a contract, and a letter offering to sell at a valuation) for a conveyance on payment of the purchase money into the bank by the plaintiff on a certain day, in default of payment, the bill to be dismissed with costs. No binding contract until payment; the estate, therefore, did not pass by a previous devise, but descended to the heir. *Gaskarth* v. *Lowther*, 12 Ves. 107; 8 R. R. 310.

On Sales of Goods.]—*See* SALE OF GOODS.

On Sales of Land.]—*See* VENDOR AND PURCHASER.

c. Arbitration.

Where Arbitration a Condition Precedent.]—A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. *Collins* v. *Locke*, 48 L. J., P. C. 68; 4 App. Cas. 674; 41 L. T. 292; 28 W. R. 189—P. C.

Fixing Price.]—According to the Roman and English law, as administered both in courts of law and equity, a fixed price is an essential ingredient in a contract of sale; a contract, therefore, which does not settle the price, is valid and complete only when and if the party to whom it is referred fixes it, and is otherwise totally inoperative. *Milnes* v. *Grey*, 14 Ves. 408; 9 R. R. 307.

Ousting Jurisdiction of Courts.]—When a contract has provided that the certificate of the engineer or of an arbitrator shall be a condition precedent to payment, the court does not obtain jurisdiction because of the power to refer to arbitration. *Sharpe* v. *San Paulo Ry.*, L. R. 8 Ch. 597; 29 L. T. 9.

When under an agreement, legislatively confirmed, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out:—Held, that the jurisdiction of the courts was, by this agreement, excluded, and that all disputes arising under it must be settled by arbitration. *Caledonian Ry.* v. *Greenock and Wemyss Bay Ry.*, L. R. 2 H. L. Sc. 347.

The plaintiff bought of the defendant jute of a particular mark, to arrive from Calcutta, the defendant guaranteeing the jute to be of the average quality of that mark as hitherto imported, and promising that if found to be inferior a fair allowance should be made to the plaintiff. The quality, as alleged by the plaintiff, was found to be inferior, and damages were claimed accordingly. The defendant stated in defence that the purchase was subject to a term that in the event of any dispute arising out of the contract, it was to be referred to jute brokers for arbitration, and that any reference to arbitration was to be demanded within fourteen days of final landing of the jute. The defendant alleged that this was a dispute arising out of the contract, and no reference was demanded within the stipulated time:—Held, that this was a good defence to the action. *Pompe* v. *Fuchs*, 34 L. T. 800.

All contracts purporting to oust the courts of their jurisdiction altogether are void, but the determination by arbitration of the amount of damages to be recovered or money to be paid may lawfully be made a condition precedent to the right to maintain an action. *Scott* v. *Avery*, 5 H. L. Cas. 843; 25 L. J., Ex. 308; 2 Jur. (N.S.) 815; 4 W. R. 746.

A building contract contained a clause that, in case of difference between the contractor and his employer, the award in writing of the architect in all matters connected with the works, or their execution, or the value of extra work, or reductions, or the meaning of the plans or specifications, should be final and conclusive, so far as the law permitted, and such award should be a condition precedent to any proceeding whatever at law or in equity in respect of any matter or thing which could or might be the subject of such award:—Held, that the architect's award was not a condition precedent to an action by the employer against the contractor for not completing the buildings, and for leaving them unfinished. *Mansfield* v. *Doolin*, Ir. R. 4 C. L. 17.

Rules of Mutual Insurance Society.]—A policy in a mutual insurance society was subject to the following rules:—(1) That the directors should have full power to adjust, settle and decide all claims and determine all disputes between the society and its members, and that their decision should be final, and that no member should be allowed to bring any action for any claim on the society "except as is provided by these presents;" and (2) that in all cases of loss of any vessel the directors should examine into the circumstances and make such decision and regulations thereon as in their judgment the case might require, and that the owner should not prosecute any action without their consent; and (3) that if any member

should be dissatisfied with the decision of the directors he should take certain specified steps to obtain a revision thereof, in the first instance by a board of directors or ultimately by a special general meeting, the decision of which last was to be final:—Held, that an action could be maintained on a policy for a total loss though no final decision by a special general meeting had been obtained in accordance with these rules. *Edwards* v. *Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563; 34 L. T. 457. Reversing 44 L. J., Q. B. 67; 23 W. R. 304.

The rules of a marine insurance association provided that disputes should be referred to arbitration:—Held, that the assurer was not bound to submit a legal point to the decision of arbitration before suing in equity. *Alexander* v. *Campbell*, 41 L. J., Ch. 478; 27 L. T. 25.

Lessor and Lessee—Compensation for Excessive Amount of Game.]—A lessee covenanted with the lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators, or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares and rabbits as would do no injury, but had kept such a number as did injury, and had neglected to pay any compensation:—Held, that upon the true construction of the lease the covenant to refer the amount of compensation was a collateral and distinct covenant, and that the action was maintainable, although there had been no arbitration. *Dawson* v. *Fitzgerald* (*Lord Otho*), 45 L. J., Ex. 893; 1 Ex. D. 257: 35 L. T. 220; 24 W. R. 773—C. A.

Delay by Appraiser—Estoppel.]—A. agreed to sell to B. his interest in a public-house, and his furniture at an appraisement, to be made by two appraisers, the same to be paid for on B.'s taking possession, which was to be on or before the 25th of March next; and the sum of 30*l.* was paid by B. as a deposit; and he agreed that if he should not complete his part of the agreement, the sum so paid should be forfeited. The buyer and seller appointed appraisers. On the 25th of March the two appraisers met, and the seller's appraiser was informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day; no objection was made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract:—Held, that it was incumbent on the seller, if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer, and not having so done, that the latter was entitled to recover back the deposit. *Carpenter* v. *Blandford*, 8 B. & C. 575; 3 Man. & Ry. 93; 7 L. J. (o.s.) K. B. 58.

Award of One of Two Arbitrators.]—Where the rules of certain races provided that all disputes should be settled by the stewards, and two stewards had been named, one of whom, on a dispute arising as to which horse was entitled to the stakes of a race, gave his opinion, in writing, that the plaintiff was entitled to them:—Held, that he could not recover the stakes on the award of that steward alone, although it appeared that the other steward had stated that he would acquiesce in whatever his colleague did. To make the sole award of the latter available, it must be clearly shown that both the disputing parties, and the stakeholder also, submitted to his sole authority. *Marryatt* v. *Broderick*, 2 M. & W. 369; M. & H. 96; 6 L. J., Ex. 113; 1 Jur. 242.

A declaration for the price of goods bought, subject to the valuation of A. and B., stated that A. refused to value, but did not state that the defendant prevented him from valuing. It then averred that a valuation was made by B. alone:—Held, that the defendant was not liable for the price of the goods at the valuation of B. alone. *Thurnell* v. *Balbirnie*, 2 M. & W. 786; M. & H. 235; 6 L. J., Ex 255; 1 Jur. 847.

Award by Arbitrator's Deputy.]—In an action on an agreement for the sale of goods at a valuation to be made by A., the issue was, whether a valuation was made by A. The goods were in fact valued by B., A.'s clerk:—Held, that the defendant was not bound by it, unless it was shown that it was agreed between the parties that B.'s valuation should be taken as A.'s; and that the fact of the defendant's seeing B. valuing, and making no objection until B. told him the amount, was not evidence of such agreement. *Ess* v. *Truscott*, 2 M. & W. 385; M. & H. 75; 6 L. J., Ex. 144; 1 Jur. 358.

Duty as to Valuer.]—An agreement to settle disputes between two parties as to the amount to be paid by one of them in respect of the value of the goods belonging to or work done by the other of them, by a reference to two valuers, one to be appointed by each party, does not import any undertaking by the former that the valuer whom he may appoint shall act in the valuation, nor any liability for his not acting. *Cooper* v. *Shuttleworth*, 25 L. J., Ex 114.

The party is only bound to appoint a valuer on his part, and if the person appointed does not act, the other party is remitted to his original cause of action, and may revoke his submission, or he may possibly, if the valuer has undertaken to act and failed in his duty, have a right of action against him, but has no right of action against the party who appointed him. *Ib.*

Evidence as to Fact of Valuation.]—It was agreed between A. and B., that B. should buy of A. certain plant, materials, and tools, at a valuation to be made by A. and a person to be appointed by B., and that B. should pay for the same by a bill for 150*l.* at two months from the valuation, and by another bill for the balance of the valuation at three months after date. Under this agreement B. was let into possession, and A. and one C. (who represented B.), met and proceeded to value, having a list of the articles to be valued, as to all of which, except certain timber, the prices were finally agreed upon; but, as to the timber, the price per foot and the superficial measurement only were ageeed upon, the calculating the cubical contents and the carrying out the amount being left to be filled in by B.'s foreman. A. and C. never met again, and did not agree upon the sum total, but B. (after action brought for it) paid the 150*l.*:—Held, sufficient

evidence to warrant the jury in finding that a valuation had been made by A. and C. *Gordon* v. *Whitehouse*, 18 C. B. 747; 25 L. J., C. P. 300.

Failure of Arbitration.]—The defendant, as incoming tenant, agreed in writing with the plaintiff, as outgoing tenant, to purchase straw upon the farm at a valuation to be made by two persons, or their umpire. Valuers were appointed by the parties, who did not agree upon the valuation or appoint an umpire, and in the meanwhile the defendant consumed the straw:—Held, that the plaintiff was entitled to recover for the straw as upon a quantum meruit, the arbitration agreed to by the parties having become impracticable. *Clarke* v. *Westrope*, 18 C. B. 765; 25 L. J., C. P. 287.

Appointment and Notice thereof.]—Agreement for the sale of crops, the price to be paid on the 5th June, the valuation to be made by two persons, one named by each party, and, if they disagreed, by a third person, to be named by them before entering upon the valuation; the valuation to be made by the 3rd June, and each party to appoint a referee by the 31st May; and in case either party neglected or refused to nominate a referee within the time appointed, the referee of the other party alone to make a final decision:—Held, that the nomination of a referee included notice of it to the other party; and therefore, that a nomination on the 31st May, and notice of it to the other party on the 1st June, did not satisfy the agreement. *Tew* v. *Harris*, 11 Q. B. 7; 17 L. J., Q. B. 1; 11 Jur. 947.

Neglect to Appoint.]—Declaration on a written agreement, by the plaintiff, to let land to the defendant, with the right of sporting, the defendant to make satisfaction to the plaintiff's tenants for damage done by game on their farms; the amount to be ascertained by a valuer, to be chosen by each party, and an umpire; that the defendant entered, and preserved the game, which did damage to the tenants; that he was requested by the plaintiff to appoint a valuer. Breach, that, although, within a reasonable time, a valuer was appointed by the plaintiff, and notice given to the defendant, and the plaintiff requested him to give the name of a referee on his part, and fix a time for meeting, to ascertain the damage, in default of which the plaintiff's valuer would alone ascertain the damage done; yet the defendant did not give notice to the plaintiff of any valuer chosen by him, nor has he ever made satisfaction:—Held, that after verdict it must be taken that the declaration alleged a refusal by the defendant to appoint a valuer. *Thomas* v. *Fredericks*, 10 Q. B. 775; 16 L. J., Q. B. 393; 11 Jur. 942.

Partial Valuation.] — A declaration stated, that the defendant covenanted to pay the plaintiff 400*l.* in moieties on the 11th November and 11th May; and that the drugs, stock in trade, utensils, and shop fixtures in certain premises, should be valued by a person to be named by the plaintiff and the defendant, and a moiety paid immediately upon such valuation, and the residue at the expiration of a year. That the drugs, &c., were valued by L., named by the plaintiff and the defendant, at 190*l.* Breach, that the defendant refused to pay the second moiety of the 400*l.* on the 11th May, and the residue of the 190*l.* at the expiration of the year. Plea, that the drugs, &c., were not valued by a person named by the plaintiff and the defendant. It appeared that L. was agreed upon by the plaintiff and the defendant to value the drugs, stock in trade, utensils, and shop-fixtures, and that, after the valuation was complete, except as to the drugs, the sum of 70*l.* was agreed on by the parties as the value of the drugs, and 50*l.* as the value of a horse and gig belonging to the plaintiff, which sum, with the rest of the valuation, amounted to 190*l.*:—Held, that the jury was rightly directed, that if the horse and gig were part of the stock in trade, or were treated as such by the parties, the plaintiff was entitled to a verdict. *Rawlinson* v. *Clarke*, 15 L. J., Ex. 171—Ex. Ch.

What included in Agricultural Valuation.]—B. sold a farm to R., and by agreement between them, E. was to estimate and certify the sum to be paid to B. for the labour of ploughing and sowing parts of the farm. E. certified that a sum was to be allowed for three ploughings of the same land, and a further sum for working and burning stroyle:—Held, that all expenses incidental to the preparation of the land for sowing were included in the terms of the agreement. *Branscombe* v. *Rowcliffe*, 6 C. B. 525; 18 L. J., C. P. 38.

Accord without Valuation.]—A., being possessed of plant and other materials for the construction of a canal and other engineering works in Holland, agreed by parol to sell the same to B., and two persons were sent to the spot to value them. An inventory was accordingly made, and on the 31st of March, A. and B. signed the following memorandum at the foot thereof; "Agreed between B and myself, 4,509*l.* 12*s.*" On the 8th of May, a written contract for the sale of the plant and materials was executed by A. and B., by which it was agreed that A. should sell and B. should purchase all such parts of the plant, materials, and things then on or about the works of the canal which belonged to A., and that the price to be paid for the same should be the fair amount of the value thereof, such amount to be settled, in case the parties should differ as to the same, by arbitration, "in manner therein provided." And that B. should pay to A. the amount of such price or value within two calendar months after such price or value should have been fixed and determined. B. was let into possession immediately after the 31st of March, and remained in possession. No arbitration was ever demanded, and no dissatisfaction expressed by B. at the price fixed by the valuers:—Held, that the event upon which the arbitration clause of the contract of the 8th of May was to take effect, viz. the parties to differ as to the value, never having arisen, A. was entitled, at the expiration of two months from that date, to recover the value agreed on by the memorandum of the 31st March, on a count for goods sold and delivered. *Cannan* v. *Fowler*, 14 C. B. 181: 2 C. L. R. 43; 23 L. J., C. P. 48; 2 W. R. 101.

See further, ARBITRATION AND AWARD.

d. Waiver.

Contract to Erect Buildings—Owner taking Possession.]—Where a building is to be erected, or repairs done upon, or alterations made to, a building on a man's own land, under a special contract containing a condition precedent, which

is unperformed by the contractor, the mere fact of the owner taking possession does not raise any inference of waiver of the condition precedent or of the entering into a new contract, and therefore an action will not lie either upon the special contract, or upon an implied contract to pay for the work done according to its value. *Munro* v. *Butt*, 8 El. & Bl. 738 ; 4 Jur. (N.S.) 1231. And see *Mackay* v. *Dick*, 6 App. Cas. 251—H. L. (Sc.), post, col. 147.

Contract to Purchase Mail-coach Business—Consent of Postmaster.]—A party agreed in writing to purchase the mail-coach concern between Derby and Leicester, provided the postmaster consented. The party afterwards took possession of it with the risk of obtaining that consent :—Held, that the proviso had been waived. *Mansfield* v. *Chaslyn*, 2 L. J. (O.S.) K. B. 85.

Contract of Exchange—Repudiation of Agreement to Finance.]—Where a company contracted with a bank that the bank should, within certain limits of time, pay to the company sterling money or an equivalent in exchange for the company's silver at a specified rate, and that the company should finance goods with the bank :—Held, that compliance with their agreement to finance was a condition precedent of the company's right to demand fulfilment of the exchange contracts, but that as both parties were under an obligation to settle reasonable terms of financing, and as the conduct of the bank amounted to a complete repudiation of the contracts, the company were absolved from making further offers to settle terms of finance in order to preserve their claim for damages for breach of the contracts of exchange. *Bank of China, Japan, and the Straits* v. *American Trading Co.*, 63 L. J., P. C. 92 ; [1894] A. C. 266 ; 6 R. 494 ; 70 L. T. 849—P. C.

Conditional Acceptance by Government Board—Waiver by Committee.]—The captain of an Indiaman, on arriving at Madras, reported his arrival to the government board there, and was directed by them to place himself under the orders of the commercial committee at that place. After which he made an offer to the government board, through the commercial committee, to purchase some cotton belonging to the India Company at a certain price. The government board accepted the offer conditionally, and wrote a letter to that effect to the commercial committee. The plaintiff, on being shown the letter, objected to the condition, in consequence of which the commercial committee took upon themselves to dispense with it :—Held, that the India Company could not enforce the condition against the plaintiff. *Smith* v. *East India Co.*, 16 Sim. 76 ; 17 L. J., Ch. 178 ; 12 Jur. 367.

4. Impossible Contracts.

a. Generally.

Necessity of Performance.]—Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible ; but this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied. *Taylor* v. *Caldwell*, 3 B. & S. 826 ; 32 L. J., Q. B. 164 ; 8 L. T. 356 ; 11 W. R. 726.

Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not have been fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor. A. agreed with B. to give him the use of a music hall on certain specified days, for the purpose of holding concerts, with no express stipulation for the event of the destruction of the music hall by fire :—Held, that both parties were excused from performance of the contract. *Ib.*

Where the law casts a duty on a man which, without fault on his part, he is unable to perform, the law will excuse him for non-performance. *Clark* v. *Glasgow Assurance Co.*, 1 Macq. H. L. 668.

But where a man by his own contract binds himself to do a thing, he is bound to do it, if he can, notwithstanding any accident, because he ought to have guarded by his contract against it. *Ib.*

On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a degree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties. *Prebble* v. *Boghurst*, 1 Swanst. 329.

—— **Corn becoming Heated.**]—A contract for the sale of a cargo of corn, by a factor, on a del credere commission, described the corn as of average quality when shipped, and was made for a certain price "free on board and including freight and insurance to a safe port in the United Kingdom." &c. In fact the corn had, a short time before the date of the contract, been sold at Tunis in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract, and it was held that the contract contemplated that there was an existing something to be sold and bought, and capable of transfer, which was not the case at the time of the sale, and that the factor was not liable. *Couturier* v. *Hastie*, 5 H. L. Cas. 673 ; 25 L. J., Ex. 253 ; 2 Jur. (N.S.) 1241.

—— **Contract to Erect Engines—Premises Burnt.**]—The plaintiffs contracted to erect machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials were destroyed by fire :—Held, that both parties were

excused from the further performance of the contract; but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. *Appleby* v. *Meyers*, 36 L. J., C. P. 331; L. R. 2 C. P. 651; 16 L. T. 669—Ex. Ch. Reversing, 14 W. R. 835.

Performance Prevented by Strikes.]—The plaintiffs on the 13th September, 1873, contracted in writing with the defendant to sell 4,000 parcels of Kibbles coal at 15*s.* 6*d.* per parcel of 2,240 lbs., loaded into the defendant's trucks at the average rate of two trucks per day, a truck consisting of eight tons: in the event of a colliers' strike or accident the vendors not binding themselves to keep up the daily supply. Coal was delivered under this contract up to the 28th March, 1874, but on that day, in consequence of the plaintiffs' men refusing to accept a lower rate of wages proposed by the plaintiffs, in pursuance of a combination entered into by the plaintiffs with other masters in the district, the pits were closed by the plaintiffs, and remained closed until the 28th July, other pits in the neighbourhood being also closed by their owners for a like reason. During that time no coal was in consequence delivered; but at the end of the strike the plaintiffs called upon the defendant to take the amount of coal which still remained undelivered under the contract. In an action for not accepting this coal:—Held, that the strike was equally a strike within the meaning of the contract, though brought about by the plaintiffs lowering the wages of their men; that the effect of the strike was merely to postpone the daily deliveries, and that the defendant was bound to accept the coal remaining undelivered. *King* v. *Parker*, 34 L. T. 887.

Held, also, that under the circumstances the delay was not of such a nature as to entitle the defendant to consider the contract at an end in a commercial sense, and so repudiate the performance of it. *Ib.*

Inability to Supply Goods.]—A. contracted to sell B. 100 hogsheads of Gingelly oil, "expected to arrive by the ship 'Resolute,' from Madras." The ship arrived with 100 hogsheads of the oil on board, but it turned out that thirty-four hogsheads only were consigned to or under the power or control of A. Semble, that this did not excuse A. for the non-performance of his contract, and that it would not be performed by a delivery or tender of the thirty-four casks over which he had control. *Fischel* v. *Scott*, 15 C. B. 69.

Natural Obstructions.]—Under the terms of a charterparty, the defendant's ship was to proceed to Galatz, or as near thereto as she might safely get, and there load a cargo from the factors of the freighters; the danger and accidents of the seas, rivers, and navigation during the voyage always excepted. On the 5th November, the ship arrived off the entrance of the Danube. From that time until the 7th January following the water was so low on the bar at the mouth of the river that she could not cross. On the 11th December she sailed for Odessa, and took in a cargo and sailed for England. On and after the 7th of January there was sufficient water on the bar to have enabled the ship to enter the river, and to take in a cargo at Galatz. In an action for breach of the charterparty:—Held, that there was no excuse for non-performance, nor a dissolution of the contract by any of the excepted clauses. *Schilizzi* v. *Derry*, 4 El. & Bl. 873; 24 L. J., Q. B. 193; 1 Jur. (N.S.) 795; 3 W. R. 374.

If performance of a contract becomes, from unforeseen circumstances, perilous to the party entitled to demand performance, the party upon whom lies the burden of performance may be justified in pausing for a reasonable time, in order to consider the danger, and, if possible, communicate with the other party. *Pole* v. *Cetcovich*, 2 F. & F. 104; 9 C. B. (N.S.) 430; 30 L. J., C. P. 102; 3 L. T. 438; 9 W. R. 279.

State Interference—Hiring.]—A declaration alleged that, by agreement between the plaintiff and the defendant, in consideration of 7,800*l.*, the plaintiff sold and transferred all title and interest in and to the services and labour of 153 apprenticed labourers, formerly slaves, belonging to him, for the term of their apprenticeship, to the defendant, with a warranty of the quiet possession of their services according to law; and the defendant promised to pay the plaintiff the money in six instalments of 1,300*l.*, at annual periods, and in case of failure in the payment of any instalment, the plaintiff should be entitled to reclaim the services of such labourers during the remaining term of apprenticeship, and the services should revert to the plaintiff, the defendant remaining liable for such sums as should be then due for the value or hire of the labour, during such period as the defendant should have received the services, at the rate of 1,300*l.* per annum. Plea, that the agreement was made at Berbice, in British Guiana, between British subjects, and was made for the purpose of transferring, and purported to transfer, the services of the 153 labourers, during their term of apprenticeship, according to the statute. That the defendant had the services till the 1st of August, 1838; that in July, 1838, the governor and council of Berbice, according to the statute and the usages of the colony, made an ordinance that all persons who, on the 1st of August, 1838, were apprenticed labourers should from that day be discharged from such apprenticeship, and that, before the breach of the agreement, the labourers were discharged, and the parties to the agreement were prohibited by authority from performing the same:—Held, that the agreement was not a contract of hiring and letting, but an absolute contract for a sale and transfer of the plaintiff's right to the services for a gross sum of money, due in præsenti, though payable by instalments; and that the plaintiff was entitled to the last two instalments, though the legislature had determined the apprenticeship before they became due. *Mitelholzer* v. *Fullarton*, 6 Q. B. 989; 9 Jur. 334.

A. signed ship's articles for a voyage from Liverpool to ports in America. The ship sailed on the 5th November, 1853. During the voyage the captain shot one of the crew, and the ship was taken into Monte Video, and on the 5th of May, 1854, the British consul there, in pursuance of the 7 & 8 Vict. c. 112, ss. 59, 60, sent the captain to England for trial, with the witnesses, A. being one. In an action for his wages:—Held, that he having been separated from the ship at a foreign port by authority of the British legislature, and sent to England without any

reasonable possibility of his ever being able to rejoin the ship during the voyage, the contract must be considered as dissolved by the supreme authority of the state, which was binding on both parties. *Melville* v. *De Wolf*, 4 El. & Bl. 844; 3 C. L. R. 960; 24 L. J., Q. B. 200; 1 Jur. (N.S.) 758; 3 W. R. 401.

Charterparty.]—In an action by a shipper on a contract of affreightment, the declaration stated that he shipped on board the defendant's ship, then in the Bay of Gibraltar, and bound for London, calling at Cadiz, goods, to be safely conveyed to London, and there delivered in good order, the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, excepted, the shipper paying freight. Promise by the defendant so to convey and deliver the cargo, saving the above exceptions. Breach, that he failed to do so. Plea, that the ship, in the course of her voyage, called at Cadiz, and was within the jurisdiction of the officers of the customs there, and of a certain court of Spain; that while the ship was there the goods were, according to the law of Spain, lawfully taken out of the ship by the officers, against the will and without the default of the defendant, on a charge of suspicion of being contraband according to the law of Spain, and were confiscated, by a decree of the court, upon this charge:—Held, that the plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer, and that it did not appear by the plea to have been incurred through any fault of the shipper. *Spence* v. *Chodwick*, 10 Q. B. 517; 16 L. J., Q. B. 313; 11 Jur. 872.

By a charterparty the owners agreed that a vessel, being tight, staunch, and strong, and well conditioned for the voyage, should sail from Callao, and load a cargo of guano at the Chincha Islands, calling on her way at Pisco to obtain the necessary pass to load, to be given to the captain by the charterers' agents free of expense, within twenty-four hours of his application. To an action against the charterers for loading an insufficient quantity of guano, they pleaded, that by the laws of the republic of Peru, every vessel proceeding from Callao to the Chincha Islands for guano was obliged to procure from the government a written pass or permit, and that, on inspection of the vessel, the government refused to give a pass or permit, but on the owners repairing the vessel a permit was granted to load a limited quantity of guano, which was accordingly loaded, and that if a greater quantity had been loaded, the vessel and cargo would have been liable to seizure:—Held, that the plea was no answer, for the charterers undertook to procure the pass, and were not prevented from so doing by any act of the owners, there being no allegation that, in point of fact, the vessel was in an improper condition to load a greater quantity. *Kirk* v. *Gibbs*, 1 H. & N. 810; 26 L. J., Ex. 209.

Necessity of Repairing Ship.]—A declaration on a charterparty stated that it was agreed between the shipowner and a charterer, that the ship should proceed to S., and there take on board from the agents of the freighter a full and complete cargo of coals, and therewith proceed to L., and deliver the same at a wharf to the order of the freighter (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature or kind, during the voyage, always excepted), that the charter should be in force for six successive voyages, and that they should be made not later than the last day of February, 1853. Breaches, that the ship did not make six successive voyages, and that the shipowner would not permit the ship to make more than three voyages. A plea, that during the three voyages the ship sustained great damage by dangers and accidents of the seas and navigation, which damage was necessary to be repaired before she could commence her fourth voyage; that the shipowner forthwith, on the completion of the three voyages, proceeded to repair, and did repair, the damage; but it could not be repaired, nor could the ship be made fit to commence the fourth voyage until after the last day of February, 1853, had elapsed,—is bad, inasmuch as the inability to perform the voyages within the time specified did not discharge the contract, nor afford any excuse for not commencing the fourth voyage. *Pope* v. *Bavidge*, 10 Ex. 33.

Performance prevented by Illness.]—The plaintiff contracted with a wife as her husband's agent that she should play the piano at a concert to be given by the plaintiff on a specified day. She was on that day unable to perform through illness. The contract contained no express term as to what was to be done in case of her being too ill to perform. In an action against the husband for breach of this contract:—Held, that his wife's illness and consequent incapacity excused him, inasmuch as the contract was in its nature not absolute, but conditional upon her being well enough to perform. *Robinson* v. *Davison*, 40 L. J., Ex. 172; L. R. 6 Ex. 269; 24 L. T. 755; 19 W. R. 1036.

—— **Covenant to Insure Life.**]—A., on his marriage in August, 1873, covenanted with the trustees of his marriage settlement that he would, on or before the 2nd of July, 1875, insure his life for the sum of 10,000*l*., which when received was to be held by them on trusts for the benefit of his wife and children. At the time of his marriage and until shortly before July, 1875, A. was and continued to be in good health, but after that he fell ill and consequently was unable to effect an insurance. He remained in ill-health thenceforward until his death. In an action for the administration of his estate:—Held, that the contingency of A.'s health failing was in the contemplation of the parties, and, consequently, that the covenant was absolute. *Arthur's Estate, In re, Arthur* v. *Wynne*, 49 L. J., Ch. 556; 14 Ch. D. 603; 43 L. T. 46; 28 W. R. 972.

—— **Lunacy—Surety's Liability.**]—In an action against the sureties of a barony cess-collection, on a bond for the due performance of the duties of the office, the defendants pleaded that immediately after the delivery to the collector of the warrant in respect of which the alleged liability on the bond arose, and before he could collect any of the moneys sued for in the action, he became, and continued, a lunatic, and wholly incapacitated from acting under the warrant, and was not able to collect, and did not, in fact, collect any of the moneys sued for, and

that the defendants were thereby discharged from liability on the bond:—Held, that the defence was good. *Grove* v. *Johnston*, 24 L. R. Ir. 352—C. A.

And see also SHIPPING (*Charterparty*).

b. Impossibility of Performance by Act of Party.

Sale upon Condition—Seller prevented from fulfilling by Buyer.]—If in the case of a contract of sale and delivery, which makes acceptance of the thing sold, and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. *Mackay* v. *Dick*, 6 App. Cas. 251; 29 W. R. 541—H. L. (Sc.)

The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2,000 tons of pig iron at 42*s.* a ton, to be delivered to the plaintiff free on board at the maker's wharf at Middlesborough, "in November, 1879, or equally over November, December and January next at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—Held, by Bramwell and Baggallay, L.JJ. in C. A., following *Hoare* v. *Rennie* (5 H. & N. 19), Brett, L.J., diss., that the plaintiff's failure to take the one-third in November justified the defendant in refusing to deliver the other two-thirds afterwards. *Honck* v. *Muller*, 50 L. J., Q. B. 529; 7 Q. B. D. 92; 45 L. T. 202; 29 W. R. 830—C. A.

And see SALE OF GOODS.

Substituting Agreement—Waiver.]—To an action for work and labour, the defendant pleaded that the work was done under an agreement in writing whereby the plaintiff agreed to build for him six houses, and completely finish and give up the premises to him on or before a specified day, under a penalty of 1*l.* for each house for each and every week the works should remain incomplete and possession withheld from the defendant after that date, the amount of the penalty to be paid out of the moneys which might become due to the plaintiff under the agreement, that the houses remained incomplete, and possession was withheld from the defendant for twelve weeks after and beyond the day stipulated, wherefore the defendant claimed to deduct a certain sum of money. The plaintiff replied that before any of the penalties had been incurred, it was mutually agreed that the plaintiff should perform other work in and upon the houses in addition to the work in the first agreement, such additional work to be done within a reasonable time; that the work under the second agreement was so mixed up with the work in the first agreement, being part and parcel thereof, that it became impossible to complete the work in the first agreement until the work under the second agreement was also completed, as the defendant, at the time of making that agreement, well knew; and that the plaintiff had performed all the work under both agreements within a reasonable time:—Held, a good legal answer to the claim for penalties, on the ground of waiver. *Thornhill* v. *Neats*, 8 C. B. (N.S.) 831; 2 L. T. 539.

Semble, per Byles, J., that the replication afforded a good equitable answer, on the ground that the performance of the original agreement had become impossible by the act of the defendant. *Ib.*

Breach by One Party of Agreement preventing Performance.]—A. was retained by a resolution of the directors of a company, as broker, to dispose of the shares therein, upon the terms that he was to receive 100*l.* down, and 400*l.* more when all the shares were allotted. By the act of the directors, without any default on A.'s part, the company was wound up before the whole of the shares had been disposed of:—Held, that A. was entitled to recover, as damages for the breach of the contract, such a sum as a jury should think reasonable. *Inchbald* v. *Western Neilgherry Coffee Plantation Co.*, 17 C. B. (N.S.) 733; 34 L. J., C. P. 15; 10 Jur. (N.S.) 1129; 11 L. T. 345; 13 W. R. 95.

The plaintiff sold his interest in a patent to the defendant, and it was agreed that the defendant should pay to the plaintiff for such interest 2,600*l.*, "in such manner as shall be ultimately agreed upon":—Held, that after a reasonable time had elapsed, and after the defendant had refused to enter into any agreement as to the manner of payment, and had refused to pay, the plaintiff might sue him for the amount; and that it was no answer to allege that no agreement had been made as to the manner of payment, for the defendant, by refusing to enter into any agreement, had rendered the performance impossible. *Hall* v. *Conder*, 2 C. B. (N.S.) 53; 26 L. J., C. P. 288; 3 Jur. (N.S.) 963; 5 W. R. 742—Ex. Ch.

A declaration stated that the defendant, as executor of J., was accustomed and liable to pay over to A., under her will, rents and moneys received by him under the will to the use of A., and that, in consideration that the plaintiff would advance moneys to A., the defendant promised to repay her any such sums as she might so advance, from and out of the first moneys which he (the defendant) should receive on account of A., to wit, out of the first moneys to be by him thereafter received on account of the rents and moneys, as and when he should receive the same. Averment, that the plaintiff afterwards advanced to A. moneys amounting to 58*l.* 8*s.*, and A. thereupon gave her an authority to receive the amount from the defendant; that the defendant afterwards received 20*l.* on account of the rents and moneys, and paid the same to the plaintiff, but afterwards, and before he received any more, purchased A.'s interest in the rents and moneys, and took an assignment thereof, and thereby disabled himself from performing his contract with the plaintiff, and had ever since received the rents and moneys in his own right. A plea, that at the time of the purchase of A.'s interest, the defendant had no notice or knowledge that the plaintiff had advanced A. more than the 20*l.* so paid by him to the plaintiff, or that A. had given the plaintiff an authority to receive any further sum, is a sufficient answer to the action; for the defendant's promise did not attach until the authority was given, and A., by parting with his interest, deprived himself of the power to give such authority. *Howlor* v.

Carpenter, 2 C. B. (N.S.) 56; 26 L. J., C. P. 136; 3 Jur. (N.S.) 494; 5 W. R. 486.

Where one of two contracting parties so conducts himself as to hinder the performance of the contract by the other, or to subject the latter to an action at the suit of some third person, if he duly performs the contract, no action will lie for the non-performance. *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 30 L. J., C. P. 247; 8 Jur. (N.S.) 136.

The plaintiff, tenant from year to year of premises, sold the goodwill of a business carried on there to the defendants under an agreement, which was to be void unless free and undisturbed possession should be guaranteed to them. Subsequently they promised to pay the plaintiff 100*l.* if he procured them to be accepted as tenants by the landlord. While the plaintiff was negotiating with the landlord, defendants transferred their contract of sale of the goodwill to W., who entered into possession and was accepted by the landlord. Upon action to recover the 100*l.*:—Held, that the defendants having, by the voluntary act of their sale to W., disabled themselves from receiving the benefit for which they had agreed to pay, were liable to pay the 100*l.* to the plaintiff, unless they could prove that he could not have succeeded in getting them accepted as tenants, if they had entered into possession as contemplated in the agreement. *Bradley* v. *Benjamin*, 46 L. J., Q. B. 590.

—— **Dispensing with Request for Performance.**]—A party who, by his own act, incapacitates himself from performing his contract, makes himself thereby at once liable for a breach of it, and dispenses with the necessity of any request that he will perform it by the party with whom the contract is made. *Lovelock* v. *Franklyn*, 8 Q. B. 371; 15 L. J., Q. B. 146; 10 Jur. 246. S. P., *Short* v. *Stone*, 3 D. & L. 580; 15 L. J., Q. B. 143; 10 Jur. 245; *Caines* v. *Smith*, 3 D. & L. 462; 15 M. & W. 189; 15 L. J., Ex. 106.

Assignment of Contract—Performance by Assignee.]—The plaintiffs, a waggon company, by agreement in writing let the defendants a number of railway waggons for a term of years at an annual rent, the agreement providing that the plaintiffs, their executors or administrators, should during the term keep the waggons in repair. Pending the agreement an order was made for the winding-up of the plaintiff company under the supervision of the court, in pursuance of a resolution previously passed by the company, and liquidators were appointed, who joined the company in assigning the benefit of the contract to another company, upon the terms that such company should perform the stipulations by the assignors contained in the original contract. The assignees took over the repairing stations of the plaintiffs and the staff of workmen employed by them, and were always ready and willing to execute all necessary repairs to the waggons:—Held, that the defendants had no defence to an action for rent, upon the ground that the plaintiffs had incapacitated themselves from performing their contract; for, first, the voluntary liquidation of the company was immaterial, the liquidators having power under the Companies Act, 1862, ss. 95, 131, to continue the letting of the waggons; and, secondly, the repair of the waggons by the company to whom the contract was assigned was a sufficient performance by the plaintiffs of their agreement to repair. *British Waggon Co.* v. *Lea*, 49 L. J., Q. B. 321; 5 Q. B. D. 149; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.

Rescinding.] — See *Sheffield, &c., Co.* v. *Unwin*, 2 Q. B. D. 214, infra, sub-tit. DISCHARGE (*Rescission*).

5. ILLEGAL CONTRACTS.

a. General Rules.

The principles relating to public policy discussed. *Westmeath (Marquis)* v. *Westmeath (Marchioness)*, 1 Dow (N.S.) 519.

Contracts are illegal from their tendency to promote unlawful acts, without regard to any circumstances which go to affect the probability of the unlawful act being done. *Everton* v. *Brownlow (Earl)*, 4 H. L. Cas. 1; 23 L. J., Ch. 348; 18 Jur. 71.

Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance. *Booth* v. *Bank of England*, 7 Cl. & F. 509; West, 298; 6 Bing. (N.C.) 415.

Whether Forbidden by Statute or not.]—Contracts not prohibited by positive laws nor adjudged illegal by precedent may nevertheless be void as against principle. *Jones* v. *Randall*, Cowp. 39.

Where a contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by common or statute law, no court will lend its assistance to give it effect. *Cope* v. *Rowland*, 2 M. & W. 149; 2 Gale, 231; 6 L. J., Ex. 63. See *Swan* v. *Bank of Scotland*, 1 Deac. 752.

So, it is equally a rule that a contract is void, if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. *Ib.*

If the contract is rendered illegal, it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. *Ib.*

In Whole or Part.]—To an action on a deed for payment of money. Plea, that it was unlawfully agreed between the plaintiff and the defendant that the plaintiff should sell and the defendant should purchase land for a certain sum of money, to the intent and for the purpose, as the plaintiff at the time of making the agreement well knew, that the land should be sold by way of lottery; and that afterwards, in pursuance of the illegal agreement, the land was sold to the defendant, and a part of the purchase-money being unpaid, the defendant, to secure its payment to the plaintiff, executed the deed:—Held, first, that the plea was to be construed as affecting the plaintiff with a participation in the intent and purpose of selling the land by lottery. *Fisher* v. *Bridges*, 3 El. & Bl. 642; 2 C. L. R. 929; 23 L. J., Q. B. 276; 1 Jur. (N.S.) 157; 2 W. R. 706—Ex. Ch.

Held, secondly, semble also, that if necessary to make the plea good it might be taken to mean that the deed was given in pursuance of the illegal agreement, and in that case it would be an answer to the action. *Ib.*

Held, thirdly, that, if it was not so understood, it showed a good defence, because the law would

not allow the plaintiff to enforce a security for the purchase-money, which by the original bargain was tainted with illegality. *Ib.*

A party cannot enforce a contract where the consideration is illegal, either wholly or in part. *Waite* v. *Jones*, 1 Scott, 730; 1 Bing. (N.C.) 656; 1 Hodges, 166; 4 L. J., C. P. 184.

—— **Severance of Good Part from the Bad.**]—Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by common law, you may reject the bad part and retain the good. *Byrne, Ex parte, Burdett, In re*, 57 L. J., Q. B. 263; 20 Q. B. D. 314; 58 L. T. 708; 36 W. R. 345; 5 Morrell, 32—C. A.

The principle of construction which guides the court in severing the valid and rejecting the invalid portions of covenants considered. *Baker* v. *Hedgecock*, 57 L. J., Ch. 889; 39 Ch. D. 520; 59 L. T. 361; 36 W. R. 840.

If an instrument contains distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though those which are illegal cannot. *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. 152; 12 Jur. 189.

Where an equal agreement cannot, by reason of a subsequent act of parliament, or some other lawful impediment, be performed in the whole; yet the same shall be specifically executed in such part of it as remains lawful. *Betteworth* v. *St. Paul's (Dean)*, 1 Bro. P. C. 240.

Semble, where in consideration of a lawful and an unlawful contract, a payment is covenanted to be made, the covenantee cannot split the consideration when subsequent events have determined the illegal contract. *Walrond* v. *Walrond*, 4 Jur. (N.S.) 1099.

Intention.]—It is not sufficient to invalidate a contract for the sale of goods, that the vendor knew they were to be applied to an illegal purpose, unless he has a share in the unlawful transaction. *Hodgson* v. *Temple*, 1 Marsh. 5; 5 Taunt. 181; 14 R. R. 738.

A person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price, if he yields no other aid to the illegal transaction than selling the goods and obtaining permits for their delivery to the agent of the purchaser. *Ib.*

The presumption of law is always in favour of the legality of a contract, and therefore if it be reasonably susceptible of two meanings, one legal and the other not, that interpretation shall be put upon it which will support and give it operation. *Mittelholzer* v. *Fullarton*, 6 Q. B. 989. *S. C.* (in error), *ib.* 1022; and see *Lewis* v. *Davidson*, 4 M. & W. 654, 657; 8 L. J., Ex. 78.

When a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties know the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to enforce it in an illegal manner, it is necessary to show the existence of a wicked intention to break the law. *Waugh* v. *Morris*, 42 L. J., Q. B. 57; L. R. 8 Q. B. 202; 28 L. T. 265; 21 W. R. 438.

Money advanced solely for the purpose of obtaining security for a pre-existing debt, though the person advancing it was aware that it would be applied to an illegal purpose, is not money paid upon an illegal consideration. *Bagot* v. *Arnott*, Ir. R. 2 C. L. 1; 15 W. R. 812.

Where a contract to sell, which is tainted with illegality, is followed by a delivery of the thing sold, a third party cannot rely on the illegality to defeat the title of the purchaser. *Ib.*

Rule at Common Law.]—A court of law will not lend its aid to enforce the performance of a contract between parties, which appears, upon the face of the record, to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. *Gaslight and Coke Co.* v. *Turner*, 5 Bing. (N.C.) 666; 7 Scott, 779; 9 L. J., C. P. 75. *S. C.*, affirmed, 6 Bing. (N.C.) 324; 8 Scott, 609; 9 L. J., Ex. 336.

The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. A. bet an illegal wager of twenty-five guineas with B. on a horse-race, of which C., at his own request, staked ten. A. won, and paid C. ten guineas, in the expectation of receiving the whole amount of the bet from B. B., however, died, and A. never received it:—Held, that A. could not recover back the ten guineas which he had paid to C., because he could not establish his claim without going into proof of the illegal transaction, in which both were equally engaged. *Simpson* v. *Bloss*, 2 Marsh. 542; 7 Taunt. 246; 17 R. R. 509.

An illegal contract, if rescinded as to part, must be rescinded in toto. Therefore, where goods were delivered under an agreement to take a specific parcel of copper money in payment, a delivery of such copper, though in fact counterfeit money, will be a bar to an action. *Alexander* v. *Owen*, 1 Term Rep. 225.

Rule in Equity.]—A contract or an instrument which fails in a court of law by reason of its illegality will not be enforced in equity because money has been paid and received in respect of it. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claim sought to be actively enforced, the defence of illegality is as available in a court of equity as it is in a court of law. *Cork and Youghal Ry., In re*, 39 L. J., Ch. 277; L. R. 4 Ch. 748; 21 L. T. 735; 18 W. R. 26.

No equity can be enforced on illegal contracts, or contracts against public policy. *Thomson* v. *Thomson*, 7 Ves. 470; 6 R. R. 151.

Equity will not look minutely into the circumstances of a transaction impeached on the grounds of public policy. *Roche* v. *O'Brien*, 1 Ball & B. 338.

—— **Jurisdiction to order Delivery up of Instruments.**]—There is no jurisdiction in equity to order a legal instrument to be delivered up on the ground of illegality which appears upon the face of the instrument itself. *Simpson* v. *Howden (Lord)*, 3 Myl. & C. 97; 1 Jur. 703. Reversing, 1 Keen, 583; 6 L. J., Ch. 315.

Equity has jurisdiction to order an instrument to be delivered up, though void at law, as if against policy. *St. John (Lord)* v. *St. John (Lady)*, 11 Ves. 535.

On a bill for account of illegal contract, though subsequently become legal, as a set-off against a separate demand, and for which the defendant had brought an action against the plaintiff, an injunction which had been obtained on the filing of the bill was dissolved, on the ground of it being an illegal contract, and although defendant had not relied on the illegality of the contract as a ground of defence, the court itself setting up the objection. *Evans* v. *Richardson*, 3 Mer. 469.

A promissory note suspicious in itself, under the circumstances, and the admitted object of it being an improper one, even if the note were actually genuine, decreed, at the instance of the person alleged to have given it, to be deposited with the registrar of the court, in the first instance, with a declaration that the plaintiff was entitled to be relieved against it without preventing the defendant from bringing an action on it within a reasonable time; and if delay in doing so, then to be delivered up. *Winchester (Bishop)* v. *Fournier*, 2 Ves. 445.

Whether either Party entitled to Relief.]—Parties to a contract which is against public policy or illegal are not always regarded as being in pari delicto, but public policy is sometimes considered as advanced by allowing either or the more excusable of the parties to sue for relief against the transaction. *Reynell* v. *Sprye*. 8 Hare, 275. Affirmed, 1 De G. M. & G. 660; 21 L. J., Ch. 633.

The rule in pari delicto melior est conditio possidentis, preventing suit is not universal, admitting degrees of guilt by concurring in the same criminal act. *Osborne* v. *Williams*, 18 Ves. 379; 11 R. R. 218.

The court will entertain a bill for a discovery, and to perpetuate evidence, in aid of a defence to an action at law on a contract, although the discovery and evidence are to establish that the contract was void, as corrupt, illegal, and unconstitutional, and that both parties were in pari delicto. *Longfield* v. *Aubrey*, 1 Hog. 300. And see *Benyon* v. *Nettlefold*, 17 Sim. 51; 18 L. J., Ch. 445; 13 Jur. 798. Reversed, 3 Mac. & G. 94; 20 L. J., Ch. 186; 15 Jur. 209.

Fraud on Third Party.] — An agreement made with the purpose of doing something which is calculated to defraud or injure a third party is illegal and void as between the parties to it; and it makes no difference that no damage has in fact been sustained by such third party. *Harrington* v. *Victoria Graving Dock Co.*, 47 L. J., Q. B. 594; 3 Q. B. D. 549; 39 L. T. 120; 26 W. R. 740.

Where a bargain is made between one who is in the employ of another and a third party who has contracted with the employer, which bargain is calculated to bias the mind of the employed and to cause him to act to the prejudice of the employer, such bargain is corrupt, even though it does not actually bias the mind of the employed, and though no damage results to the employer. *Ib.*

—— Agreement to make a Market for Shares —Criminal Conspiracy.]—An agreement between two or more persons to induce would-be buyers of shares in a company, contrary to the fact, to believe that there was a market for the shares, and that the shares were of greater value than they really were, is an illegal transaction, and can be made the subject of an indictment for conspiracy. *Scott* v. *Brown*, 61 L. J., Q. B. 738; [1892] 2 Q. B. 724; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213—C. A.

b. Contrary to Public Policy.

Affecting Third Persons.] — By agreement between A. and B., reciting that A. was expecting to become seised in fee of premises on the death of S., widow, as the devisee under her will (which premises were then in the occupation of lessees under a lease, of which A. was assignee), and that A. had contracted to sell all the possibility and expectancy of an estate and interest in the premises to B., for all A.'s estate and interest therein expectant, for 2,000*l.*, which B. agreed to pay to him, A. agreed with B. that he would, within three months from the decease of S., in case A. became devisee, convey the premises to B., his heirs and assigns, and make him a good title, and that B. should in that event become entitled to the rents and profits from the day of S.'s decease; and that in case A. should not become the devisee or should not make a good title within six months from the decease of S., A should, within the latter period, repay the 2,000*l.* (without interest) to B., and that A. should execute a deed, assigning a policy on his life as a security for such repayment, B. to re-assign if the conveyance should be perfected according to the agreement. The deed was executed accordingly:—Held, that the agreement was not illegal as contravening public policy by creating an interest in S.'s death, or in the exercise of an undue influence over her mind as to the making of her will. *Cook* v. *Field*, 19 Q. B. 460; 14 L. J., Q. B. 441; 14 Jur. 951.

By Public Officer.]—A. obtained a judgment against B., who was possessed of lands for a term of years, subject to a mortgage, and issued and lodged with the sheriff a writ of fi. fa.; and while the writ was in the sheriff's hands, A.'s solicitor entered into an agreement with the mortgagees that, in consideration of their consenting to a sale of the leasehold interest through the sheriff, under the writ of fi. fa., he (A.'s solicitor) would take care to have the same sold subject to and guarded by proper conditions of sale so that the mortgage debt should, in the first instance, be paid out of the proceeds of sale. In an action by the mortgagees against A.'s solicitor for breach of contract in not carrying out the said agreement:—Held, that the agreement was an undertaking to procure the performance by the sheriff of an act which would be a violation of his duty; first, in selling under the writ an interest not thereby authorised to be sold; and, secondly, in the payment of the proceeds of sale to a person other than the execution creditor; that, therefore, the agreement was void as against public policy, and one for breach of which an action would not lie. *Moher* v. *O'Grady*, 4 L. R., Ir. 54.

Not to Tender.]—Tenders for the supply of stone having been invited by a corporation, it was agreed between A., B., C. and D., quarry owners, that B. should not tender, that C. and D. should tender above A.'s price, that A. should purchase certain quantities of stone from B., C. and D. at a fixed price, and that B., C. and D. should not supply the corporation with stone during 1875. The stone was purchased, as

agreed, by A., but B., in breach of the agreement, sent in a tender, which was accepted:—Held, that the agreement was not void, and that a bill would lie by A. to restrain B. from supplying the corporation directly or indirectly during 1875 with stone, without making the corporation parties. *Jones* v. *North*, 44 L. J., Ch. 388; L. R. 19 Eq. 426; 32 L. T. 149; 23 W. R. 468.

Not to expose Misconduct.]—To a declaration in an action on a bond against an executor, he pleaded, for an equitable defence, that before the making of the bond the plaintiff had seduced and committed adultery with the wife of the testator, and that, after the making of the bond and before action, it was agreed between the testator and the plaintiff, that, in consideration that the testator would not expose and make public the conduct of the plaintiff with regard to the seduction and adultery, the plaintiff would not enforce payment of or sue on the bond:—Held, that such an agreement was against public policy, and furnished no valid consideration for the promise of the plaintiff, and therefore the plea was bad. *Brown* v. *Brine*, 45 L. J., Ex. 129; 1 Ex. D. 5; 33 L. T. 703; 24 W. R. 177.

Votes at Charity Election.]—The plaintiff and defendant were both subscribers to a charity, the objects of which were elected by the subscribers who had votes proportioned in number to the amount they had subscribed. They expressly agreed that if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favoured, the defendant would at the next election give twenty-eight votes for such object of the charity as the plaintiff should then favour:—Held, that there was a legal consideration for the defendant's promise, and that the agreement was not void as against public policy. *Bolton* v. *Maddan*, 43 L. J., Q. B. 35; L. R. 9 Q. B. 55; 29 L. T. 505; 22 W. R. 207.

Agreement originating in Communications by Commissioners and Witnesses as to Evidence.]—Bill for specific performance of agreement, originating in communications by commissioners, who took the depositions in a cause, and by witnesses, to defendant as to nature and effect of evidence; though plaintiff was not implicated in the transaction, bill was dismissed on grounds of public policy. *Cooth* v. *Jackson*, 6 Ves. 12. *See* 10 R. R. 190.

Payment of "Differences" as between Broker and Principal—"Time Bargains."]—The plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange; to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable; and he sued the plaintiff for indemnity against the liability incurred by him and for commission as broker:—Held, that the plaintiff was entitled to recover; for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict. c. 109, s. 18. *Thacker* v. *Hardy*, 48 L. J., Q. B. 289; 4 Q. B. D. 685; 39 L. T. 595; 27 W. R. 158—C. A.

Validity of Agreement to pay Purchase-money for Land and Buy off Opposition.]—A railway company, proposing to apply to parliament for an Extension Act, which a landowner, over whose estate the proposed railway was to pass, threatened to oppose, made an unconditional agreement with him under the seal of the company, by which, after reciting that he agreed to withdraw his opposition, the company agreed to make the line, and to pay 2,000*l.* for his land therein specified, required for the railway, and by clause 3 that they should pay him 2,000*l.* within three months from the passing of the act, as and for a personal compensation to him for the annoyance, inconvenience, loss, &c., which he had sustained, or might sustain, in respect of the sporting and game upon his estate, in consequence of the construction of the intended works, and of the surveys and other works incidental thereto. The landowner agreed not to oppose the passing of the bill. The bill passed and three months afterwards he brought an action to recover the money:—Held, that the contract was not ultra vires of the directors, in the sense of being prohibited by the legislature, and was therefore a legal contract binding upon the company. *Taylor* v. *Chichester and Midhurst Ry.*, 39 L. J., Ex. 217; L. R. 4 H. L. 628; 23 L. T. 657. Reversing 16 W. R. 147—Ex. Ch.

Securities given to persons who would be prejudiced by the passing of a private bill in parliament, in consideration of their withdrawing their opposition to it, are illegal on the ground of public policy. *Vauxhall Bridge Co.* v. *Spencer* (*Earl*), Jacob, 64; 2 Madd. 357.

An agreement not to oppose a railway bill in parliament is not illegal. The projectors of a railway, pending a bill in parliament for incorporating them, made an agreement on behalf of the proposed corporation, in consequence of which a threatened opposition to the bill was withdrawn:—Held, that the corporation, having received the benefit of the agreement, was bound by it. *Edwards* v. *Grand Junction Ry.*, 7 Sim. 337. Affirmed on appeal, 1 Mylne & C. 650. Disapproved, *Caledonian Ry.* v. *Helensburgh*, 2 Macq. H. L. 391; 2 Jur. (N.S.) 695; 4 W. R. 671.

—— **With Member of Parliament.**]—A private agreement between a peer of parliament and the promoters of a particular railway, that the former should accept a sum of money by way of compensation, in respect of the damage that may be done to his lands, and should not oppose the passing of the bill to establish the railway, is valid. *Simpson* v. *Howden* (*Lord*), 9 Cl. & F. 61; 3 Railw. Cas. 294.

It is not illegal for the promoters of a railway to agree personally with a landowner, even (so long as there is no proof of corrupt influence on his vote) though he is a member of either house of parliament, to pay him a sum of money for withdrawing his opposition to their bill, or giving his countenance and support to their scheme; but such a payment is not an "expense incurred in obtaining the special act, or incident thereto," within s. 5 of the Companies Clauses Act, and cannot so be upheld as a liability of the

company. *Shrewsbury (Earl)* v. *North Staffordshire Ry.*, 35 L. J., Ch. 156; L. R. 1 Eq. 593; 12 Jur. (N.S.) 63; 13 L. T. 648; 14 W. R. 220.

Arbitrator—Award not to be Impeached for Fraud.]—A clause in a building contract providing that the valuations, certificates, orders, and awards of the arbitrator appointed thereunder should be final and binding, and should not be set aside for any pretence, charge, suggestion, or insinuation of fraud, collusion, or confederacy:—Held, not obnoxious to public policy, for, in the absence of fraud on the part of the parties to the contract, it was competent to them to agree not to raise any question of fraud in the arbitrator. *Tullis* v. *Jacson*, 61 L. J., Ch. 655; [1892] 3 Ch. 441; 67 L. T. 340; 41 W. R. 11.

Grant of Annuity until Grantee is in Possession of a Living.]—Bond by a father to secure an annuity to his son until he should be in possession of a living of a certain value, and an agreement of the same date reciting the bond, declaring that the son would forthwith enter into holy orders, and accept such living. The Lord Chancellor expressed a strong opinion that upon grounds of public policy, by the effect of the agreement, the transaction was illegal; but the decision was, upon the ground that the son had not complied with the condition, having received the annuity nine years, and being still only in deacon's orders, that the annuity was determinable by the father or his representatives. *Kircudbright (Lord)* v. *Kircudbright (Lady)*, 8 Ves. 51; 6 R. R. 216.

Where Suspicion of Undue Influence.]—Contracts contrary to the policy of the law, as a deed of gift by a client to an attorney, by an heir to guardian, the purchase of a reversion from a young heir, the trustee selling to himself, set aside without evidence of fraud. *Morse* v. *Royal*, 12 Ves. 371; 8 R. R. 338.

Instrument giving Separate Rights to Different Persons.]—It is no legal objection to a written contract that it gives separate rights of action to different persons. *Best* v. *Saunders*, 7 L. J. (O.S.) K. B. 50; 3 M. R. 4.

Unnatural Agreements.]—One differing with his mother, settles his mansion-house on his brother, but first takes a bond from him in his sister's name, that the brother should not permit his mother to come into the house. Bond set aside in equity, as unnatural. *Traiton* v. *Traiton*, 1 Vern. 413.

Where parent had objected to daughter's marriage with an individual, and she entered into a secret bond to forfeit 500*l.* if she did not marry him in thirteen months after parent's death: on her application for relief against bond, decreed that it should be cancelled, such a transaction being encouragement to disobedience and fraud on parents. *Woodhouse* v. *Shepley*, 2 Atk. 535.

A contract by a wife with her husband to bring up an infant child is void as against public policy. *Walrond* v. *Walrond*, 4 Jur. (N.S.) 1099.

Agreement to Divide Benefits to be received under a Will or by Descent.]—Contracts made during the lifetime of a testator, and fairly obtained by persons living in expectation of receiving benefits under his will, to divide among them any such benefits after his death, if amounting to agreements to use undue influence upon the testator, are bad; but they are good if amounting to agreements to disinterestedly abstain from interfering with the testator, and will be upheld where there is mutuality of consideration. *Higgins* v. *Hill*, 56 L. T. 426.

An agreement between two sons to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise from him, is not contrary to public policy, but will be enforced in equity. *Wethered* v. *Wethered*, 2 Sim. 183; 29 R. R. 77. S. P., *Harwood* v. *Tooke*, 2 Sim. 192; 29 R. R. 81.

According to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding. In a case of doubt as to legitimacy, an agreement between claimants to divide the property is valid. *Hotchkis* v. *Dickson*, 2 Bligh, 348; 21 R. R. 89.

The case is different where there is a question whether the parties dealt with equal knowledge of the subject. So where there is a suppression of a material fact by one of the parties, e.g. the private marriage of the father, which the defendant knows and calls a mere ceremony. The fact, whatever its character may have been, should be communicated at the time of the agreement. Such communication is essential to the fairness and validity of the transaction between brothers on a question of rights depending upon legitimacy. *Ib.*

Illegal Race—Action for Reward.]—If A. employs B. to run an illegal race, B. cannot sue A. for the stipulated reward. *Coates* v. *Hatton*, 3 Stark. 61.

Removal of Corpses.]—An agreement to build houses on a disused, unconsecrated burial ground, necessitating the removal of some thousands of corpses, which removal would of necessity involve an outrage on public decency, and amount to an indictable offence, is illegal. *Gibbons* v. *Chambers*, 1 Cab. & E. 577.

Recovery of Money Paid.]—A person who has authorised the application of his money to an illegal purpose can recover it before it has been paid over or applied to such purpose. *Bone* v. *Ekless*, 5 H. & N. 925; 29 L. J., Ex. 438.

The defendant employed the plaintiff to sell a ship to a foreign government, authorising him to employ a part of the proceeds in bribing its officials. The plaintiff sold the ship to the government, and informed the defendant that he had sold it for a certain sum net; that the difference was to be applied in bribing the officials as agreed. This the defendant ratified, and the whole of the purchase-money having been paid to the plaintiff, as the defendant's agent, the plaintiff paid to the defendant the sum mentioned between them as net; paid a part of the difference to the officials, and retained the rest:—Held, that the defendant had a right to set off this latter sum in an action brought against him by the plaintiff, as the defendant, in claiming it, was not setting up or relying on the illegal arrangement, and he would have a right to recover it as received to his use. *Ib.*

Question, how Raised and Determined.]—The

question whether a contract is void, as contrary to public policy, is for the court when the circumstances raising the question are conceded; and semble, that a plaintiff in his declaration or a defendant in his plea may introduce averments of circumstances for the purpose of maintaining either side of that proposition. *Tallis* v. *Tallis*, 1 El. & Bl. 391; 22 L. J., Q. B. 185; 17 Jur. 1149; 1 W. R. 114.

Pleas.]—Plea by a railway company, that a certain contract was, under the provisions of an act of parliament, illegal, and could not be enforced. It appeared the contract was, in fact, illegal on general equitable principles:—Held, that the plea sufficiently raised the general question of illegality. *Aberdeen Ry.* v. *Blaikie*, 2 Eq. Rep. 1281.

The defence that the transaction under which the plaintiff claims was illegal must be pleaded in distinct terms. *Haigh* v *Kaye*, 41 L. J, Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

Evidence — Presumption of Legality.] — A party who contends that the contract upon which he is sued is illegal, must prove it to be so, although the proof be of a negative, because primâ facie it will be presumed to be legal. *Sissons* v. *Dixon*, 5 B. & C. 758; 8 D. & R. 526: 4 L. J. (o.s.) K. B. 299.

c. Contrary to Statute.

i. *Generally.*

Extent.]—A contract declared by a statute to be illegal, is not made good by a subsequent repeal of the statute. *Jaques* v. *Withy*, 1 H. Bl. 65.

An agreement entered into for the purpose of enabling one of the parties to it to contravene a statute passed for the protection of public morals cannot be enforced in a court of law. *Ritchie* v. *Smith*, 6 C. B. 462; 18 L. J., C. P. 9; 13 Jur. 63.

Explosives Act.]—The defendant let the basement of a store to the plaintiff, and covenanted to keep the premises in proper repair and condition, so that the same might be available for storing cartridges, and for quiet enjoyment by the plaintiff. Other parts of the store were let to other persons for the storage of gunpowder. Soon afterwards the Explosives Act, 1875, was passed, making it illegal to store cartridges and gunpowder in the same store without a licence, under pain of forfeiture. On the act coming into operation the defendant removed the cartridges which the defendant had deposited in the store, and gave notice that he would inform the authorities if the plaintiff stored any more:—Held, that there had been a trespass but no eviction by the defendant, and that there had been no breach of covenant by the defendant, the covenant to keep the demised premises in proper condition for storing cartridges only referring to physical condition, and there being no obligation on the defendant to procure a licence to make the storage legal notwithstanding the act. *Newby* v. *Sharpe*, 47 L. J., Ch. 617; 8 Ch. D. 39; 38 L. T. 583; 26 W. R. 685—C. A.

Sale of Joint-Stock Bank Shares—Name of Shareholder not given.] — The defendant, a stockbroker, who had undertaken to sell shares of a joint-stock bank for the plaintiff, a shareholder, sold them to a jobber on the Stock Exchange, and sent an advice note of such sale to the plaintiff, but in accordance with the custom of the Stock Exchange, the bought and sold notes between the defendant and the jobber omitted to state the name of the registered proprietor of the shares, as required by 30 & 31 Vict. c. 29, s. 1, by reason of which the contract for sale was void, and the bank having stopped, and an order for its winding up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, and the plaintiff remained the holder of the shares:—Held, that the defendant had committed a breach of duty in not making a valid contract of sale, notwithstanding the custom of the Stock Exchange to disregard the said statute, as such custom was both unreasonable and illegal, and that for such breach of duty the plaintiff was entitled to recover from the defendant, by way of damages, the price at which the shares had been sold. *Neilson* v. *James*, 51 L. J., Q. B. 369; 9 Q. B. D. 546: 46 L. T. 791—C. A.

Sale of Drugs.]—Where a druggist, after 42 Geo. 3, c. 38, but before 51 Geo. 3, c. 87, sold and delivered to a brewer drugs, knowing that they were to be used in the brewery:—Held, that he could not recover the price of them. *Langton* v. *Hughes*, 1 M. & S. 593; 14 R. R. 531.

Contagious Diseases (Animals).]—A statute cannot make an act done in connection with a private contract an actionable wrong if it was not actionable independently of the statute. *Ward* v. *Hobbs*, 48 L. J., Q. B. 281; 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114.

Where a statute prohibited persons from sending animals affected with a contagious disease to market and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase. *Ib.*

Serving Unqualified Medical Practitioner as Assistant.]—The act 55 Geo. 3, c. 194, prohibiting medical practice by unqualified persons, is not repealed by implication by the Medical Act, 1858. The defendant, a duly qualified medical practitioner, agreed with the plaintiff, a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve the plaintiff as assistant in his profession as a medical practitioner, and not to practise at R. within five years after the close of the engagement. The plaintiff applied for an injunction to prevent the defendant from practising at R. in breach of this agreement:—Held, that his doing so was made illegal by the act 55 Geo. 3, c. 194, s. 14, that the agreement therefore was to assist the plaintiff in carrying on a business which he could not lawfully carry on, and that the agreement was illegal and could not be enforced. *Davies* v. *Makuna*, 54 L. J., Ch. 1148; 29 Ch. D. 596; 53 L. T. 314; 33 W. R. 668; 50 J. P. 5—C. A.

Semble, if the plaintiff had carried on his business by means of duly qualified assistants, without personally acting as a physician, sur-

geon, or apothecary, the agreement might have been legal. *Ib.*

Taking Unlicensed Broker into Partnership.]—By an agreement between A. and B., who was a London colonial broker, made in January, 1865, it was agreed for certain considerations that on 1st January, 1866, B. should take A. into partnership for fourteen years. This agreement B. refused to fulfil, upon the ground that A. had not become a colonial broker, and that by 6 Anne, c. 16, and 57 Geo. 3, c. 60 (local and personal), it would have been a breach of the law to have allowed A. to act as a broker, not being admitted and licensed. Upon demurrer to a plea setting up these facts in answer to a declaration for not taking A. into partnership:—Held, that the plea was an answer to the action. *Hunter* v. *Wykes*, 15 L. T. 210; 15 W. R. 125.

Director Contracting with Company.]—A contract entered into by a director with a railway company, after his election, is not rendered void by 8 & 9 Vict. c. 16, ss. 85 and 86, but the office only of director is vacated. *Foster* v. *Oxford, Worcester, and Wolverhampton Ry.*, 13 C. B. 200; 22 L. J., C. P. 99; 17 Jur. 167.

Officer of Local Authority interested in Contract.]—A contract by a local board of health made with two persons, one of whom is the surveyor of the board at a yearly salary, and who, as an officer appointed by the local authority, is required by s. 193 of the Public Health Act, 1875, not to be interested in any contract made with the authority, is illegal. *Mellis* v. *Shirley Local Board*, 55 L. J., Q. B. 143; 16 Q. B. D. 446; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214—C. A.

Policy on Advances on Ship—"Full interest admitted."]—A policy insuring cash advances on a ship is within 19 Geo. 2, c. 37, s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute. *Smith* v. *Reynolds* (1 H. & N. 221), and *De Mattos* v. *North* (L. R. 3 Eq. 185) followed. *Berridge* v. *Man On Insurance Co.*, 56 L. J., Q. B. 223; 18 Q. B. D. 346; 53 L. T. 375; 35 W. R. 343; 6 Asp. M. C. 104—C. A.

Company, the Formation of which is Prohibited.]—Persons to a number exceeding twenty had formed themselves into a society, called the "Ipswich Mechanics' Mutual Benefit Society." From the rules of the society it appeared that there were 400 shares in the society of 10*l.* each, and that no member could hold more than twenty shares. The object of the society was to raise, by monthly subscriptions and payments payable by the members in respect of their shares, a fund for the purpose of making advances to members. From time to time, as soon as the fund in hand amounted to a certain sum, it was put up for sale by auction amongst the members, the highest bidder receiving the amount on loan from the society at interest. No member could receive on loan more than the nominal amount of the share or shares held by him; but ultimately every member who did not withdraw his share under the rule providing for such withdrawal, was to have advanced or allotted to him out of the funds accruing to the society the sum of 10*l.* for every share held by him. The society was not registered under the Companies Act, 1862:—Held, that the society was illegal by reason of the provisions of the Companies Act, 1862, s. 4, which prohibits the formation of any company, association, or partnership consisting of more than twenty persons for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless registered as a company under the act:—Held, also, that a promissory note given by a member to the trustee of the society to secure a sum of money advanced to such member under the rules of the society was invalid, and no action could be maintained thereon. *Jennings* v. *Hammond*, 51 L. J., Q. B. 493; 9 Q. B. D. 225; 31 W. R. 40.

T. was the president of a loan society. The objects of the society were to form a fund, from which money might be advanced to enable shareholders to build or purchase a dwelling-house or other buildings, or to lend money to each other on approved personal security; five per cent. interest was to be charged on all moneys advanced by the society. The society consisted of more than twenty members, and was not registered under any statute. The society advanced a sum of money to the defendants, who signed promissory notes by way of security for the loan; and when T. went out of office, he indorsed the promissory notes to the plaintiff, who succeeded him. The plaintiff having sued upon the notes for the benefit of the society:—Held, that the society not having been registered, was rendered illegal by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, it being an association having "for its object the acquisition of gain," within the meaning of that enactment; that the plaintiff could not be in a better position than the society, and therefore could not recover upon the promissory notes. *Padstow Total Loss and Collision Assurance Association, In re* (20 Ch. D. 137) followed. *Jennings* v. *Hammond* (supra) approved. *Shaw* v. *Benson*, 52 L. J., Q. B. 575; 11 Q. B. D. 563—C. A. S. P., *Crowther* v. *Thorley*, 45 L. T. 644; 31 W. R. 564. Reversed in C. A.

And see COMPANY.

Pawnbrokers.]—Where a statute enjoins certain things to be done as preliminaries or accompaniments of a certain contract, and they are not complied with, such a contract is illegal and void, although a penalty may be imposed by the act for the non-compliance with its injunctions. *Fergusson* v. *Norman*, 5 Bing. (N.C.) 76; 6 Scott, 794; 1 Arn. 418; 8 L. J., C. P. 3; 3 Jur. 10.

By 39 & 40 Geo. 3, c. 99, s. 6, every pawnbroker advancing money upon goods pawned shall, before he advances any money upon such pawn, make entries in his books of certain facts into which he is required to inquire before any money shall be lent; by s. 26, a penalty is imposed for every neglect to make such entries:—Held, that such inquiries and entries are a condition precedent to the validity of a contract upon a pledge of goods with a pawnbroker, and, therefore, that in the case of non-compliance with the requisitions of this act, a pawnbroker could not set up a lien upon goods pawned with him. *Ib.*

To carry on the business of pawnbrokers without disclosing the partners, is a contravention of

the 39 & 40 Geo. 3, c. 99. *Frazer* v. *Hill*, 1 Macq. H. L. 392 ; 1 C. L. R. 7.

A pawnbrokers' contract stipulating to conceal the name of any partner cannot be valid. *Ib.*

But if the contract was legal in its inception, the mode of carrying it on would not render it illegal. *Ib.*

An agreement for a secret partnership is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. *Armstrong* v. *Armstrong*, *Lewis* v. *Armstrong*, 3 Myl. & K. 45 ; 3 L. J., Ch. 101.

Unauthorised Printing Press—Pleading.]—By 39 Geo. 3, c. 79, s. 23, any person having any printing press is to cause notice thereof to be given to the clerk of the peace acting for the county, stewarty, riding, division, city, borough, town, or place where the same shall be intended to be used . . . . under a penalty of 20*l.* for keeping or using such press. By 7 & 8 Vict. c. 71, s. 11, the quarter sessions for the city of Westminster are abolished, and all the duties of the officers thereof are transferred to the county of Middlesex. To an action for work or labour (printing) brought by a printer carrying on business in Westminster, the defendant pleaded that the printing was done after the passing of the above acts, and that plaintiff had not delivered any notice to the clerk of the peace for Middlesex ; and that the printing was done after the passing of 39 Geo. 3, c. 79, and that plaintiff had not delivered any notice to the clerk of the peace for the city of Westminster :—Held, upon demurrer, that the pleas were bad, as each plea should have negatived that notice was given neither to the clerk of the peace for Westminster, nor to the clerk of the peace for Middlesex. *Day* v. *Hemings*, 4 L. T. 443 ; 9 W. R. 703.

Agreement to Dance at Unlicensed Theatre.]—No action can be maintained for the breach of an agreement "to dance at the King's Theatre in the Hay Market, or at such other place as the plaintiff should appoint" if it appear that no license for that theatre was granted by the Lord Chamberlain as required by 10 Geo. 2, c. 28, and that plaintiff did not request defendant to dance at any other place which was licensed. *Gallini* v. *Laborie*, 5 Term Rep. 242.

Agreement inconsistent with Act of Parliament.]—By an agreement between the N. Local Board and the C. Local Board, it was agreed that the N. board should make a sewer and allow the sewers of the C. district to drain into it, but the sewage of any other districts or places was not to be permitted by the C. board to pass into their sewers so as to discharge into the sewer to be made by the N. board. Under acts of parliament then in existence the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, and by an act subsequently passed similar powers were given :—Held, that the provisions of the agreement were overruled by the subsequent act, and that the N. board could not restrain the C. board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the N. district :—Held, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the C. district had similar powers. *Newington Local Board* v. *Cottingham Local Board*, 48 L. J., Ch. 226 ; 12 Ch. D. 725 ; 40 L. T. 58.

An innkeeper, being indebted to several persons, by deed conveyed all his estate to trustees, upon trust, amongst other things, to carry on the trade, if they should think fit. At the time the deed was executed, the trader had omitted to renew his expired annual wine, beer and spirit licenses, but at the next first opportunity they were renewed by the trustees :—Held, that this circumstance formed no objection to the deed, on the ground that it was an assignment to persons to carry on an illegal trade. *Owen* v. *Body*, 2 H. & W. 31 ; 6 N. & M. 448 ; 5 A. & E. 28 ; 5 L. J., K. B. 191.

The 1 & 2 Will. 4, c. 32, s. 4, does not render illegal a contract made during the game season, whereby a party licensed to deal in game undertakes to deliver to another live game at a period out of the season. *Perrett* v. *Baker*, 10 Ex. 759 ; 3 C. L. R. 432 ; 1 Jur. (N.S.) 336.

Contrary to Private Acts.]—A company was incorporated by an act of parliament for making and maintaining a particular railway, and it was empowered to raise money for that purpose, and which was to be expended towards making and maintaining such railway, and otherwise carrying the act into execution :—Held, that such company had no power to covenant with another railway company to lease their railway, and to pay the costs of soliciting bills in parliament for purposes of such last-mentioned company, as it was beyond the authority given to them by the act incorporating them, and that a covenant to that effect was, on that account, illegal and void. *East Anglian Ry.* v. *Eastern Counties Ry.* 11 C. B. 775 ; 21 L. J., C. P. 23 ; 16 Jur. 249.

The South-Eastern Railway Company was incorporated for the purpose of making and maintaining that railway, with power to raise moneys for the purpose of the act. The projectors of an intended Dover and Deal railway contemplated bringing a bill before parliament for the establishment of such railway, but were in doubt as to proceeding. M., a person interested and having influence in the South-Eastern Company, undertook that, if the projectors of the Dover and Deal railway would proceed in endeavouring to obtain their act, and, if successful, would hand over their scheme to the South-Eastern Company, that company, if the bill were rejected, would insure them against loss by such rejection, and would pay their parliamentary expenses. No clause in the company's act empowered them so to apply their funds. The bill was proceeded with, and rejected by parliament. In an action against M. on the contract, the declaration alleging that the South-Eastern Company did not insure the company against loss, and did not pay the parliamentary expenses :—Held, that the stipulation by M. was a promise that the company should do an act which was illegal, and contravened public policy and a public statute, and that an action did not lie against M. upon such promise. *Macgregor* v. *Dover and Deal Ry.*, 18 Q. B. 618 ; 7 Railw. Cas. 227 ; 22 L. J., Q. B. 69 ; 17 Jur. 21—Ex. Ch.

Aid Refused in Equity.]—Bill, by banker, for an account of shares held in trust for him in a mercantile establishment, dismissed, the trust being in contravention of the statute 29 Geo. 2,

c. 16, which prohibits bankers from being traders. *Ottley* v. *Browne*, 1 Ball & B. 360.

Profits of partnership in underwriting illegal by 6 Geo. 1, c. 18, s. 12, and could not be subject of aid in equity, but that part of the statute is repealed by 5 Geo. 4, c. 114. *Watts* v. *Brooks*, 3 Ves. 612. S. P., *Knowles* v. *Haughton*, 11 Ves. 168.

ii. *As to Sale of Public Offices.*

Contrary to 5 & 6 Edw. 6, c. 16, ss. 1. 2, 3, 4. and 49 Geo. 3, c. 126, ss. 1, 3, 8, 9.

What Offices within the Statutes.]—The office of clerk to the deputy registrar in the Prerogative Court of Canterbury was not an office connected with the administration of justice, within 5 & 6 Edw. 6, c. 16, so as to prevent its being aliened or charged. Nor is an alienation of or charge on the profits of the office, contrary to the policy of the law restricting the alienation of the income of a public office. *Aston* v. *Gwinnell*, 3 Y. & J. 136.

The office of private secretary does not fall within the 5 & 6 Edw. 6, c. 16. *Harrington* v. *Kloprogge*, 6 Moore, 38, n.; 2 Br. & B. 678, n.; 2 Chit. 475; 4 Doug. 5; 23 R. R. 539, n.

An assignment, by a puisne judge of the Supreme Court at Madras, of the sum equal to the amount of six months' salary, directed by 6 Geo. 4, c. 85, to be paid to his legal personal representatives, in case he should die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such judge; and, not being payable during the lifetime of the judge, is not an assignment of salary within 5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126, and, therefore, not contrary to public policy. *Arbuthnot* v. *Norton*, 5 Moore, P. C. 219; 3 Moore, Ind. App. 435; 10 Jur. 145.

An agreement, after reciting that A. had carried on the business of a law stationer at G., and had been sub-distributor of stamps, and collector of assessed taxes there, and that he had agreed with B. for the sale of the business, and of his goodwill and interest therein, to him for 300*l.*, A., in consideration of 300*l.*, agreed to sell, and B. agreed to purchase, the business of a law stationer; and that A. should not at any time carry on the business of a law stationer, or within ten miles thereof, or collect any of the assessed taxes, but would use his utmost endeavours to introduce B. to the business and offices, is illegal and void, as being a contract for the sale of an office within 5 & 6 Edw. 6, c. 16, and also within 49 Geo. 3, c. 126. *Hopkins* v. *Prescott*, 4 C. B. 578; 16 L. J., C. P., 259; 11 Jur. 562.

A., an attorney, holding the office of clerk of the peace, clerk to the magistrates, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the deputy lieutenants, steward of certain manors, coroner for a liberty, secretary to a conservative association, and secretary to a polling district association, entered into articles of partnership with B., which recited that A. carried on the business of an attorney, and held many offices, clerkships, and stewardships of manors, and that it had been agreed that B. should enter into partnership with A. in the business and in the emoluments of the offices, clerkships, and stewardships for twenty years, and that all the profit and emoluments arising from the offices, clerkships, and stewardships held by A., as also all such offices, clerkships, and stewardships as should be held by either of them, A. and B., during the partnership, should be considered as partnership property, and be distributable accordingly. The articles contained a provision that if A. should die during the term, then if and during such period or periods as it should happen that no son of A. should be a partner in the business, B. should be interested in one moiety of the partnership business, and the executors or administrators of A. should be entitled to the profits of the remaining moiety, to be applied by them as part of his personal estate:—Held, that the contract was not void as being a contract for the sale of an office, either within 5 & 6 Edw. 6, c. 16, or within 49 Geo. 3, c. 126. *Sterry* v. *Clifton*, 9 C. B. 110; 19 L. J., C. P. 237; 14 Jur. 312.

The 49 Geo. 3, c. 126, s. 3, applied to the sale of an East India director's nomination to a cadetship. *Reg.* v. *Charrette*, 13 Q. B. 447.

An agreement for a pecuniary consideration for the resignation of a commission in the East India Company's service, is the sale of an office within 49 Geo. 3, c. 126, and is therefore illegal and void. *Graeme* v. *Wroughton*, 11 Ex. 146; 24 L. J., Ex. 265; 3 W. R. 509.

A declaration under 49 Geo. 3, c. 126, s. 6, alleged that the defendant advertised a proposal for a promise to give 150 guineas to any one who would procure A. a place under government: the words "for a promise" are surplusage: and the words "under government" are sufficient, though the words of the statute are "an office in the gift of the crown." *Clarke* v. *Harvey*, 1 Stark. 92.

Illegal Procurement.] — It seems doubtful whether a person paying money for procuring an office under government, can recover it back. *Pickard* v. *Bonner*, Peake, 289.

An action will not lie upon a promise to pay the plaintiff 2*l.* per cent. to procure a purchaser of the plaintiff's place of surveyor of the baggage of the port of London; being contrary to the statute. *Stackpole* v. *Earle*, 2 Wils. 131.

A bond given for the purchase of an office to which the groom of the stole has the power of recommendation, is invalid. *Hanington* v. *Duchatel*, 1 Bro. C. C. 124.

A condition to assign all offices is a valid condition, and will be taken to apply to such offices as are by law assignable. *Harrington* v. *Kloprogge*, 4 Dougl. 5; 6 Moore, 38, n.; 2 Br. & B. 678, n.; 2 Chit. 475; 23 R. R. 539, n.

A sale of a commission in the army is not bad of itself, but a sale of a public office or any obligation to be made good out of that is so. *Hartwell* v. *Hartwell*, 4 Ves. 815.

Sharing Profits.]—An agreement by which a deputy officer, appointed by his principal, is to receive all the fees, and pay the principal a fixed sum per annum, is void under 5 & 6 Edw. 6, c. 16. Alter, where a certain sum is reserved payable out of the fees; for in that case the deputy is not to pay unless the fees amount to so much. *Godolphin* v. *Tudor*, 1 Bro. P. C. 135.

Where, after the recital of the appointment of A. to be deputy to B. in the execution of an office within the purview of 5 & 6 Edw. 6, c. 16, or 49 Geo. 3, c. 126, A. paying thereout to B. an annual sum, the condition of the bond is stated to be for the payment by A. to B. of such annual

sum generally, it is a good plea in bar to say that the bond was given in pursuance of an agreement to pay such sum absolutely at all events. *Greville* v. *Atkins*, 4 Man. & Ry. 372 ; 9 B. & C. 462.

A., by the interest and on the application of B , is appointed custom-house officer of a port ; having previously signed an agreement declaring that his name was used in the application in trust for B , that he would appoint such deputies as B. should nominate, and would empower B. to receive the profits of the office to his own use. On the failure of A. to comply with the agreement, no action upon it will lie against him. *Garforth* v. *Fearon*, 1 H. Bl. 327, n. ; 2 R. R. 778

If a covenant is entered into, that, if the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the emoluments, and this is without the knowledge of the person who has the right of appointing to the office ; it is such a fraud on him as will avoid the covenant, whether the office is lawfully saleable or not. *Waldo* v. *Martin*, 6 D. & R. 364 ; 4 B. & C. 319 ; 2 Car. & P. 1 ; 28 R. R. 289.

An agreement to allow a certain share of the profits of an office in a dockyard, in order to induce the possessor to procure himself to be superannuated, is void. *Parsons* v. *Thompson*, 1 H. Bl. 322 ; 2 R. R. 773.

An attorney, town clerk, and clerk of the peace for a borough, upon the dissolution of partnership which had existed between him and two other persons, entered into an agreement to pay to one of them a certain sum of money, and use his endeavours to procure for him one-fourth of the prosecutions arising in the town clerk's office. In an action by him on this agreement, it appeared that the magistrates of the borough committed some offenders to be tried at the borough sessions, others at the county sessions, and others at the county assizes.—Held, that the defendant, as clerk of the peace of the borough, could not legally enter into such an agreement. *Hughes* v. *Statham*, 6 D. & R. 219 ; 4 B. & C. 187 ; 3 L. J. (O.S.) K. B. 179.

An assignment to trustees of all the emoluments and profits which during the life of S. and his continuing to hold the office of clerk of the peace for Westminster should arise or become due to him as such clerk of the peace, or in respect of his office, after deducting the salary of his deputy for the time being, upon trust to pay the interest arising on certain debts due from S., and from time to time render the residue, after satisfying the trusts, to S., is invalid in law. *Palmer* v. *Bate*, 6 Moore, 28 ; 2 Br. & B. 673 ; 23 R. R. 525.

iii. *As to Bail.*

Contract to indemnify Bail.]—A contract to indemnify bail against the consequences of the non-appearance of an accused person is contrary to public policy and therefore illegal. The defendant became bail in 100*l.* for the appearance of M. upon a charge of embezzlement. M. paid 100*l.* to the defendant to indemnify him for becoming bail, and then absconded :—Held, that the plaintiff, the trustee in bankruptcy of M., was entitled to recover that sum from the defendant ; for although the contract to indemnify the defendant was against public policy, yet it remained executory, in the absence of any evidence to show that the liability of the defendant, as bail, had been discharged. *Wilson* v. *Strugnell*, 50 L. J., M. C. 145 ; 7 Q. B. D. 548 ; 45 L. T. 218 ; 14 Cox, C. C. 624 ; 45 J. P. 831.

A. entered into a recognizance of bail for B. on the removal by certiorari of an indictment for conspiracy from the Central Criminal Court to the Queen's Bench. B. was convicted, and the recognizance was estreated for non-payment of the prosecutor's costs :—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones* v. *Orchard*, 16 C. B. 614 : 24 L. J., C. P. 229 ; 1 Jur. (N.S.) 936 ; 3 W. R. 554.

A defendant requested the plaintiff to become bail for the appearance of a person to take her trial at the Central Criminal Court, upon an indictment to be there preferred ; and in consideration thereof, verbally agreed to indemnify the plaintiff against all liability in respect thereof. The person bailed not appearing, the recognizances were estreated, and the plaintiff incurred other expenses incidental thereto :—Held, that the Statute of Frauds did not apply, this being a mere promise to indemnify, and not a promise to answer for the debt, default, or miscarriage of another, within s. 4 of the 29 Car. 2, c. 3. *Cripps* v. *Hartnoll*, 32 L. J., Q. B. 381 ; 10 Jur. (N.S.) 200 ; 8 L. T. 768 ; 11 W. R. 953—Ex. Ch.

A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned ; and no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound. *Wilson* v. *Strugnell* (supra), as to this point overruled. *Herman* v. *Jeuchner*, or *Zeuchner*, 54 L. J., Q. B. 340 ; 15 Q. B. D. 561 ; 53 L. T. 94 ; 33 W. R. 606 ; 49 J. P. 502—C. A. Reversing 1 Cab. & E. 364.

On Mesne Process.]—The bailiff of a county court, being about to arrest B. under a warrant of contempt for non-payment of a judgment debt, the defendant, in consideration that he would forbear to execute the warrant, promised to pay the bailiff 17*l.* on a given day, or surrender B. :—Held, not an agreement by the defendant to be answerable for the debt or default of B., but an original promise by the defendant to pay the money or surrender B., for which a note in writing was not required by the Statute of Frauds. *Reader* v. *Kingham*, 13 C. B. (N.S.) 344 ; 32 L. J., C. P. 108 ; 9 Jur. (N.S.) 797 ; 7 L. T. 789 ; 11 W. R. 366.

M. being in custody under an execution, pursuant to a warrant of attorney, by which he agreed that execution should issue from time to time for certain instalments of a mortgage debt, the defendant in consideration that the plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution :—Held, that the defendant's was a valid contract. *Atkinson* v. *Baynton*, 1 Bing. (N.C.) 444 ; 1 Scott, 404 ; 4 L. J., C. P. 127.

A declaration alleged that an action had been brought by the plaintiff against D., who, being about to leave the country, had been arrested under a capias; that, in consideration that the plaintiff would discharge him out of custody, the defendant promised to pay the plaintiff the debt and costs in that action: alleging, as a breach, non-payment; to which the defendant pleaded, that, during the continuance of that action, and while D. was in custody, and at the time of making the promise, the plaintiff had no claim, demand, or cause of action in respect whereof he could have recovered against him; and that, by discharging him out of custody, he did not give up any available remedy against him, as the plaintiff, at the time of the arrest and promise, did, but the defendant did not, know; and that the former suit and arrest were only colourable on the part of the plaintiff, and were not prosecuted for the purpose of trying any doubtful or contested question of law or fact:—Held, that the declaration was good, and the plea bad, as it did not show that the arrest was fraudulent or illegal. *Smith* v. *Monteith*, 13 M. & W. 427; 2 D. & L. 358; 14 L. J., Ex. 22; 9 Jur. 310.

Under 23 Henry 6.]—An undertaking of an attorney to give a bail-bond in due time, is contrary to 23 Hen. 6, c. 10, and void. *Sidgworth* v. *Spicer*, 4 East, 568; 2 Smith, 305.

Nor can an attorney, by that statute, give an undertaking to a sheriff's officer to appear and put in bail, even before the arrest is made, and it is not in the power of the officer to execute the writ. *Parker* v. *England*, 2 Smith, 52. And see *Rex* v. *Southerton*, 6 East, 143; 8 R. R. 428; and *King* v. *Price*, 1 Price, 341.

So, an agreement in writing to put in bail, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by 23 Hen. 6, c. 10. *Rogers* v. *Reeves*, 1 Term Rep. 418.

But an undertaking of an attorney, given to the plaintiff in order to procure the discharge of the defendant, to put in bail or pay the debt, is not within the statute, because it is not given to the sheriff. *Ib.*

A promise of a bribe to a bailiff to take bail is illegal, and an action will not lie upon the promise. *Smith* v. *Stotesbury*, 1 W. Bl. 204; 2 Burr. 924.

d. Contrary to Orders in Council.

Intention.]—A charterparty was made in France, by which it was stipulated that the ship should proceed to Trouville, a port in France, and should there load a cargo of hay, and proceed therewith direct to London; all cargo to be brought and taken from the ship alongside. The agent of the charterer told the master that the consignors would require the hay to be delivered at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, which he promised to do. On arriving in the Thames, he was informed that by an order in council made under the Contagious Diseases (Animals) Act, 1869, it was illegal to land in Great Britain hay brought from France. The order in council was in existence when the charterparty was entered into, but neither of the parties knew of it, nor did the shipowner contemplate any violation of the law. The charterer after a time exported the hay, and the shipowner brought an action against him to recover damages in respect of the detention of the ship:—Held, that under these circumstances the charterer could not set up as a defence that the voyage was illegal. *Waugh* v. *Morris*, 42 L. J., Q. B. 57; L. R. 8 Q. B. 202; 28 L. T. 265; 21 W. R. 438.

A. commissioned B. to get a charterparty effected on his ship, Russian built and British owned. She was accordingly chartered to go to America, and take in there a cargo of permitted goods, rice and cotton being specified, and to sail therewith to Cadiz, Lisbon, or Gottenburg, as directed. By a previous agreement it appeared to have been in the contemplation of the parties to carry the goods to some port in the United Kingdom, and that the ship should carry no licence:—Held, that this was not an illegal contract, so as to deprive B. of his right to his commission, for procuring the charterparty to be effected. *Haines* v. *Busk*, 1 Marsh. 191; 5 Taunt. 521.

Where A. agreed to sell to B. one-third share of a ship, which was to be employed on a joint adventure, in the exportation of military stores to South America, contrary to an order in council then in force:—Held, that (the agreement being entire, and containing on the face of it an illegal stipulation) it lay on the party seeking to enforce the same, to show that means had been used to obtain a licence, or that the illegal purpose had been abandoned; and that in failure thereof, A. could not recover for the share of the ship. *Holland* v. *Hall*, 1 B. & Ald. 53; 18 R. R. 428.

To an action on a bond, a plea that the bond was given to secure payment of the price of goods, agreed to be sold and delivered in London, by the plaintiff to the defendant, to be by the latter shipped to Ostend, and thence re-shipped for the East Indies, and there trafficked with clandestinely, is a sufficient bar to the action; the case being within 7 Geo. 1, c. 21, which avoided all contracts for supplying cargoes to foreign ships in such a trade. *Lightfoot* v. *Tenant*, 1 Bos. & P. 551; 4 R. R. 735.

After Declaration of War.]—A declaration on a charterparty, by which the charterer engaged to load at Odessa, by his factors, a cargo of wheat, thirty-five running days to be allowed; alleged as breaches, that he did not load the cargo, and, though he detained the ship on demurrage at Odessa, had not paid the demurrage. A plea stated, that the charterer was a British subject, and that after making the charterparty, and before the arrival of the ship at Odessa, and before he provided a cargo, war was declared by England against Russia; that Odessa was a hostile port; that it became impossible for him to fulfil the charterparty without dealing or trading with the Queen's enemies, of which the shipowner had notice before the expiration of the running days. The replication set out an order in council of the same date as the declaration of war, by which the Queen waived her right of seizing enemies' property on board of neutral ships, and another order in council made before the expiration of the running days, and while there was time to load the vessel within them, allowing neutral vessels to export into the Queen's dominions merchandise to whomsoever they might belong, and permitting British subjects to trade with all places not blockaded. It was alleged that the ship and the shipowner were neutral, and that Odessa was

not in blockade :—Held, that the plea was good, as the contract was rescinded by the declaration of war ; and that the replication was bad as the orders in council could not revive it when once dissolved. *Esposito* v. *Bowden*, 7 El. & Bl. 763 : 27 L. J., Q. B. 17 ; 3 Jur. (N.S.) 1209 ; 5 W. R. 732—Ex. Ch.

Authority.]—An ordinance passed in pursuance of an order in council, and not altered or disapproved of by the Queen in council, though seemingly more extensive than contemplated by the order, is not void for the excess, but will be considered as duly authorised by the order, and taken in conjunction with it. *Inglis* v. *De Barnard*, 3 Moore, P. C. 425.

A. undertook to convey B.'s goods from Liverpool, and to land them at Canton. On arriving there the British superintendent of trade, acting under the orders of the government in England, prohibited A. from landing the goods, and a loss ensued. In an action for breach of contract he pleaded only that he was prevented from performance by the officers of the Queen, duly authorised in that behalf, and exercising the powers of the governor. The officers were appointed by 3 & 4 Will. 4, c. 93, s. 5, and acted under the orders of the Queen in council. The plea was bad, because it did not set out the orders under which the superintendent of British trade at Canton acted, nor did it set out that the performance of the contract had been prevented by any acknowledged prerogative of the Crown *Evans* v. *Hutton*, 4 Man. & G. 954 ; 2 D. (N.S.) 600 ; 5 Scott (N.R.) 670 ; 12 L. J., C. P. 17 ; 6 Jur. 1042.

e. Contrary to International Law

Effect of Declaration of War]—The effect of a declaration of war is to dissolve contracts of affreightment made before but which remain to be executed at the time. *Esposito* v. *Bowden*, 7 El. & Bl. 763 ; 27 L. J., Q. B. 17 ; 3 Jur. (N.S.) 1209 ; 5 W. R. 732—Ex. Ch.

The shipping of a cargo from an enemy's port, even in a neutral vessel, is an act of dealing and trading with the Queen's enemies, and is therefore illegal. *Ib.*

A neutral, while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subject of it is lying in a neutral or an enemy's port. *Sorensen* v. *Reg.*, 11 Moore, P. C. 141.

A Russian vessel was sold, bonâ fide and absolutely, by an enemy to a neutral when the war between Russia and Great Britain was imminent. The vessel was at the time of the sale in the prosecution of a voyage from an enemy's port to a neutral port, where she arrived, and was taken possession of by the purchaser :—Held, that the sale, though in transitu, was valid, as the transitus had ceased when the vessel had come into possession of the purchaser, which took place before the seizure *Ib.*

A declaration of war by this country against a foreign power, imports a prohibition of commercial intercourse with the subjects of that power. *Barrick* v. *Buba*, 2 C. B. (N.S.) 563 ; 26 L. J., C. P. 280 ; 5 W. R. 665.

A mere intimation by the agent of the charterer to the master, before the time for loading had expired, that "he had ceded the charterparty, with all its rights and obligations," to a third person, and that he must address himself to such third person for a cargo, does not amount to a renunciation of the charterparty, so as to entitle the owner to sue as for a breach at that time. *Ib.*

Position of Neutral.]—The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war. *The Gerasimo*, 11 Moore, P. C. 88 ; 5 W. R. 450.

A temporary occupation of a territory by an enemy's force does not, of itself, necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. *Ib.*

The purpose of the blockade was declared to be for preventing the import of provisions to the enemy in possession of a neutral's country. Semble, that the fact of a neutral ship bringing out a cargo of corn is not a breach of such blockade. *Ib.*

The sale of a ship absolutely and bonâ fide by an enemy to a neutral imminente bello, or even flagrante bello, is not illegal. *Sorensen* v. *Reg*, 11 Moore, P. C. 119.

—— **Running Blockade.**]—It is not an offence against the law of nations, or the law of this country, for the subject of a neutral state to supply contraband of war to a belligerent power ; and the right of the other belligerent to seize such contraband of war in transitu is merely a co-existent conflicting right which exposes the neutral merchant to the risk of confiscation, but does not render illegal a contract between him and another neutral subject for a joint adventure for the supply of such contraband goods. *Chavasse, Ex parte, Grazebrook, In re*, 34 L. J., Bk. 17 ; 11 Jur. (N.S.) 400 ; 12 L. T. 249 ; 13 W. R. 627.

Nor is such a contract rendered void by the Foreign Enlistment Act, or 16 & 17 Vict. c. 107, or the Royal Proclamation of the 13th of May, 1861. *Ib.*

Goods which are contraband of war, in the course of transport from a neutral port to a neutral port, in a neutral ship, are not by the law of nations liable to seizure by the cruisers of a belligerent state, even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captors. To render goods contraband of war liable to seizure, they must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port. *Hobbs* v. *Henning*, 17 C. B. (N.S.) 791 ; 34 L. J., C. P. 117 ; 11 Jur. (N.S.) 222 ; 12 L. T. 205 ; 13 W. R. 431.

Nor does the mere fact that the ship carries simulated papers per se operate as a forfeiture of either ship or goods, though it may afford evidence from which a prize-court may infer that the ship was or the goods were enemy's property, or that her destination was to a blockaded port or to an enemy's port with contraband of war. *Ib.*

A breach of blockade by neutrals is not an offence against the municipal law of this country and therefore an agreement contemplating a

breach of blockade is not illegal. *The Helen*, 35 L. J., Adm. 2; 11 Jur. (N.S.) 1025; 13 L. T. 305.

And see SHIPPING.

Foreign Loans.]—It is illegal for a person residing in this country to raise money by way of loan, to assist subjects of a foreign state, so as to enable them to prosecute a war against a government in amity with our own. *De Wutz* v. *Hendricks*, 9 Moore, 586; 2 Bing. 314; 3 L. J. (O.S.) C. P. 3; 27 R. R. 660.

A foreigner has no right to negotiate in England a loan for the use of a state which has separated itself from and is at war with one of England's allies (such state not being at the time recognised by England), without the permission of the English government. *Yrisarri* v. *Clement*, 3 Bing. 432; 11 Moore, 308; 2 Car. & P. 223.

If several persons are jointly engaged in a bubble, to raise money for a non-existing state or government, one cannot maintain an action against another for the money so raised. *MacGregor* v. *Lowe*, 1 Car. & P. 200; R. & M. 57.

Nor, where the original contract was made with a government not acknowledged by Great Britain, can a court of equity give relief. *Thompson* v. *Powles*, 2 Sim. 194.

It is illegal to purchase obligations or securities purporting to be granted by the government of a foreign country which government has not been recognised by the King of England. *Thompson* v. *Barclay*, 6 L. J. (O.S.) Ch. 93.

Illegal Abroad.]—A written contract made in Jamaica, which, by the laws of that island, is void for want of a stamp, cannot be recovered upon here. *Alves* v. *Hodgson*, 7 Term Rep. 241; 2 Esp. 528; 4 R. R. 433.

A document will not be rejected as evidence on the ground that it has not been stamped in the manner required by the law of a foreign country; but where the law of a foreign country renders a contract invalid unless stamped in a particular way, a contract not so stamped cannot be enforced here. *Bristow* v. *Sequeville*, 5 Ex. 275; 19 L. J., Ex. 289; 14 Jur. 674.

Forging Foreign Notes.]—The value of paper made for the purpose of forging assignats upon, to be exported to France, may be recovered in our courts, although the plaintiff knew for what purposes the paper was to be applied. *Smith* v. *Marconnay*, Peake, Ad. C. 81.

Where the consideration of a promissory note was the engraving of plates upon which assignats were to be forged:—Held, that if the party did not know that they were made with a fraudulent intention, and supposed them to be issued with the authority of government, he might recover on the note. *Strongitharm* v. *Lukyn*, 1 Esp. 389.

f. Contrary to Morality.

Cohabitation as Consideration.]—Agreements entered into with a view to future cohabitation and prostitution are illegal and void, as being against public morality. *Walker* v. *Perkins*, 3 Burr. 1568; 1 W. Bl. 517.

A bond for cohabitation with a woman seduced by the obligor, and for maintenance, after his death, is void. *Ib.*

B., a married woman living separate from her husband, entered the service of C. as his housekeeper, and formed an illicit connection with him, during which period C. struck her a violent blow, which compelled her to have medical advice. On her threatening legal proceedings, C. promised compensation, and an agreement was drawn up by which, after reciting that they had lived together, but agreed thenceforth to separate, C. agreed to pay certain sums to B. for her separate use, and it was mutually agreed that each should live separate and apart from, and in no manner molest or annoy, the other. The illicit connection thereupon ceased. B. filed her bill for specific performance of this agreement:—Held, on demurrer, that there was no sufficient consideration in the agreement to entitle B. to recover upon it. *Lancaster* v. *Carter*, 2 W. R. 437.

A bill to be relieved from a security, first, on the ground that it was given for an immoral consideration; and, secondly, because it was not drawn in conformity with the agreement between the parties, cannot be sustained. This court has authority to relieve against an instrument, which, though legal upon the face of it, was, in fact, executed for an illegal and immoral purpose. *Batty* v. *Chester*, 5 Beav. 103.

Where a party filed a bill to be relieved from a deed, made in consideration of future cohabitation, and in pursuance of an alleged contract to provide for the woman only during the connection, and the bill was so framed as to make it the gist of the complaint, that the immoral contract had not been performed on the part of the woman, the bill was dismissed. *Ib.*

In an action on an annuity bond given by a man to a woman with whom he has cohabited, the question for the consideration of the jury is, whether at the time it was given there was or was not an intention and agreement to continue the connection for the future; for if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover. *Friend* v. *Harrison*, 2 Car. & P. 584; 31 R. R. 698.

Voluntary bond, during cohabitation to a woman previously of a very loose life; soon afterwards another bond expressly securing a continuance of the connection by an annuity in case of separation. Bill by the executor to have the bonds delivered up was dismissed with costs, the former being considered unimpeached; the latter void at law as pro turpi causâ. *Gray* v. *Mathias*, 5 Ves. 286; 5 R. R. 48.

S., living in unlawful cohabitation with M., granted an annuity to a trustee for her, and agreed to charge it on any real estate he might become possessed of, the first payment to be made upon his death or marriage, or cessation of cohabitation. He also gave a bond and warrant of attorney to secure the annuity. The cohabitation ceased, and an action was brought on a judgment which had been entered up on the warrant of attorney. S. filed a bill to restrain the action, and for cancelling the grant of the annuity:—Held, that the grant was totally void at law. *Smyth* v. *Griffin*, 14 L. J., Ch. 28; 8 Jur. 1131.

Bill for payment of a sum of money and an annuity secured by a deed poll to a young woman, who had been seduced by a married man in whose family she lived as companion to his wife, and who by continuing to live with him occasioned a separation, dismissed; but without costs, on account of her previous good character. *Priest* v. *Parrot*, 2 Ves. 160.

Where a married man living with his wife cohabited with a single woman, who knew that he was married, and at the termination of the illicit intercourse, gave her a bond to secure the payment of an annuity for the support of herself and two young children, the offspring of their cohabitation :—Held, that the bond was void. *Nye* v. *Moseley*, 9 D. & R. 165 ; 6 B. & C. 133 ; 30 R. R. 266.

A declaration stating that the plaintiff had cohabited with the defendant as his mistress, and that it was agreed that no further immoral connection should take place between them, and that the defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour : and that thereupon, in consideration of the premises, and that the plaintiff would give up the annuity, the defendant promised to give her as much as the annuity was worth, is bad. *Binnington* v. *Wallis*, 4 B. & Ald. 650.

Past seduction and cohabitation are not a good consideration to support a grant of an annuity. *Beaumont* v. *Reeve*, 8 Q. B. 483 ; 15 L. J., Q. B. 141 ; 18 Jur. 284.

A., having a wife who lived separate from him, afterwards purported to marry another woman who knew nothing of the wife being alive ; but it being discovered, A., in order to prevail with the other woman to stay with him, some years afterwards gave a bond to her trustee to leave her 1,000*l.* at his death, and died not leaving assets to pay his simple contract debts. If this bond had been given immediately on the discovery, and they had parted, it had been good ; but as it was, it was decreed to be delayed to all other creditors. *Coa's Case*, 3 P. W. 339.

Bill to be relieved against a bond to pay 400' to a woman the plaintiff kept as a mistress : relief denied ; but otherwise, if the obligee was a common strumpet, but then it must be so charged in the bill, and put in issue, for otherwise, if it is so proved, the depositions cannot be read *Whaley* v. *Norton*, 1 Vern. 483.

Not presumed unless proved. *Lightbone* v. *Weeden*, 1 Eq. Abr. 24.

Where testator gave a bond ex turpi causâ, and made an equal provision for obligee by will, it was held void as against creditors, and the legacy was left for the obligee and executor to contest. *Robinson* v. *Gee*, 1 Ves. 251.

Voluntary bond given by a person to a common woman after he had kept her two years not relieved against upon a bill by the executor of the obligor. *Hill* v. *Spencer*, Ambl. 641.

Bill by executor to avoid bonds given by testator, on suggestion that they were gained by threats and undue means ; defendant by answer says they were entered into for money lent and debts due. It appeared, defendant was a common harlot, and the plaintiff's father had unlawful conversation with her :—Held, though this not set forth in the bill, yet the defendant's answer, saying the bonds were given for money lent, sufficiently puts it on issue, though not laid in the bill. Where the party himself is culpable, and comes for relief against the said bonds, court may refuse ; otherwise where his executor comes. *Matthews* v. *Hanbury*, 2 Vern. 187.

A daughter joined her father in covenanting to surrender a copyhold, by way of mortgage, to A. for a sum of money lent by him to the father. Part of the consideration was the permission of the father to allow A. to continue his visits to the daughter, whom he was seducing, or had seduced. Upon a bill to enforce the deed and a cross bill to cancel it, the court at first considered that it could not interfere for either party, but ultimately ordered the deed to be cancelled, and that A. should pay the costs of both suits, except those of the father. *W*—— v. *B*——, *B*—— v. *W*——, 32 Beav. 574.

Note given ex turpi causâ set aside. *Robinson* v. *Cox*, 9 Mod. 263.

Demurrer allowed to bill, after verdict at law on bond, praying discovery, if consideration was not an illicit connection, and if defendant was not guilty of general incontinence. *Franco* v. *Bolton*, 3 Ves. 368. *See* 6 R. R. 71, n.

—— **When Security Valid — Past Cohabitation.**] — The plaintiff sought to be relieved from a deed by which he had covenanted to pay an annuity to the defendant, a female, on the ground that the consideration for it was a promise made to him by the defendant to live with him as his mistress. The defendant demurred for want of equity ; but the demurrer was overruled, because it did not appear that the plaintiff had availed himself of the promise. *Sidney* v. *Ley*, 17 Sim. 1 ; 18 L. J., Ch. 350 ; 13 Jur. 480.

To an action for arrears of an annuity, it is no answer that it was granted in consideration of cohabitation with the plaintiff, unless she knew of the arrangement. *Daniel* v. *Landen*. 1 F. & F. 289.

Bond by an obligor to secure the payment of an annuity to his kept mistress after his death. The consideration did not appear upon the face of the bond ; but at the time of executing it the obligor stated it to be for past cohabitation, and because the obligee was the mother of children by him. The bond was retained by the obligor in the custody of his solicitor, so that the obligee did not become aware of its existence till after his death .—Held, that it was a valid operative instrument, although the obligor when he executed it declared it to be his intention not to break off the connection with the obligee, and did in fact maintain her and her children till his death. *Hall* v. *Palmer*, 3 Hare, 532 ; 13 L. J., Ch. 352 ; 8 Jur. 459.

The testator six months before his death gave a bond to a lady with whom he had cohabited for more than thirty years, conditioned for the payment to her at the expiration of two years of a sum of money and interest ; and he continued to cohabit with her until his death. There was nothing on the face of the bond with reference to the cohabitation, and there was no evidence that it was in fact given to secure the continuance of the cohabitation :—Held, that the mere continuance of the cohabitation was not enough to raise the presumption that the bond was given in consideration of future cohabitation, and accordingly that the bond was good. *Gray* v. *Mathias* (5 Ves. 286 ; 5 R. R. 48) observed on. *Vallance, In re, Vallance* v. *Blagden*, 26 Ch. D. 353 ; 50 L. T. 574 ; 32 W. R. 918 ; 48 J. P. 398.

A., having seduced B., and she being enceinte by him, and living with him, he executed to her a deed whereby, in consideration of the release of a debt due by him to her uncle, he granted to her an annuity payable out of lands. The cohabitation continued for fourteen years, when they separated, and A. by testamentary papers alleged, (as the fact was) that the consideration stated in the deed was fictitious, and endeavoured

to deprive her of her annuity. B. swore that no agreement or stipulation for any future cohabitation was entered into or promised at the date of the deed, which was prepared solely by the solicitor of A., and without her knowledge or solicitation, and without her being aware of the intention of A.:—Held, that the onus was on those impeaching the instrument, which was primâ facie valid, to show that it was given ex turpi causâ; and the case being one in which B. would clearly be entitled to a premium pudicitiæ, the deed was allowed to prevail over volunteers claiming under the will. *Howell* v. *Price*, 1 Jur. (N.S.) 494.

It has been held that a bond in consideration of past cohabitation is good. *Turner* v. *Vaughan*, 2 Wils. 339. And see *Gray* v. *Mathias*, and *Friend* v. *Harrison*, supra. col. 174

A bond for securing a provision to a woman who had been seduced by the obligor, and for her children, given after cohabitation determined, held good, notwithstanding the obligor was married when the connection commenced. *Knye* v. *Moore*, or *Moseley*, 2 Sim. & S. 260; 3 L. J. (O.S.) Ch. 136.

A contract to grant an annuity, in consideration of the discontinuance of cohabitation and of the release of an alleged promise of marriage, is enforceable in equity. *Rennan* v. *Handley*, 2 De G. J. & S. 283; 10 Jur. (N.S.) 906; 10 L. T. 800; 12 W. R. 1021.

A bond given to kept mistress for her maintenance, and provision for child she had by deceased, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud; but shall not be paid out of personal estate until after simple contracts, but shall be paid out of the real estate, if there be one, in case personal estate falls short. *Cray* v. *Rooke*, Cases t. Talb. 153.

A. executes a deed, whereby he agrees that his executors, &c., shall, after his death, pay B. 2,000*l*., in order to purchase an annuity for the life of herself and a bastard child begotten on her by A. Equity will compel a specific performance of this agreement. *Annandale* (*Marchioness*) v. *Harris*, 1 Bro. P. C. 250; 2 P. W. 432.

A. grants an annuity to a woman whom he had seduced, out of his manor of D., in which A. had no estate. Equity will make him secure the annuity out of other lands. *Ib.*

Plaintiff had seduced his wife's sister, and had several children by her, and gave her some bonds for payment of money, as a provision for her and her children, and these bonds being sued, he brought a bill suggesting that the bonds were given for no valuable consideration, but it was dismissed with costs. *Spicer* v. *Hayward*, Pre. Ch. 114.

And that an agreement by the defendant to allow the plaintiff, with whom he cohabited, in case they should separate, an annuity for life, provided she should continue single, is valid. *Gibson* v. *Dickie*, 3 M. & S. 463; 16 R. R. 333.

A person bound himself to pay an annuity to an unmarried woman, by whom he had had several children, on condition that she should not require their custody or management:—Held, that there was a sufficiently valuable consideration to support the bond as a specialty debt. *Plaskett, In re*, 30 L. J., Ch. 606; 4 L. T. 544; 9 W. R. 628.

Clause in a deed of assignment of stock, from a married man to a married woman, that she shall live where he resides, though suspicious, is not sufficient ground to hold it pro turpi causâ. *Colman* v. *Sarrell*, 1 Ves. J. 51; 1 R. R. 53.

In a separation deed a covenant, by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, is good, and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery. But, semble, per Cotton, L.J., on the authority of *Evans* v. *Carrington* (2 De G. F. & J. 481), that if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void. *Fearon* v. *Aylesford* (*Earl*), 54 L. J., Q. B. 33; 14 Q. B. D. 792; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A.

—— **Plea of—Discovery in Aid.**]—A. covenanted with trustees to pay an annuity for the benefit of a woman. The trustees sued A. on the covenant, the deed being good on the face of it. A. pleaded that the consideration for the covenant was future illicit cohabitation between himself and the woman, and he then filed a bill against the trustees for discovery in aid of the plea. Upon demurrer to the bill by the trustees:—Held, reversing the order below, that A. was entitled to the discovery, notwithstanding he was particeps criminis. *Benyon* v. *Nettlefold*, 3 M. & G. 94; 20 L. J., Ch. 186; 15 Jur. 209. Reversing 17 Sim. 51.

Prostitution.]—If a party lets lodgings to an immodest woman, to enable her to consort with the other sex, he cannot recover in an action for the rent of the lodgings; but if the woman merely lodges there, and receives her visitors elsewhere, he may. *Appleton* v. *Campbell*, 2 Car. & P. 347.

—— **Knowledge of Purpose.**]—So, although he did not know, at the time of letting the lodgings, of her habits, if he afterwards became acquainted with the fact, and permitted her to remain as a tenant. *Jennings* v. *Throgmorton*, R. & M. 251. S. P., *Girardy* v. *Richardson*, 1 Bos. & P. 340; 1 Esp. 13.

But an agreement to pay for the washing and getting up of expensive articles of dress for a prostitute has been held valid, although it was known to the party by whom the work was done that the dresses were to enable her to appear at public places in the exercise of her vocation. *Lloyd* v. *Johnson*, 1 Bos. & P. 340; 4 R. R. 822.

And so held, in nearly a similar case at nisi prius, unless proved that the plaintiff had furnished them with an express view to enable the defendant to carry on her prostitution, and expected to be paid from the profits of it. *Bowry* v. *Bennet*, 1 Camp. 348; 10 R. R. 697.

It is a good defence to an action for the hire of a brougham that the defendant was a prostitute, and that the plaintiff at the time of the hiring knew it, and that the brougham was for the purpose of meretricious display; and it is not necessary to prove that the brougham was supplied in the expectation that the defendant would pay for it out of her earnings as a prostitute. *Pearce* v. *Brookes*, 35 L. J., Ex. 134; L. R. 1 Ex. 213; 12 Jur. (N.S.), 342; 14 L. T. 288; 14 W. R. 614.

A lessee of a house which had been notoriously used for many years as a brothel, assigned his term to a purchaser, knowing that the rent and

a premium would be paid out of the profits of the immoral trade carried on there. Among the covenants contained in the original lease was a covenant to deliver up the premises in good repair at the expiration of the term, and also not to permit the same to be used as a brothel. At the termination of the lease, the lessor compelled the lessee to pay a large sum for dilapidations and certain arrears of rent. The lessee submitted to the payment and claimed over against the estate of his assignee under a covenant in the assignment for indemnity in respect of all the lessee's covenants:—Held, that the assignor was not entitled to recover, the whole transaction and every obligation arising out of it being tainted with immorality. *Smith* v. *White*, 35 L. J., Ch. 454; L. R. 1 Eq. 626; 14 L. T. 350; 14 W. R. 510.

To a declaration containing two counts, the first for the breach of a contract to re-deliver a bank-note to the plaintiff, and the second for detaining the note, the defendant pleaded that it was deposited by way of pledge to secure the repayment of money advanced to the plaintiff. Replication, that the money was knowingly advanced for immoral purposes. Upon the trial the facts were proved as stated in the pleadings:—Held, that upon the whole record the defendant was entitled to judgment, as it was impossible that the plaintiff could recover, except through the medium and by the aid of an immoral transaction to which he was himself a party, so that the maxim "In pari delicto potior est conditio possidentis" was applicable. *Taylor* v. *Chester*, 10 B. & S. 237; 38 L. J., Q. B. 225; L. R. 4 Q. B. 309; 21 L. T. 359.

Other Immorality.]—The defendant contracted to let rooms to the plaintiff. Afterwards discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book, he refused to allow the use of them, but did not assign this as a reason for his refusal. In an action for breach of the contract:—Held, first, that the publication of such doctrines was blasphemy, and that therefore the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced by law. *Cowan* v. *Milbourn*, 36 L. J., Ex. 124; L. R. 2 Ex. 230; 16 L. T. 290; 15 W. R. 750.

Held, secondly, that the defendant was entitled to justify his refusal on this ground, notwithstanding his having assigned a different reason. *Ib.*

The printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him. *Poplett* v. *Stockdale*, R. & M. 337; 2 Car. & P. 198; 31 R. R. 662.

An author, by a verbal agreement, employed a printer to print a work, and placed the manuscript in his hands, with an intimation that it would be accompanied by a dedication. The work was printed by him, and the dedication having been sent, a proof of it was struck off at his premises by his servants. Before the copies of the dedication were worked off, his attention was for the first time directed to its contents, and, finding them libellous, he refused to print the dedication:—Held, first, that he might recover against the author for printing the work without the dedication. *Clay* v. *Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur. (N.S.) 908; 4 W. R. 557.

Held, secondly, that the action for this purpose was rightly brought for work, labour, and materials; and that this was not a contract for the sale of goods within the Statute of Frauds (29 Car. 2, c. 3), s. 17. *Ib.*

A. agreed to supply B. with a manuscript of a work, to be printed by the latter, the profits of which were to be equally divided between them:—Held, that B. might maintain an action against A. for refusing to supply manuscript after part of the work had been printed; but it would be a good defence of such action, to show that the intended publication was of an illegal nature; but this is not to be presumed, the work itself not having been produced at the trial. *Gale* v. *Leckie*, 2 Stark. 107; 19 R. R. 692.

An action will not lie for the price of libellous, obscene, or immoral prints. *Fores* v. *Johnes*, 4 Esp. 97; 6 R. R. 840.

Nor for pirating a work of a libellous or of an immoral tendency—as the "Amours of a Courtezan." *Stockdale* v. *Onwhyn*, 7 D. & R. 625; 5 B. & C. 178; 2 Car. & P. 163; 4 L. J. (O.S.) K. B. 122; 29 R. R. 207.

Without a plea of immorality, a defendant will not be allowed to give that fact in evidence as avoiding a contract, but may do so to impeach the plaintiff's credibility. *Macnab* v. *Johnson*, 2 F. & F. 293.

Possible Immorality—Existence of Contract, how affected by.]—Where a party has agreed to print and publish a certain specified quantity, as a sheet or a page, or a certain number of pages, of printed matter, at a certain time, and at a certain rate per page or sheet, there is a complete contract, and he cannot disclaim or deny the contract merely because, at the time he made it, he had not seen the matter to be printed, and that it might contain indecent, immoral, or libellous matter; for if it did so, though that would be a legal excuse for declining to print and publish it, it would be no ground for denying the existence of the contract, and would be no evidence under non assumpsit, but must be specially pleaded by way of excuse. *Lara* v. *General Apothecaries Co.*, 26 L. J., Ex. 225.

g. Compromise of Criminal Proceedings.

Agreement not to Prosecute.]—A sum was provided by A. under an agreement, by which it was to be applied in paying the liabilities of B. to a company, with the object on the part of A. of saving B. from a criminal prosecution. The company intended to prosecute, but pending negotiations for the contract counsel advised them that no crime had been committed:—Held, that the agreement was void on three grounds: first, that the company had not disclosed the fact that they had abandoned their intention; secondly, that it was against public policy, as being an agreement to stifle a public prosecution; and thirdly, that it was made under pressure. *Davies* v. *London and Provincial Marine Insurance Co.*, 47 L. J., Ch. 511; 8 Ch. D. 469; 38 L. T. 478; 26 W. R. 794.

Held, also, that the illegality was not such that (the fund being in medio) the court would refuse to interfere in favour of A. *Ib.*

—— **Specific Performance.**]—A court of equity will not enforce an agreement against a party who was induced to enter into it in order to save

his sons from a threatened prosecution for felony. *Dewar* v. *Elliott*, 2 L. J. (o.s.) Ch. 178.

A bill in equity lies not to compel a specific performance of an agreement to pay money in consideration of having stifled prosecution for felony. Secus, if to stop a prosecution at law for a fraud. *Johnson* v. *Ogilby*, 3 P. W. 279.

Withdrawal from Prosecution.]—An agreement by a wife to waive the further prosecution of an indictment against her husband for an assault, in consideration of his allowing her an annuity by way of separate maintenance, is an illegal contract, though entered into with the sanction of the court in which the indictment is tried. *Garth* v. *Earnshaw*, 3 Y. & C. 584.

A petition having been presented to the House of Commons against the return of a member, on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition:—Held, that this agreement was illegal. *Coppock* v. *Bower*, 4 M. & W. 361; 8 L. J., Ex. 9

—— **In Consideration of Money Paid.**]—A banking company commenced a prosecution against a customer for having obtained credit from them under false pretences, which is by s. 13 of the Debtors Act, 1869, made a misdemeanour. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained by false pretences. An application was made to the magistrate, by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor, and granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon after adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt:—Held, that the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that, though H., being in pari delicto, could not have recovered the money from the bank, the trustee, to whom by virtue of the relation back of his title to the act of bankruptcy, the money really belonged, could recover it. *Caldecott, Ex parte* (4 Ch. D. 150), distinguished. *Wolverhampton Banking Co., Ex parte, Campbell, In re*, 14 Q. B. D. 32.

—— **In Consideration of Deposit of Deeds.**]—A. having been arrested at the instance of B. on the charge of having committed the offence of larceny by a bailee, was brought up before a magistrate and remanded. A.'s wife then induced B. to withdraw from the prosecution on A.'s wife agreeing to charge her separate real estate with the amount taken. The title deeds of the property were deposited at a bank in the joint names of the solicitors of the parties. A. being again brought before the magistrates, the latter, having been informed of the terms, allowed the prosecution to be withdrawn. A.'s wife afterwards refused to perform her agreement. B. brought an action to enforce the charge, and A.'s wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her:—Held, that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was entitled to the declaration for delivery of the deeds. Larceny by a bailee is a felony, but, if it had been a misdemeanour, the agreement to charge in consideration of the withdrawal of the prosecution would have been void. *Whitmore* v. *Farley*, 45 L. T. 99; 29 W. R. 825; 14 Cox. C. C. 617—C. A.

—— **In Consideration of Staying Civil Action.**]—An agreement to withdraw from a prosecution for felony, provided the person accused will promise to bring no action for trespass and false imprisonment or for malicious prosecution, is void, and cannot be enforced; and if the person accused subsequently sues the prosecutor, the action will not be stayed upon the ground that it is brought against good faith. *Rawlings* v. *Coal Consumers' Association*, 43 L. J., M. C. 111; 30 L. T. 469; 22 W. R. 704.

In an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against 1 Will. & M. c. 18, s. 18, in disturbing a dissenting congregation, and a commitment for want of sureties under it to the next sessions; and that before the next sessions, it was agreed between the prosecutor and the plaintiff, with the consent of the magistrates, that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; and that the plaintiff was accordingly then and there so discharged, in full satisfaction and discharge of the assault and imprisonment:—Held, that this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a public misdemeanour, and thereby impeding the course of justice, or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and their consent afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgecombe* v. *Rodd*, 5 East, 294; 1 Smith, 515; 7 R. R. 700.

Inference as to Consideration.]—Where the treasurer of a friendly society had embezzled the funds, and the trustees agreed to take a bond and a sum of money to forego a criminal prosecution against him, the bond was declared illegal in an action thereon. *Cannon* v. *Rands*, 23 L. T. 817; 11 Cox, C. C. 631.

An agreement to abstain from instituting a threatened prosecution for a criminal offence is not illegal, unless there are reasonable grounds for believing that the alleged offence has been actually committed, or unless each party entered into the agreement on that assumption. *Ib.*

B. and his son had each separate banking accounts with W., and dealt with each other. The son being in difficulties, paid into his account numerous bills and notes purporting to bear his father's signature. B., being informed of this,

went with his son to the bank, when the son admitted he had forged his father's signature. The banker then hinted that if it could be arranged he would not exercise pressure. Thereupon B., to save his son from being prosecuted, and not being in any way civilly liable on the bills, agreed to give securities over his own estate for the amount of those bills, and gave them accordingly to the banker:—Held, that the reasonable inference being that the basis of the agreement was the stifling of a prosecution, B. was entitled to a decree ordering the securities to be given up to be cancelled. *Williams* v. *Bayley*, 35 L. J., Ch. 717; L. R. 1 H. L. 200; 12 Jur. (N S.) 875; 14 L. T. 802.

Such an agreement would not have been legal even if the banker had proposed it. *Ib.*

A court of equity will set aside any agreement having for its object the stifling of a criminal prosecution. *Ib.*

The court will not set aside a warrant of attorney given to secure a debt, on the ground that it was obtained by a threat of prosecution for felony, unless it distinctly appears that there was an agreement, either express or necessarily implied, to abstain from prosecuting upon the security being given. *Ward* v. *Lloyd*, 6 Man. & G. 785; 7 Scott (N.R.) 449; 13 L. J., C. P. 5.

In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to show that the creditor was thereby induced to abstain from prosecuting. Following *Ward* v. *Lloyd*, supra. *Flower* v. *Sadler*, 9 Q. B. D. 83; 46 J. P. 503 Affirmed, 10 Q. B. D. 572—C. A.

A clerk having robbed his employers of money, gave them, upon the discovery of his frauds and before his prosecution, an equitable security on policies and lands for the amount. He was afterward prosecuted and convicted:—Held, that the debt was a good consideration for the securities, and that they were valid. *Chowne* v. *Baylis*, 31 Beav. 351.

Semble, that where the consideration for a contract is an agreement not to prosecute, it does not follow as a necessary inference of fact that there is such pressure or undue influence on the party to whom the consideration moves as to entitle him to equitable relief. *Jones* v. *Merionethshire Permanent Benefit Building Society*, 61 L. J., Ch. 138; [1892] 1 Ch. 173; 65 L. T. 685; 40 W. R. 273; 17 Cox, C. C. 389. Cp *McClatchie* v. *Haslam*, 65 L. T. 691; 17 Cox, C. C. 402.

Misdemeanour.]—It is not illegal to compromise indictments for misdemeanours. *Elworthy* v. *Bird*, 9 Moore, 430; 2 Bing. 258; 13 Price, 222; 2 Sim. & S. 372; 3 L. J. (O.S.) C. P. 260.

Secus, as to indictments for felony. *Ib.* See *Whitmore* v. *Farley*, supra.

A party who has been defrauded of goods by the apprentice of another may legally agree not to proceed against the master who has received the goods at an under price. *Drage* v. *Ibberson*, 2 Esp. 643.

Where Offence subject of Civil Action.]—The law permits the compromise of offences (although made the subject of criminal prosecution), for which the injured party might sue and recover damages in an action; but no agreement can be valid which is founded upon the consideration of stifling an offence of a public nature. *Keir* v. *Leeman*, 6 Q. B. 308; 13 L. J., Q. B. 259; 8 Jur. 824. *S. C.*, affirmed in error, 9 Q. B. 371; 15 L. J., Q. B. 359; 10 Jur. 742—Ex. Ch.

At the trial of the defendants on the prosecution of the plaintiffs for obstructing a highway, an agreement was entered into between the parties, with the approval of the court, that the defendants should restore the highway, and that in the meantime the indictment should lie in the office, and that on the fulfilment of the agreement the plaintiffs should consent to an acquittal. In pursuance of this agreement the defendants covenanted to restore the highway:—Held, that the covenant was founded on an illegal consideration, and was void. *Keir* v. *Leeman*, supra, followed and approved. Dictum of James, L.J., in *Fisher* v. *Apollinaris Co.*, infra, not followed. *Windhill Local Board* v. *Vint*, 59 L. J., Ch. 608; 45 Ch. D. 351; 63 L. T. 366; 38 W. R. 738—C. A Affirming, 17 Cox, C. C. 41.

When an offence is of such a nature that the person injured may obtain either a civil or a criminal remedy, there is nothing unlawful in a compromise of criminal proceedings taken against the offender. *Fisher* v. *Apollinaris Co.*, 44 L. J., Ch. 500; L. R. 10 Ch. 297; 32 L. T. 628; 23 W. R. 460.

Action for malicious prosecution, obstruction of a right of way, and stopping a public footpath, whereby the public was forced to pass over the plaintiff's lands. Plea, that after the grievances a consent was entered into between the plaintiff and defendant that all actions and suits pending at the suit of the defendant or of the Queen, against the plaintiff, should be stopped and abandoned by the defendant, and that no rule should be made on a motion for a certiorari then pending, and that the defendant should pay all costs; and that the plaintiff agreed to accept such consent and the signing thereof in full satisfaction of the causes of action to which the plea was pleaded, and that the consent was duly made and signed by the defendant, and so accepted by the plaintiff. Replication, that one of the actions and suits in the consent mentioned was an indictment preferred at the suit of the Queen by the defendant against the plaintiff, and duly found a true bill by the grand jury for obstructing a public footway, and that at the time of making the consent the bill was still pending, and the plaintiff was not discharged for the same, and that by reason thereof the consent was illegal and void. Rejoinder, that the consent was made a rule of court:—Held, that there was no fact shown on the pleadings which rendered this consent void as an agreement to stifle a public prosecution. *Crooke* v. *Powerscourt* (*Lord*), 16 W. R. 969.

A bond conditioned (on the obligee's agreeing not to prosecute) to remove certain public nuisances, and not erect any others of the same kind, is good. *Fallowes* v. *Taylor*, 7 Term Rep. 475; Peake Ad. C. 155.

Claim arising out of Felony—Whether Debt provable in Bankruptcy.]—Bankers allowed a customer to overdraw his current account on his depositing with them as security for the overdraft some bills of exchange drawn by him upon, and purporting to be accepted by, a third person. After the customer had overdrawn his account the bankers discovered that the acceptances were forgeries. They then communicated with the customer, and ultimately gave up the forged acceptances to him, receiving from him in ex-

change joint and several promissory notes of himself and his father. The customer was afterwards adjudicated a bankrupt. The notes were not paid at maturity:—Held, that, though the bankers had not prosecuted the bankrupt for the felony, and whether they had or had not agreed not to prosecute him, they were entitled to prove in the bankruptcy for the balance due to them upon the bankrupt's current account. *Leslie, Ex parte, Guerrier, In re*, 51 L. J., Ch. 689; 20 Ch. D. 131; 46 L. T. 548; 30 W. R. 314—C. A.

Consent of Judge.]—Where an offence was not confined to a personal injury, but was accompanied with riot, and the obstruction of a public officer in the execution of his duty; an agreement by the prosecutor to compromise the matter, and forego the prosecution, is invalid, even though made with the knowledge and consent of the judge. *Keir* v. *Leeman*, supra, col. 183.

A promissory note given by a defendant in prison after conviction for a misdemeanour, and before sentence, in pursuance of a recommendation of the court to compromise, is valid; although the court is not apprised of the terms of the compromise, and although the costs of the prosecution are included in the note. *Kirk* v. *Strickwood*, 1 N. & M. 275; 4 B. & Ad. 421; 2 L. J., M. C. 43.

See *Windhill Local Board* v. *Vint*, supra, col. 184.

Securities for—Bond.]—A bond given by way of indemnity, to one who had given his note to a prosecutor on an indictment for perjury, to induce him to withhold his evidence, is void ab initio. *Collins* v. *Blantern*, 2 Wils. 341, 347.

Any contract having a tendency, however slight, to affect the administration of justice is illegal and void. The consideration of a bond was expressed to be that the obligor was to be free from any legal proceedings or other consequences for having introduced the obligee to C., through whom the obligee had lost money:—Held, on the evidence, that the consideration included promises that no criminal proceedings should be commenced against the obligor, and that certain criminal proceedings then pending against C. should be so conducted that the name of the obligor should not be mentioned, or should be mentioned in such a way as not to damage him; that the consideration was partly illegal as tending to affect the course of justice; and that there was no good consideration for the bond. *Lound* v. *Grimwade*, 57 L. J., Ch. 725; 39 Ch. D. 605; 59 L. T. 168.

Warrant of Attorney.]—A warrant of attorney, given by an attorney to induce a party to stay proceedings against him on a rule, is illegal and void, and the court will direct it to be taken off the file of the court and cancelled. *Kirwan* v. *Goodman*, 9 D. P. C. 330; 5 Jur. 293. S. P., *Pool* v. *Bousfield*, 1 Camp. 55; 10 R. R. 633.

A. preferred a charge of embezzlement against B., the investigation of which was several times adjourned, the magistrate on each occasion expressing a strong opinion that the prosecution could not be sustained, as the evidence seemed to establish the existence of a partnership between the prosecutor and B. Previously to the final adjudication of the matter by the magistrate, a warrant of attorney was given to the prosecutor, to secure the payment to him of the sum due from B.; and at the next meeting before the magistrate, upon the prosecutor, by his attorney, stating that he was advised by counsel that he could not substantiate the charge, B. was forthwith dismissed:—Held, that the warrant of attorney was void, as having been given on an illegal consideration. *Critchley, Ex parte*, 1 B. C. Rep. 7; 3 D. & L. 527, 15 L. J., Q. B. 124; 10 Jur. 112.

In an application to set aside a warrant of attorney given by a collector who had received moneys and failed to account for them, evidence was given that when the defalcations were first discovered, the collector's principal threatened to prosecute him for unlawfully making use of his money, and the collector thereupon gave the security in question, and no prosecution followed:—Held, that the warrant of attorney was not given for an illegal consideration. *Ward* v. *Lloyd*, 6 Man. & G. 785; 7 Scott (N.R.) 449.

Promissory Note.] — Promissory notes, delivered by one person to another, to induce the latter to forego prosecuting him for cheating at cards, will be decreed to be delivered up, because it would be extremely dangerous to allow a party to be a judge in his own cause, and to determine in his own favour what amount of penalty ought to be paid for a breach of the law committed by another person, notwithstanding he may have suffered by it. *Osbaldiston* v. *Simpson*, 13 Sim. 513; 7 Jur. 736.

The respondents gave a written undertaking to the appellant society to make good part of a debt arising from the criminal default of the secretary of the society, the consideration expressed being that the society should not sue the secretary to recover that part of the debt. The society had threatened to prosecute the secretary, and, though the question of their doing so was not mentioned in the negotiations which led to the undertaking, the respondents had heard of the threat, and in giving the undertaking were, as was well known to the directors of the society, actuated by a desire to prevent a prosecution:—Held, that it was a term of the true agreement between the parties that there should be no prosecution; that the consideration for such agreement was illegal; and that certain promissory notes given in pursuance of the undertaking could not be enforced by the society. *Jones* v. *Merionethshire Permanent Benefit Building Society*, 61 L. J., Ch. 138; [1892] 1 Ch. 173; 65 L. T. 685; 40 W. R. 273; 17 Cox, C. C. 389—C. A.

Bill of Exchange.]—An agreement to forego a criminal prosecution is illegal, but the plaintiff may recover on a bill of exchange given by the defendant for the costs of a civil proceeding against a third person, and the amount of a composition with him, although the plaintiff has instituted a prosecution against such third person, which he afterwards abandoned, unless the abandonment of the prosecution formed part of the consideration of the bill. *Harding* v. *Cooper*, 1 Stark. 467.

In an action on a bill of exchange by the drawer against the acceptor, the defendant pleaded, in substance, that the only consideration for the bill, was the discontinuance by the drawer of certain proceedings by civil bill, and his forbearing to commence a prosecution for an alleged forgery against a third person which he had threatened to institute:—Held, on demurrer, that the agreement to abstain from instituting the prosecution, though in itself an insufficient

consideration for the bill, was not shown by the defence to be an illegal agreement, and therefore did not avoid the contract of the acceptor, for which the abandonment of the civil bill proceedings would otherwise afford an admittedly valid consideration. *Rourke* v. *Mealy*, 4 L. R., Ir. 166.

—— **Forged Indorsement, Ratification of.**]—The defendant's name was forged, by one Jones, to a joint and several note for 20*l*., dated the 7th of November, 1869, and purporting to be made in favour of the plaintiff, by the defendant and Jones. While the note was current the defendant signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority:—"I hold myself responsible for a bill dated the 7th of November, 1869, for 20*l*., bearing my signature and Richard Jones', in favour of Mr. Brook." At the trial of an action against the defendant on the note, the judge ruled that this memorandum was a ratification, and directed the jury that the only question for them was whether the defendant signed it. It being admitted that he did, a verdict was entered for the plaintiff:—Held (per Kelly, C.B., Channell and Pigott, BB., Martin, B., dissentiente), a misdirection:— Per Kelly, C.B., Channell and Pigott, BB., that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void and incapable of ratification, but that it was, in fact, an agreement by the defendant to treat the note as his own in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on an illegal consideration. *Brook* v. *Hook*, 40 L. J., Ex. 50; L. R. 6 Ex. 89; 24 L. T. 34; 19 W. R. 508. Compare *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477—H. L. (Sc.)

—— **For Expenses of Prosecution.**]—A security for the fair expenses of the prosecution, agreed to be given, at the recommendation of the court of quarter sessions, by a party who stood convicted before them of a misdemeanour, in ill-treating his parish apprentice, for which the parish officers had been bound over by recognisance to prosecute him under 32 Geo. 3, c. 57, and the giving of which security was considered by the court in abatement of the period of imprisonment to which he would otherwise have been sentenced, is legal. *Beeley* v. *Wingfield*, 11 East, 46; 10 R. R. 431.

Postponement of Trial.]—There is no objection to the legality of an agreement to pay money in consideration of putting off the trial of an indictment. *Harvey* v. *Morgan*, 2 Stark. 17.

Recovery back of Money paid.]—A person who has voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate, upon a charge of having instigated an escape, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor, may, at any rate, countermand the application of the money before it is so applied, and recover it back. *Taylor* v. *Lenday*, 9 East, 49.

Action for Damages.]—One of two parties to an agreement to suppress a prosecution for a felony cannot maintain an action against the other for an injury arising out of the transaction, in which they have both been illegally engaged. *Fivaz* v. *Nicholls*, 2 C. B. 501; 15 L. J., C. P. 125; 10 Jur. 50.

Guardians of a poor-law union indicted a party for disobeying an order of sessions for maintenance of a bastard. Before trial, he offered a compromise; and the clerk to the guardians, on their behalf, agreed with him for a sum on account of costs and maintenance, which he paid; and the indictment was dropped. Afterwards, he discovered that the order of sessions was defective and void, and he brought an action for money had and received against the clerk:—Held, that the clerk was not liable, having done nothing in the prosecution beyond preferring the indictment. *Goodall* v. *Lowndes*, 6 Q. B. 464; 9 Jur. 177.

If the compromise was illegal, the party, being in pari delicto with the other parties offending, could not sue them for money which he had paid. *Ib.*

Discovery.]—Transfer of stock under an agreement to satisfy the deficiency in the amount of a banker's clerk, though he is not a party, amounts to a composition of felony, to prevent a prosecution. Defendant, therefore, may protect himself by plea from discovering, not only the broad leading fact, but any fact, the answers to which may form a step in the prosecution. *Claridge* v. *Hoare*, 14 Ves. 59.

h. Brokerage.

An agreement to procure a situation for a medical man, by the assignment of patients by a third person, to whom a premium was to be paid, is not illegal. *Edgar* v. *Blick*, 1 Stark. 464; 18 R. R. 809.

So an action lies for brokerage in procuring a medical partnership. *Ib.*

But an agreement to allow poundage to a person upon the amount of the bills of all customers recommended by such person, is illegal, as a fraud upon the customers. *Wyburd* v. *Stanton*, 4 Esp. 179.

If A. agrees to give B. a certain sum for goods, in advancement of C., any secret agreement between B. and C., that the latter shall pay a further sum, is void as a fraud on A., although the bill of sale is made to A.; and B. cannot recover such further sum against C. *Jackson* v *Duchaire*, 3 Term Rep. 551.

Government having contracted to furnish forage for a certain number of horses to be kept by a suttler, and the contractor for forage having agreed not to commute the forage for money; an agreement between the suttler and the contractor, that the latter should allow the former a sum of money for each ration of forage allowed for the whole number of horses, and should retain the forage, is void. *Willis* v. *Baldwin*, 2 Dougl. 450.

A demurrer was allowed in equity to a bill of discovery in support of an action to recover the expenses of entertainments, given by the plaintiff under an agreement with the defendant to introduce him to a woman of fortune, with a view to marriage. *King* v. *Burr*, 3 Mer. 693.

An action will not lie to recover back money deposited for the purpose of being paid to a person for his interest in soliciting a pardon for

a person under sentence of death. *Norman* v. *Cole*, 3 Esp. 253.

Default in Sending Contract Note—Right to Commission.]—Section 17 of the Customs and Inland Revenue Act, 1888, which imposes a penalty on a broker who fails to send a contract note to his principal does not render the contract between broker and principal illegal so as to preclude the broker from recovering commission or brokerage. *Learoyd* v. *Bracken*, 63 L. J., Q. B. 96; [1894] 1 Q. B. 114; 9 R. 92; 69 L. T. 668; 42 W. R. 196—C. A.

i. In Restraint of Trade.

i. *General Principles.*

Changes in Doctrine.]—The changes in the doctrine of public policy and the authorities discussed. *Davies* v. *Davies*, 56 L. J., Ch. 962; 36 Ch. D. 359; 58 L. T. 209; 36 W. R. 86—C. A.

The old rule that the law does not allow an absolute covenant in restraint of trade is still binding. *Ib.* per Cotton, L. J.

Construction.]—The court will construe agreements in restraint of trade in accordance with the intention of the parties, without leaning to one side or the other. *Mills* v. *Dunham*, 60 L. J., Ch. 362; [1891] 1 Ch. 576; 64 L. T. 712; 39 W. R. 289—C. A.

ii. *What is.*

Not to Ship Goods in other than a particular Dock.]—The Taff Vale Railway Company covenanted with the Bute Dock trustees, first, that the company would, as far as they were able, cause all goods carried along the Taff Vale Railway, or any branch thereof to be shipped or unshipped in the Bute Dock; and, second, that, for all goods carried over the Taff Vale Railway, or any branch thereof, which should be shipped or unshipped in "any dock, canal, or cut whatsoever other than" the Bute Dock, the company would pay the trustees the wharfage and dockage dues to which they would have been entitled if the goods had been shipped or unshipped in the Bute Dock. The Taff Vale Company subsequently took a lease of the Penarth Harbour and Dock Railway, and used this harbour and dock for the shipment and unshipment of goods which passed along the Penarth Railway and along the Taff Vale Railway:—Held, that the above covenants were not in restraint of trade. *Taff Vale Ry.* v. *Macnabb*, 42 L. J., Q. B. 153; L. R. 6 H. L. 169; 22 W. R. 65.

Rule of Society not to employ Servants of other Members.]—A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employé who had left the service of another member without the consent in writing of his late employer till after the expiration of two years:—Held, that the rule was unreasonable, in restraint of trade, and void. But, semble, a rule protecting the members against information gained by servants being improperly communicated to other members, if reasonably framed, would have been good. *Mineral Water Bottle Exchange Society* v. *Booth*, 36 Ch. D. 465; 57 L. T. 573; 36 W. R. 274—C. A.

Not to Solicit Customers of Plaintiffs or their Successors.]—By an agreement in writing the plaintiffs engaged the defendant as their traveller and assistant in their business of antiseptic manufacturers. The defendant agreed "to call upon and solicit orders from" customers for the said business, and to report to the plaintiffs "all calls made by or upon him"; and he further agreed that he would not after the termination of the agreement, "for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any person or persons or firm, call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with any person or firm who during the continuance of this agreement shall be customers of" the plaintiffs, "or any future successors of" the plaintiffs, "or any of the successors in business of such customers":—Held, that, notwithstanding the generality of the language, the true intent of the parties was to bind the defendant not to engage in any competing business; that the agreement was not in restraint of trade; and that the plaintiffs were entitled to an injunction restraining the defendant from soliciting orders for a rival firm. *Mills* v. *Dunham*, 60 L. J., Ch. 362; [1891] 1 Ch. 576: 64 L. T. 712; 39 W. R. 289—C. A.

To disclose Inventions and Improvements.]—An agreement by a managing director with his company that the company should be entitled to the full and exclusive benefit of all new inventions or improvements that might be made or discovered by the director after the date of the agreement, in connection with certain named subjects, and that he would communicate to the company particulars of any such new invention or improvement, and would execute such documents as might be requisite to enable the company to obtain patents for such inventions and improvements, is not void either as being in restraint of trade, or as contrary to public policy, or as being too vague to be enforced. *Maxim-Nordenfeldt Co.* v. *Nordenfeldt*, 67 L. T. 469.

Sale of Goodwill.]—The sale of a trade with a goodwill does not prevent the vendor setting up again a similar trade, unless there is an express covenant or fraud, by representing it as a continuation of the old trade, or conduct encouraging others to involve themselves in the confidence that he would not trade again. *Crutwell* v. *Lye*, 17 Ves. 335; 11 R. R. 98. See *Thomas, Ex parte*, 2 Mont. D & D. 294.

The saleable quality of goodwill in trade deserves protection. *Elves* v. *Croft*, 10 C. B. 241; 19 L. J., C. P. 385; 14 Jur. 855.

A covenant, by which a butcher on assigning premises for the residue of a term, and also his goodwill in trade to another butcher, covenanted not to carry on the trade of a butcher within five miles of the premises assigned, is good in law, and it continues binding on the covenantor after the expiration of the term, and during the life of the covenantee, although he may have ceased to carry on the trade. *Ib.*

A widow carried on the business of a licensed victualler on premises held by her from year to year. Prior to her second marriage she assigned her household goods, furniture, stock-in-trade, brewing utensils, and all other effects, upon trusts, excluding her husband. She married:—Held, that the goodwill of the trade, which was afterwards sold, passed by the deed as

incident to the stock and licence, and not to the husband with the premises. *England* v. *Downs*, 6 Beav. 269.

And see *In respect of Time*, infra, viii.

iii. *Reasonableness.*

General Rule.]—The true test of the validity of a covenant which is in restraint of trade—whether the restraint be general or partial—is whether it is or is not reasonable. *Nordenfeldt* v. *Maxim-Nordenfeldt Guns and Ammunition Co.*, 63 L. J., Ch. 908; [1894] A. C. 535; 11 R. 1; 71 L. T. 489—H. L. (E.)

Where a covenant in restraint of trade is general—that is, without qualification—it is bad, as being unreasonable and contrary to public policy; where it is partial—that is, subject to some qualification either as to time or space—then the question is whether it is reasonable, and, if reasonable, it is good in law. *Badische Anilin Fabrik* v. *Schott*, 61 L. J., Ch. 698; [1892] 3 Ch. 447; 67 L. T. 281.

In considering the question of reasonableness, the points to which the attention of the court is specially directed are the limits of time and of space, and the protection required for the trade of the covenantee, this latter point involving the examination of the nature and extent of the trade. The reasonableness depends on all the circumstances, which must be duly weighed in each case. If the restraint is greater than can be possibly required for the protection of the covenantee, the covenant is unreasonable; but if the restraint is not greater than can possibly be required for the protection of the covenantee, it is not unreasonable; and where the covenant is qualified as to time, the burden lies on the covenantor of showing that the restraint is unreasonable. *Ib.*

Restraint Unlimited.] — Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of his labour, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labour, skill, or talent, and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject-matter of the contract. *Leather Cloth Co.* v. *Lorsont*, 39 L. J., Ch. 86; L. R. 9 Eq. 345; 21 L. T. 661; 18 W. R. 572.

Upon the formation of a company for the purchase and working of a process of manufacture introduced into this country from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory of the vendors, and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased."—Held, that the restriction contained in this clause was no greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors. *Ib.*

A covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable and therefore good in law, if it relates to the use of a trade secret. *Hogg* v. *Darley*, 47 L. J., Ch. 567; 38 L. T. 312.

The purchaser of the business of certain manufacturers and sellers of well-known disinfectants, by his statement of claim alleged that the mode by which those disinfectants were manufactured was a secret; that the vendors of the business (of whom the defendant was one) had at the time of the sale entered into a several covenant not to carry on the business of manufacturers or sellers of such disinfectants, or other articles of a similar kind, within fourteen years from that date, and that the defendant had infringed this covenant. A demurrer to so much of the statement of claim as related to this covenant, on the ground that the covenant was too general, and therefore bad in law, was overruled. *Ib.*

There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space. The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space. *Allsopp* v. *Wheatcroft* (L. R. 15 Eq. 59) disapproved; *Leather Cloth Co.* v. *Lorsont* (supra) followed. *Rousillon* v. *Rousillon*, 49 L. J., Ch. 338; 14 Ch. D. 351; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

A covenant in restraint of trade may be unlimited in point of space, provided that it is not more than is reasonably necessary for the protection of the covenantee, and is in no way injurious to the interests of the public. *Nordenfeldt* v. *Maxim-Nordenfeldt Guns and Ammunition Co.*, supra, col. 191.

A trader may sell a secret in his trade, and restrain himself generally from the use of it. *Bryson* v. *Whitehead*, 1 Sim. & S. 74; 1 L. J. (o.s.) Ch. 42.

Divisibility of Stipulations.]—P. covenanted with G. not to carry on the trade of a perfumer within the cities of London and Westminster, or within 600 miles from the same, and bound himself in 5,000*l.* by way of liquidated damages for the observance of the covenant. The executor of G. brought an action for a breach of the covenant by the defendant in carrying on the business in the city of London. Plea, that the deed was void, because the covenant extended to all England:—Held, that the covenant was divisible, and that, although void as regards the distance of 600 miles from London and Westminster, it was good as regards the cities of London and Westminster themselves. *Price* v. *Green*, 16 M. & W. 346; 16 L. J., Ex. 108; 9 Jur. 880—Ex. Ch.

In an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customer served or belonging at any time to the master, his successors or assigns:—Held, that, if on the construction of the undertaking it was not limited to interference with persons who were customers during the employment of the servant, the undertaking was severable, and capable of enforcement in respect of persons who were customers during the employment. *Baines* v. *Geary*, 56 L. J., Ch. 935;

35 Ch. D. 154; 56 L. T. 567; 36 W. R. 98; 51 J. P. 628.

The defendant entered into an agreement to serve the plaintiff in his business of dairyman as a milk-carrier. By the agreement the defendant agreed that he would not during the continuance of the service nor at any time thereafter serve, for his own benefit or for the benefit of any other person, or solicit or in any way interfere with any of the customers who should at any time be served by the plaintiff in his business:—Held, that the clause was severable, and that an injunction could properly be granted restraining the defendant from serving persons who were customers of the plaintiff during the employment of the defendant by the plaintiff. *Dubowski* v. *Goldstein*, 65 L. J., Q. B. 397; [1896] 1 Q. B. 478; 74 L. T. 180; 44 W. R. 436—C. A.

Held, also, by Lord Esher, M.R., and Rigby, L.J. (Lopes, L.J., dissenting), that, without any severance, the restrictive clause was valid, as it did not go beyond what was reasonably necessary for the protection of the plaintiff's business. *Ib.*

In an action for the breach of an agreement, a clause contained therein (although illegal, as being in restraint of trade), if it forms no part of the consideration, need not be set out in the declaration. *M'Allen* v. *Churchill*, 11 Moore, 483; 4 L. J. (o.s.) C. P. 183; 28 R. R. 680.

What held to be unnecessary Restrictions.]—All contracts of trade, whereby a party is restricted generally, and without reference to place, from exercising his trade for a special time, are void by the general policy of the law. *Ward* v. *Byrne*, 5 M. & W. 548; 9 L. J., Ex. 14; 3 Jur. 1175.

A covenant by a clerk and traveller with a firm of brewers that he would not, during his service or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person, public company or corporation, of any Burton ale or porter brewed at Burton, or offered for sale as such, other than the ale, beer, or porter brewed by the firm, is void, as unnecessarily extensive. *Allsopp* v. *Wheatcroft*, 42 L. J., Ch. 12; L. R. 15 Eq. 59; 27 L. T. 372; 21 W. R. 102.

A covenant by the lessor of a brewery, that he will not "during the continuance of the demise, carry on the business of a brewer or merchant, or agent for the sale of ale in S., or elsewhere, or in any other manner howsoever, be concerned in the business," is void, as being a general restraint of trade. *Hinde* v. *Gray*, 1 Man. & G. 195; 1 Scott (N.R.) 123; 9 L. J., C. P. 253; 4 Jur. 392.

All restraints of trade, which are larger than are necessary for the protection of the party with whom the contract is made, are unreasonable, and void as against public policy. *Mallan* v. *May*, 11 M. & W. 853; 12 L. J., Ex. 376; 7 Jur. 536.

Whether a contract in restraint of trade is reasonable or not, is a question of law to be determined by the judge, and not a matter of fact to be left to the consideration of a jury. *Ib.*

An agreement between a foreman cutter and general superintendent of a tailor's business and his master, contained a covenant that the former would not after quitting his master's service enter "into any engagement or be concerned in carrying on any business whatsoever" within a given period of time and limit of distance:—Held, that the covenant could not be construed as merely a covenant not to carry on the business of a tailor, but was void as being in general restraint of trade. *Baines* v. *Geary* (35 Ch. D. 155), discussed. *Baker* v. *Hedgecock*, 57 L. J., Ch. 889; 39 Ch. D. 520; 59 L. T. 361; 36 W. R. 840.

By an agreement in writing the plaintiff engaged the defendant as clerk and bookkeeper, and the defendant agreed "not to accept another situation as clerk or agent, nor to establish himself" within a certain district, without the written permission of the plaintiff, for three years after leaving his service. There was a proviso that such permission should not be withheld if it could be proved to the satisfaction of the plaintiff that the situation was not with a firm dealing in the same class of goods as the plaintiff, or that the defendant, after establishing himself, would deal in goods other than those of the plaintiff, for three years:—Held, that the agreement was in restraint of trade, and void. *Perls* v. *Saalfeld*, 61 L. J., Ch. 409; [1892] 2 Ch. 149; 66 L. T. 666; 40 W. R. 548—C. A.

On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at Wolverhampton and in London. In an action by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in Middlesex:—Held, that the covenant to retire from the business so far as the law allows was too vague for the court to enforce. *Davies* v. *Davies*, 56 L. J., Ch. 962; 36 Ch. D. 359; 58 L. T. 209; 36 W. R. 86.

What held to be Reasonable.]—Upon the sale of the business of a general merchant in a country place, the vendor agreed to give a bond for 1,600*l.* as liquidated damages, if he should be thereafter concerned in any trading establishment within a neighbouring district, comprising a considerable section of the county of Cornwall:—Held, that this was not too general a restraint of trade, and specific performance of the agreement was decreed at the suit of the vendor. *Avery* v. *Langford*, 1 Kay, 663; 23 L. J., Ch. 837; 18 Jur. 905; 2 W. R. 615.

In construing the condition of such a bond, a court of law would take into consideration the surrounding circumstances at the time of executing the bond, and would consider the words "trading establishment" to mean an establishment for any trade likely to interfere with the goodwill, which was the subject of the sale. *Ib.*

A covenant by a licensee for the residue of a term of fourteen years, of patented improvements in machinery for slubbing fibrous substances, not to make or sell any slubbing frames whatever without the invention applied to them, is not void as a covenant in restraint of trade. *Jones* v. *Lees*, 1 H. & N. 189; 26 L. J., Ex. 9; 2 Jur. (N.S.) 645.

The plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land

but the plaintiff did not enter into any covenant to supply it. The defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house which he supplied with his own beer. The plaintiff filed a bill in equity to restrain the defendant from supplying beer, alleging that the plaintiff had always been ready to furnish a sufficient supply of good beer at a fair price:—Held, that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade, or because it purported to be perpetual, and that though it was in terms positive, it was in substance negative, and that the court could interfere by injunction to restrain the defendant from acting in contravention of it. *Catt* v. *Tourle*, 38 L. J., Ch. 665; L. R. 4 Ch. 654; 21 L T. 188.

An agreement between the plaintiff, a brewer, whose business consisted exclusively in supplying beer in casks of 4½ gallons and upwards, and the defendant, provided that the defendant would serve the plaintiff as his traveller, and would procure from "wholesale purchasing agents only" orders for beer and other malt liquors, and also, if required, aërated waters, &c., and the defendant agreed that in the event of the determination of the service from any cause whatever, he would not for a period of two years after such determination directly or indirectly engage or be concerned or interested in selling beer or other malt liquors, aërated waters, &c., within 100 miles of Cardiff, whether on his own behalf, or as a partner with, or agent, traveller, clerk, or servant of any other person, firm or company:—Held, that the covenant, so far as it applied to the sale of beer and other malt liquors, included selling by retail as well as wholesale, and that the covenant, so extended, was not wider than was reasonably necessary for the protection of the plaintiff, and was therefore valid:—Held, also, that that part of the covenant as to the sale of aërated water, &c., was severable from the covenant as to the sale of beer and other malt liquors. *Rogers* v. *Maddocks*, 62 L. J., Ch. 219; [1892] 3 Ch. 346; 2 R. 53; 67 L. T. 329—C. A.

iv. *Consideration.*

Sufficiency.]—A legal consideration of any value is sufficient to support a contract in partial restraint of trade; and the court will not inquire as to its adequacy. *Gravely* v. *Barnard*, 43 L. J., Ch. 659; L. R. 18 Eq. 518; 30 L. T. 863.

The plaintiff, a surgeon, engaged the defendant (who was not qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently the defendant, previously to going up to pass his examination, executed, at the request of the plaintiff, a bond which was conditioned to be void if the defendant should not practise within certain limits, but which contained no express agreement on the part of the plaintiff to continue the defendant's employment. The defendant remained in the employment for about three months afterwards, and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was instituted to restrain him from so doing:—Held, that an agreement by the plaintiff to continue the defendant's employment on the old terms could be inferred; that there was consideration to support the bond; and that the plaintiff was entitled to an injunction. *Ib.*

Held, also, that the point was one that ought to be decided on motion without waiting for the hearing. *Ib.*

In determining whether a contract is a hard bargain, the court will not (if there be valuable consideration) consider whether the consideration is sufficient, but whether one party has taken an unfair advantage of the position of the other party. In consideration of A. employing B. at a weekly salary of 21*s.* to go about London and sell oil for him, B. agreed that he would not for twelve calendar months after the determination of the agreement, which was determinable on a week's notice on either side, sell oil within a radius of eight miles from the General Post Office. After a year's employment B. determined the agreement, and then commenced selling oil on his own account within the prohibited area:—Held, that the agreement not being a hard bargain, and being for valuable consideration, A. was entitled to an injunction. *Middleton* v. *Brown*, 47 L. J., Ch. 411; 38 L. T. 334—C. A.

Contracts by bond or otherwise, entered into between two persons, to restrain one of them from setting up, or exercising a particular trade, within a certain limited district, and for a valuable consideration, are valid. *Chesman* v. *Nainby*, 1 Bro. P. C. 234. S. P., *Morris* v. *Coleman*, 18 Ves. 438; 11 R. R. 230.

An agreement in partial restraint of trade is not void, because the party is thereby restricted from exercising his business in a particular place for his life, notwithstanding the death of the other party. *Hitchcock* v. *Coker*, 1 N. & P. 796; 6 A. & E. 438; 2 H. & W. 464; 6 L. J., Ex. 266—Ex. Ch.

A court of law will not consider the adequacy of a consideration, given for an agreement in partial restraint of trade; it is sufficient that there is a legal consideration, and of some value. *Ib.*

Where a party has agreed to forego a business for a consideration the court cannot enter into the reasonableness of the restraint as compared with the consideration; and therefore, although the restriction may be unlimited as to time, the covenant cannot be pronounced void as operating in undue restraint of trade. *Archer* v. *Marsh*, 6 A. & E. 959; 2 N. & P. 562; W. W. & D. 641; 6 L. J., K. B. 244.

A covenant to restrain a person from exercising a trade is not illegal, if it is not to the general prejudice of the public, and the consideration is reasonable. *Horner* v. *Ashford*, 11 Moore, 91; 3 Bing. 322; 4 L. J. (o.s.) C. P. 62.

An agreement in partial restraint of trade can only be supported by an adequate consideration. Thus an agreement by which a brass-founder was to work exclusively for certain factors for his and their lives, they not undertaking to find him full employment, but on the contrary reserving liberty to employ others to execute their orders in his trade, if they should think fit, and to put an end to the agreement at three months' notice, is bad, though London and six miles round were left open to the party to take orders from. *Young* v. *Timmins*, 1 Tyr. 226; 1 C. & J. 331; 9 L. J. (o.s.) Ex. 68.

A promissory note given by a party for dam-

ages arising by his working for others, contrary to an agreement which is in restraint of trade, and therefore void, is bad for want of a consideration. *Ib.*

The plaintiff and defendant agreed to become partners in the business of stage-coach proprietors, for the purpose of running a coach daily, at certain hours, between London and Croydon. The agreement contained various stipulations as to the conduct of the business, and a provision that it should be lawful for either party to determine the partnership by giving four weeks' notice in writing. It contained also the following article: —12th, that, in the event of such dissolution of partnership, and so long as the plaintiff should continue to carry on the trade of a coach proprietor at Croydon, the defendant should not, either on his own account, or that of any other person or persons or jointly with any other, run, or use for hire, any stage-coach, omnibus, or other carriage, or otherwise ply for hire, on any part of the road over which the coach was appointed to run at any time within one hour before or after certain specified hours of the day, under a penalty of 40*l.*, to be recovered as liquidated damages. The last article also provided that, without prejudice to the right of the parties under the preceding article, they bound themselves for the true and faithful performance of the agreement in every respect, under the penalty of 100*l.*, to be recovered as aforesaid:—Held, first, that the agreement of the plaintiff to enter into the partnership was, of itself, a sufficient consideration for the partial restraint of trade imposed on the defendant by the 12th article, and therefore that an action was maintainable for a breach of it, in running an omnibus on the road within the prohibited hours, after a dissolution of partnership by notice from the plaintiff; secondly, that the 40*l.* must be construed as liquidated damages, and not as a penalty. *Leighton* v. *Wales*, 3 M. & W. 545; 7 L. J., Ex. 145.

—— **Agreement with Assignees of a Bankrupt.**]—A., a trader, became bankrupt, whereupon B. agreed to purchase the business from the assignees, and to enter into partnership with A.'s son, if A. would enter into a bond not to carry on the same business within twenty miles. A. gave the bond:—Held, that there was a sufficient consideration for the bond to entitle B. to an injunction to restrain A. from carrying on the business within the limits prescribed. *Clarkson* v. *Edge*, 33 Beav. 227; 33 L. J., Ch. 443; 10 Jur. (N.S.) 871; 12 W. R. 518.

—— **With a Father for his Son, an Infant.**]—Articles under which A. served his clerkship to an attorney, contained a proviso that A. should not practice within a certain distance; and also a covenant, on the part of his father, that A. should, within a month after he came of age, execute a bond, in a specified penalty, to insure his fulfilment of the proviso; A., who was an infant at the time of the execution of the articles, served under them for three years after he attained full age, but was never called on to execute any bond, and with a knowledge of the purport of the articles, completed his clerkship, and afterwards began to practice as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within that district was refused with costs. *Capes* v. *Hutton*, 2 Russ. 357; 26 R. R. 102.

—— **Reasonableness of Restraint.**]—Agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract; and also unless they are made upon a real and bonâ fide consideration. *Collins* v. *Locke*, 48 L. J., P. C. 68; 4 App. Cas. 674; 41 L. T. 292; 28 W. R. 189.

Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition at least amongst themselves, and also, it may be, to keep up the price to be paid for the work:—Held, that such agreement is not invalid if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade. *Ib.*

A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant. *Ib.*

But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose which can be avowed. *Ib.*

A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. *Ib.*

Contract partly Oral partly Written—Parol Evidence.]—In contracts in restraint of trade which are partly verbal and partly in writing, parol evidence is admissible to show what was the consideration therefor. *Cooper* v. *Southgate*, 63 L. J., Q. B. 670; 10 R. 552.

v. *Dealing with Particular Persons.*

Covenants to buy all Beer from Brewers.]—A covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord. Semble, that where such a covenant is entered into by a tenant there is, in the absence of express stipulation, an implied obligation to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled, the tenant is at liberty to buy the beer which he requires elsewhere. *Edwick* v. *Hawkes*, or *Edridge* v. *Hawker*, 50 L. J., Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 914.

An agreement in a lease, that in case the lessee ceased to purchase beer of the lessor, his rent should be advanced, is extremely injurious to the public interest and welfare and is not to be favoured by the courts *Cooper* v *Twibill* 3 Camp 286 n , 13 R R 803 n

A plea in bar to an avowry for such advanced rent, stating the beer delivered to be bad nauseous and unwholesome was considered to be a good defence *Ib*

Where such an agreement was in the alternative, either that the publican should take all his beer of the brewer or pay an advanced rent — Held, that it could not be enforced unless good beer was supplied *Holcombe* v *Hewson* 2 Camp 391 11 R R 746

Contracts by which brewers bind publicans to deal with them, are not to be favoured in law because they tend to prejudice the health of the subject *Thornett* v *Sherratt* 8 Taunt 529 20 R R 543

A condition in a deed of composition that a publican should continue to deal for twelve years with his creditors in the articles of their respective trades may be valid but it is qualified by the implied condition that such articles should be good, and of a marketable quality *Ib*

Where in the conditions of sale of a public house it was described as a free public house and the lease contained a covenant of this nature —Held, that the purchaser was not bound to complete his purchase and might recover back his deposit, even although the lease was read over by the auctioneer at the time of sale *Jones* v *Edney*, 3 Camp 285, 13 R R 803

Where the lessee of a public house covenanted for himself, his executors, and assigns with his lessors (brewers) to take all his beer of them or their successors in their trade and then lessors sold their trade and the public house with other premises, to third persons, who moved the plant &c, to a distance of two miles, and there carried on the business of brewers —Held that the trade of the lessors was thereby determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer *Doe* d *Calvert* v *Reed*, 10 B & C 849, 8 L J (o s) K B 328

The plaintiff demised a public house to the defendant, the defendant to take all his malt of the plaintiff, the plaintiff upon every reasonable request to deliver good malt, and if he did not the defendant to be at liberty to buy it of any other, breach that the defendant used a quantity of malt not bought of the plaintiff, and without requiring the plaintiff to deliver such Plea that the plaintiff delivered bad malt to the defendant, who thereupon bought malt of others, is bad, for as one failure by the plaintiff would not operate as a total suspension of the covenant, the defendant should have alleged a request to send him good malt, and that he had purchased the malt of others on the plaintiff's failure to do so *Weaver* v *Sessions*, 1 Marsh 505, 6 Taunt 154

Between Partners]—By a deed between A, B., and C., dissolving their partnership as rope makers, A and B covenanted to allow C, during his life, 2*s.* on every cwt of cordage which they should make on the recommendation of C for any of his friends and connections, and whose debts should turn out to be good and that A and B should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C's connexions whom they should be disinclined to trust And C covenanted not to carry on the business of a rope maker during his life (except on government contracts) and that all debts contracted or to be contracted in his or their names pursuant to the deed, should be the exclusive property of A and B , and that C should during his life exclusively employ A and B and no other person to make all the cordage ordered of him by or for his friends and connexions and should not employ any other person to make any cordage on any pretence whatsoever — Held that the covenant by C to employ A and B exclusively to make cordage for his friends and not to employ any other (A and B not being obliged to work for any other than such as they chose to trust) was not illegal and void as being in restraint of trade without adequate consideration for the whole deed must be construed together according to the apparent reasonable intent of the parties and the general object being only to appropriate to A and B so much of C's private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C was still at liberty to work for any of his friends who were refused to be trusted by A and B by which construction the restraint on C was only coextensive, as in reason it could only be intended to be, with the benefit to A and B and therefore the restraint on C could be no prejudice to public trade *Gale* v *Reed*, 8 East, 80, 9 R R 376

Exclusive Right to Sell Goods.]—A entered into a contract with B by which B agreed to sell to him the whole of the get of coal of a specified seam in a colliery belonging to B during a period of five years at a certain price On a bill by A to restrain B from selling the coal to other parties —Held, that he was not entitled to any relief in equity *Rothergill* v *Rowland*, 13 L J Ch 252, L R 17 Eq 132, 29 L T 414, 22 W R 42

A corporation advertised for tenders for the supply of stone to the borough during 1875 A, C, D, and E, quarry owners entered into an arrangement by which it was agreed that A should send in the lowest tender, so that if possible it should be accepted, that C should not send in any tender at all, and that D and E should send in tenders higher than A's it was also arranged that A should purchase from C, D, and E certain quantities of stone to be supplied by him under his anticipated contract to the corporation, so that, by this means, A, C, D, and E would each have some share in the profits to arise from A's contract with the corporation Notwithstanding this arrangement C sent in a tender which was accepted —Held, that a bill for an injunction would lie against C to restrain him from supplying any stone to the corporation under his contract with them during 1875 *Jones* v. *North*, 44 L J, Ch 388, L R 19 Eq 426, 32 L T. 149, 23 W R 468

Held, also, that the corporation was not a necessary party to the suit *Ib*

When the owners of a public building have contracted with the plaintiff, that he, renting a stall from them, shall have the exclusive right to

exhibit and sell certain specified classes of goods, an injunction will lie against them for permitting the exhibition and sale by other renters of stalls within the building of goods so specified *Altman* v *Royal Aquarium Society*, 3 Ch D 228

Contract to Play at Theatre]—An opera singer by an agreement dated only as to the year 1870, agreed to sing at a theatre for the whole London season, and nowhere else in the kingdom of Great Britain pendant l'année 1871, without the written consent of the employer The salary did not extend beyond the season, which ended on the 5th August On motion for an injunction to restrain him singing elsewhere after the season was over during 1871 — Held, that the court would not under the circumstances grant an injunction on an interlocutory application *Mapleson* v *Bentham*, 20 W R 176 Affirmed, *Ib* 177 n, L JJ

An actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere *Montague* v *Flockton*, 42 L J, Ch 677 L R 16 Eq 189, 28 L T 580, 21 W R 668 And see *Lumley* v *Wagner*, 1 De G M & G 604, 21 L J, Ch 898, 16 Jur 871

To Write for]—A contract with the proprietors of a theatre not to write dramatical pieces for any other, is legal, not resembling a covenant restraining trade generally *Morris* v *Colman*, 18 Ves 437, 11 R R 230

So would be a similar restraint of a performer *Ib*

See also COPYRIGHT

As to Patents]—It is not against public policy for the vendor of a patent to agree to assign to the purchaser all future patent rights which he might afterwards acquire with respect to the inventions sold or any of a like nature *Printing and Numerical Registering Co* v *Sampson*, 44 L J, Ch 705, L R 19 Eq 462, 32 L T 354, 28 W R 463

An agreement by a licensee for the residue of a term of fourteen years, of patented improvements in machinery for slubbing fibrous substances, not to make or sell any slubbing frames whatever without the invention applied to them is not void as a covenant in restraint of trade *Jones* v *Lees*, 1 H & N 189, 26 L J, Ex 9, 2 Jur (N S) 645

vi *In Respect of Distances*

Medical Men, &c]—Where a surgeon took an assistant, who entered into a bond not to practise on his own account for fourteen years, within ten miles of the place where the surgeon lived, the bond is good in law *Davis* v *Mason*, 5 Term Rep 118, 2 R R 562

A agreed, by articles under seal, to enter the service of B, as assistant to him in his business of a surgeon dentist, for a period of four years, and the agreement contained a covenant, that, after the expiration of that term, A would not, without the consent in writing of the other, carry on the business of a surgeon-dentist in London, or any of the towns or places in England or Scotland where B, or A on his account, might have been practising before the expiration of the above service —Held, first, that this covenant so far as it related to London, was not, but as to its other provisions it was, void as imposing an unreasonable restraint of trade, and secondly, that the covenant was divisible, so that the illegality of the second branch did not vitiate the whole *Mallan* v *May*, 11 M & W 853, 12 L J, Ex 376, 7 Jur 536

Semble that, in estimating the reasonableness of a contract not to exercise a trade or profession within a particular district, the populousness of the district is not to be taken into account *Ib*

An agreement that a moderately skilful dentist would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months notice is unreasonable and void, being a restraint of trade not founded on an adequate consideration *Horner* v *Graves*, 7 Bing 735, 5 M & P 768, 9 L J (o s) C P 192

A bond by an apothecary not to set up business within twenty miles of A, is not illegal as being in restraint of trade *Hayward* v *Young*, 2 Chit 407

And see *Gravely* v *Barnard*, L R 18 Eq 518, ante, col 195

Solicitors]—An agreement by an attorney first to relinquish his business, and recommend his clients to two other attorneys for a valuable consideration secondly, not to practise in such business within certain limits and thirdly, to permit the purchasers to make use of his name in their firm for a certain time, without any interference on his part, is valid *Bunn* v *Guy*, 4 East, 190 1 Smith, 1, 7 R R 560 But see *Hughes* v *Statham*, 6 D & R 219, 4 B & C 187 3 L J (o s) K B 179

The defendant bound himself to a London solicitor by articles for a term, and covenanted that he would not at the expiration of the term, or at any time thereafter either solely, or jointly with, or as agent for, any other person or persons, directly or indirectly practise the business of an attorney or solicitor within the city of London, or the counties of Middlesex or Essex, nor directly or indirectly act as such attorney or solicitor for any client or clients of the plaintiff, or any partner or partners of the plaintiff, or for any person or persons who should have been a client or clients of the plaintiff, or any partner or partners of the plaintiff at any time during the term At the expiration of the term the defendant having commenced business on his own account in Southwark —Held, that the restriction was not unreasonable, and that the defendants acting for the petitioner in the London Court of Bankruptcy was a breach of the covenant *May* v *O Neill*, 44 L J, Ch 660

An agreement by a solicitor, for valuable consideration, not to practise as a solicitor in any part of Great Britain for twenty years, is valid *Whittaker* v *Howe*, 3 Beav 383

By agreement between the plaintiff, a solicitor, and the defendant, after reciting that the plaintiff, being manager of certain estates at Torquay, and finding it expedient to establish an office there for the transaction of law and other business, had proposed to appoint the defendant as resident clerk there, it was agreed that the defendant should reside at Torquay, and that in considera-

tion of his services, the plaintiff should pay him a certain salary, and that either party might determine the agreement by a certain notice, and that the defendant would not, for the space of twenty-one years, notwithstanding the death of the plaintiff, reside in the parish of Torquay, or within twenty-one miles thereof, or carry on therein, the distance aforesaid, during the period of twenty-one years, any business of the description of that carried on under the agreement:—Held, per Pollock, C.B., Alderson, B., and Platt, B., that the restriction was not unreasonable, and was good in law; per Martin, B., that the agreement was valid, for if the restriction as to residence was void, that as to not carrying on business was good. *Dendy* v. *Henderson*, 11 Ex. 194; 24 L. J., Ex. 324.

A declaration on this agreement alleged as a breach, that, after its determination, the defendant resided in the parish of Torquay, and during the period of twenty-one years carried on the business in that parish of the description of that carried on under the agreement. Plea to the first breach, that although the defendant resided in the parish of Torquay, yet he did not reside for the purpose or with the intention of carrying on business of the description of that carried on under the agreement:—Held, that whether the allegation in the declaration was to be read as one breach or two distinct breaches, the plea was bad. *Ib.*

Publisher.]—A declaration stated that the plaintiff and the defendant carried on in partnership the business of publishers in various places in Great Britain and Ireland, at a greater distance than 150 miles from the General Post Office, London, of which a branch was known as the canvassing trade, consisting of publishing, in parts, works in some of which the copyright had ceased, and of employing canvassers to go from house to house to solicit purchasers for such publications, and that upon the dissolution of the partnership, the defendant covenanted that he would not at any time thereafter carry on that part of the trade of a publisher known as the canvassing trade within the distance of 150 miles from the General Post Office, London. Breach, that the defendant carried on the canvassing trade in London, and within 150 miles of the General Post Office:—Held, that the restraint was not unreasonable. *Tallis* v. *Tallis*, 1 El. & Bl. 391; 22 L. J., Q. B. 185; 17 Jur. 1149; 1 W. R. 114.

Semble, also, that that part of the covenant which restrained the defendant from carrying on the canvassing trade in Edinburgh or Dublin, or within 150 miles of either of them, or in any place in Great Baitain or Ireland where the plaintiff or his successors in the business might by themselves or their agents at such time carry on the trade, or might have carried it on within six months preceding, was not unreasonable. *Ib.*

Such a covenant is valid, unless it plainly appears that a restriction is imposed by it beyond what the interest of the plaintiff requires. *Ib.*

Manufacturers.]—So a covenant not to carry on the trade of horsehair manufacturer within 200 miles of Birmingham is valid. *Harms* v. *Parsons*, 32 Beav. 328; 32 L. J., Ch. 247; 9 Jur. (N.S.) 145; 7 L. T. 815; 11 W. R. 250.

A mercantile house, dealing in lace, employed travellers to obtain orders, and sell for them, in England, each in a particular district. A vacancy having occurred in the travellership of the midland district, the plaintiffs acquainted the defendant with the fact, he being in their employ in another occupation, and it was verbally agreed with him that he should fill the place, the understanding being, that a contract in writing should be afterwards drawn up and signed. The defendant started on the midland district, and afterwards the following form of contract was sent down to him and he signed it:—"In consideration of my entering upon your employ, at a salary of 50*l.*, I agree to do so, with the understanding, that in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you 50*l.*" The defendant, after having travelled for the plaintiffs on this district for about a year, quitted their service, and commenced travelling, for a rival house of business, over the same district. In an action by the plaintiffs for the penalty:—Held, that they were entitled to recover, for that a good consideration for the defendant's promise appeared on the face of the writing; that the circumstances under which he became traveller showed a good consideration in fact; that the contract meant to engage the entire services of the defendant so long as he was in the plaintiffs' employ, and that it would have been a breach of it to travel for any one else in the absence of the prohibitory part; and that, therefore, the contract intended the penalty to attach in case the defendant travelled over the same ground for any other house in the same trade after he left the plaintiffs' employ; that extrinsic evidence was properly admitted to identify the particular service in which the defendant was to be employed, viz., that of a traveller, and the ground over which he was to travel, viz., the midland district: that the subject of the contract being thus ascertained, the contract was not unlimited in point of space, and so void as in restraint of trade. And that the written contract, even apart from the extrinsic evidence, was not void as in restraint of trade. *Mumford* v. *Gething*, 7 C. B. (N.S.) 305; 29 L. J., C. P. 105; 6 Jur. (N.S.) 428; 1 L. T. 64; 8 W. R. 187.

A covenant not to carry on the business of a manufacturer for a period of five years under a particular name or style is not void, as being a covenant in restraint of trade, notwithstanding that it may be unlimited in point of space. *Vernon* v. *Hallam*, 56 L. J., Ch. 115; 34 Ch. D. 748; 55 L. T. 676; 35 W. R. 156.

Commission Merchant.]—The plaintiffs, who were agents and commission merchants, agreed with the defendant that he should enter their service as clerk, and that he should not for five years after the determination of the service engage in "any trade or business in the united kingdom in connection with any kind of goods of continental manufacture which" the plaintiffs "should have dealt in at any time previously to such determination":—Held, that "any trade or business" was to be construed as confined to any trade or business competing with the plaintiffs'; that the limit of space was not too wide having regard to the circumstances; that "dealt in at any time" meant, dealt in at any time while the defendant was their clerk, and that, therefore, the agreement was not unreasonable. *Moenich* v. *Fenestre*, 61 L. J., Ch. 737; 2 R. 102; 67 L. T. 602—C. A.

Wine Merchant.]—Where a defendant in an action had agreed to act as clerk and traveller for the plaintiff in the business of a wine and spirit merchant, carried on by him at Burton-on-Trent, and had further agreed not at any time thereafter, either alone or in partnership with, or as clerk, agent, or traveller, to, any person or persons whomsoever, to carry on or conduct, or assist in carrying on or conducting, the trade or business of a wine and spirit merchant, or any branch thereof, within the distance of fifty miles from that town without the licence and consent of the plaintiff, the court held that the restriction imposed upon the defendant was not in excess of what was required for the reasonable protection of the plaintiff in his business; that the agreement was not invalid on the ground that it was contrary to public policy, as being in unreasonable restraint of trade, and that therefore the plaintiff was entitled to a perpetual injunction to restrain the defendant from a breach thereof. *Parsons* v. *Cotterell*, 56 L. T. 839; 51 J. P. 679.

Tailor.]—The defendant was employed by the plaintiff, a tailor in Regent Street, as a cutter and fitter of wearing apparel. The defendant entered into an agreement with the plaintiff that, upon the termination of his employment for any cause, he would not carry on the business of a tailor within a circuit of ten miles of Charing Cross for the period of three years from such termination of employment. Some time afterwards the defendant left the plaintiff's employment, and set up the business of a tailor and outfitter within about two hundred yards of the plaintiff's premises. An application for an injunction to restrain the defendant having been made, the defence was raised that the restriction imposed by the agreement upon the defendant was far in excess of what was required for the reasonable protection of the plaintiff in his business; and that the agreement was therefore invalid on the ground that it was contrary to public policy, as being in unreasonable restraint of trade:—Held, that the agreement was not unreasonable, either in point of space or in point of time, for a tailor like the plaintiff to require the defendant to enter into; that therefore the agreement was not invalid; and that the plaintiff was entitled to the injunction claimed. *Nicoll* v. *Beere*, 53 L. T. 659.

Milkmen.]—The servant of a milkman, in a street in London, agreed not to carry on the like business within three miles therefrom:—Held, that this was not an undue restraint of trade, and the servant was restrained by injunction from violating his agreement. *Benwell* v. *Inns*, 24 Beav. 307; 26 L. J., Ch. 663.

A. agreed to take B. as his servant, "at such wages as might from time to time be agreed on," and B. on his part agreed to serve A., and not to set up trade for himself within certain limits. B. accordingly entered into and continued in A.'s service at the wages agreed on.—Held, that there was a good and valuable consideration to support the agreement as against B., and the court enforced it. *Ib.*

A milkman, carrying on business in three places, took the defendant into his service. The defendant agreed, as regarded the milkman, his assignees and successors, not to carry on a similar trade within certain limits. A. sold his branch business at one of the three places to the plaintiff, who retained the defendant in his service:—Held, that the plaintiff as assignee and successor of part of the business, was entitled to the benefit of the defendant's contract. *Ib.*

A., a cowkeeper and milkman, agreed to keep and retain B. in his service for one month certain, and until the expiration of a month's notice, to be given by either party to the other of them, in writing, of his intention to determine such contract and service; in consideration whereof B. agreed to serve A., and that he would not, during the continuance of such service, nor within twenty-four calendar months after quitting or being discharged from the same, commence, carry on or be concerned in any way whatsoever, either as servant or master, in the trade or business of a cowkeeper or milkman, within five miles of Northampton Square, under a penalty:—Held, that this contract did not operate in restraint of trade to such a degree as to render it void. *Proctor* v. *Sargent*, 2 Scott (N.R.) 289; 2 Man. & G. 20; 10 L. J., C. P. 34.

Carrier.]—By agreement, D. and Co., of London, foreign carriers, agreed to engage L. as their clerk on certain conditions, which L. agreed to observe and perform. The agreement contained the following covenant:—"The said L. agrees that he will not within twelve calendar months after the termination of the agreement, from whatever cause, carry on or be engaged in, or interested, directly or indirectly, in the cities of London, Birmingham, Liverpool, England, and New York, United States, or within fifty miles thereof of each of the above-named places, either as principal, clerk, agent, or otherwise, in any business similar to the business now or hereafter to be carried on by employers." The defendant, on leaving the plaintiff's service, entered into the service of a rival firm in London. The plaintiffs had not any trade with Birmingham, but a considerable business with the other places mentioned in the agreement:—Held, that the limit of time was reasonable; also that of space with the exception of Birmingham, with which place the plaintiffs appeared to have no connection; that the words "principal, clerk, agent, or otherwise," in the agreement, were not too wide; that the words "now or hereafter" in the agreement were not reasonable, and that the court could separate the different parts of the covenants, holding part good and part bad. *Davies* v. *Lowen*, 64 L. T. 655.

Other Trades.]—A., for valuable consideration, covenanted not to exercise certain trades, during his life, within the cities of London and Westminster, or within the distance of 600 miles from the same respectively:—Held, first, that this covenant was good so far as it related to London and Westminster, but that the rest was void, as being an unreasonable restraint of trade. *Green* v. *Price*, 13 M. & W. 695; 14 L. J., Ex. 105; 9 Jur. 857. Affirmed, *Price* v. *Green*, 16 M. & W. 346; 16 L. J., Ex. 108; 9 Jur. 880—Ex. Ch.

Held, secondly, that the part relating to London and Westminster might be enforced notwithstanding the illegality of the rest. *Ib.*

A covenant by a vendor of a business not to carry on the same business within 200 miles of a certain place, is not unreasonable, as in restraint of trade, if by reason of the character of the business such a limit of exclusion is necessary for the protection of the purchaser. *Harms* v *Parsons*, 32 Beav. 328; 32 L. J., Ch. 247; 9 Jur. (N.S.) 145; 7 L. T. 815; 11 W. R. 250.

The members of an association agreed not to sell certain goods at less than a particular price for ten years, and to forfeit 10*l.* for each contravention of this agreement. There was no restriction as to area:—Held, that such an agreement was unreasonable both as to time and area, and would not be enforced by the court. *Urmston* v. *Whitelegg*, 55 J. P. 453—C. A.

W. entered the service of C. as a shopman at weekly wages, and covenanted not to carry on business within one mile of the shop at any time thereafter. The business was afterwards moved to another shop close by, and sold by C. to J., together with the goodwill and beneficial interest thereof. W. then left the shop, and set up business within a mile of the old shop:—Held, that the covenant was not unreasonable, and endured for the life of W., though the original covenantee should cease to carry on business altogether, and that the covenant was not affected by the removal of the business to another shop near at hand, though it might have been otherwise if the business had been removed to quite a different neighbourhood. *Jacoby* v. *Whitmore*, 49 L. T. 335; 32 W. R. 18; 48 J. P. 335—C. A.

An agreement in writing, dated April, 1889, providing that the defendant was to be employed as commercial traveller by the plaintiff for ten years upon the terms (inter alia) that the defendant would not within twelve years or for two years after the termination of his employment, if the same should continue beyond ten years, engage in business similar to that carried on by the plaintiff, or act as commercial traveller for any person or body carrying on similar business, provided that such restriction should only extend to such counties in Ireland as the defendant should travel in for the plaintiff at any time during his employment, is a reasonable agreement for the protection of the interests and trade of the plaintiff as employer, and therefore valid. *Cussen* v. *O'Connor*, 32 L. R., Ir. 330.

vii. *Measurement of Distance.*

In a straight Line.]—In determining whether there has been a breach of a covenant entered into by the assignor of a lease of premises, used for a particular business, "that he would not be concerned in that business within a certain distance of the assigned premises," the distance is not to be measured along the nearest practicable route between the two places of business, but along the shortest straight line that can be drawn from one to the other as on a map, without regard to the curvature or to the inequalities of the surface of the earth. *Mouflet* v. *Cole*, 42 L. J., Ex. 8; L. R. 8 Ex. 32; 27 L. T. 678; 21 W. R. 175—Ex. Ch.

Under a contract not to carry on business within a given distance, the distance is to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access. *Duignan* v. *Walker*, Johns. 446; 28 L. J., Ch. 867; 5 Jur. (N.S.) 976; 7 W. R. 562.

—— **Or by Nearest Route.**]—In the construction of an engagement (a bond) not to open a shop within a mile of a certain spot, the shortest way of access by the footpath is to be taken. *Woods* v. *Dennett*, 2 Stark. 89.

In a covenant not to keep a public-house within half a mile of a particular spot, the distance must be estimated by the nearest mode of access at the time of the covenant—per Lord Tenterden, C.J., and Littledale, J.; or as the crow flies—per Parke J. *Leigh* v. *Hind*, 4 Man. & Ry. 597; 9 B. & C. 774; 7 L. J. (O.S.) K. B. 313.

Action on a deed, whereby the defendant and the plaintiff agreed to enter into partnership as surgeons for three years, and the defendant covenanted, that after the termination of the partnership he would not at any time practise as a surgeon at No. 28, Dorset Crescent, or within the distance of two miles and a half thereof, measuring by the usual streets or ways of approach thereto, nor reside within the distance of two miles and a half of No. 28, Dorset Crescent, without the plaintiff's consent, nor would attempt to prevail on any of the patients of the defendant, or of the partnership, to withdraw from the plaintiff, or to employ any other medical attendant in prejudice of the plaintiff, but would in all things endeavour to promote the business and advantage of the plaintiff as a surgeon, so far as it was in the power of the defendant, and as he could reasonably and properly be required to do. Breach, that after the expiration of the term, the defendant resided within the distance of two miles and a half of the premises:—Held, that the distance was to be measured, not by the most frequented public ways, but by any of the usual public ways. *Atkyns* v. *Kinnier*, 4 Ex. 776; 19 L. J. Ex. 132.

viii. *In Respect of Time.*

For Life.]—A contract whereby, in consideration of employment, and the payment of a certain sum weekly for life, a party engages to serve another for life, and not to set up during his life the trade of a carrier, is a legal contract, and not in restraint of trade. *Wallis* v. *Day*, 2 M. & W. 273; M. & H. 222; 6 L. J., Ex. 92; 1 Jur. 73.

An agreement in partial restraint of trade is not void because the party is thereby restricted from exercising his business in a particular place for his life, notwithstanding the death of the other party. *Hitchcock* v. *Coker*, 1 N. & P. 796; 6 A. & E. 438; 2 H. & W. 464; 6 L. J., Ex. 266—Ex. Ch.

An unlimited restriction in point of time cannot be pronounced void as in restraint of trade where there is reasonable consideration. *Archer* v. *Marsh*, 6 A. & E. 959; 2 N. & P. 562; W. W. & D. 641; 6 L. J., K. B. 244.

—— **Or Lifetime of Obligee.**]—To an action on a bond by the executors of the obligee, the defendant, after setting out the condition, which was, that "if the obligor should practise as a surgeon or an apothecary at S., at any time without the consent in writing of the obligee, then, if the obligor should pay the obligee 1,000*l.*, the bond should be void, otherwise it should remain in force," pleaded, that he did not practise as a surgeon or an apothecary at S. without the consent in writing of the obligee:—Held, that the period of restraint mentioned in the condition was not confined to the lifetime of the obligee. *Hastings* v. *Whitley*, 2 Ex. 611.

The defendant entered into a written agreement with W., in consideration of being employed as assistant master, not to carry on the business of a school within nine miles of the place where W.'s school was carried on, for twelve years after leaving the school. Subsequently, and while the defendant was in his service, W. entered into a

partnership agreement with the plaintiff, who was on his death to succeed to the business. W. died, and thereupon the defendant commenced a school in the same place. On a motion on behalf of the plaintiff to restrain the defendant from so doing:—Held, (1) that the defendant's agreement was not limited to the life of W.; (2) that though goodwill was not mentioned in the partnership agreement, the benefit thereof did pass so as on the death of W. to vest in the plaintiff; and that, following *Jacoby* v. *Whitmore* (49 L. T. R. 355), the defendant's agreement formed part of such goodwill; and (3) that the plaintiff was therefore entitled to the benefit thereof, and to the injunction asked for. *Smith* v. *Hawthorne*, 76 L. T. 716.

Consideration of Service.]—In consideration of A. employing B. at a weekly salary of 21*s.* to go about London and sell oil for him, B. agreed that he would not for twelve calendar months after the determination of the agreement, which was determinable on a week's notice on either side, sell oil within a radius of eight miles from the General Post Office. After a year's employment, B. determined the agreement, and then commenced selling oil on his own account within the prohibited area:—Held, that the agreement not being a hard bargain, and being for valuable consideration, A. was entitled to an injunction. *Middleton* v. *Brown*, 47 L. J., Ch. 411; 38 L. T. 334—C. A.

B. gave a bond to A. (a coal merchant in London), by which, after reciting that he, at the request of B., had received and taken him into his service in the capacity of a town traveller and collecting clerk, it was conditioned that he should not, within two years after leaving A.'s service, solicit or sell to any of his customers; that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the employment of A.; and that he should not leave his employment without giving a month's notice:—Held, that this condition prevented B. from setting up in business as a coal merchant on his own account, or from being employed in that business by another master for the time limited. *Ward* v. *Byrne*, 5 M. & W. 548; 9 L. J., Ex. 14; 3 Jur. 1175.

Held, also, that the bond was void, on the ground that there was a restraint of trade unlimited in point of space. *Ib.*

And an agreement by which a brass founder was to work exclusively for certain factors, for his and their lives, they not undertaking to find him full employment, but on the contrary, reserving liberty to employ others to execute their orders in his trade if they should think fit, and to put an end to the agreement at three months' notice, is bad, though London and six miles round were left open to the party to take orders from. *Young* v. *Timmins*, 1 Tyr. 226; 1 C. & J. 331; 9 L. J. (o.s.) Ex. 68.

A. made an agreement with B. to serve him at all times during seven years as a crown-glass maker, and that he would not during the term work for any other person at any other glass-house or place of business without the licence of B.; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick B. should be at liberty to employ any other persons in his stead, without paying him any wages; that B. should pay him wages as long as he should be employed, and 8*l.* per annum in lieu of house-rent and firing; and that B. should have the option of dismissing him from his service, on giving him a month's wages or a month's notice:—Held, that this contract was not void on the ground of being in restraint of trade. *Pilkington* v. *Scott*, 15 M. & W. 657; 15 L. J., Ex. 329.

A. contracted to serve B. and his partner or partners for the time being, for seven years, in his business of glass and alkali manufacturer, and that he would not during the term neglect or absent himself from the service without the consent in writing of B., or his partner or partners for the time being, as should carry on the business, nor would work for or serve any other person or persons without such consent, in consideration of which services B. agreed to pay A. 24*s.* per week, for a certain amount of work, and to find him some other description of work, provided he should not require that quantity of specified work, so that A.'s wages should not be less than 24*s.* per week, except when a furnace should be out, when A. agreed to work for 21*s.* per week; and that if A. should be sick, or otherwise incapacitated from performing the service, or in case of misconduct, or if B. or his partner or partners for the time being, as should carry on the trade, should discontinue the trade during the term, in either of such cases B. or his partners should be at liberty to retain or employ any other person in the room or stead of A. without being obliged to pay him any wages or satisfaction:—Held, that this agreement was not void as being in unreasonable restraint of trade. *Hartley* v. *Cummings*, 5 C. B. 247; 2 Car. & K. 433; 17 L. J., C. P. 84; 12 Jur. 57.

A. and B. entered into the following agreement:—"In consideration that A. of Macclesfield, surgeon and apothecary, will engage me, B., as assistant to him as surgeon, I, B., promise A. that I will not at any time practise as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of 500*l.*; and I, A., agree with B. to engage B. as an assistant to me as a surgeon, on the terms aforesaid." In an action by A. against B. for a breach of this agreement:—Held, that there was a sufficient consideration for the promise of B., and that the contract was not void as an unreasonable restraint of trade. *Sainter* v. *Ferguson*, 7 C. B. 716; 18 L. J., C. P. 217; 13 Jur. 828.

The defendant, on being appointed agent for the sale of wine and spirits of the plaintiffs, gave to them a bond, with a condition that he should diligently, honestly, and faithfully serve them as such agent, and should not engage in, undertake, transact, or do any business in the same trade within ten miles of the town of T., for himself or any other person or firm, and should use his best endeavours to promote the interest and increase of the business connection of the plaintiffs, and should faithfully and punctually collect, account for, and pay over all debts of the plaintiffs:—Held, that the restriction as to the defendant doing business for other persons in the same trade within the particular district was limited to the time he remained in the plaintiffs' service. *King* v. *Hansell*, 5 H. & N. 106; 1 L. T. 376.

—— **Separable Covenants.**]—A deed recited that the plaintiff had carried on the business of an attorney; that the defendant had for four years been his salaried clerk, and had applied to

him to accept the defendant as his articled clerk, without premium, which the plaintiff consented to do on his entering into certain covenants, and the defendant bound himself clerk to the plaintiff for five years by articles. In pursuance of the agreement, the defendant covenanted with the plaintiff and his partners, that he should not, during the term of five years, or at any time after its expiration, directly or indirectly interfere or intermeddle with or be concerned as attorney, agent, or otherwise, for any person who had already been or should thereafter become the client or correspondent in business of or with the plaintiff, or any partner or partners he might admit to a share with him, or any person to whom he might sell or assign the whole or any part of his business as attorney, and that the defendant should not act as partner, clerk, or assistant with or to any person who should interfere or intermeddle as aforesaid; and in case he should commit any breach of his covenants, he should forfeit 100*l.*; and each day's repetition or continuance of any interference should be deemed a fresh breach of covenant, and incur a separate penalty and right of action. The plaintiff assigned in his declaration breaches in respect of persons who had been his clients before and at the time of the making of the deed, and of persons who had been his clients while the defendant continued under the articles:—Held, that the part of the covenant in respect of which the breaches were assigned was good, as not operating unduly in restriction of trade, and might be separated from the rest, and therefore an action might be brought on such breaches. *Nicholls* v. *Stretton*, 10 Q. B. 346; 11 Jur. 1009. See *S. C.*, 7 Beav. 42.

Goodwill.]—An agreement to give up a house and goodwill of a business, and not to open a shop in the same line of business within one mile of the house, under a forfeiture, is not illegal on the ground that the restraint of trade is unlimited in point of time, and may continue though the purchaser ceases to carry on the business. *Pemberton* v. *Vaughan*, 10 Q. B. 87; 16 L. J., Q. B. 161; 11 Jur. 411.

Upon a contract for the sale of a lease and the goodwill of the business of a baker, an agreement by the assignor that he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent of the assignee, under a penalty, is not void as an unreasonable restraint of trade. *Rannie* v. *Irvine*, 8 Scott (N.R.) 674; 7 Man. & G. 969; 14 L. J., C. P. 10; 8 Jur. 1051.

A butcher, on assigning for the residue of a term premises upon which he had carried on his business, together with the fixtures and goodwill of the trade, covenanting with the purchaser that he would not at any time thereafter, either by himself or as agent or journeyman for another, set up, exercise, or carry on, or be employed in the trade or business of a butcher within five miles from the premises assigned, is not an unreasonable restraint either in respect of time or in respect of distance, and the covenant does not cease to be a binding contract on the expiration of the term, or on the covenantor's ceasing, by himself or his assigns, to carry on the business assigned. *Elves* v. *Crofts*, 10 C. B. 241; 19 L. J., C. P. 385; 14 Jur. 855.

And see *Jacoby* v. *Whitmore*, 49 L. T. 335; and cases supra, ii. and vi.

ix. *What Constitutes a Breach.*

Acting for Others.]—A restrictive covenant that the covenantor will not carry on a certain business in his own name or that of any other person is not violated by his acting as manager at a weekly salary to another person carrying on the same business. *Allen* v. *Taylor*, 39 L. J., Ch. 627; 22 L. T. 651. Affirmed, 19 W. R. 35.

An agreement by a man not to carry on a particular business, directly or indirectly, either alone or in partnership with, or with the assistance of, any other person, is broken by his carrying it on as manager to another person. *Dales* v. *Weaber*, 18 W. R. 993.

On the sale of his business the vendor agreed that he would not exercise or carry on the trade, either in his own name or that of any other person or persons, in a particular town:—Held, that his managing the business of another person in the same trade in the town, at a weekly salary, was not a breach of the agreement. *Allen* v. *Taylor*, 24 L. T. 249; 19 W. R. 556.

Under a bond, conditioned that the defendant should not "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise":—Held, that the condition of the bond was not broken by his entering into the service as traveller of a brewer. *Josselyn* v. *Person*, 41 L. J., Ex. 60; L. R. 7 Ex. 127; 25 L. T. 912; 20 W. R. 316.

A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a sadler, or sell any goods in any way connected with that trade within a distance of ten miles from Croydon under a penalty of 100*l.* to be paid by way of liquidated damages for every such offence, is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in Croydon; and the breach will be restrained by injunction. *Jones* v. *Heavens*, 4 Ch. D. 636; 25 W. R. 460.

A. undertook to manage the business of B., a chemist, and agreed that he, A., would not carry on the business of a chemist either in his own name or for his own benefit, or in the name or names or for the benefit of any other person, within seven miles of the place. He afterwards solicited orders for another chemist within the seven miles:—Held, that this was not a breach of his agreement. *Clark* v. *Watkins*, 9 Jur. (N.S.) 142; 8 L. T. 8; 11 W. R. 319.

C. assigned to R. his business as a surgeon and apothecary, carried on by C. in Park Street, Camden Town; and C. covenanted that he should not nor would, directly or indirectly, by himself or in co-partnership with any other person, carry on or exercise his practice or profession of a surgeon and apothecary, or either of them, either by residing or visiting any patient within the distance of three miles from the then place of business of C. in Park Street; and that, in case of any breach of this covenant, C. should and would pay to R. 500*l.*, as and for liquidated damages, and not as a penalty. After the execution of this deed, C. attended several ladies in their confinements, within the three miles, and, on one occasion, received 14*l.* 14*s.* for his services; but he attended these persons, with the knowledge and consent of C., in consequence of a request by him that R. should for a time continue to visit the patients, to keep the connection together; and the jury, in an action on the covenant, found that C. in these instances

exercised the practice and profession of a surgeon for the purpose of assisting R.:—Held, that the facts did not constitute a breach of the covenant. *Rawlinson* v. *Clarke*, 14 M. & W. 187; 14 L. J., Ex. 364.

In consideration of A. paying a sum to B., B. assigned all his interest in the business to A., and covenanted that he would not at any time carry on, or practise, or engage in, alone or with any other person, the trade or business of a tailor, within the space of twenty miles from London. In another part of the deed A. covenanted that B. should be employed as a cutter in the business so long as the business should be carried on, or so long as B. should diligently and faithfully attend to the business. Upon a bill by A. for an injunction to restrain B. from carrying on the business of tailor:—Held, that acting as the foreman of the business of a tailor was a violation of the agreement by B. *Rolfe* v. *Rolfe*, 15 Sim. 88; 10 Jur. 61.

D. sold his business, goodwill, fixtures, &c., to N., and covenanted not to carry on or be concerned or interested in the business of a tailor within five miles of the former shop. D then engaged himself to his nephew, carrying on the same trade within a quarter of a mile of the former place of business, and whose name was the same as his own, as a journeyman at a weekly salary:—Held, that this was within the spirit and letter of the covenant, and an injunction was granted. *Newling* v. *Dobell*, 38 L. J., Ch. 111; 19 L. T. 408.

Where a defendant covenants not to carry on "either directly or indirectly, on his own account or as agent or assistant of, or in partnership with, any other person or persons," or "be interested or concerned in a business within two miles" of the plaintiff's premises; the acting by the defendant, outside the prohibited distance, as agent in certain matters for a firm who carry on the same class of business within the prohibited distance, is not a breach of the covenant. *Fairbrother* v. *England*, 40 W. R. 220.

S. entered into a written agreement of service with W. & Co., who were general drapers, haberdashers, &c., and agreed not to "engage in a similar business" within half a mile of W.'s premises for six months after leaving the same. S. left W.'s service, being at the time buyer in one of the departments at a fixed salary, and almost immediately entered the service of a rival establishment of universal purveyors next door, where he was appointed to a salaried post in a precisely similar department:—Held, that, without precisely defining the meaning of the words "engage in business," the defendant had done that which the agreement intended he should not do, and an injunction must be granted. *Watts* v. *Smith*, 62 L. T. 453.

M. became assistant to H. & P., surgeons at N., and entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in N., or within ten miles thereof. The condition of the bond was that M. "shall not at any time hereafter, directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons, carry on the profession or business of a surgeon" in N., or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in N., and H. engaged M. as his assistant at a salary. P. brought his action to restrain M. from acting as such:—Held, that there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit, and, therefore, that an injunction ought to be granted. *Allen* v. *Taylor* (19 W. R. 556) distinguished. *Palmer* v. *Mallet*, 57 L. J., Ch. 226; 36 Ch. D. 411; 58 L. T. 64; 36 W. R. 460—C. A.

T., as trustee on behalf of a company about to be formed, purchased from the trustee in liquidation of H.'s affairs the business carried on by the latter, and by an agreement made between T., H., and the trustee, H. agreed with T., both personally and on behalf of the proposed company, that so long as the company carried on the business, H. would not "engage in, or be in any way concerned or interested, in any similar business within ten miles of the Royal Exchange, London." The company was subsequently formed, and whilst it was carrying on its business, H. became an employé of B. & Co., who were carrying on a similar business in London:—Held, that H. had committed a breach of his covenant. *Hill & Co.* v. *Hill*, 55 L. T. 769; 35 W. R. 137; 51 J. P. 246.

The defendant, on entering into the service of the plaintiff bank, executed a bond in the penal sum of 1,000*l.* One of the conditions on which the bond was to be void was if the obligor should pay to the bank a sum of 1,000*l.* as liquidated damages in case he should, within two years after his retirement or dismissal from the plaintiffs' service, accept any employment in any rival bank within twenty miles of the plaintiff bank or any branch at which he should have been employed at the date of his dismissal or retirement. There was no express agreement not to enter into any such employment:—Held, that the bond, reasonably construed, contained an agreement by the defendant not to enter into the employment of any rival bank within the time and distance mentioned, which could be enforced by injunction, and that the defendant had not the right to enter into such employment on paying 1,000*l.*; that the reason for inserting the penalty of 1,000*l.* was that, in the event of the bank proceeding for damages at common law, the damages for the committal of the act should, without further proof, be taken to be the sum of 1,000*l.* *National Provincial Bank* v. *Marshall*, 58 L. J., Ch. 229; 40 Ch. D. 112; 60 L. T. 341; 37 W. R. 183; 53 J. P. 356—C. A.

Acting by Servant.]—On a contract by the defendant on a sale by him of the goodwill of a business, that he would not, within a certain time, open any new business of the kind, a business having, in fact, been opened by a servant of the defendant, it was left to the jury to say whether there had been a new business opened, and whether, if so, it was really and substantially the business of the defendant, and carried on on his behalf and for his benefit. *Clark* v. *Howard*, 2 F. & F. 125.

Similar Business set up by Vendor's Wife—Separate Estate—Injunction.]—On the sale of a grocery business the vendor agreed "not to carry on or be in anywise interested in" the business of a grocer within five miles from the old shop for a period of ten years. Six or seven years afterwards the vendor's wife, out of her own separate money, set up in her own name—

i.e. in the name of her husband, with the prefix "Mrs." — a grocer's shop close to the place where her husband had formerly carried on business, and was assisted by her nephew. The vendor helped his wife to get a lease of the shop: he introduced her to a local bank, where she opened an account in her christian and surname, and he introduced the nephew to certain wholesale provision merchants who had supplied him in his business, and induced them to give the nephew credit; he assisted in the preparation of a circular inviting old friends and customers to deal at his wife's shop, and distributed this circular among various friends. He had not, however, any pecuniary interest in the business, and did not otherwise than as above stated concern himself in it:—Held (dissentiente Kay, L.J.), that the vendor did not carry on, and was not interested in, his wife's business within the agreement. *Smith* v. *Hancock*, 63 L. J., Ch 477: [1894] 2 Ch. 377; 7 R. 200; 70 L. T. 578; 42 W. R. 456; 58 J. P. 638—C. A.

Subsequent Marriage to Person Carrying on Similar Business.]—A. agreed, under a penalty, that she would not take, keep, be interested or concerned in, any licensed house within one mile of the plaintiff's premises. A. afterwards married a publican having a licensed house within one mile of plaintiff's premises, and assisted him in his business:—Held, that there was no breach of the agreement. *Loe* v. *Lardner*, 4 W. R. 597.

"Similar" — Restaurant.]—The business of one restaurant-keeper may be "similar," within the meaning of a restrictive covenant, to that carried on by another, though the establishment of the latter is a fully licensed public-house and the former has no licence of any sort. *Drew* v. *Guy*, 63 L. J., Ch. 547; [1894] 3 Ch. 25; 7 R. 220; 71 L. T. 220; 58 J. P. 803—C. A.

Supplying from Outside District.]—An agreement, by which, in consideration that the plaintiff would purchase the defendant's premises and stock of wine, and would pay 2,000*l.* as a premium for the goodwill of his business of a wine merchant, he agreed that he would not, by himself or agent, or otherwise howsoever, either directly or indirectly, set up, embark in, or carry on the business or trade of a wine and spirit merchant at C., or at any other town or place within the three counties of C., A., and M.:—Held, that the defendant had broken the agreement by supplying wine to persons resident in C. and in other towns and places within the counties of C., A., and M., solicited by him from them, within C. and the other towns and places, personally, and by his agents, though he had no place of residence, warehouse, cellars, or place of business within C. or the other towns and places. *Turner* v. *Evans*, 2 El. & Bl. 512; 22 L. J., Q. B. 412; 17 Jur. 1073; 1 W. R. 434. *S. C.*, 2 De G. M. & G. 740.

Upon the sale of the goodwill of a drapery business, the vendor covenanted that he would not carry on, or assist in the carrying on, of a business such as that carried on upon the premises assigned, within two miles:—Held, that this covenant was broken by the vendor's supplying from a place beyond the prescribed limit, goods to customers residing within the district, at their solicitation. *Brampton* v. *Beddoes*, 13 C. B. (N.S.) 538; 7 L. T. 679; 11 W. R. 268.

"Holding Out"]—A., for valuable consideration, covenanted with B. that he would not carry on certain businesses within ten miles of the town of O., and would not "by publication, advertisement, circular, or otherwise, hold himself out to have been, nor seek to induce others to believe him to have been, formerly connected in trade, either as partner, manager, or servant with B." A. and B. had carried on business in co-partnership at M. and O., and B. still continued to carry on business at those places:—Held, that the covenant was not unnecessarily wide for B.'s protection, nor in general restraint of trade; and that an advertisement issued by A., in which he described himself as "late of O. and formerly of M.," was a breach of the covenant. *Wolmershausen* v. *O'Connor*, 36 L. T. 921.

Manufacture or Trade.]—A covenant, on the purchase of the business of horsehair manufacturers, not to carry on the trade of a horsehair manufacturer, construed to prevent the covenantor from the buying and selling manufactured horsehair. *Harms* v. *Parsons*, 32 Beav. 328; 32 L. J., Ch. 247; 9 Jur. (N.S.) 145; 7 L. T. 815; 11 W. R. 250.

Fraud—Misrepresentation as to Age.]—In April, 1870, A. agreed with B., a milk seller, to serve him at weekly wages for a certain time, and not to carry on the same business on his own account within two miles of his house for two years after quitting his service. At the time of the execution of the agreement, A. was a minor, but he represented himself to be of age, and he attained his majority eighteen months before leaving B.'s service. He left it in April, 1872, and immediately afterwards set up in business within the prescribed limits, and obtained many of B.'s customers:—Held, that B. was entitled to an injunction to restrain him. *Cornwall* v. *Hawkins*, 41 L. J., Ch. 435; 26 L. T. 607; 20 W. R. 653.

Waiver.]—The defendant was under a covenant with the plaintiff not to enter the service of a coachbuilder within a certain area. In answer to a letter from a coachbuilder within the prescribed distance, inquiring after the defendant's character, the plaintiff replied, "The defendant will be of no use to you as foreman." The defendant entered into his service, and continued there to the knowledge of the plaintiff, for upwards of nine months. Bill for injunction dismissed. *Vaythorne* v. *Palmer*, 11 Jur. (N.S.) 230; 11 L. T. 261; 13 W. R. 37.

—— Assignment of Goodwill—Benefit of Restrictive Agreement.]—The plaintiffs in March, 1886, employed the defendant as brewer's traveller under an agreement restraining him from becoming employed in the sale of beer, spirits, tobacco, or cigars within a limited area for two years after leaving their service, without their written consent. In March, 1887, they assigned their business of brewers, with the goodwill, to a company, agreeing verbally with the company that the latter should employ their old travellers. The defendant entered the company's service, and left them in September, 1887, and became employed in a similar business. The plaintiffs brought an action against defendant for injunction:—Held, (1) that the benefit of the restrictive agreement passed to the company with the good-

will, and that the plaintiffs were merely trustees thereof for the company; (2) that leave might be given to the plaintiffs at the trial to add the company as co-plaintiffs without putting the plaintiffs on terms as to costs; (3) that the plaintiffs' consent to defendant's entering the service of the company (independently of its not having been in writing) was not a release of the restrictive agreement for the future. *Showell* v. *Winkup*, 60 L. T. 389.

Competition, what is.]—An agreement for the sale of a medical practice provided that the vendor would not practise or reside within a given radius, or otherwise directly or indirectly enter into competition with the purchaser. The vendor was called in by patients resident within the radius, and visited them. He did not, however, solicit such patients, and they stated that they would in no event have called in the purchaser.—Held, that the competition contemplated by the agreement was not confined to active competition, and that the acts of the vendor constituted an infringement of the covenant. *Rogers* v. *Drury*, 57 L. J., Ch. 504; 36 W. R. 496.

Agreement by Music Hall Artiste—Performance Elsewhere on Sunday.]—See *Kelly* v. *London Pavilion*, 77 L. T. 215.

x. *Satisfaction for Breach.*

Injunction.]—A coachmaster having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from R. to London, or prejudicial to the business which he had sold, an injunction was granted, restraining him from running a coach from P. through R. to London. *Williams* v. *Williams*, 2 Swanst. 253.

—— **Covenant Determined by Notice.**]—A. agreed to act as assistant to B. in his business of surgeon and apothecary, and covenanted with him that he would not at any time after he should cease to act as B.'s assistant, and whether the deed should be in other respects determined or not, carry on or exercise the profession and business of a surgeon and apothecary in the town of C., or within the compass of five miles therefrom. The deed contained a proviso that it should be lawful for A., by giving one month's notice, to determine the deed and the covenants and agreements therein contained, subject nevertheless and without prejudice to any rights of action which might have accrued, or which might accrue thereafter to B., by virtue of the deed, and for the true performance of the covenants thereinbefore contained, on the part of A., not to carry on the profession or business of a surgeon and apothecary at C. A. by due notice determined the deed "and the covenants and agreements therein contained," and then proceeded to practise as a surgeon and apothecary at C. An injunction to restrain him was granted in the terms of the covenant. *Giles* v. *Hart*, 5 Jur. (N.S.) 1381; 1 L. T. 154; 8 W. R. 74.

—— **Where no negative Covenant.**]—Where in breach of an agreement by the defendant to serve the plaintiff for fourteen years as manager of his business (which agreement contained no express negative covenants), the defendant left the plaintiff and started a similar business a few doors off:—Held, that the court had power to grant an injunction. *Jackson* v. *Astley*, 1 Cab. & E. 181.

—— **Penalty—Condition in Bond.**]—The defendant having been appointed by the plaintiffs their bank manager at Leeds, executed a bond in 1,000*l.* to the plaintiffs, conditioned to be void if the defendant, after quitting the plaintiffs' employ, should not enter into similar employ within the time and distance specified. The defendant having committed a breach of the condition, contended that the plaintiffs' only remedy was to recover the monetary penalty in the bond:—Held, that the condition of the bond was evidence of an agreement sufficient to sustain an injunction. *London and Yorkshire Bank* v. *Pratt*, 56 L. J., Ch. 987; 57 L. T. 875; 36 W. R. 135.

—— **Discretion of Court.**]—The court, in granting an injunction against breach of contracts by defendant not to engage in trade similar to that of plaintiff:—Held, to have a discretionary jurisdiction to limit the extent of the injunction, and in the circumstances of the case, granted it for two years only, from the date of the termination of defendant's employment. *Cussen* v. *O'Connor*, 32 L. R., Ir. 330.

By Assignee.]—A covenant by one partner upon the dissolution of the partnership, not to trade, act, or deal, so as to directly or indirectly affect the continuing partners:—Held, to be personal to the continuing partners, and could not be sued upon by their assignees. *Davies* v. *Davies*, 56 L. J., Ch. 962; 36 Ch. D. 359; 58 L. T. 209; 36 W. R. 86—C. A.

A shopman at weekly wages covenanted with his employer not to carry on business within a mile from the shop at any time thereafter. The employer sold his business together with the goodwill and beneficial interest thereof to the plaintiff:—Held, that the covenant added to the value of the goodwill, and, therefore, was part of the goodwill and assignable with it, and did, in fact, pass by the sale of the goodwill and beneficial interest to the plaintiff so as to give him a right of action. *Jacoby* v. *Whitmore*, 49 L. T. 335; 32 W. R. 18; 48 J. P. 325—C. A.

Consideration for Annuity—Performance.]—An action was brought to cover arrears of an annuity, the consideration for which was an agreement by the annuitant, a commercial traveller in the hop trade, "that he would not at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting the defendant, solicit orders for hops from any of the customers in the West of England or in South Wales or any district whatsoever":—Held, without deciding whether the restraint of trade, so far as it regarded the West of England and South Wales, could be enforced, that the plaintiff, who had performed his part of the contract, was entitled to recover the consideration due in respect of it. *Bishop* v. *Kitchin*, 38 L. J., Q. B. 20.

See further INJUNCTION and PENALTY.

j. In Restraint of Marriage, &c.

In Restraint of Marriage.]—A covenant not to revoke a will is not necessarily against public policy, as being in restraint of marriage. *Rob-*

inson v. *Ommanney*, 51 L. J., Ch. 894. Affirmed, 52 L. J., Ch. 440 ; 23 Ch. D. 285 ; 49 L. T. 19 ; 31 W. R. 525.

Mutuality.]—An engagement or a bond engaging not to marry any one but the obligee, who did not engage to marry the obligor, is void, because against policy and reason. *Low* v. *Pure*, Lofft, 345. *S. C.*, nom. *Lowe* v. *Peers*, 4 Burr. 2225.

Where the condition of a bond was that one defendant should not marry any other person but the plaintiff, and to pay 1,200*l.* in case she did so, or refuse to marry him within a month after her father's death : semble, that when she married the other defendant, although her father was alive, the bond was forfeited, and the money payable. *Box* v. *Day*, 1 Wils. 59.

Reduction of Annuity.]—A covenant to pay to C. during her life, subject to the proviso hereinafter contained, an annuity of 40*l.*; the proviso being, that in case C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to 20*l.* only, which sum should in such case be paid and payable to C., from the time of her marriage, for the remainder of her life, is, in effect, a covenant to pay an annuity of 40*l.* until marriage, and afterwards an annuity of 20*l.* only ; the proviso for reducing the annuity being part of the original gift itself, and not operating as a condition subsequent, so as to be void as in restraint of marriage. *Webb* v. *Grace*, 2 Ph. 701 ; 18 L. J., Ch. 13 ; 12 Jur. 987.

Wager.] — A wagering contract for fifty guineas, that the plaintiff would not marry within six years, is primâ facie in restraint of marriage, and therefore void ; no circumstances appearing to show that such restraint was prudent and proper in the particular instance. *Hartley* v. *Rice*, 10 East, 22 ; 10 R. R. 228.

Compromise.]—An agreement by a petitioner in a suit for dissolution of marriage to withdraw from the suit, in consideration of a sum of money paid and to be secured by the co-respondent, is a fraud on 20 & 21 Vict. c 85, and void as against public policy. *Gipps* v. *Hume*, 2 J. & H. 517 ; 31 L. J., Ch. 37 ; 7 Jur. (N.S.) 1301 ; 5 L. T. 307 ; 10 W. R. 38.

A deed of separation, between husband and wife, contained a covenant by the trustees of the wife that she would not molest or disturb her husband :—Held, that a suit for a judicial separation was no breach of the covenant. *Thomas* v. *Everard*, 6 H. & N. 448 ; 30 L. J., Ex. 214.

An agreement to put an end to a suit for nullity of marriage on the ground of impotency, is not void as against public policy. *Wilson* v. *Wilson*, 14 Sim. 405. Affirmed, 1 H. L. Cas. 538. See *S. C.*, 5 H. L. Cas. 40.

Condition in Will.] — Testatrix devised real estate to her father for life, remainder to her brother for life, remainder to his first and other sons in tail, with remainders over. She then bequeathed the proceeds of her residuary personalty in trust for her brother absolutely. But, she declared, if her brother should thereafter, whether he should at the time be in possession as tenant for life or not, marry a domestic servant, or a person who had been a domestic servant, then the devises and bequests in favour of her brother and issue should be null and void, and in lieu thereof she devised her real estate to the use of the plaintiffs, and declared that the personalty was to be held and enjoyed with a specific part of the realty. The father survived the testatrix and died. Thereupon the brother became entitled to the realty as tenant for life in possession. Afterwards, the brother married a person who at the time of her marriage was, and had previously been, a domestic servant :—Held, that the condition was valid, and that the real estate passed to the plaintiffs. *Jenner* v. *Turner*, 50 L. J., Ch. 161 ; 16 Ch. D. 188 ; 43 L. T. 468 ; 29 W. R. 99 ; 45 J. P. 124.

A condition subsequent in restraint of marriage is void if annexed to a gift of the income arising from a mixed fund, consisting of the proceeds of the sale of real estate and pure personal estate. *Bellairs* v. *Bellairs*, 43 L. J., Ch. 669 ; L. R. 18 Eq. 510 ; 22 W. R. 942.

A condition in restraint of the second marriage whether of a man or of a woman is not void. *Allen* v. *Jackson*, 45 L. J., Ch. 310 ; 1 Ch. D. 399 ; 33 L. T. 713 ; 24 W. R. 306—C. A.

D. made his will as follows :—"I give, devise, and bequeath unto my sister Mary, her daughter Elizabeth, and Sarah, the daughter of David Jones, all my landed property, together with all my goods, chattels, and effects, to possess and enjoy the same jointly during their lifetime ; and when any or some of the before-mentioned parties shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime ; provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman, otherwise, if she shall alter her present state of single woman and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed by the other mentioned parties, share and share alike :"—Held, that the estate of Mary Davies ceased on her marriage ; for the object of the testator appeared to be, not to restrain marriage, but to provide for Mary Davies while she was unmarried ; and the question whether the clause amounted to a condition or a limitation was immaterial, as the authorities upon such a distinction did not apply to a devise of realty. *Jones* v. *Jones*, 45 L. J., Q. B. 166 ; 1 Q. B. D. 279 ; 34 L. T. 243 ; 24 W. R. 274.

Procurement of Marriage.]—Where the marriage of a female pauper is brought about by the fraud of parish officers, that does not prevent her from acquiring a settlement by the marriage in the husband's parish. *Rex* v. *Birmingham*, 8 B. & C. 29 ; 2 Man. & Ry. 230.

The defendant gave a note to the plaintiff, in consideration of the plaintiff's marrying one of his daughters, which marriage took place in fact, and was believed to be valid, and intended to be so by all parties, and after the wife's death the defendant was sued on the note :—Held, that a verdict for the plaintiff was right. *Wilkinson* v. *Payne*, 4 Term Rep. 468.

A bond, conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. *Milbourn* v. *Ewart*, 5 Term Rep. 381.

A note given fraudulently to carry on a

marriage treaty, will be good against the drawer. *Montesion* v. *Montesion*, 1 W. Bl. 363.

Pre-Contracts.]—By 26 Geo. 2, c. 33, s. 13, re-enacted by 4 Geo. 4, c. 76, s. 27, pre-contracts are not enforceable, and therefore a pre-contract is no disability to marry another person. *Beachey* v. *Brown*, El. Bl. & El. 796; 29 L. J., Q. B. 105; 6 Jur. (N.S.) 345; 8 W. R. 292.

k. Contrary to Bankruptcy Laws.

Promises to pay Debt barred by.]—A promise to pay a debt barred by bankruptcy is a mere nudum pactum, notwithstanding the Bankruptcy Repeal Act, 1869. *Jones* v. *Phelps*, 20 W. R. 92.

A debtor and his creditors entered into a deed of composition while the Act of 1861 was in operation, which deed was to have the same effect on his debts as if the debtor had been discharged in bankruptcy. After the repeal of the statute by 32 & 33 Vict. c. 83, s. 20, the debtor gave a bill of exchange to one of his creditors who was barred by the composition deed, for his old debt:—Held, that the operation of s. 164 upon this transaction was preserved by the saving clause in s. 20; and the bill was therefore void. *Rimini* v. *Van Praagh*, 42 L. J., Q. B. 1; L. R. 8 Q. B. 1; 27 L. T. 540; 21 W. R. 107.

To a declaration by an indorsee against the acceptor of two bills of exchange made in January, 1870, he pleaded that there was no other consideration for the bills than a debt barred by a composition deed entered into by him, with his creditors in 1869, under the Bankruptcy Act, 1861:—Held, that the plea was good. *Ib.*

In 1859, W. became insolvent and obtained his discharge. The defendant was at that time a scheduled creditor for 200*l.* In 1865, W. gave to the defendant a bill of sale on his furniture and effects to cover the prior debt of 200*l.* and further advances with interest at 5*l.* per cent. Sundry payments were made by W., who was charged 15*l.* per cent. interest; and the amount due, apart from the 200*l.*, was reduced to 38*l.* In February, 1867, W. gave the defendant a note of hand for 100*l.* The defendant then seized under the bill of sale, and sold the furniture and effects for 121*l.*, paying thereout 40*l.* due to the landlord. W. became bankrupt in October, 1867:—Held, that the 200*l.* due prior to the insolvency could not be revived; that the bill of sale was a security only for the advances made thereon with interest at 5*l.* per cent., and not for any further advances; that the seizure was illegal, and the sum of 40*l.* paid to the landlord was an improper payment; and that the 121*l.* realised by the sale must be refunded. *Peakman* v. *Harrison*, L. R. 14 Eq. 484.

A promise by a debtor to pay a debt barred by a discharge under 32 & 33 Vict. c. 71, s. 49, is nudum pactum, and its breach does not afford a cause of action. *Heather* v. *Webb*, 46 L. J., C. P. 89; 2 C. P. D. 1; 25 W. R. 253.

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee to pay, out of the rents and profits, annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity at the instance of the insolvent himself, must be rescinded on the ground of public policy. *M'Neill* v. *Cahill*, 2 Bligh, 229.

Debt Released.]—Where a debtor, after having obtained an order of discharge under the Bankruptcy Act, 1869, promises, for a new and valuable consideration, to pay a debt which by virtue of s. 49 has been released by the discharge, an action lies against him for the amount of the debt. *Heather* v. *Webb* (supra) distinguished. *Jakéman* v. *Cook*, 48 L. J., Ex. 165; 4 Ex. D. 26; 27 W. R. 171.

Agreements to withdraw Opposition.]—A promise made by a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt law. *Nerot* v. *Wallace*, 3 Term Rep. 17.

If a creditor has taken money for signing a bankrupt's certificate, it may be recovered back. *Smith* v. *Bromley*, 2 Dougl. 696, n. S. P., *Sievers* v. *Boswell*, 4 Scott (N.R.) 165; 3 Man. & G. 524; 11 L. J., C. P. 14.

A fiat issued against the defendant on the petition of the plaintiff. After the fiat, and before the choice of assignees, the plaintiff obtained from the bankrupt his acceptance for part of his debt. The plaintiff was afterwards chosen one of the assignees, and the defendant obtained his certificate:—Held, that it was not competent to the plaintiff to sue upon the bill; the security being void, both as being contrary to the policy of the bankrupt law generally, and contrary to the spirit of 6 Geo. 4, c. 16, s. 8. *Rose* v. *Main*, 1 Scott, 127; 1 Bing. (N.C.) 357; 4 L. J., C. P. 18.

An agreement between the petitioning creditor, who had sued out a fiat, and the bankrupt, that the former should abandon the prosecution of the fiat, and that the bankrupt should accept a bill of exchange for a certain amount, was illegal, even as between the bankrupt and the petitioning creditor; and the bill accepted by the bankrupt, in pursuance of such an agreement, was void, and no action could be maintained upon it. *Davis* v. *Holding*, 1 M. & W. 159; 1 Gale, 380; 1 Tyr. & G. 371; 5 L. J., Ex. 102.

A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is good in law. *Kaye* v. *Bolton*, 6 Term Rep. 134.

An agreement by which A., an opposing creditor of B., an insolvent, undertakes to withdraw his opposition, on the terms that A. shall be sole assignee, and shall in that capacity receive a certain sum within a given time, is contrary to public policy, and therefore void. *Murray* v. *Reeves*, 2 Man. & Ry. 423; 8 B. & C. 421; 6 L. J. (O.S.) K. B. 348.

A promise by a third person to pay a creditor a sum of money in consideration of the creditor withdrawing his opposition to the discharge of the debtor, is founded on an illegal consideration. *Hall* v. *Dyson*, 17 Q. B. 785; 21 L. J., Q. B. 224; 16 Jur. 270.

A creditor may legally contract to sue out a commission of bankruptcy against the debtor, in consideration that a friend of the debtor will give the petitioning creditor 5*s.* in the pound for his debt; and a bill of exchange given for the agreed sum is a valid bill. *Fry* v. *Malcolm*, 5 Taunt. 117; *see* 15 R. R. 655.

—— **Attorney for Costs.**]—An attorney, con-

ducting a commission of bankruptcy, having received a debt due to the bankrupt, in order to effect an arrangement for a supersedeas, undertook to pay the defendant, the solicitor of the bankrupt, the surplus of the sum so received, should any remain, after defraying certain charges incurred by the plaintiff, if the defendant would pay the plaintiff his costs of conducting the commission:—Held, not a sufficient consideration to support an action against the defendant on his promise to pay the plaintiff's costs without an averment and proof that the commission had been superseded, as the contract without a supersedeas was illegal. *Haslam* v. *Sherwood*, 4 M. & Scott, 434; 10 Bing. 541; 3 L. J., C. P. 176.

—— **Partial Performance — Bar to Action for Money paid.**]—Where money is paid under an illegal contract which has been partially carried into effect, the money cannot be recovered back. The defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendants a sum of money for these costs, which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his order of discharge. The defendants, with the consent of their client, agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and, before any application for his discharge had been made, the plaintiff brought an action to recover back the money from the defendants:—Held, that though the contract was illegal, the partial performance of it prevented the plaintiff from recovering back the money paid under it. *Kearley* v. *Thomson*, 59 L. J., Q. B. 288; 24 Q. B. D. 742; 63 L. T. 150, 38 W. R. 614; 54 J. P. 804—C. A.

Re-entry.]—A proviso in a lease for twenty-one years, that the landlord shall re-enter on the tenant's committing any act of bankruptcy, whereon a commission shall issue, is good. *Roe* d. *Hunter* v. *Galliers*, 2 Term Rep. 133; 1 R. R. 445.

Consent to Assignment.]—An agreement between a bankrupt and a third person, that the former should receive a certain sum from the latter, on his obtaining the assent of his assignee to the sale of his house to such person at a certain price, is void in law. *M'Shane* v. *Gill*, 1 Car. & P. 149.

Fraudulent Assignment — Immateriality.]—The plaintiff, in order to carry out a scheme to defeat his creditors, assigned goods to A. The defendant, one of the creditors, was a party to the scheme, which, however, was not carried out. A., without the plaintiff's sanction, assigned the goods to the defendant:—Held, that the plaintiff not being compelled to rely on the illegal transaction as a material part of his case, was entitled to recover his goods from the defendant. *Taylor* v. *Bowers*, 46 L. J., Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499—C. A.

See also FRAUD and BANKRUPTCY.

I. Contrary to Revenue Regulations.

Generally.]—The breach of mere revenue regulations, which tend to insure the due payment of duties imposed upon the manufacture of an exciseable article, does not render the trade itself illegal, so as to incapacitate the manufacturer from recovering the price of such article, or from suing upon a guarantee given for the due payment thereof. *Brown* v. *Duncan*, 5 Man. & Ry. 114; 10 B. & C. 93; 8 L. J. (O.S.) K. B. 60.

A statute forbidding an act under a penalty, intended to protect the revenue, does not make void the act if done, nor prevent a right of action arising out of it. *Swan* v. *Bank of Scotland*, 1 Dcac. 752. See *Cope* v. *Rowlands*, 2 M. & W. 149; 2 Gale, 231; 6 L. J., Ex. 63.

But if a thing is prohibited for other than revenue purposes no action can arise. *Ib.*

A contract entered into in contravention of a statutory provision, whether the prohibition is express, or is implied from the imposition of a penalty, will not support an action. *Cundell* v. *Dawson*, 4 C. B. 376; 17 L. J., C. P. 311.

Where a statute, with the view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits the act itself, and renders it illegal. *D'Allax* v. *Jones*, 26 L. J., Ex. 79; 2 Jur. (N.S.) 979.

Sale of Bricks.]—The 17 Geo. 3, c. 42, which required bricks for sale to be of certain dimensions, and gave a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks were sold and delivered under the statutable size unknown to the buyer, the seller could not recover the value of them. *Law* v. *Hodson*, 11 East, 300; 2 Camp. 147; 10 R. R. 513.

Sale of Butter.]—Where a statute contains regulations for the protection of buyers against the fraud of sellers, a seller cannot recover for the price of goods sold in contravention of the regulations, although the statute does not in terms prohibit such a sale, but imposes a penalty on the seller. Where, therefore, butter was sold in firkins not branded according to 36 Geo. 3, c. 86, and 38 Geo. 3, c. 73, which require that makers of vessels for the packing of butter shall brand them with their names, under a pecuniary penalty, and that sellers of butter shall, under a further penalty, use vessels so branded, and brand their own names:—Held, that an action for the price could not be maintained. *Foster* v. *Taylor*, 3 N. & M. 244; 5 B. & Ad. 887; 3 L. J., K. B. 137. See *Cope* v. *Rowlands*, 2 M. & W. 149; 2 Gale, 231; 6 L. J., Ex. 63.

Secus, in the case of a breach of a mere revenue regulation, which is enforced by a penalty. *Ib.*

Excise.]—A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at Guernsey, of which a regular entry was made on importation, but without having entered himself with the excise officer as a dealer in tobacco nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered; and this, though the tobacco was sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties; even if such factor could, upon this single and accidental instance, be considered as a dealer in tobacco within the 29 Geo. 3, c. 68, s. 70, which requires every

person who shall deal in tobacco first to take out a licence, under a penalty. *Johnson* v. *Hudson*, 11 East, 180; 10 R. R. 465.

The 6 Geo. 4, c. 81, ss. 25, 26, imposes penalties on any manufacturer of, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises, in manner therein directed, or who shall manufacture, deal in, retail or sell tobacco, without taking out the licence required for that purpose:—Held, that the effect of these sections was to impose a penalty on the offender for the benefit of the revenue, but that they did not render void a contract for the sale of tobacco made by a manufacturer or dealer who failed to comply with their requisites. *Smith* v. *Mawhood*, 14 M. & W. 452; 15 L. J., Ex. 149.

If the legislature had intended to prohibit the contract itself, if only for the purposes of revenue, it would have been illegal, and no action could have been maintained on it. *Ib.*

An agreement, the object of which is to enable an unlicensed person to sell excisable liquors, contrary to 9 Geo. 4, c. 61, is on this ground illegal. *Ritchie* v. *Smith*, 6 C. B. 462; 18 L. J., C. P. 9; 13 Jur. 63.

An agreement having for its object the carrying on a trade in contravention of the excise laws is illegal. *Ib.*

See further, REVENUE.

Conveyancer.]—The 44 Geo. 3, c. 98, s. 14, which imposes a penalty on any unqualified person who acts as a conveyancer, is a prohibitory act, and therefore such person cannot recover for conveyances drawn by him. *Taylor* v. *Crowland Gas and Coke Co.*, 10 Ex. 293; 2 C. L. R. 1247; 23 L. J., Ex. 254; 18 Jur. 913; 2 W. R. 563.

Pawnbrokers.]—*See* supra, col. 162.

Surgeon.]—The 3 Hen. 8, c. 11, which imposes a penalty on a person exercising or occupying himself as a surgeon without being duly admitted, is a prohibition of his practising as a surgeon, and disables him from recovering for work and labour as such. *D'Allax* v. *Jones*, 26 L. J., Ex. 79; 2 Jur. (N.S.) 979.

But a plea founded on that statute must show that the work was done within the places to which the statute extends. *Ib.*

Registration of Ships.]—A. and B., British subjects, purchased and repaired an American-built ship, on a joint speculation, with a view to employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States, in the name of C., a citizen of that country, upon a false declaration that she was bonâ fide the sole property of C. After the ship had made several voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, and, in spite of the dissent of A., sent her on another voyage to America:—Held, that, even supposing the declaration, and the registration thereby effected, to have been a fraud upon the American law, and the subsequent employment of the ship so registered to have been a fraud upon the English navigation laws, such fraud would not prevent A. from maintaining a suit in equity against B. for an account and payment of his share of the realised profits of the speculation. *Sharp* v. *Taylor*, 2 Ph. 801.

The courts of this country will not refuse to administer justice between joint importers of any article of commerce, merely upon proof that, in the production or exportation of such article, some fiscal law of the country of produce has been violated. *Ib.*

Agreement between A., B., and C., that they shall purchase a ship, and that it shall be registered in the names of A. and B., is against public policy, and demurrer allowed to bill for account in such transaction. *Battersby* v. *Smyth*, 3 Madd. 110.

And see SHIPPING.

m. Contrary to Poor Laws.

As to Pauper's Residence.]—A covenant with a lessor of premises in a parish to indemnify the parish against any paupers which the covenantor may cause to be settled in it, is valid, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws. *Walsh* v. *Fussell*, 3 M. & P. 457; 6 Bing. 163; 7 L. J. (O.S.) C. P. 261.

A bond given to parish officers, reciting that B. had taken a house in the parish for a term of seven years, and conditioned to indemnify the parish against any charges which they might sustain on account of B. and his family becoming inhabitants of and belonging to the parish, is not discharged by B.'s purchasing an estate of the value of 30*l.* in the parish, and residing on it upwards of forty days after the expiration of the seven years' lease. *Edwards* v. *Bobbit*, 1 M. & S. 120.

n. Solicitors.

Right of Unqualified Practitioner to Recover.]—A person not duly qualified as a solicitor, who nevertheless acts for parties in an action in the county court, and does solicitor's work for them, is not entitled to recover his expenses and fees from those for whom he acts; the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, having enacted that none but duly-qualified solicitors shall be entitled to do so. *Verlander* v. *Eddolls*, 51 L. J., Q. B. 55; 45 L. T. 543; 30 W. R. 104; 46 J. P. 229.

Employing Uncertificated Solicitor—Costs.]—Under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12—which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever—the successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated, recover his costs or disbursements from the party otherwise liable. *Fowler* v. *Monmouthshire Railway and Canal Co.*, 48 L. J., Q. B. 457; 4 Q. B. D. 334; 41 L. T. 159; 27 W. R. 659.

The 6 & 7 Vict. c. 73 (The Attorneys and Solicitors Act), s. 26, does not extinguish the debt of a solicitor or an attorney for costs in respect of business done while uncertificated, but only his remedy. *Jones, In re*, 39 L. J., Ch. 83; L. R. 9 Eq. 63; 21 L. T. 482; 18 W. R. 159.

Therefore, where a client has taken out an

order of course for taxation of his solicitor's bill, with the usual submission to pay what should be found due, and the master had disallowed certain items for business done while his certificate had not been renewed:—Held, that he was entitled to be allowed the items in question. *Ib.* This was, however, before the passing of the 33 & 34 Vict. c. 97, and the 37 & 38 Vict. c. 68, s. 12. *See preceding case.*

Proceedings taken by an uncertificated attorney are not, as affects his client, deemed void or irregular. *Brown* v. *Tolley*, 31 L. T. 485.

Granting Annuity out of Profits.]—Where a father, who never was duly qualified pursuant to 53 Geo. 3, c. 127, after carrying on for some years the business of a proctor conjointly with his son, who was duly qualified, retired, and his son granted him an annuity, payable out of the capital or profits of the business in consideration of his retiring, and giving up his share in the profits:—Held, that it was not illegal to grant the annuity in consideration of the father ceasing to do that which was illegal; and that the fact that the annuity was to be paid out of the profits of the business did not make the transaction illegal, within 53 Geo. 3, c. 127, s. 8, but that the grant was voluntary, and that the consideration was not good against the son's creditors for value. *Eddison* v. *Rothery*, 10 Jur. (N.S.) 943; 11 L. T. 134; 12 W. R. 1138.

Upon the dissolution of partnership between H. & A., solicitors, it was agreed that H., continuing the business on his own account, should grant to A. an annuity, and be at liberty to continue his name in the firm, guaranteeing him against all liability by reason thereof:—Held, that such an agreement is not void as being against public policy. *Aubin* v. *Holt*, 2 Kay & J. 66; 25 L. J., Ch. 36; 4 W. R. 112.

Agreement as to Loss.]—A contract whereby an attorney stipulates with a client to receive, in consideration of the advances requisite to the conducting the proceedings to a successful issue, over and above his legal costs and charges, a sum which should be commensurate with his outlay and exertions, and with the benefit resulting to the client, is void on the ground of maintenance. *Earle* v. *Hopwood*, 9 C. B. (N.S.) 566; 30 L. J., C. P. 217; 7 Jur. (N.S.) 775; 3 L. T. 670; 9 W. R. 272.

And see SOLICITOR.

o. Trade Unions and Combinations.

Agreement—Direct Enforcement.]—By the Trade Unions Act, 1871, s. 4, it is provided that nothing in the act shall enable the court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members. The plaintiffs, members of a trade union within the act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—Held, that such an injunction would not be a direct enforcement of the alleged agreement, and that the court might entertain the proceeding. *Wolfe* v. *Mathews*, 51 L. J., Ch. 833; 21 Ch. D. 194; 47 L. T. 158; 30 W. R. 838.

Central Society suing Branch for Wrongfully Dividing Funds.]—The central body of a society brought an action against a branch to restrain the latter from dividing certain funds in possession of the latter. Some of the rules of the society provided for benefits to members, and there were others which were in restraint of freedom of trade:—Held, that the action could not be maintained—(1) as it was brought to enforce an agreement between members of a trade union to provide benefits to members within the meaning of s. 4 of the Trade Union Act, 1871; and (2) as the agreement could not have been enforced previously to that act. *Duke* v. *Littleboy*, 49 L. J., Ch. 802; 43 L. T. 216; 28 W. R. 977.

Effect of, on Rights of Action.]—In such cases it makes no difference whether a central society sues a branch, a society sues an individual, or an individual sues a society. *Ib.*

Principle on which Court interferes to prevent Expulsion of Member of Voluntary Association.]—The foundation of the jurisdiction of the court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived. *Rigby* v. *Connol*, 49 L. J., Ch. 328; 14 Ch. D. 482; 42 L. T. 139; 28 W. R. 650.

Agreement as to Lien.]—An agreement entered into by a number of dyers, pressers, bleachers, &c., at a public meeting, that they would not receive any more goods to be dyed, &c., but on condition that they should respectively have a lien on those goods for their general balance, is good in law; and any one who after notice of it delivers goods to any of those persons must be taken to have assented to those terms; and consequently cannot demand goods so delivered to any such dyer, &c., without paying the balance of his general account. *Kirkman* v. *Shawcross*, 6 Term Rep. 14; 3 R. R. 103.

Not to Compete.]—An agreement between two coachmasters not to oppose each other, and to charge the same prices, is legal. *Hearn* v. *Griffin*, 2 Chit. 407.

An agreement between three persons carrying on the trade of trunk and box makers, and travelling by themselves and their servants into various parts of England to vend trunks and boxes, to divide, and not interfere with certain districts of the several cities, boroughs, towns, and villages, as set forth by them on Bowles' post map of England; and that each during his life, by himself and his agents duly authorised, should travel into, to sell trunks and boxes in his way of business, without any interruption whatever by either of the other two, during their joint lives, in certain cities, boroughs, towns, and villages, and not to suffer any goods in the trade to be manufactured at their shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of on the ground to be travelled by the other parties thereto; and not to aid and assist any person to oppose all or any and either of the parties; and not to purchase any tea-chest or chests, black or green, at a higher price than 6*d.* or 8*d.* each in Oxford; and in case, at any time, during their joint lives, any person or persons should set and oppose any or either of the parties, to meet together and enter into such mutual agreement, to the intent therein agreed to, as should be beneficial to the mutual interests of the parties, it being their declared intention not to do any act prejudicial to the interests of each other, but to

aid and assist each other in their trade and business to the utmost of their power;—does not operate in general restraint of trade, and, as an agreement contemplating a partial restraint only, if founded on a sufficient and valid consideration, is good. *Wickens* v. *Evans*, 3 Y. & J. 318.

Not to Employ.]—The condition of a bond recited that the obligors were manufacturers in Wigan and the neighbourhood, and that combinations of workmen, preventing free labour by fear of social persecution, injuriously interfered with the management of their manufactories, and that these combinations were sustained by funds extorted from workmen employed by the manufacturers, and that measures were necessary to protect as well the manufacturers in the free management of their capital as the workmen in the free disposal of their labour; wherefore the manufacturers had agreed, in regard to the amount of wages, the periods of engagement, the hours of work, and the general management of their establishments, to act for twelve calendar months in conformity with the lawful resolutions of a majority of the manufacturers present at a meeting, and declared that the bond should be void if this agreement were performed. In an action on the bond:—Held, that the bond was illegal at common law, and could not be enforced, as being contrary to public policy and in restraint of trade. *Hilton* v. *Eckersley*, 6 El. & Bl. 47; 25 L. J., Q. B. 199; 2 Jur. (N.S.) 587; 4 W. R. 326—Ex. Ch.

Enforcing Penalty.]—An agreement between persons jointly interested, to horse a coach, each of them one stage, on the road from L. to B.; and that, in case of default, one of them should sue the defaulter for a penalty, which, when recovered, was to be divided amongst the non-defaulters, is an agreement on which an action may be maintained against the defaulter, by one of the parties appointed by the others to sue, and the others need not join in the action. *Rudenhurst* v. *Bates*, 3 Bing. 468; 11 Moore, 121; 4 L. J. (O.S.) C. P. 169; 28 R. R. 659.

A contract made between two or more persons to enter into a partnership in contravention of the law, is void, and confers no rights upon either party. *Armstrong* v. *Lewis*, 4 M. & Sc. 1.

See also TRADE.

p. Consideration or Security tainted with Illegality.

Not Enforceable.]—Where a deed is given as a security for the payment of a debt tainted with illegality, the law which will not enforce the payment of the debt will not enforce the payment of the security. *Fisher* v. *Bridges*, 3 El. & Bl. 642; 2 C. L. R. 929; 23 L. J., Q. B. 276; 1 Jur. (N.S.) 670; 2 W. R. 706—Ex. Ch.

A., being about to compound with his creditors, in order to induce B. (one of them) to execute the deed, without the knowledge of the other creditors, gave him two promissory notes, each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, and an action was brought upon it, and judgment obtained, and execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantee for the amount of the judgment and the outstanding note; and thereupon the two notes were given up:—Held, that the guarantee was tainted with the original fraud, and therefore could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been, but was not pleaded. *Clay* v. *Ray*, 17 C. B. (N.S.) 188. S. P., *Geere* v. *Mare*, 2 H. & C. 339; 33 L. J., Ex. 50; 8 L. T. 463; 12 W. R. 17. See *Scott* v. *Gillmore*, 3 Taunt. 226; 12 R. R. 641.

A declaration alleged that the plaintiffs, who were proprietors of a newspaper, at the solicitation and request of the defendant, published a statement in their newspaper; that one C. afterwards commenced an action against them for a libel contained in the publication; and that the defendant, in consideration of the premises, and that the plaintiffs would defend the action, undertook to save the plaintiffs harmless, and indemnify them from all payments, damages, costs, charges, and expenses which they might incur, sustain, or be liable for, by reason of their publishing the statement, and of their defending the action:—Held, that the consideration was entire, and that the part of it which consisted of the publication of a libel being illegal, the whole of it was tainted with illegality, and that the action could not be supported; and that if the former part of the consideration was rejected as surplusage, the promise was then void as amounting to maintenance. *Shackell* v. *Rosier*, 2 Hodges, 17; 2 Bing. (N.C.) 634; 3 Scott, 59; 5 L. J., C. P. 193.

Where Valid.]—Where, upon an advance of money, a security has been taken which is tainted with usury or other illegality, and afterwards another security is taken, for the same advance, untainted with the illegality, and obviating any necessity of resorting to the former one for the recovery of the money, such substituted security is valid, and the money really advanced can be recovered thereon. *Att.-Gen.* v. *Hollingworth*, 2 H. & N. 416; 27 L. J., Ex. 102; 5 W. R. 684.

A loan of money at usurious interest before the repeal of 12 Anne, c. 16, is a good consideration for a promise, made after the repeal, to repay the loan at the same interest. *Flight* v. *Reed*, 1 H. & C. 703; 32 L. J., Ex. 265; 9 Jur. (N.S.) 1016; 8 L. T. 638; 12 W. R. 53.

q. Gaming and Wagering.

See GAMING.

D. INTERPRETATION OF CONTRACTS.

1. CONSTRUCTION.

a. By what law.

Where made.]—The place of making a contract should be considered in expounding it unless the parties have a view to another kingdom. *Robinson* v. *Bland*, 1 W. Bl. 234, 256.

The law of a country where a contract is to be enforced must govern the construction of such contract. *Don* v. *Lippmann*, 6 Cl. & F. 1.

The legality of a contract is determined by the lex loci contractûs. *Branley* v. *S. E. Ry.*, 12 C. B. (N.S.) 63; 6 L. T. 458.

When a contract is entered into in one country and is sought to be enforced by the courts of justice of another country, the question is, not only whether it is a valid contract according to the law of the country where it was entered into, but whether it is, or is not, in accordance with the

laws of the country in which it is sought to be enforced. *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J., Ch. 417; 3 Jur. (N.S.) 454; 5 W. R. 387.

As a general rule the lex loci contractûs governs the construction of contracts. *Gibbs* v. *Freemont*, 9 Ex. 25; 22 L. J., Ex. 302; 17 Jur. 820; 1 W. R. 482.

Therefore if a bill of exchange, on the face of which no interest is reserved, is drawn in one country, payable in another, the drawer is liable on its dishonour to pay as damages interest at the current rate in the country where the bill was drawn. *Ib.*

In an action on a contract where the question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance, and relates entirely to the effect of the transaction at the place where it was entered into, the liability of the defendant must be determined by the lex loci contractûs. *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L. J., Q. B. 81; 8 Jur. (N.S.) 557; 6 L. T. 21.

A contract between domiciled Englishmen, relating to real estate in a foreign country, is to be determined by the lex loci; but a contract between an Englishman domiciled and resident in England and an Englishman resident in a foreign country, but not having acquired a foreign domicil, must be governed by the rules of English law. *Cood* v. *Cood*, 33 Beav. 314; 3 N. R. 275; 33 L. J., Ch. 273; 9 Jur. (N.S.) 1335.

The rule governing the interpretation of a contract made in one country, to be performed wholly or partly in another country, is, that the law of the country where the contract is made governs as to the nature of the obligation; and the interpretation of it, if the parties to the contract are either subjects of a power there ruling, or as temporary residents owe that power a temporary allegiance. In either case they must be understood to submit to the law there prevailing, and agree to its action on their contract. *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, 3 Moore, P. C. (N.S.) 272; 11 Jur. (N.S.) 771; 12 L. T. 808; 13 W. R. 1049.

It is immaterial that such agreement so to be ruled by the lex loci contractûs is not so expressed in terms; it is equally an agreement, in fact, presumed de jure: and a foreign court interpreting or enforcing a contract so made on any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognised comity of nations. *Ib.*

Intention.]—The rights of parties to a contract are to be judged of by that law which they intended, or rather, by what they may justly be presumed to have bound themselves. *Lloyd* v. *Guibert*, 6 B. & S. 100; 35 L. J., Q. B. 74; L. R. 1 Q. B. 115; 13 L. T. 602—Ex. Ch.

A party who relies upon a right or an exemption by foreign law, is bound to bring that law properly before the court, and to establish it in proof, otherwise the court, not being authorised to notice such law without judicial proof, must proceed according to the law of England. *Ib.*

Where a contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern. *Ib.*

Method.]—When a contract is made in a foreign country, and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the instrument on ordinary principles of construction. *Di Sora* v. *Phillips*, 10 H. L. Cas. 624; 2 N. R. 553; 33 L. J., Ch. 129.

Reference to Foreign Law—Effect of.]—A reference to foreign law in an English contract does not incorporate the foreign law, but merely affects the interpretation of the contract. *Dever, Ex parte, Suse, In re*, 56 L. J., Q. B. 552; 18 Q. B. D. 660—C. A.

Questions of Procedure.]—The law of the country, where a contract is made or is to be performed, furnishes the rules for expounding the nature and extent of its obligations. *Ferguson* v. *Fyffe*, 8 Cl. & F. 121.

But the law of the country, where it is sought to enforce the performance of a contract, governs all questions as to the remedy and mode of procedure, including lapse of time. *Ib.*

As to contracts purely personal, it is a general rule that questions relating to the validity and to the interpretation of a contract, are to be governed by the law of the country where the contract was made; and if a remedy for the non-performance of a contract is sought in another country, the mode of suing, and the time within which the suit must be brought, are governed by the law of the country in which the action is brought. *Cooper* v. *Waldegrave (Earl)*, 2 Beav. 282.

Questions of procedure are to be determined by the lex fori, not by the lex loci contractûs. *MacFarlane* v. *Norris*, 2 B. & S. 783; 31 L. J., Q. B. 245; 9 Jur. (N.S.) 74; 6 L. T. 492.

Semble, that set-off is matter of procedure, and, as such, determinable by the lex fori. *Ib.*

The law of the country where the contract is to be enforced, not that of the country in which it is made, governs the question of admissibility of evidence on a trial arising out of such contract. *Bain* v. *Whitehaven and Furness Ry.*, 3 H. L. Cas. 1. *See also* INTERNATIONAL LAW.

b. Particular Words, Terms and Phrases.

Construction for Court.]—The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court. *Bowes* v. *Shand*, 46 L. J., Q. B. 561; 2 App. Cas. 455; 36 L. T. 857; 25 W. R. 730.

The construction of a contract, and the meaning of particular words used in it, are for the judge, except in cases where there is evidence that a particular word was used in a sense peculiar to a particular trade or business, or that its meaning depends on the usage of a particular place. *Simpson* v. *Margitson*, 11 Q. B. 23; 17 L. J., Q. B. 81; 12 Jur. 155.

Where it was agreed that an auctioneer should receive a commission, in case a sale of an estate should be effected within two months of a given day:—Held, that months, primâ facie, meant lunar months, and that the subsequent conduct of the parties was not to be looked at to show that it meant calendar months. *Ib.*

In an action upon a covenant, or other written agreement, it is the duty of the judge to state to the jury its construction as a matter of law,

or to explain to them how far its construction may be modified by evidence of usage, when such evidence is admissible; and in cases where such evidence is not admissible, and the construction of the contract is a question of law, his omitting to direct the jury as to its construction is a misdirection. *Griffiths* v. *Rigby*, 1 H. & N. 237; 25 L. J., Ex. 284.

In an action on a covenant on a demise of coal mines, accompanied by a proviso that in case the coals, so far as the same could be fairly wrought, should be worked out prior to the expiration of the term, the rent should cease, it is a misdirection on the part of the judge to leave the meaning of the proviso, especially with reference to the words "fairly wrought," to the jury, upon evidence as to the impossibility of working the mine at a profit; the question of profit having no bearing upon the proviso, which regarded only the manner of working; and the construction of which was a question of law for the judge to determine by his direction. *Ib.*

If a doubt arises upon the construction of a phrase in a written instrument, it is to be decided by the court upon inspection, and not by the jury. *Rex* v. *Hucks*, 1 Stark. 521.

In Equity.]—There is no equitable construction of an agreement distinct from its legal construction. *Scott* v. *Liverpool Corporation*, 28 L. J., Ch. 230; 5 Jur. (N.S.) 105; 7 W. R. 153—L.JJ.

Where the law has declared the construction of a contract, a court of equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealings under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised, and in due form. *Midland Great Western Ry.* v. *Johnson*, 6 H. L. Cas. 798; 4 Jur. (N.S.) 643; 6 W. R. 510.

If such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal. *Ib.*

Language that of both Parties.]—An agreement must be taken to be in the words of both parties. *Wood* v. *Copper Miners Co.*, 7 C. B. 906; 18 L. J., C. P. 293.

Construction Preferred which gives Meaning.]—Words construed so as to have some meaning rather than rejected; therefore vendor proposing a price, clear of all expenses, construed that the purchaser should bear the expense of making out the title, the law imposing on him the expense of the conveyance. *Stratford* v. *Bosworth*, 2 Ves. & B. 341.

Ordinary Meaning.]—In construing instruments, the words are to be construed according to their strict and primary acceptations, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; subject, however, to this, that the meaning of a particular word may be shown by parol evidence to be different, in some particular place, trade, or business, from its proper and ordinary signification. *Mallan* v. *May*, 13 M. & W. 511; 14 L. J., Ex. 48; 9 Jur. 19.

By articles of agreement between A., described as of Great Russell Street, Bloomsbury Square, in the county of Middlesex, and B., the former agreed to instruct the latter in the business of a surgeon-dentist for a term of four years; and it was stipulated that B. should not, without the consent of A., carry on the business of a surgeon-dentist "in London, or any of the towns or places in England or Scotland" where A. may have been practising before the expiration of the term:—Held, that, in its strict and proper meaning, the word London meant the city of London, in which sense it ought to be understood, as there was nothing in the context to prevent its being construed in its proper sense; and that a statement in the case, that London had a popular or colloquial sense, in which Great Russell Street would be understood to be within its limits, was not sufficient for the purpose of causing a different construction to be put upon that word in the instrument. *Ib.*

Contracts should be construed according to the natural meaning of the words used, except (a) where the context affords a different interpretation, and (b) where their conventional meaning is not the same as their legal sense; in the latter case, the meaning to be attributed to the words must depend upon whether the parties at the time of making the contract had or had not the law in their contemplation. *McCowan* v. *Baine*, [1891] A. C. 401; 65 L. T. 502; 7 Asp. M. C. 89.

Meaning acquired by Mercantile Usage.]—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth* v. *Redford*, 43 L. J., C. P. 57; L. R. 9 C. P. 20.

A plaintiff sold to the defendants goods; the invoice was dated the 1st of May, and at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage; the jury having found that the action was not brought too soon:—Held, that the direction to the jury was proper, and that the plaintiff was entitled to the verdict. *Ib.*

Inserted by Mistake.]—By a written agreement the plaintiff undertook to do work to some houses of the defendant in South Street and Southampton Street. It was proved that the defendant had no houses in Southampton Street. The judge asked the jury whether the parties meant to describe houses in South Street only, and whether the insertion of the word "and" in the agreement was a mistake:—Held, that the judge should have construed the agreement himself, and not have left it to the jury to say whether there was a mistake. *Hitchin* v. *Groom*, 5 C. B. 515; 17 L. J., C. P. 145.

As to Time.]—Where a thing is to be done in a reasonable time, the reasonableness of the time is a question wholly for the jury. *Nelson* v. *Patrick*, 2 Car. & K. 641.

A contract to be performed "directly," means to be performed not "within a reasonable time," but "speedily," or at least "as soon as practicable." *Duncan* v. *Topham*, 8 C. B. 225.

On the 18th of February the plaintiff wrote to the defendant, offering to supply him with lin-

seed cake at 10*l.* 15*s.* per ton; on the 19th the defendant replied, "I can take five tons at 10*l.* 10*s.*, but it must be put on board directly;" and on the 22nd the plaintiff again wrote, "I shall ship you five tons best cakes to-morrow": —Held, that this correspondence did not prove a contract on the part of the defendant to accept cake to be delivered within a reasonable time. *Ib.*

Contract for Lease—"Immediate Possession if required."]—In a contract for a lease the words "immediate possession if required" do not fix the commencement of the term. *Rock Portland Cement Co.* v. *Wilson*, 52 L. J., Ch. 214.

"Say about"—Words of Expectation.]—A charter-party provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1,100 tons.' The charterer provided a cargo of 1,080 tons, the actual capacity of the ship being 1,210 tons:—Held, that the words, "say about 1,100 tons," were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity; but that three per cent. was a fair amount of excess over 1,100 tons to allow in estimating what was a full and complete cargo of about 1,100 tons, and consequently that the cargo actually provided fell short of the charterer's obligation by fifty-three tons. *Morris* v. *Levison*, 45 L. J., C. P. 409; 1 C. P. D. 155; 34 L. T. 576; 24 W. R. 517.

Freight payable on Measurement of Goods—Place of Measurement.]—By a charter-party made between plaintiff, a shipowner, and defendants, merchants at Manchester, it was agreed that plaintiff's ship should sail to Bombay, and there load a cargo of cotton, and proceed with it to Liverpool and "deliver the same" on being paid freight at the rate of "7*5s.* per ton of 50 cubic feet delivered; the freight to be paid on right delivery of the cargo." The ship accordingly sailed to Bombay, and received a cargo of cotton, which, previously to being loaded, had been subjected in accordance with the usual practice to a high hydraulic pressure, so as to reduce its contents to a minimum. On being removed from the hold at Liverpool, the cotton naturally expanded very considerably, and the plaintiff claimed in this action freight on its measurement when delivered, and not when shipped. At the trial it was proved to be the custom of the Bombay trade to pay freight for cotton goods under a charter-party worded as above, on the measurement of the goods at the port of shipment. No evidence was given to show that plaintiff had actual notice of the custom:—Held, first, that apart from the custom proved, the freight was payable, on a true construction of the charter-party itself, on the measurement of the goods when shipped, and not when delivered; and, secondly, that the evidence of the custom was properly admitted as not being contradictory of the terms of the charter-party. *Buckle* v. *Knoop*, 36 L. J., Ex. 49; L. R. 2 Ex. 125; 16 L. T. 231; 15 W. R. 588.

Per Kelly, C.B., and Pigott, B., that the circumstances of the case were such as to raise a presumption that the plaintiff was aware of the custom. *Ib.*

Per Channell, B., that the fact of the plaintiff not having been proved to have had notice of the custom was an objection rather to the weight than to the admissibility of the evidence. *Ib.*

"Say not less than."]—In an agreement, on the 12th December, between A. and B., that B. should deliver to A. all the wool which B. might pull up to the 6th January, "say not less than 100 packs," the word "say" in this agreement must be read as if it had been written "that is to say;" and the words following it, therefore, must be taken to form part of a binding stipulation, and not to be merely words of conjecture or estimate; and the true construction of the agreement is, that B., on his part, was bound to deliver at least 100 packs of wool. *Leeming* v. *Snaith*, 16 Q. B. 275; 20 L. J., Q. B. 164; 15 Jur. 988.

The court, in construing a mercantile contract, is bound, in the absence of any averment to the contrary, to construe all words in their ordinary, and none in any technical sense. *Ib.*

"If Remainder are as Good as Sample, you may send me thirty more"—Less than thirty sent.]—Plaintiff wrote to defendant, "I have bought 100 cheese, 30 of which are very fine, 80 lbs. a cheese. The remainder are not so large. On receipt of your order, I will forward sample." Defendant replied, "You may send me 6 Cheddar cheese as a sample." Plaintiff sent 6 with a letter saying, "I am obliged to change one of the cheese, fearing it would not bear carriage." Defendant afterwards wrote, "If remainder are as good as sample, you may send me 30 more. You may also send sample of the smaller ones, and say the lowest price for cash." Plaintiff replied, "Your favour to hand. I will send the cheese to-morrow; I could not say less than 78*s.*, they ought to be 80*s.*" The plaintiff then forwarded to defendant 12 larger cheeses, and 6 smaller ones, which defendant refused to accept, as he said on account of badness of quality:—Held, that he was bound to accept the 12 larger ones, but not the 6 smaller ones, as the contract for the larger ones did not mean 30 absolutely, but as many of the lot of 30 as were of the same quality as the samples previously sent, and as the 6 smaller ones were sent as samples merely, which the defendant was not bound to keep. *Symes* v. *Hutley*, 2 L. T. 509.

"Prosecution Laid."]—Freeholders, claiming a common right of fishery, subscribed an agreement to bear each other's expenses of defending any prosecution laid against them for fishing in the alleged common water. A question arising on the trial of a civil action against subscribers for so fishing:—Held, that the words "prosecution laid," in the agreement, must be taken to mean criminal proceedings only. *Rawlins* v. *Jenkins*, 4 Q. B. 419; 12 L. J., Q. B. 151.

Vendor "to take upon himself all risks and dangers of Sea."]—By an agreement in which C. was described as vendor, and P. as purchaser, C. agreed to ship a cargo of ice, and on being shipped, to forward to P. bills of lading, on receipt of which he was to "take upon himself all risks and dangers of the sea, &c.," he agreeing also to buy and receive the ice on its arrival, taking the ice from alongside the ship, and paying for it in cash on delivery at the rate of

20*s.* per ton, weighed on board during delivery:—Held, that the effect of the clause as to risks and dangers of the seas was not merely to save C. from liability for non-delivery, but to bind P. to insure the cargo on receiving the bill of lading; and that the ship and cargo having been lost on the voyage through perils of the seas, P. was liable to pay C. the price or the value of the cargo. *Castle* v. *Playford*, 41 L. J., Ex. 44; L. R. 7 Ex. 98; 26 L. T. 315; 20 W. R. 440—Ex. Ch.

And see SALE and SHIPPING (*Charter-party*).

Agreement to use Influence and Secure Situation.]—A party agreed with another as follows:—"Provided you use your influence, and secure me the situation of superintendent, I agree to pay you the amount of my first quarter's salary":—Held, that, to maintain an action on the agreement, the influence used must be such that the situation was, in fact, secured by it. *Neelly* v. *Lock*, 8 Car. & P. 527.

"Receiving Notice."]—A declaration stating a promise of a defendant to be, that "if he received seven days'" notice requiring the appearance of W. at a place to be in the notice named, he would produce him, need not aver a notice in writing. *Thompson* v. *Ayling*, 4 Ex. 614; 19 L. J., Ex. 55.

A declaration set out an agreement, dated the 27th April, 1840, whereby, after reciting that the defendant was indebted to the plaintiffs in 60*l.*, to be repaid with interest at 5*l.* per cent., it was agreed "that the 60*l.* shall remain in the hands of the defendant from the date thereof, for one whole year; that at the expiration of that period (if the interest shall be then paid, and no notice be then given to call in the same), the 60*l.* shall continue in the hands of the defendant for another year, and so on from year to year, until notice in writing shall be given by the plaintiff to call in the same; that twelve calendar months' notice in writing shall be given to call in the 60*l.*, and that at the expiration of the notice the same shall be paid by instalments of 10*l.* every third month until the whole amount be paid, the first payment of 10*l.* to be made at the expiration of fifteen months from the date of the notice, so that the whole amount of 60*l.* shall be paid by the end of two years and six months from the date of the notice," and averred that a notice in writing, dated the 29th day of May, 1846, was served upon the defendant to call in the principal, and that although twelve calendar months from the date of such notice and service elapsed before action, and although six months from the expiration of the twelve months had also elapsed, and although two instalments had become due, yet the defendant had not paid the same:—Held, that after the expiration of the first year, the notice to pay off the principal might be given at any period of the year, and that the time for payment of the instalment was to be calculated from the date of the notice, not from the day of the year corresponding with the date of the agreement. *Brown* v. *Hartill*, 2 Ex. 846; 17 L. J., Ex. 278.

Default in Payment on Demand.]—Where by the terms of a mortgage deed the plaintiffs were to remain in possession on their own account, and managed the mortgaged property until they should make default in payment of the mortgage money upon demand in writing in manner specified, and such demand was made on the wife of one of the plaintiffs during the plaintiff's absence by a person who represented himself as the defendant's agent, and upon non-payment the defendant forthwith entered upon possession and seized the mortgaged property:—Held, in an action of trespass against the mortgagee, that such non-payment before the plaintiffs had had any opportunity to inquire into the truth of the alleged agency did not constitute default, and that the defendant was liable to the mortgagors in substantial damages. *Moore* v. *Shelley*, 52 L. J., P. C. 35; 8 App. Cas. 285; 48 L. T. 918—P. C.

Default in "Punctual Payment" of Instalment—Right to retake Possession of Goods.]—A piano was let on the three years' hire system, under an agreement providing that "In case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to J. B. C., who shall thereupon be entitled to resume possession of the instrument":—Held, upon default, that J. B. C. was entitled to the possession of the piano, although the instalments in arrear were tendered by the hirer, before action brought. *Cramer* v. *Giles*, 1 Cab. & E. 151. Affirmed in C. A.

"Keep in Order."]—A. contracted, in consideration of 220*l.* 10*s.*, to sell and plant a quantity of trees on B.'s land, and also that "he should and would, at his own costs and charges, well and sufficiently keep in order the trees aforesaid for two years after the planting, and that such as should die during the period (except from injury by sheep, game, or cattle.) should be replaced by him." In an action to recover the price, the jury thought that the words, "keep in order," meant to prune only, and did not extend to weeding and clearing the ground, and they found their verdict accordingly. The court, thinking this an improper construction, granted a new trial:—Held, also that evidence of non-performance by A., of any part of the contract on his part, was admissible in reduction of damages. *Allen* v. *Cameron*, 1 C. & M. 832; 3 Tyr. 907; 2 L. J., Ex. 263.

"Ship"—Owners of Ship.]—The plaintiffs were owners of the ship W., and M. of the ship G., which was insured in two companies, one of which was represented by the defendant, the other by M. himself. The G. ran into the W., and was arrested in the Admiralty Court; an agreement was entered into by the plaintiffs, M., and the insurers, that the plaintiffs would release the ship, and the other parties would "pay the amount of damage which the ship W. had received from the collision," and that in case of dispute about "the amount of damages claimed by Heard Brothers (the plaintiffs) by reason of the collision," the matter should be referred:—Held, that "ship" in the first clause must be read "owners of the ship," and that the plaintiffs were entitled to recover for loss of profits, as they would have done in the Admiralty Court. *Heard* v. *Holman*, 19 C. B. (N.S.) 1; 34 L. J., C. P. 239; 11 Jur. (N.S.) 544; 12 L. T. 455; 13 W. R. 745.

"His Share" equivalent to share of Firm.]—Where a memorandum of mutual agreement had been entered into between M., the plaintiffs, and three other firms, whereby M. agreed to surrender

to the plaintiffs "his share" in a certain mortgage held by him as trustee :—Held, upon all the circumstances of the case, that the share of M.'s firm therein passed, and not merely his own individual share as between himself and his partner. *Marshal* v. *Maclure*, 10 App. Cas. 325—P. C.

Machine for cutting Glue Pieces strong and sound "to approval of A."]—The proper construction of an agreement to make a machine "for cutting glue pieces according to drawing, &c., strong and sound workmanship to the approval of A.," is that the approval of A. is to be as to the strength and workmanship of the machine, not as to its efficiency for cutting glue pieces. *Ripley* v. *Lordan*, 2 L. T. 154.

"Continued Ill-health."]—A schoolmaster, in 1842, contracted with the defendant to rent of him a house and school-room, at the rent of 35*l.* a year; and it was agreed between them that unless death or continued ill-health in either case should take place, the defendant promised to provide two bedrooms over the intended school-room, but not before 1844; and when such rooms should be provided, the defendant agreed to pay for them an additional rent of 5*l.* a year. In an action on this agreement, the declaration alleged as a breach that although the whole of 1845, except a few days, had elapsed, and although the defendant had not been prevented by any ill-health, he had not, although often requested, provided the two bedrooms :—Held, that "the continued ill-health in either case" meant ill-health of either of the parties, and therefore that the declaration was bad for not averring that there had been no continued ill-health on the part of the plaintiff. *Ireland* v. *Harris*, 14 M. & W. 432.

Contract by Music Hall Artiste—"Engagement," whether Sundays included—"Perform."] —*See Kelly* v. *London Pavilion*, post, col. 271.

"Good" or "Fine" Barley.]—The defendants wrote to the plaintiffs, and offered them a quantity of good barley, to which they answered that they accepted the offer, expecting the defendants would give them fine barley. The defendants, in reply, stated that their letter contained no such expression as fine barley, and that therefore they declined to ship the same. In an action against the defendants for not delivering the barley :—Held, that it was for the jury to say whether the words "good" and "fine" were mercantile phrases, and that the court was to determine the meaning of the contract; and the jury having found that there was a distinction in the corn trade between good and fine barley, there was not a sufficient acceptance, and therefore the plaintiffs must be nonsuited. *Hutchinson* v. *Bowker*, 5 M. & W. 535; 9 L. J., Ex. 24.

"Cider"—Liability to Duty.]—Where a contract was made between A. and B., whereby A., having a quantity of apples, agreed to sell his cider to B. at a certain price per hogshead, to be delivered at T. at a future time, and to lend such pipes as he had for the use of the cider, to be manufactured on his, A.'s, premises, and to be paid for before it was removed; and A., in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by B. to manufacture the cider on A.'s premises, and before the cider was completely manufactured it was seized by the excise officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as B.'s property, together with the casks; and, in action for goods sold and delivered, by A. against B., it appeared that the word cider, at the place where the contract was made, meant the juice of the apples as soon as it was expressed :—Held, that the contract must be construed to have been for the sale of cider in that sense of the word, and that the property passed to B. as soon as the apple juice was delivered to his servant; and secondly, that it was B.'s duty to enter the premises; and as through his fault it became impossible for A. to deliver the goods at T., the failure to do so did not bar his action. *Study* v. *Sanders*, 5 B. & C. 628; 4 L. J. (O.S.) K. B. 290.

"Timber Dues"—Remission of Duty.]—Upon the dissolution of a partnership between G. and one B., a deed was entered into to settle the rights of the parties. It contained a clause to the effect that, should the respondent succeed in obtaining from the government a remission, in whole or in part, of an amount due from the firm for "timber dues," secured by a bond, he should account for and pay to G. one-half of the amount so remitted. The government, upon the application of B., subsequently remitted upon the bonds an excess of rents paid by the firm :—Held, that the assignee of G. was entitled under the agreement to have the benefit of this remission. *Burstall* v. *Baptist*, 21 W. R. 485—P. C.

"Becoming Insolvent."] — The expression "Becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the Insolvent Debtors Act, unless the context so restrains it. *Biddlecombe* v. *Bond*, 4 A. & E. 332; 5 N. & M. 621; 5 L. J., K. B. 47.

In a contract for the supply of goods there was a condition that in the event of the bankruptcy or insolvency of the vendee, the contract should be terminated, or if he should be afflicted in mind or body so as to be unable to carry on his trade :—Held, that there was nothing in the contract to show that the word insolvency was used in a technical sense, and therefore it must be understood in its ordinary import of being unable to pay his just debts. *Parker* v. *Gossage*, 2 C. M. & R. 617; 1 Tyrw. & G. 105; 1 Gale, 288; 5 L. J., Ex. 4.

"Weekly Accounts"—Building Contract.]—In a contract under seal, by which the plaintiff contracted to build for defendants a house and premises for a certain sum, it was provided that "no alterations or additions should be admitted unless directed by the defendants' architect by writing under his hand, and a weekly account of the work done thereunder should be delivered to the architect every Monday next ensuing the performance of such work." In an action on the contract :—Held, that parol evidence was admissible to show that by the usage of the building trade "weekly accounts" meant accounts of the day work only, and did not extend to extra work capable of being measured. *Myers* v. *Sarl*, 30 L. J., Q. B. 9; 7 Jur. (N.S.) 97; 9 W. R. 96.

"Rent Balance."]—Action for work done under the following agreement :—"Mrs. E. agrees with Mr. B. to cleanse the cesspools to the thirteen houses in S. street for 8*l.* 2*s.*: Mr. H.'s rent balance to be deducted from the said

sum." H. was a weekly tenant to the defendant of one of the houses. The agreement was signed in the middle of one of the weeks of his tenancy. At that time 2*l.* was due from him for rent, but when the work was completed, another week's rent had become due. The judge at the trial having expressed an opinion that the rent balance meant the amount due when the agreement was signed, and the verdict having been found accordingly, the court refused a new trial. *Edwards* v. *Bagster*, 2 M. & W. 221.

Ice to be taken "from the Deck."]—A cargo of ice was consigned to the plaintiff, and before the ship came into harbour the defendants purchased the cargo, with a condition that the ice was to be taken from the ship's deck by them:—Held, that the contract "from the deck" meant that the vendor should pay all that was necessary in order to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before goods could be removed were payable by the vendor. *Playford* v. *Mercer*, 22 L. T. 41.

Whether Usage excluded.]—When two parties enter into a written contract, specifying the terms on which they contract, they are mutually bound by the terms as expressed in the writing, and construed by the court, although one may have understood differently from the other the effect of those terms. *Baines* v. *Woodfall*, 6 C. B. (N.S.) 657; 28 L. J., C. P. 338; 6 Jur. (N.S.) 19.

The usage of insurance brokers at Liverpool is, that if, on the occasion of a policy for time being cancelled before the expiration of the time, the premium, or a part of it, is to be returned, the return is made only in respect of unbroken months; but a contract made by a proposal or request in these terms:—"We will thank you to render us a credit note for unexpired time, say from the 12th instant, to the date of the expiration of the policy," and an acceptance in these: "Please to hand bearer stamped policies, &c., to put forward returns for cancelling," must be construed as having been made irrespective of and excluding the usage. *Ib.*

And see *Buckle* v. *Knoop*, supra.

Mode of Carrying out Contract.]—The mode agreed on to carry a contract into effect is as much binding on the parties as the contract itself. *Frankfort* v. *Thorpe*, 2 Ball & B. 372.

c. Implied Terms.

Intention.]—In the construction of a document, the court will not imply a contract or a covenant not expressed in terms, unless it is satisfied from something to be found in the document that the parties to it must have intended such a contract or a covenant. *Midland Ry.* v. *L. & N. W. Ry.*, 15 L. T. 264.

—— **Agreement for Sale of Products of a Business.**]—The defendants, who carried on business as brewers, entered into an agreement in writing, by which they agreed to sell to the plaintiffs, and the plaintiffs agreed to buy, all the grains made by the defendants, at the average of the rates charged each year by certain specified firms, from July 10, 1885, until September 30, 1895. In 1890 the defendants sold their business, and in consequence ceased to supply grains to the plaintiffs:—Held, that a term could not be implied in the contract to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains to the plaintiffs for the period mentioned. Such an implication of a term in a contract ought to be made only where it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, and to prevent such failure of consideration as cannot have been within the contemplation of either party. The question whether in any case such an implication ought or ought not to be made must depend on the particular facts of the case. The construction of one contract in this respect affords little or no guidance for the construction of another. *Hamlyn* v. *Wood*, 60 L. J., Q. B. 734; [1891] 2 Q. B. 488; 65 L. T. 286; 40 W. R. 24—C. A.

Not to alter Circumstances.]—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. *Stirling* v. *Maitland*, 5 B. & S. 840; 34 L. J., Q. B. 1; 11 L. T. 337; 13 W. R. 76.

An insurance company covenanted with C. D., for a valuable consideration, to appoint him their agent, together with A. B., and that if A. B. should be displaced from the agency they would pay C. D. a certain sum; the company having transferred their business to another company, and wound up their affairs, and dissolved themselves:—Held, that it was a displacement of A. B. within the meaning of the covenant. *Ib.*

Altered Circumstances—Extra Cost.]—Where a contract is made with reference to certain anticipated circumstances, and when it becomes wholly inapplicable or impossible of application to any such circumstances, without any default on the part of the plaintiff, it ceases to have any application: it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. *Bush* v. *Whitehaven Trustees*, 52 J. P. 392.

B. contracted with W. in the month of June to lay a certain conduit pipe, and W. agreed to be ready at all times to give B. possession of the sites, to enable him to proceed with the construction of the works. By means of W.'s delay in giving possession of portions of the sites to B., B. was thrown into the winter months when wages were higher and the works were more difficult to construct:—Held, that a summer contract having, by implication, been in the contemplation of the parties when the contract was made, B. was entitled to a quantum meruit or damages in respect of the increased expenditure which he was thereby compelled to incur. *Ib.*

Transfer of Goodwill—Covenant to carry on Business.]—A., in consideration that B. would transfer to him the goodwill of his business as a surgeon, promised to pay B. one-fourth part of his earnings for and in respect of each of four successive years, if he should be living at the end of each respective year:—Held, that there was an implied covenant by A. to carry on the business, and that he would not during the four years, by his wilful acts or default, prevent the receipt

of earnings. *M'Intyre* v. *Belcher*, 14 C. B. (N.S.) 654; 32 L. J., C. P. 254; 10 Jur. (N.S.) 239; 8 L. T. 461; 11 W. R. 889.

Assignment of Patent in consideration of Royalty—Covenant to Maintain.]—By a deed, dated in 1883, a patent was assigned by the inventors and patentees to a company in consideration of 250*l.*, and the other considerations thereinafter appearing. The deed contained covenants for title by the assignors, including a covenant for quiet enjoyment of the patent "during the term subsisting therein." The company covenanted for the payment of a royalty for every article manufactured and sold by them under the patent "while subsisting," and also for payment of a share of any sums obtained by granting licences under the patent "while subsisting." In consequence of the company having, by inadvertence, omitted to pay one of the renewal fees of 10*l.*, payable under the Patents, Designs, and Trade Marks Act, 1883, in lieu of the stamp duty of 50*l.*, the patent became void. An unsuccessful application was then made by the company to parliament for an act to revive the patent. Subsequently the company went into voluntary liquidation. The assignors sent in a claim to the liquidators for 2,000*l.* damages for the loss of the patent, contending that the assignment contained, by implication, though not in express terms, a covenant by the company to keep the patent on foot. Thereupon a summons was taken out by the liquidators under s. 138 of the Companies Act, 1862, for directions as to whether they should allow all or any part of the claim:—Held, that there was no implied covenant to keep the patent on foot, and that, therefore, the claim of the patentees entirely failed. But held, that even if such a covenant could be implied, yet, as there was no obligation on the part of the company to manufacture the patented article, in no circumstances could more than nominal damages be claimed. *Railway and Electric Appliances Co., In re*, 57 L. J., Ch. 1027; 38 Ch. D. 597; 59 L. T. 22; 36 W. R. 730.

Contract to supply Gas—Specific Period.]—A gas company agrees to supply with gas A.'s premises, situate in a town where there is no other gas company, and he accordingly fits his premises with pipes, burners, stoves, and meter, for the reception and use of the gas. There is no implied contract that the company, although having a monopoly, is to continue to supply the gas for any specific period. *Haddesdon Gas and Coke Co.* v. *Haselwood*, 6 C. B. (N.S.) 239; 28 L. J., C. P. 268; 5 Jur. (N.S.) 1013; 7 W. R. 415.

Agreement to pay Debt on recovering Estate—Promise to take Proceedings.]—A., by agreement, not under seal, in consideration of B.'s consenting to a supersedeas of a commission against him, undertook, in the event of his recovering a certain estate, to liquidate B.'s claim on him, which he was not bound legally to do:—Held, that this raised an implied promise on the part of A. to take some steps for recovery of the estate. *Edmunds* v. *Wilkinson*, 7 Car. & P. 387.

Agreement by Landlord to give Land for Tramway—Rights vested in Landlord.]—Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, inter alia, "by the end of the policy" of the landlord; and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, inter alia, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road, the property of the landlord, which, before it reached the tenants' works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was, that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there was no termini habiles. The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":—Held, that under the agreement the stipulation was that the tramway should pass outside the walls which enclose the policy of the landlord; and that, by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway. *Sinclair* v. *Caithness Flagstone Quarrying Co.*, L. R. 6 App. Cas. 340.

Agreement in Articles of Association Excluding Voluntary Winding-up.]—See *Ellis* v. *Dadson*, 60 L. J., Ch. 353.

Implied Warranty.]—*See* supra, Warranty.

To Give Employment.]—Where H. contracts to furnish R. with a reasonable quantity of work at a fixed rate of wages, and R. is bound not to work for any other person or persons for a period of seven years, there is a mutuality of contract implied, and H. is bound to furnish work for the whole period of seven years. *Hartley* v. *Cummings*, 5 C. B. 247; 2 Car. & K. 433; 17 L. J., C. P. 84; 12 Jur. 57.

The plaintiffs agreed in writing with L., that he should serve them for seven years as a crown-glass maker—that he should not, during that term, work for any other person without their licence—that they might deduct from his wages any fine he might incur for breach of their rules—that, during any depression of trade, if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in his stead without paying him any wages—that the plaintiffs should pay him so long as he should be employed and work wages by the piece, and 8*l.* a year in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages:—Held, that this agreement bound the plaintiffs to employ him during the seven years, subject to the above power of dismissal—that there was, therefore, a good consideration for L.'s contract to serve for seven years. *Pilkington* v. *Scott*, 15 M. & W. 657; 15 L. J., Ex. 329.

An agreement, by which a person and others agreed to serve the owners of a colliery, to work coals and do other works for carrying on the colliery as they should be required, at the rates and on the terms as follows:—The parties hired shall, during all times the pit shall be laid off, work, and continue the servants of the owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit, and that the hewers shall, when required (except when prevented by sickness or other unavoidable cause), do and perform a full day's work on each and every working day":—Held, that there did not arise upon this agreement an implied promise on the part of the owners to keep the works open, for the purpose of affording to the plaintiff an opportunity of working and earning wages. *Williamson* v. *Taylor*, 5 Q. B. 175; 13 L. J., Q. B. 81; 8 Jur. 79.

To Teach a Trade.]—A written agreement "to remain with A. two years, for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. to teach. *Lees* v. *Whitcomb*, 5 Bing. 34; 2 M. & P. 86; 3 Car. & P. 289; 6 L. J. (o.s.) C. P. 213; 30 R. R. 539.

To Accept Goods.]—A. agreed to let, and B. to take, for one year, at a stipulated rent, certain works; and A. agreed to supply to B. the whole of the chlorine still waste, as it came from his stills, neither adding to nor taking anything from the same, at the rate of 2*s.* 6*d.* for every twenty-one hundredweight of waste so supplied, with the undertaking that B. was to have the option of a lease of the premises for seven or fourteen years at the same rent, if he should feel disposed so to do, within three months from the date thereof. And A. agreed not to use, or injure, or part with any of the still waste except to B., so long as he should hold the works:—Held, that B. was bound to accept and pay for the whole of A.'s chlorine still waste during the year or such further term as B. should hold the works; and that it was no answer to an action for not accepting it, that B.'s manufacture failed and was discontinued and the chlorine still waste proved useless, and was no longer necessary for the manufacture. *Beatty* v. *Stuart*, 7 H. & N. 753; 31 L. J., Ex. 281; 8 Jur. (N.S.) 389.

To Supply Goods for Carriage—Unilateral Contract.]—By agreement of the 1st of October, 1851, between a railway company and the plaintiff, the plaintiff undertook to provide all waggons, horses, &c., necessary for the cartage of grain, merchandise, &c., between Hatfield and Ware, and to convey all grain, merchandise, &c., that might be presented to him for that purpose between the above points for 5*s.* per ton. "And it is mutually agreed that the agreement should continue in force for the period of twelve months from the date thereof." The plaintiff purchased waggons, horses, &c., and commenced carrying between Hatfield and Ware, under the agreement. On the 18th March, 1852, the company gave the plaintiff notice that the arrangement entered into for the conveyance of grain, merchandise, &c., would cease from and after the 1st of April next. Accordingly, on the 1st of April the company ceased to present any goods whatever to the plaintiff for carriage in consequence of having leased a portion of the line to another company, and bound themselves not to carry between Hatfield and Ware. The plaintiff thereupon brought an action against the company, the declaration in which stated that it was mutually agreed between the plaintiff and the company "that the plaintiff should carry all grain and other merchandise for the company between Hatfield and Ware, at the rate aforesaid, for one year," and alleged as a breach that although the plaintiff had always been ready and willing to perform his part of the agreement, yet the company would not permit him to perform the same, but prevented him from so doing, and wrongfully discharged him from any further performance of it:—Held, first, that the above was a unilateral agreement, the only contract on the part of the company being to pay the stipulated price for the carriage of such goods between Hatfield and Ware as might be presented to the plaintiff for that purpose, and consequently the agreement alleged in the declaration was not proved. *Burton* v. *Great Northern Ry.*, 9 Ex. 507; 23 L. J., Ex. 184; 2 W. R. 257.

Held, secondly, that if the declaration was amended by stating that the agreement was to carry such goods "as should be presented to the plaintiff," the declaration would be bad in arrest of judgment, since there was no breach of that contract, for no goods were ever presented. *Ib.*

d. Several Documents.

Construction preferred which renders contemporaneous documents consistent. *Phœnix Bessemer Steel Co., In re*, 44 L. J., Ch. 683; 34 L. T. 854.

Failure to prove one of the Documents.]—The plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the defendant, alleging that the agreement was contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The defendant, by his statement of defence, denied that he had agreed with the plaintiffs as alleged by them with reference to the second document:—Held, that the plaintiffs were not entitled to specific performance of the agreement contained in the first and third documents, or to damages for the breach of it. *Post* v. *Marsh*, 50 L. J., Ch. 287; 16 Ch. D. 395; 43 L. T. 628; 29 W. R. 198.

Covering Letter to Agent — Condition — Waiver.]—T., who was desirous of floating a gold mining company in England, sent, through his broker F., a letter to D., a Dublin stockbroker, offering him a specified fee in consideration of the company going to allotment, and D. allowing his name to be used as stockbroker. D. signed a letter of acceptance, which had also been forwarded to him by T., through F., and sent the acceptance to F. in a covering letter addressed to F., in which D. mentioned that he signed the acceptance on the distinct understanding that Messrs. H. (an English firm) also joined. The company's prospectus was issued, but instead of Messrs. H., another firm of equal high standing appeared as the English brokers of the company. D., who was only interested in not being associated with what are commonly known as mining brokers, made no objection to the substitution, did not withdraw his name, and acted as Dublin broker until the company went to allotment. In an action for the fee:—

Held, (i.) that the complete contract in T.'s letter and D.'s acceptance could not be varied by the covering letter addressed to F. as T.'s agent; (ii.) that, as matter of construction, the covering letter was not intended to make the contract conditional upon H. being the English brokers; and (iii.) that even if such a condition were imported into the contract, it could be waived by D., being one for his benefit only. *Maconchy* v. *Trower*, [1894] 2 Ir. R. 663.

e. Joint or Several Contracts.

Rule of Equity.]—There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several. *Kendall* v. *Hamilton*, 48 L. J., C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.

Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint and several; therefore, where four persons had opened a joint account with certain bankers who had advanced to them money on such joint account:—Held, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency. *Thorpe* v. *Jackson*, 2 Y. & C. 553.

Intention.]—Where it appears upon an instrument that a promise by two contractors is intended to be joint, it may be treated as such although the promise is in terms several only. *Lee* v. *Nixon*, 3 N. & M. 441: 1 A. & E. 201; 3 L. J., K. B. 160.

Names—Primâ facie Evidence.]—The name in which a contract is made is primâ facie evidence of the party for whom the contract was made, but it is not conclusive; therefore, where two persons sue on a contract between them and their bankers, and it appears at the trial that the bank account was opened in the name of one only, it is competent for the two to prove that the account was opened on behalf of them both; and it is sufficient to maintain the action if it is proved that the one who actually opened the account at the time, intended it to be the account of the two, without shewing that the bankers had, before the action, any notice that he had so intended. *Cooke* v. *Seeley*, 2 Ex. 746; 17 L. J., Ex. 286.

All Parties to Consideration should Sue.]—Generally, in an action of simple contract all the parties to the consideration should jointly sue. *Jones* v. *Robinson*, 1 Ex. 454; 17 L. J., Ex. 36; 11 Jur. 933.

By an agreement between the plaintiff and A., B. and C., and the defendant, reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention; that the plaintiff and A. had obtained a patent for another invention, the plaintiff and B. for another, and the plaintiff and C. for another; it was agreed between the parties, that it should be lawful for the defendant exclusively to use, manufacture, and sell any or all of the patent inventions within certain limits, during the continuance of the several patents, on certain terms: viz. that an office and warehouse should be prepared for the sale of articles connected with the inventions, and that books of account of sale of the inventions should be kept there by the defendant, and be open at all times to the inspection of the parties, and the defendant should pay to the plaintiff 400*l.* a year, as a consideration for the licence for the sale of the patents, and that such sum should be charged as a payment by the defendant in his books of account; that he should pay a ratable sum on all machines used on his patent principle; that he should also pay the plaintiff a moiety of the net profits to arise from all the inventions (except those in which B. and C. were interested); to the plaintiff and B., two-thirds of the net profits to arise from them; and either of the parties might determine the agreement at the end of five, seven, or ten years. In an action on this agreement, by the plaintiff alone, to recover a half-yearly payment:—Held, that the declaration was bad on the ground of variance, inasmuch as it stated the agreement to be made between the plaintiff and the defendant; whereas there were other parties to it besides the plaintiff, from whom the consideration for the defendant's promise moved as well as from the plaintiff. *Chanter* v. *Leese*, 5 M. & W. 698; 9 L. J., Ex. 327—Ex. Ch.

A Spanish firm, C. & Co., authorised the plaintiff, a London merchant, by letter of attorney, to sign in the name of the firm a contract for the sale of their mines in Spain. The plaintiff was to be remunerated by part of the purchase-money. Two documents were then made between the plaintiff, "acting for himself, and, under the letter of attorney, for and on behalf of C. & Co., co-proprietors with him of the mines, of the one part," and the defendants of the other part, whereby the plaintiff, "acting for himself and his co-partners, called the vendors," agreed to sell the mines belonging to the vendors to the defendants, and they agreed to buy them. One part was sealed with the defendants' seal; the other signed by the plaintiff "for self and partners":—Held, that C. & Co. were parties, and ought to be joined as plaintiffs in an action on this contract. *Jung* v. *Phosphate of Lime Co.*, 37 L. J., C. P. 73; L. R. 3 C. P. 139; 17 L. T. 541; 16 W. R. 309.

At a vestry meeting the accounts of the defendant K., a surveyor of highways, were opposed and rejected, on the ground that he had incurred costs in defending appeals without due authority, but in consideration of his offering to pay 50*l.* towards the bill of the attorneys for defending the appeals, a majority in the vestry agreed by a resolution not to oppose the accounts when presented to the magistrates for their approval. The sum of 50*l.* was to be paid by K. to his successor in office. The plaintiff, who was a member of the vestry, and who had signed the resolution, together with the other vestrymen, was appointed successor to K., as surveyor of the highways. The accounts having passed before the magistrates, and K. having refused to pay the 50*l.*, the plaintiff sued for that sum:—Held, that the other vestrymen should have joined as plaintiffs. *Kilham* v. *Collier*, 21 L. J., Q. B. 65; 15 Jur. 1175.

Semble, that the contract with the vestry was illegal as contrary to public policy. *Ib.*

Action for Work—Two Persons on Duty when Order given.]—A herald and a pursuivant at arms may maintain a joint action for work in making out a pedigree, both having been on duty

when the order was given, although only one of them was applied to by the defendant. *Townsend* v. *Neale*, 2 Camp. 190.

Offer of Reward—Communication afterwards made to another Person.]—A hand-bill relating to a stolen parcel offered a reward of 100*l.* to "whoever should give such information as should lead to the early apprehension of the guilty parties":—Held, that where the communication was first made by the plaintiff to C. in conversation, but the information was afterwards communicated to a constable jointly by the plaintiff and C., they ought both to have joined in the action. *Lockhart* v. *Barnard*, 14 M. & W. 674; 15 L. J., Ex. 1; 9 Jur. 929.

Acting on behalf of Others—Member of Orchestra.]—The plaintiff, acting on behalf of the members of an orchestra to which he himself belonged, signed a proposal "on behalf of the members of the orchestra" to continue their services, provided the defendant would guarantee a certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he had acted on behalf of himself as well as the rest:—Held, that the contract was joint, and that he alone could not recover. *Lucas* v. *Beale*, 20 L. J., C. P. 134; 10 C. B. 739.

—— **Member of Firm.**]—Although in an action on a written agreement made by or with one or more members of a firm on behalf of the rest, all the members may be joined, it is otherwise when the agreement is inter partes, and there is no partnership between the person who is party to it on the one side or the other, and the third person whom it sought to join. *Robinson* v. *Rudkins*, 26 L. J., Ex. 56.

A., being in want of money, applied to D. & S., who were in partnership, for an advance. They sent him an acceptance by D. alone; and A. agreed that, if he discounted that acceptance, he would give to D. & S. his own acceptance. He discounted D.'s acceptance, but failed to give his cross acceptance. D. was afterwards sued on his acceptance by the holder of it, and paid it out of the money of D. & S. D. sued A. for money paid:—Held, that the action could be maintained by D. alone, upon an implied contract to indemnify him, which arose when he paid the acceptance, upon which he alone was liable to be sued. *Driver* v. *Burton*, 17 Q. B. 989; 21 L. J., Q. B. 157; 16 Jur. 373.

—— **Members of Company.**]—Two members of a company, but which was not completely registered in their own names, entered into a contract, by their agent, but which was in fact for the benefit of the company:—Held, that they might sue and be sued upon the contract. *Clay* v. *Southan*, 7 Ex. 717; 21 L. J., Ex. 202; 16 Jur. 1074.

Guarantee.]—Where A., as farmer and renter of tolls, and B. as his surety, severally promise, undertake, and agree to and with the lessors, that A. shall pay a yearly rent; A. and B. cannot be sued jointly upon default by A. to pay the rent. *Lee* v. *Nixon*, 3 N. & M. 441; 1 A. & E. 201.

By Two Persons.]—Action by a plaintiff against the defendants jointly upon the following guarantee: "In consideration that you will sell to Mr. F. the distillery situate at, &c., and will take Mr. F.'s acceptance, to be dated 29th of September, 1849, for 400*l.* (the amount of the purchase-money), and interest, payable at six months after date, we undertake and guarantee that the 400*l.* and interest shall be duly paid to you when the acceptance arrives at maturity, in the proportion of 200*l.* each":—Held, that the defendants were severally liable to the plaintiff to the extent of 200*l.* each. *Fell* v. *Goslin*, 7 Ex. 185; 21 L. J., Ex. 145.

Effect of Death on Joint Contract.]—A., B., C., D. and E. obtained a concession from, and entered into a contract with, the Egyptian government for the construction of certain works. Before the works had been actually begun, A. died. Doubts existing as to the rights of A.'s trustees and executors (who by his will had the fullest power of management given them, and of completing any existing contracts), and the other contractors inter se, a contract was, after considerable negotiations, drawn up between B., C., D. and E. and " executors and trustees of the will of" A., and signed by B., C., D. and E. before the will of A. had been proved. The agreement was that the work should be completed in the joint interests of the survivors and the estate of A. Subsequently one of the executors and trustees renounced and disclaimed, and the others signed the agreement. B., C., D. and E. filed a bill to set aside the agreement for a declaration that the partnership was dissolved by A.'s death, and for winding-up:—Held, first, that the agreement was binding on all parties. *M'Clean* v. *Kennard*, 43 L. J., Ch. 323; L. R. 9 Ch. 336; 30 L. T. 186; 22 W. R. 382.

Held, secondly, that independently of the agreement, the right of A.'s representatives was to have the contract completed, the estate being liable to contribute towards the required capital, and liable for any losses. *Ib.*

Right of Joint Contractors to sue for what one of them has Sanctioned.]—Action by A. and two others on a contract, on the deposit of goods by the three with the defendant, not to give them up without the joint order of the three. Breach, that they were given up without such joint order. Plea, that they were given up to A. at his request, is a good plea; for A. being disabled from suing for what he himself procured to be done, could not sue, though joining the others with him. *Brandon* v. *Scott*, 7 El. & Bl. 334; 26 L. J., Q. B. 163; 3 Jur. (N.S.) 362; 5 W. R. 235.

f. Alternative.

Alternative or Absolute.]—A declaration alleged that the defendant received certain bills of lading and drafts on the terms that on the acceptance of the latter by B., the former should be delivered to him, that he should present such accepted drafts to B. for payment, and remit to the plaintiff the proceeds if the same should be paid, and if the drafts should not be paid, either return them to the plaintiff, or pay him the amount, for reward to the defendant; that everything happened to entitle the plaintiff to have the drafts returned or the amount paid by the defendant, yet he did not return the drafts, nor did he pay the plaintiff their amount. Judgment went by default, and it appeared that the

drafts were of no value :—Held, by Keating, J., Brett, J., and Grove, J., that, the true construction of the declaration was that the defendant promised if he did not return the drafts to pay their amount, which was, therefore, recoverable; but per Bovill, C.J., the contract alleged was only alternative to return the drafts or pay their amount, and that only the nominal damages arising from the least burdensome alternative were recoverable. *Deverell* v. *Burnell*, 42 L. J., C. P. 214; L. R. 8 C. P. 475; 28 L. T. 874.

Alternative or Optional.]—In general, where the contract is in the alternative, the election is in the party who is to do the first act. *Chippendale* v. *Thurston*, 4 Car. & P. 98.

Option with whom—Penalty.]—Under an agreement to perform one of two things, the option is in the person who is to perform; and if one of the two things is prohibited under a penalty, no action will lie for the penalty until the party makes his election by performing the prohibited part of the contract. *Layton* v. *Pearce*, 1 Dougl. 15.

Right to exercise Option, whether Determined—Payment by Cheque.]—On 15th June, 1864, plaintiff advanced 500*l.* on loan to defendants, on terms of an agreement between them of that date, whereby it was agreed that "in consideration of F.'s making an advance for a period of two months, such advance shall be repaid at any time after the expiration of two months from the date hereof on the application of the said F., and further that the said F. shall have the option while the amount remains unpaid of accepting paid-up shares in the company, or partly paid-up shares to the amount, or for such amount thereof as the said F. may desire, or of accepting a deposit receipt of 1*l.* per share on 500 shares, or any proportion thereof at his the said F.'s discretion." On 17th November in the same year, in pursuance of a resolution of the company that such advance should be repaid, the secretary of the company sent to plaintiff a cheque on the company's bankers for the amount of the said loan, which cheque the plaintiff immediately returned to the defendants, with a letter dated 17th November, in which he declined to receive the cheque, and applied to have 500 shares in the company allotted to him and a deposit receipt of 1*l.* per share on the same forwarded to him in accordance with the terms of the agreement of 15th June. The defendants refusing to comply with his demand, plaintiff brought an action for damages for breach of contract to allot shares and for money lent, to which defendants, amongst other things, pleaded payment within the meaning of the agreement before plaintiff exercised his option :—Held, that the money advanced by plaintiff remained unpaid on 17th November, the date of his demand for an allotment of shares, inasmuch as the sending of the cheque, which was forthwith returned to plaintiff, did not amount to payment, and therefore plaintiff had a right to exercise an option, and to elect to be repaid by an allotment of shares, which application on his part not having been complied with by defendants, the present action was maintainable, the plea of payment not having been proved. *Ferguson* v. *Washoe Mining Co.*, 17 L. T. 409.

Per Bramwell and Channell, BB. The plaintiff might have exercised his right of option within the two months from the date of the loan, although it could not have been enforced until after the expiration of that time.

Per Bramwell, B., under the terms of the contract there was no power or right in defendants to repay the money until after an application first made by plaintiff for its repayment.

One Alternative Impossible]—If an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound by law to perform the other. *Stevens* v. *Webb*, 7 Car. & P. 60.

A. was in custody on a ca. sa., and, in consideration of the plaintiff consenting to his discharge, B. agreed to pay 35*l.* or to surrender A. to the sheriff; A. on a subsequent day offered to surrender himself to the sheriff, who would not retake him, as the plaintiff had consented to his discharge :—Held, that the agreement was absolute for the payment of the 35*l.*, and that the other alternative was not satisfied by the offer of the surrender. *Ib.*

An agreement to do either of two things is not discharged when one of the two things becomes impossible by the act of God. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 156.

In the case of an ordinary memorandum of association, according to which the capital is divided into shares of equal amount, the interests of the shareholders are equal in all respects. Where, therefore, in consideration of the assignment of a lease, A. agreed to pay B. 1,000*l.* within twelve months, or otherwise transfer to B. the like amount in fully paid-up shares in a company to be formed by A., and the company was formed by A., with preferred and deferred shares :—Held, that B. was entitled to receive shares, the interest in which was equal in all respects to those held by other shareholders; that A. by forming the company with two unequal classes of shares, had put it out of his power to comply with the one alternative of the contract, and that, therefore, he was bound to perform the other alternative, viz. to pay 1,000*l.* *Studholme* v. *Mandell* (1 Ld. Raym. 279) followed. *McIlquham* v. *Taylor*, 63 L. J., Ch. 758; [1895] 1 Ch. 53; 8 R. 740; 71 L. T. 484; 43 W. R. 297. Affirmed in C. A., 64 L. J., Ch. 296; 8 R. 750, n.; 71 L. T. 679.

—— **Or Illegal.**]—If one of the parties to a contract stipulates for the option of performing his part in one of two lawful ways, he is, after having once made his election, bound by such election; and if the performance is impossible, and not illegal, he is liable to damages for not being able to perform it. *Brown* v. *Royal Insurance Society*, 1 El. & El. 853; 28 L. J., Q. B. 275; 5 Jur. (N.S.) 1255; 7 W. R. 479.

In an action on a policy of insurance against fire, which contained a condition by which the society reserved to itself the right of reinstatement in preference to the payment of claims, a plea by the company that, having elected to reinstate the insured premises, they were proceeding with the reinstatement, when, by order of the Commissioners of Sewers, lawfully acting in that behalf, the premises were taken down, being in a dangerous condition, such condition not being caused by the fire, and that if the premises had not been so taken down, they would have proceeded with the reinstatement, and would have restored them to the condition they were in before the fire, is a bad plea. *Ib.*

Where an agreement is entered into between two parties, whereby one of them covenants to do one of two specified things, if either of the alternatives is to do an illegal act, the whole agreement is void: but if the condition is to do an act which may be effected either by lawful or unlawful means, the law will presume in favour of the contract that the contracting parties contemplated the former. *Lewis* v. *Davidson*, 4 M. & W. 654; 1 H. & H. 425; 8 L. J., Ex. 78; 3 Jur. 387.

g. Entire or Divisible.

To Let Milking of Cows.]—A contract by A. to let, and by B. to take, the milking of thirty cows, at 7*l.* 10*s.* per cow per annum, from 14th February, the rent to be paid quarterly in advance, and by C. to pay the rent, is an entire and not divisible contract. *Whitcher* v. *Hall*, 8 D. & R. 22; 5 B. & C. 269; 4 L. J. (O.S.) K. B. 167; 29 R. R. 244.

To Cure Sheep.]—Where in an action of assumpsit for curing 497 sheep of the scab, it appeared that the plaintiff agreed he should not be paid anything unless he cured all:—Held, that he could not recover, because 40 of the flock were not cured. *Bates* v. *Hudson*, 6 D. & R. 3.

Salary—Abandoning Contract.]—The defendant having contracted with the Lords of the Admiralty to provide a steam-vessel for exploring the river Niger, wrote to the plaintiff as follows: "I am willing to give you the command of the steamer destined for an exploring and a trading voyage up the river Niger and its tributaries, your pay to be at the rate of 50*l.* per month, commencing from the 1st of December, 1853, and a commission of twenty per cent. on the net proceeds of the produce you may bring down." In reply, the plaintiff wrote to the defendant as follows: "In answer to your letter of yesterday, offering me the command of the vessel to go out in a trading and an exploring voyage to the river Niger and its tributaries, at a fixed pay of 50*l.* per month, and twenty per cent. on the net proceeds of the goods obtained, I beg leave to say, that I accept the service, and the terms you mention." The vessel proceeded up the Niger, under the command of the plaintiff, as far as Dagbo, when the plaintiff refused to proceed further, and abandoned the command:—Held, that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost or divested by the plaintiff's desertion or abandonment of the contract. *Taylor* v. *Laird*, 1 H. & N. 266; 25 L. J., Ex. 329. See *Cutter* v. *Powell*, 6 Term Rep. 320; 3 R. R. 185.

Action by Administrator—Completion of Contract.]—A. declared as administrator of B., stating that the defendant in B.'s lifetime was indebted to B. in money to be paid by the defendant to B. on request. It was proved that B., had contracted with the defendant in writing to do certain works for him for 400*l.*, to be paid upon completion of the works. B. died before their completion, and A., before he had taken out letters of administration, agreed with the defendant to complete, and did complete, the works:—Held, that these facts did not support the declaration, inasmuch, as the contract being entire, and the works unfinished at B.'s death, no debt accrued from the defendant to B. in B.'s lifetime, although the new agreement with A. amounted as between him and the defendant to a rescission of the original contract, which would entitle A. as administrator, to sue on a quantum meruit in respect of the work done by B. *Crosthwaite* v. *Gardner*, 18 Q. B. 640; 21 L. J., Q. B. 356; 17 Jur. 377. *See further*, SALE OF GOODS.

Printing—Damage by Fire.]—Where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire breaks out and consumes the premises before the whole number has been worked off, the printer cannot recover anything, although a part has actually been delivered. *Adlard* v. *Booth*, 7 Car. & P. 108. S. P., *Gillett* v. *Mawman*, 1 Taunt. 137.

Part Performance with Assent of Both Parties.] — Although an entire contract is not divisible, and a part-performance cannot therefore be the subject of an action on the contract itself; yet if there be part-performance, with the assent of both parties, an action may be maintained to recover a fair value or reward in respect of that part-performance. *Shipton* v. *Casson*, 5 B. & C. 378; 8 D. & R. 130; 4 L. J. (O.S.) K. B. 199.

Within Statute of Frauds.]—S. agreed by parol to procure for C., as purchaser, the estate of R., in consideration of C.'s making to S. a lease of a quarry, and of paying to S. the sum, if any, by which the purchase-money of the estate should fall short of a maximum price fixed on:—Held, that the contract was indivisible, and being within s. 4 of the Statute of Frauds, no action could be brought by S. upon it to recover the difference between the purchase money and the maximum price. *Savage* v. *Canning*, Ir. R., 1 C. L. 434; 16 W. R. 133.

"If Remainder are as good as Sample you may send me 30 more"—Less than 30 sent.]—See *Symes* v. *Hutley*, ante, col. 236.

h. Uncertain.

Validity.]—Where parties have expressed the matter of their agreement in such uncertain or imperfect terms that it is impossible to ascertain any definite meaning, such agreement is necessarily void. *Baxter, Ex parte, Vince, In re*, 61 L. J., Q. B. 836; [1892] 2 Q. B. 478; 67 L. T. 70; 41 W. R. 138; 9 Morrell, 222—C. A.

In Part.]—An agreement to take a lease of a house if put into thorough repair, and the drawing-rooms "handsomely decorated according to the present style," is too uncertain for a court of equity to enforce. *Taylor* v. *Portington*, 7 De G. M. & G. 328; 1 Jur. (N.S.) 1057; 3 Eq. R 781.

"Et cætera"—Effect of.]—Where terms for letting farms provided that all materials required for building proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "&c.," should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, "&c.," allowing the tenant

for any reasonable damages:—Held, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically. *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; 6 W. R. 608.

The terms "goodwill, &c.," in a contract for the sale of a foundry, are not so uncertain as alone to prevent a decree for specific performance of it, for the words "et cætera" point to things necessarily connected with, and belonging to, the good-will, and to be defined in the conveyance. *Cooper* v. *Hood*, 26 Beav. 293; 28 L. J., Ch. 212; 4 Jur. (N.S.) 1266; 7 W. R. 81.

Specific performance of an agreement to purchase one-third of a foundry refused, on the ground of uncertainty, the contract not specifying what portion of the purchase-money was to be left in the business, but only a large portion, and not stating when it was to be paid, or how to be secured, and what interest was to be allowed in the meanwhile. *Ib.*

Promise to do Act—If Horse Lucky.]—A. bought a horse from B., and promised that "if the horse was lucky to him he would give 5*l.* more, or the buying of another horse." It was held that such a promise was too vague to be considered in a court of law. See *Guthing* v. *Lynn*, 2 B. & Ad. 232.

"For such Remuneration as should be Deemed Right."]—A. agreed with B. to do certain services for such remuneration as should be deemed right:—Held, that there was no promise that A. should receive anything, nor any engagement capable of enforcement. See *Taylor* v. *Brewer*, 1 M. & S. 290.

"So far as the Law Allows."]—A. covenanted with B. to retire from a trade "so far as the law allows." It was held that the parties must fix the limit of their covenant and not leave the court to do so. *Davies* v. *Davies*, 36 Ch. D. 359.

2. PAROL EVIDENCE.

To establish Collateral Parol Contract.]—A tenant entered on lands on the understanding that a lease should be signed at a future time. When the lease was presented to him for signature he refused to sign unless the landlord would undertake to destroy the rabbits. This the landlord by word of mouth promised to do, and the tenant thereupon signed. The lease contained a clause by which the tenant agreed not to shoot, hunt, or sport on the land, or destroy any game, but to use his best endeavours for the preservation of the same, and to allow his landlord or friends at any time to hunt, shoot, and sport on the land. In an action by the tenant against the landlord, for breach of agreement in not destroying the rabbits:—Held, that this agreement was collateral to, and did not alter or vary the written contract, and that therefore evidence of such agreement was admissible. *Morgan* v. *Griffith*, 40 L. J., Ex. 46; L. R. 6 Ex. 70; 23 L. T. 783; 19 W. R. 957.

On the sale by auction of a lease, containing a covenant against alienation without the consent of the lessor, the auctioneer announced that the landlord would give his consent for a certain sum, then mentioned, which the vendor verbally agreed to pay; and the auctioneer, on the day of the sale, signed and delivered to the purchaser a memorandum of the names of the vendor and purchaser, the price and the amount to be paid for the landlord's consent, containing a stipulation that the latter sum should not be charged to the purchaser. A deed of assignment, not specifying by whom the sum requisite to obtain the landlord's consent should be borne, having been executed, the purchaser was compelled, by the default of the vendor, to pay it, in order to render his title valid:—Held, that the memorandum was a sufficient note of an agreement by the vendor, collateral with the deed of assignment, and not merged therein, to pay the sum necessary to obtain the landlord's consent to the assignment, and that the plaintiff was entitled to recover the amount which he had paid for that purpose from the defendant. *Carrigy* v. *Brock*, Ir. R. 5 C. L. 501.

To establish Trust—On Conveyance of Realty.]—L. agreed by parol with W. for a conveyance of a life interest in real estate, part of which, a cottage, was in his own occupation. The terms were, that W. should be repaid the purchase money and interests out of the rent, and should allow L. to continue to occupy the cottage. G. swore that this was the effect of the parol arrangement, but two other witnesses swore that they had heard W. deny it. A short time after this agreement, W. asked L. to execute an absolute conveyance of the same life interest to W.'s daughter, an infant, which L. accordingly did, and W. entered into possession of the property, leaving the cottage in L.'s possession, rent free. W. wrote letters afterwards to G. and to J., saying that he had bought the property out and out, and offered L. an annuity for life if he would give up possession of the cottage. W., by will, devised his real estate to his daughter, and appointed B. his executor, and her guardian. B. made L. an offer of the annuity on the same terms as W. had done, but the offer was refused. Thereupon B., as the next friend of W.'s daughter, brought ejectment against L., who filed a bill to restrain it, alleging the parol agreement, and praying an injunction to stay the action, and a re-conveyance of the property on payment of what was due:—Held, that evidence of the parol agreement was admissible notwithstanding the Statute of Frauds (29 Car. 2, c. 3), and a decree made declaring the daughter of W. to be a trustee for L., who was entitled to redeem on payment of what was due. *Lincoln* v. *Wright*, 21 L. J., Ch. 705. S. P., *Haigh* v. *Kaye*, 41 L. J., Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

—— On Assignment of Leaseholds.]—*Marlborough (Duke), In re, Davis* v. *Whitehead*, 63 L. J., Ch. 471; [1894] 2 Ch. 133; 70 L. T. 314; 42 W. R. 456.

Part Written, part Oral.]—A., having entered into a contract for supply of iron rails for Vera Cruz, applied to B. & Co., shipowners and brokers, to procure vessels to carry it thither; whereupon B. & Co. on the 19th of November wrote to A.: "We engage to find tonnage for about 5,000 tons of rails to load at M. for Vera Cruz, subject to the following conditions, viz. 1,000 tons to be delivered at Vera Cruz in three months from this time, and 1,000 tons per month afterwards." After a long correspondence and several interviews as to the class of vessels to be chartered, and the flag, B. & Co. on the 11th of December, wrote to A. as follows: "Our engagement to procure tonnage for Vera Cruz, in the letter addressed to your Mr. B. on the 19th November;

and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1,000 tons. We cannot restrict ourselves to vessels of any particular flag or class, but will of course give a preference to neutral ships of high class." On the 15th of December B. & Co. wrote to A. saying, "that they would prefer abandoning the contract altogether." And afterwards on the same day A. wrote, "We accept your offer of the 19th of November last, coupled with the initialled offer of the 18th. Messrs E. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning it as intimated" :—Held, that these letters did not constitute a complete contract, but that recourse must be had to parol evidence; and, consequently, that it was properly left to the jury to say whether or not a binding contract as alleged in the declaration was to be inferred from the whole. *Bolckow* v. *Seymour*, 17 C. B. (N.S.) 107.

Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury. *Ib.*

Incomplete Written Agreement]—Where there is a parol agreement between two persons, and a subsequent written agreement which does not embrace all the terms of the parol agreement, it is a question of fact for the jury whether it was the intention of the parties that there should be a distinct parol agreement collateral to the written agreement, and evidence of the terms of the parol agreement is admissible *Lindley* v. *Lacey*, 17 C. B. (N.S.) 578; 34 L. J., C. P. 7; 10 Jur. (N.S.) 1103; 11 L. T. 273; 13 W. R. 80.

A. verbally agreed with B. to sell him certain goods, B. having induced A. so to do on his undertaking to settle an action about to be commenced against A. The agreement as to the sale was put into writing, and in the agreement authority was given to B. to settle the action, but his obligation to do so was not stated. The action was not stayed, and execution issued. In an action on the agreement for the price of the goods and damages sustained, by the action having been allowed to proceed, it was objected that evidence of the verbal agreement was not admissible, as being part of one entire contract which had been reduced into writing :—Held, that the evidence was admissible. *Ib.*

State of Document when Signed.]—A. signed a proposal for a contract in a certain form. B. then altered it and signed it in the altered form and brought it to A. Parol evidence having been given in an action against A. that he verbally agreed that the altered document should be the contract :—Held, that such evidence was rightly admitted, as showing what was the state of the document when it became an agreement. *Hudson* v. *Stuart*, 43 L. J., C. P. 204; L. R. 9 C. P. 311; 30 L. T. 333; 22 W. R. 534.

No Contract.]—When a document appears on the face of it to contain the terms of a written agreement, parol evidence is admissible to show that it was not intended to be an agreement, but was written for some other purpose, and the question whether this is so or not is for the jury. *Clever* v. *Kirkman*, 33 L. T. 672; 24 W. R. 159.

The defendant gave the plaintiff a paper stating, "The terms upon which I agree to sell you the business . . . are as follows : . . .," addressed to the plaintiff, signed by the defendant. The plaintiff afterwards wrote below, "I agree to the above terms, and accept the same," and signed. In an action for not selling, the defence was that the paper was not meant to be a contract of sale. The judge left it to the jury whether the defendant signed the paper as an agreement or an offer to the plaintiff, or as a memorandum of terms on which the plaintiff might offer the business for sale to a purchaser : —Held, a proper direction. *Ib.*

Evidence is admissible to show that a document, apparently an agreement, was signed without any intention of making a present contract, but that it was to be conditional only upon the happening of an event which has not occurred. *Pym* v. *Campbell*, 6 El. & Bl. 370; 25 L. J., Q. B. 277: 2 Jur. (N.S.) 641; 4 W. R. 528. S. P., *Davies* v. *Jones*, 17 C. B. 625; 25 L. J., C. P. 21; 4 W. R. 248; *Furness* v. *Meek*, 27 L. J., Ex. 34.

Different Contract.]—When letters contain certain terms which may form the basis of a contract, it is necessary to ascertain from the letter whether the terms are finally arrived at, and if they are not, verbal evidence is admissible to shew that a different contract has been entered into. *Johnson* v. *Appleby*, 43 L. J., C. P. 146: L. R. 9 C. P. 158; 30 L. T. 261; 22 W. R. 515.

A document purporting to be a contract, signed by the parties, is not necessarily so; and it is competent for either of the parties to show by parol evidence that it was not their intention, in signing, that it should operate as a contract, and that the real contract between them was not in writing. *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L. J., Ex. 241; 9 Jur. (N.S.) 898; 9 L. T. 292; 11 W. R. 1074.

Of what Matters.]—In ambiguous contracts, the domicile of the parties, the place of execution, the purpose, and the various provisions and expression of the instrument are material to be considered in the construction. *Lansdowne* v. *Lansdowne*, 2 Bligh, 66; 21 R. R. 43.

Surrounding Circumstances.]—Extrinsic circumstances not only may but must always be looked at, because an agreement can never be made intelligible unless the persons and subject-matter with which the parties are dealing can be identified. *Brown* v. *Fletcher*, 35 L. T. 165.

—— **Unilateral Contract.**]—Where a document purports to be a unilateral contract, binding the signatories for an indefinite time to sell certain specified debentures of a company to one of its officers at a specified price; but the circumstances under which it was executed shewed that the real intention of the signatories was to limit for their common benefit their claims against the company, in order to facilitate some financial operation then contemplated :—Held, that such intention controlled its effect, and that it could not be treated as an agreement for sale, for the benefit of such purchaser. *Senécal* v. *Pauzé*, 14 App. Cas. 637—P. C.

Subsequent Acts.]—Acts or communications of the parties, after an agreement, may be evidence of facts existing at the time of the agreement material to its construction, but not

to determine its meaning. *Monro* v. *Taylor*, 8 Hare, 56; 3 Mac. & G. 713; 21 L. J. Ch 525.

To Vary.]—Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. *Hickman* v. *Haynes*, 44 L. J., C. P. 358; L. R. 10 C. P. 598; 32 L. T. 873; 23 W. R. 871.

Agreement to purchase established upon a correspondence referring to the terms of such agreement. Parol evidence is admissible to explain the subject matter of an agreement, although not to vary the terms. *Ogilvie* v. *Foljambe*, 3 Mer 53; 17 R. R. 13. And see *Child* v. *Comber*, 3 Swanst. 423, n.

—— Assent to Contract Signed by Other Persons.]—If a party, by the payment of money, and by his conduct in other respects, signify his assent to the terms of a written agreement, signed by other persons, but not by himself, he will not be entitled, in an action arising out of that contract, to give verbal evidence of a subsequent variance, in order to proceed against any of those persons, as on a new and independent contract, or to recover back the money so paid as money had and received, without resorting to the written agreement. *Day* v. *Canning*, 5 L. J. (o.s.) K. B. 231.

To show previous Parol Promise.]—When a written contract has been executed, containing all the terms agreed upon between the parties, a previous parol promise relating to the same subject-matter is invalid. *Angell* v. *Duke*, 32 L. T. 320; 23 W. R. 548.

The defendant let a house and furniture to the plaintiff by a written agreement; evidence of a previous parol promise by the defendant to put in more furniture was tendered at the trial and rejected:—Held, that the rejection was right. *Ib.*

In Cases between Landlord and Tenant.]—*See* LANDLORD AND TENANT.

To Connect Documents.]—*See* supra, STATUTE OF FRAUDS—Sufficiency of Memorandum.

See further, EVIDENCE.

E. DISCHARGE AND BREACH OF CONTRACTS.

1. BY DISCHARGE OR RESCISSION.

Where new Agreement.]—Novation means that, there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be), or between different parties; the consideration mutually being the discharge of the old contract. A common instance is in partnership cases, when the members of the new firm take over the liabilities of the old firm. *Scarf* v. *Jardine*, 51 L. J., Q. B. 612; 7 App. Cas. 351; 47 L. T. 258; 30 W. R. 893—H. L. (Sc.) And see *Hobson* v. *Cowley*, 27 L. J., Ex. 205; 6 W. R. 334.

Retaining Smaller Sum in Lieu of Larger.]—Where a lesser sum has been tendered, even though after time, and retained in discharge of a larger sum, which in default of payment of the lesser sum would have become due, the receiver cannot retain such sum otherwise than as the discharge. Such larger sum is of the nature of a penalty, and the court is at liberty to grant any equitable relief from such payment as it may think fit. *Johnson* v. *Colquhoun*, 32 W. R. 124.

Exercise of Right of Election to Rescind.]—The exercise of a right of election to rescind a building agreement must be signified in an unqualified manner and within a reasonable time, or, at all events, not after the other party to the agreement has gone to expense in the belief of the right of election not being exercised. *Marsden* v. *Simbell*, 43 L. T. 126; 28 W. R. 952.

Mistaken Claim to Rescind, Effect of.]—A mistaken claim by one of the parties to such an agreement to rescind it, does not ipso facto operate to rescind the agreement, unless the other party claims a rescission on the ground of the mistaken claim. *Ib.*

If one of the parties to such an agreement himself rescinds it, he is not entitled to make entry on the premises for the purpose of removing the goods after the date of rescission. *Ib.*

Mutual Stipulations—Discharge of One Party, whether Discharge of Both.]—Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. *Jones* v. *Barkley*, 2 Dougl. 684.

Where Third Party has Acquired an Interest.]—Where an agreement is made between two parties, by virtue of which a third party acquires such an interest as would entitle him, after the death of one of the contracting parties, to sue as plaintiff in a court of equity, the contracting parties are not necessarily prevented from altering or rescinding the contract. *Hill* v. *Commee*, 1 Beav. 540. Affirmed, 5 Myl & C. 250; 9 L. J., Ch. 54; 4 Jur. 165.

Mutual Consent.]—B., being about to erect seats for viewing a public funeral, entered into an agreement with A., a foreign agent, to make the scheme known abroad and dispose of tickets for the seats. A. was to be paid for his work and expenses by a percentage on the tickets which he sold. After he had incurred expenses, but before he had sold any tickets, B. desired him not to dispose of them, as he would sell them himself. A. accordingly sent all applicants for the tickets to him, and after the funeral delivered to B. a bill for work done and expenses incurred. B. paid the expenses, but refused to pay for the work:—Held, that it was a question for the jury whether the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that A. should be paid for the work actually done, as upon a quantum meruit. *De Bernardy* v. *Harding*, 8 Ex. 822; 1 C. L. R. 884; 22 L. J., Ex. 340; 1 W. R. 415.

A rescission of a contract can only be by mutual consent, and any expression of wish to rescind uttered by one party, and not communi-

cited to the other, is immaterial. *Heinekey* v. *Earle*, 8 El. & Bl. 410; 28 L. J., Q. B. 79; 4 Jur. (N.S.) 848; 6 W. R. 687—Ex. Ch.

Two persons, in 1799, sign and give to each other papers by which each charges his real and personal estate with 1,000*l.* in favour of the other if he should survive him, each paper expressly referring to the other as its inducement. The parties never met afterwards; but, many years afterwards, a correspondence took place between them, in which each expressed a wish to abandon the agreement, and one of them sent back to the other his paper. Shortly afterwards both died:—Held, that the estate of the survivor had no purely equitable claim against that of the other, and, the legal claim being doubtful, the bill was retained for twelve months, with liberty to bring an action. *Ryan* v. *Daniel*, 1 Y. & Coll. C. C. 60.

Quære, whether he had a legal claim, and whether, if legal originally, it was not legally cancelled. *Ib.*

—— **Proof.**]—A rescission of an agreement requires proof of an actual agreement to rescind. *Rockcliffe* v. *Pearce*, 1 F. & F. 300.

A declaration alleged that the plaintiff was possessed of a house for the residue of a term of six years, and of goods and furniture therein, and that the plaintiff agreed to assign the lease of the house to the defendant at a certain price, and the furniture at a valuation, possession to be delivered at a certain day; and that she was ready and willing to assign her interest in the house, and to deliver up possession of the goods at a fair appraisement. It was proved at the trial that a great part of the house and furniture were destroyed by fire shortly after the agreement, and before the time of its completion. The agreement provided that either party making default should pay to the other 500*l.* as liquidated damages. After making the agreement, but before the day for its completion arrived, the parties agreed, by an indorsement on the former agreement, to enlarge the time for its performance for a few days:—Held, that this amounted to a fresh agreement. *Bacon* v. *Simpson*, 3 M. & W. 78; M. & H. 309; 7 L. J., Ex. 34.

A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. *Darnley* (*Earl*) v. *London, Chatham, and Dover Ry.*, 36 L. J., Ch. 404; L. R. 2 H. L. 43; 16 L. T. 217; 15 W. R. 817.

Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding. *Ib.*

A contract in writing was made for the sale of goods above 10*l.* in value, to be delivered at a future time. Before the time for delivery arrived the parties made a parol agreement extending the time:—Held, that the parol agreement, being invalid under the Statute of Frauds (29 Car. 2, c. 3, s. 17), did not effect an implied rescission of the former contract. *Noble* v. *Ward*, 4 H. & C. 149; 36 L. J., Ex. 91; L. R. 2 Ex. 135; 15 L. T. 672; 15 W. R. 520—Ex. Ch.

Leave and licence cannot be pleaded to a breach of contract; but the defendant must show an exoneration or discharge. *Dobson* v. *Espie*, 2 H. & N. 79; 26 L. J., Ex. 240; 3 Jur. (N S.) 470; 5 W. R. 560.

A plea, in an action on a contract to do several things, that the contract was rescinded before breach, even although the breach laid in the declaration is general, is to be construed as meaning that the rescission was before any breach, and, therefore, if this is not proved, the plea fails in toto, and there is no necessity for a new assignment. *Burgess* v. *De Lane*, 27 L. J., Ex. 154.

A valid contract cannot be waived unless both parties assent, at the same time, to the proposal to put an end to it. *Whittaker* v. *Fox*, 13 L. T., 588; 14 W. R. 192.

A contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo, as before the contract. *Hunt* v. *Silk*, 5 East, 449; 2 Smith, 15; 7 R. R. 739.

When Impossible.]—A contract which cannot be rescinded in toto, cannot be rescinded at all; but the party complaining of the non-performance of the fraud must resort to an action for damages. *Sheffield Silver Nickel and Plated Co.* v. *Unwin*, 46 L. J., Q. B. 299; 2 Q. B. D. 214; 36 L. T. 246; 25 W. R. 493

A defendant entered into an agreement in writing with the plaintiff, by which he was to board and lodge with the plaintiff at a certain weekly sum, and the plaintiff agreed to take in payment for the board and lodging certain furniture of the defendant in the plaintiff's house. The furniture having afterwards, and before the plaintiff had appropriated it, been taken in execution for a debt of the defendant to another party:—Held, that the plaintiff was entitled to recover for board and lodging generally, as if the special contract had never existed. *Keys* v. *Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

By Parol.]—Agreement in writing may be discharged by parol, notwithstanding the Statute of Frauds. *Goman* v. *Salisbury*, 1 Vern. 240.

Recovery back of Money Paid.]—An action for money had and received lies when a payment has been made on a contract which is put an end to. *Towers* v. *Barrett*, 1 Term Rep. 133. S. P., *Weston* v. *Downes*, 1 Dougl. 23; *Davis* v. *Street*, 1 Car. & P. 18.

But if it continues open, the plaintiff can only recover damages, and then he must state the special contract and the breach of it. *Ib.*

Where the master and part owner of a vessel agreed to purchase the remaining moiety of his partner, and having paid the purchase-money, and received the title-deeds, which he deposited with a third person as a security, required entire possession of the ship, but his partner afterwards refused to execute a bill of sale or refund the money:—Held, that an action would not lie to recover the purchase-money, as the parties could not be restored to their original situation. *Reed* v. *Blandford*, 2 Y. & J. 278.

Where some act is to be done by each party under a special agreement, and the defendant, by his neglect, prevents the plaintiff from carrying the contract into execution, the plaintiff may recover back any money paid under it. *Giles* v. *Edwards*, 7 Term Rep. 181; 4 R. R. 414.

B. engaged to let A. land on building leases, and to lend him 4,000*l.* to assist him in the erection of twenty houses, the money to be repaid

by June, 1823. A. agreed to build the houses, to convey them as security for the loan, and repay the money. When six houses were built, and 1,168*l.* had been advanced, B. requested A. not to go on with the other fourteen houses; A. desisted: —Held, that, after June, 1828, B. might recover the 1,168*l.* as money lent; and that it was not necessary to sue on the agreement, which was rescinded by consent. *James* v. *Cotton*, 7 Bing. 266; 5 M. & P. 26.

Discharge in Country of Debtor's Domicil.]—The discharge of a debt or liability under a contract by the law of a foreign country, not being the country where the contract was made or is to be performed, is no answer to an action upon the contract in England, even though the discharge has been obtained in the country of the debtor's domicil. *Gibbs* v. *Société Industrielle des Métaux*, 59 L. J., Q. B. 519; 25 Q. B. D. 399; 63 L. T. 503—C. A.

Necessary to Determine Voidable Contract.]—When a contract is voidable, but not void, it remains valid till it is rescinded. *Reese River Mining Co.* v. *Smith*, 39 L. J., Ch. 849; L. R. 4 H. L. 64; 17 W. R. 1042.

2. ALTERATION.

By Agent—Building Contracts.]—A. built a house on land of B. under a written agreement with him containing provisions for payment, on certificates of B.'s architect, and stipulations as to orders for extras. The contract, while in the custody of the architect, was altered in a material particular relating to such orders. The main work only having been certified and paid for, A. sued B. upon a quantum meruit to obtain payment for certain extra work done, and he put the written agreement in evidence:—Held, that the alteration by the architect must be treated as if made by B. himself; but, nevertheless, that A. could not recover, because the work, having been done on land, no contract could be implied by law from the mere retention of that which could not be returned: and it appeared that a special written bargain had been made, the terms of which, however, could not be proved by A., as the agreement containing them having been vitiated by a material alteration, was inadmissible, although sufficiently existing in specie to be capable of showing that an express contract had been entered into under which the work was done. *Pattison* v. *Luckley*, 44 L. J., Ex. 180; L. R. 10 Ex. 330; 33 L. T. 360.

By one Party—Assent.]—An alteration in a material part of a written contract, without the consent of both parties, is a material alteration, which avoids the contract, although it may not have altered the duty of the party sought to be charged. *Mollett* v. *Wackerbarth*, 5 C. B. 181; 17 L. J., C. P. 47.

A material alteration in a sold note made by a buyer without the knowledge or consent of the seller, prevents the former from suing on the contract, notwithstanding the duty of the latter may not be varied by the alteration. *Ib.*

C. & Co. and H. & Co. were merchants at Calcutta. H. & Co. sold to C. & Co. a quantity of indigo, through a broker, who drew up a sold note, addressed to H. & Co., and submitted it to H. for his approval, when he having objected to a particular word remaining, the broker took the note to C., and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H. & Co. against C. & Co. for non-performance of the contract contained in the sold note:—Held, that the transaction was one of bought and sold notes, and that the circumstances attending C.'s alteration of the sold note, and affixing his initials, were not sufficient to make that note alone a binding contract; and that, there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. *Cowie* v. *Remfry*, 5 Moore P. C. 232; 3 Moore Ind. App. 448; 10 Jur. 789.

—— **Not Insisted on.**]—An alteration made by the owner of a house in the terms of an agreement for a lease thereof, but not insisted on by him:—Held, not to vitiate the contract. *Jolliffe* v. *Blumberg*, 18 W. R. 784.

After Breach.]—An alteration of a written agreement, even after breach, after delivery to the party suing upon it, renders the agreement void. *Davidson* v. *Cooper*, 11 M. & W. 778; 12 L. J., Ex. 467.

Plea, to a guarantee, that, after it had been signed and delivered to the plaintiff, and whilst in his hands, it was, without the knowledge or consent of the defendant, altered in a material particular by some person to the defendant unknown, and its nature and effect materially changed, by such unknown person affixing a seal by or near to the signature of the defendant, so as to make it purport to be sealed by the defendant, and to be the deed of the defendant; by reason of which alteration the guarantee became void. At the trial it was proved that the guarantee when signed had no seal to it, but, when produced in evidence by the plaintiff, it had a waifer affixed to it before the signature of the defendant:—Held, that the plea was proved, and that it purported to be the deed of the defendant. *Ib.* Affirmed in the Exchequer Chamber, 13 M. & W. 343; 13 L. J., Ex. 276.

Held, also, that the plea was a good defence to the action. *Ib.*

By Broker—Margin of Charterparty.]—A merchant at Liverpool entered into a charterparty on the following terms with the owner of a vessel:—"It is mutually agreed with the owner of the good ship 'Zwaan,' now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, of the one part, and the charterer, of the other part, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," as in the usual printed form of charterparty. The exception was as follows: "Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies throughout this charterparty always excepted." After signing the charter, the broker who had acted for the owner wrote in the margin, to come in after the words "March next," "wind and weather permitting, with cargo or in ballast, for ship's benefit." He then took the charter to the charterer, and told him that he had made

the note in the margin, which he said did not affect it. The charterer said that the note altered the matter, and he did not know that he would then accept the charter; and he ultimately refused to do so. The ship did not sail from Amsterdam, in consequence of what was admitted to be "the act of God":—Held, that the charter-party was avoided by the alteration so made in the margin. *Crookewit* v. *Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153; 5 W. R. 348.

Bank Note—Erasure of Number.]—In an action against the Bank of England for the non-payment of notes payable to bearer which had been regularly issued by the bank, it appeared that the notes had been bonâ fide purchased by the plaintiff for value, but that before the plaintiff took them the notes had been altered by erasing the numbers upon them, and substituting others, with the object of preventing the notes from being traced, as payment had been stopped and a notice issued specifying their numbers:—Held, that although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover in his action on them against the bank. *Suffell* v. *Bank of England*, 51 L. J., Q. B. 401; 9 Q. B. D. 555; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500—C. A.

Schedule added after Execution of Agreement.]—Where the subject-matter of an agreement of hiring was expressed to be "furniture, &c., &c., mentioned in the schedule hereto," and the schedule was added by the plaintiff after execution:—Held, that this did not vitiate the agreement. *Harris* v. *Tenpany*, 1 Cab. & E. 65.

By Court.]—Court of equity has no power to alter the contracts of parties from an eventual change not contemplated at the time. *Revell* v. *Hussey*, 2 Ball & B. 288; 12 R. R. 87.

3. Repudiation and Non-performance.

Repudiation.]—An absolute unconditional renunciation of a contract before time of performance amounts to a breach at the election of the promisee. *Wilkinson* v. *Verity*, 40 L. J., C. P. 141; L. R. 6 C. P. 206; 24 L. T. 32; 19 W. R. 604. S. P., *Frost* v. *Knight*, 41 L. J., Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471—Ex. Ch.

The repudiation of a contract upon insufficient grounds will be good, if at the time there existed sufficient grounds of which the person repudiating was not aware. *London and Mediterranean Bank, In re, Wright's Case*, 41 L. J., Ch. 1; L. R. 7 Ch. 55; 25 L. T. 471; 20 W. R. 45.

When the defendant has contracted to sell goods to be delivered at various times, if he repudiates at the date of an early delivery, the plaintiff may treat that as a breach of the whole contract and sue accordingly. And the measure of damages will be the differences between the contract price and the prices at the different times of intended delivery. *Roper* v. *Johnson*, 42 L. J., C. P. 65; L. R. 8 C. P. 167; 28 L. T. 296; 21 W. R. 384.

Of Executory Contract.]—When two parties enter into a contract which is to be performed at a future day, and, before the day for performance arrives, one of them gives the other notice that he does not hold himself bound by it, the other is at liberty to treat such renunciation as a breach of the contract, without waiting the arrival of the day fixed for its performance. *Danube and Black Sea Railway and Kustendjie Harbour Co.* v. *Xenos*, 11 C. B. (N.S.) 152; 31 L. J., C. P. 84; 5 L. T. 527. Affirmed, on appeal, 13 C. B. (N.S.) 825; 31 L. J., C. P. 284; 8 Jur. (N.S.) 439; 10 W. R. 320—Ex. Ch.

When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. *Cort* v. *Ambergate Ry.*, 17 Q. B. 127; 20 L. J., Q. B. 460; 15 Jur. 877.

A declaration stated an executory contract, whereby the plaintiff agreed to sell and the defendant to buy, on arrival by a certain ship, one-third of a cargo of tea, to be consigned to the plaintiff, and delivered in Belfast, from the ship to the defendant, at a certain price payable after delivery. It averred that the ship arrived at Belfast with a cargo of tea, consigned to the plaintiff; that the plaintiff was ready and willing to deliver the cargo in Belfast to the defendant according to the agreement; yet the defendant before the arrival of the ship with the cargo at Belfast, discharged the plaintiff from delivering the cargo, and thenceforth refused to perform the agreement:—Held, first, that the defendant was not bound before the arrival of the cargo to give the plaintiff a distinct answer whether he would fulfil the contract or not. *Ripley* v. *M'Clure*, 4 Ex. 345; 18 L. J., Ex. 419.

Held, secondly, that a refusal by the defendant, before the arrival of the cargo, to perform the contract, was not a breach of it; but that such refusal unretracted, down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal, and a waiver of the condition precedent of delivery, and consequently the defendant was liable for the breach of contract. *Ib.*

See also Sale of Goods.

Before Time for Performance—Election.]—In a lease of premises for a term of twenty-one years determinable by the lessee at the end of the first four years by a six months' notice, the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon a six months' notice from the lessee requiring him to do so. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee, in consequence of this statement by the lessor, gave the requisite notice, under the provisions of the lease, to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mortgagees, on the chance, as he stated, of the lessor's procuring the money to rebuild. The lessor being, however, unable to rebuild the premises, the lessee claimed damages against

him for breach of the contract to do so:—Held, that the covenant to rebuild never having been actually broken, because the lessee had before the time for its performance determined the term, he could not recover unless there had been a breach of contract by anticipation within the doctrine of *Hochster* v. *De la Tour* (2 El. & Bl. 678) and *Frost* v. *Knight* (L. R. 7 Ex. 111), by reason of a wrongful repudiation of his covenant by the lessor before the time for performance; that what had been said by the lessor did not under the circumstances of the case amount to such a repudiation; and that, if it did, such repudiation before the time of performance arrived would not amount to a breach of the contract, unless the lessee elected to treat it as putting an end to the contract except for the purposes of an action for such breach, and the lessee had not under the circumstances so elected; and that he could not therefore maintain his claim. Quære, whether the doctrine of *Hochster* v. *De la Tour* (2 El. & Bl. 678), can be applicable to the case of a lease or other contract containing various stipulations where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor. *Johnstone* v. *Milling*, 55 L. J., Q. B. 162; 16 Q. B. D. 460; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694—C. A.

By Tenant—Action for Rent—Fitness of House for Occupation.]—One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must show, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intimation by the tenant of his intention to repudiate the contract. *Bird* v. *Greville* (*Lord*), 1 Cab. & E. 317.

Non-performance of Executory Contract.]—An agreement was executed between a banker of Paris and the directors of a company formed to take over his business. No day was fixed for the completion of the transfer of the business and offices. In fact, the transfer was never carried out; but the company was started, and it transacted business, and the banker admitted a committee of its directors to his offices, which he vacated, removing his clerks to a higher storey in the same building, where he continued to transact his business pending the completion of the contract, which he was always anxious and willing to effect by handing over books and executing legal transfers. The contract never was completed by the default of the company. The company came to a winding-up. The banker claimed the full amount of the purchase-money for which he had contracted:—Held, that the contract was in fieri, and as it was owing to the fault of the company that it never became fully executed, an inquiry was directed before the chief clerk as to the damages sustained by the banker through the breach of the contract, he to be allowed to prove for the amount of the damages so ascertained. *Lafitte & Co.* v. *Lafitte*, 42 L. J., Ch. 716; 29 L. T. 80; 21 W. R. 750—H. L.

Declaration on an agreement to employ the plaintiff as a courier from a day subsequent to the day of the writ. Averment, that the plaintiff from the time of the agreement to the refusal after mentioned was ready and willing to perform his part of the contract. Breach, that before the day for the commencement of the employment the defendant refused to perform the agreement and discharged the plaintiff from performing it, and wrongfully and wholly put an end to the agreement:—Held, that a party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract; and that an action will lie for such breach before the time for the fulfilment of the agreement: and that it sufficiently appeared on the face of this declaration that there was on the part of the defendant not merely an intention to break the contract, of which intention he might repent, but a renunciation communicated to the plaintiff, on which he was entitled to act. *Hochster* v. *De la Tour*, 2 El. & Bl. 678; 22 L. J., Q. B. 455; 17 Jur. 972; 1 W. R. 469.

A. stipulated that he would as soon as he should become possessed of a public-house, execute a lease thereof to B. from the 21st December, 1825, for fourteen or twenty-one years. At the time of the agreement, the house was upon lease, which would not expire till Midsummer, 1827; the legal estate being in trustees, first, to pay debts, and then to pay an annuity, and subject thereto to the use of A. if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees joined in a lease to C. for twenty-three years:—Held, that A. having thereby put it out of his power, so long as the latter lease of 1824 subsisted, to grant any lease to B., had committed a breach of his agreement, and was liable to an action for a breach of that agreement, although the first lease had not expired. *Ford* v. *Tiley*, 6 B. & C. 325; 5 L. J. (o.s.) K. B. 169; 30 R. R. 339.

—— **Grant for Life.**]—If a parson contracts that a party shall occupy the parsonage lands during a certain term of years, his resignation of the living is a breach of his contract. *Price* v. *Williams*, 1 Gale, 362; 1 M. & W. 6; 1 Tyr. & G. 197; 5 L. J., Ex. 129.

S. was lord of a manor, and the office of steward of the manor was in his gift. The former steward resigned his office upon the lord agreeing to execute a bond to him for an annuity for his life. The defendant, in consideration of S. permitting the defendant to hold the office at the will of S., promised to pay out of the fees of the office the annuity to the former steward during his life, and to indemnify S. therefrom, so long as the defendant should execute the office, either by himself or deputy to be approved of by S. S. appointed the defendant accordingly, and afterwards appointed him by deed for life; S. died, and the defendant refusing to pay the annuity to the former steward, on the ground that his promise only extended to his continuing in office at the will of S., which had been terminated by the grant for life; he was thereupon sued by the executors of S.:—Held liable. *Mattock* v. *Kinglake*, 1 P. & D. 46; 8 A. & E. 795; 1 W. W. & H. 667; 8 L. J., Q. B. 56.

Place for Performance—Demand.]—Where a condition is to be performed—e.g. where money is to be paid—at a particular place, there is no default by the person liable, unless the person entitled to require performance of the condition

—e.g. payment of the money—has required it at the place appointed. *Thorn* v. *City Rice Mills*, 58 L. J., Ch. 297 ; 40 Ch. D. 357 ; 60 L. T. 359 ; 37 W. R. 398.

Partial Non-performance.]—Where, by the terms of an agreement between the plaintiff and the defendant, it was agreed that each of them was to perform certain acts, a partial failure of performance by the plaintiff will not authorise the defendant to rescind the contract. *Franklin* v. *Miller*, 4 A. & E. 599.

The maxim in chancery that he who seeks equity must do equity, when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages upon contracts, discriminates between a whole or only a partial failure of performance ; the breach being a bar when it goes to the whole, but no bar to a partial failure. In which case the party injured is entitled by a cross action to compensation. *Oxford* v. *Provand*, L. R. 1 P. C. 135 ; 5 Moore P. C. (N.S.) 150.

Seller prevented from fulfilling Condition by Buyer.]—If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. By a written contract A. agreed to buy of B. a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the C. cutting and tried at a face not a "properly opened-up one," and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine :—Held, affirming the decision of the court below, that B. was entitled to a decree against A. for payment of the price of the machine. *Mackay* v. *Dick*, 6 App. Cas. 251 ; 29 W. R. 541 —H. L. (Sc.)

Goods to be delivered by Instalments—Failure as to One.]—The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2,000 tons of pig iron at 42*s.* a ton, to be delivered to the plaintiff free on board at the maker's wharf, at Middlesborough, "in November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November : —Held, in an action by the plaintiff for damages, in respect of the defendant's refusal (Brett, L.J., dissenting), that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-thirds afterwards. The decision in *Hoare* v. *Rennie* (5 H. & N. 19) held to be right by Bramwell and Baggallay, L. JJ., and wrong by Brett, L. J. *Honck* v. *Muller*, 50 L. J., Q. B. 529 ; 7 Q. B. D. 92 ; 45 L. T. 202 ; 29 W. R. 830 —C. A.

And see SALE OF GOODS.

Successive Deliveries—Non-Payment for one Delivery.]—*See* supra, col. 126.

Excuse for Non-Performance.]—The plaintiff contracted with a wife (as her husband's agent) that she should play the piano at a concert to be given by the plaintiff on a specified day. She was, on that day, unable to perform through illness. The contract contained no express terms as to what was to be done in case of her being too ill to perform. In an action against the husband for breach of this contract :—Held, that his wife's illness and consequent incapacity excused him, inasmuch as the contract was in its nature not absolute, but conditional upon her being well enough to perform. *Robinson* v. *Davison*, 40 L. J., Ex. 172 ; L. R. 6 Ex. 269 ; 24 L. T. 755 ; 19 W. R. 1036.

The plaintiffs contracted to erect machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials thereon were destroyed by an accidental fire :—Held, that both parties were excused from the further performance of the contract, but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. *Appleby* v. *Meyers*, 36 L. J., C. P. 331 ; L. R. 2 C. P. 651 ; 16 L. T. 669—Ex. Ch. Reversing 14 W. R. 835.

And see IMPOSSIBLE CONTRACTS, supra.

—— **Mistake as to Terms—Rectification.**]—A company guaranteed a firm against loss in respect of their gross annual returns. To an action to recover the annual subscriptions in respect of the guarantee, the defendant pleaded, that by certain printed rules and regulations delivered to him as the rules and regulations under and subject to which the agreement for guarantee was to be made, the amount of subscription payable by the assured was to be increased at a certain specified percentage rate, according to the amount of admitted claims in the previous year, and that the defendant entered into the contract upon the basis and faith of such rules and regulations ; but that the contract did not contain them, and other and much less advantageous rules, with other rates were substituted, of which the defendant had no notice : —Held, that the plea was bad, as the facts stated would not relieve the defendant from the performance of the contract, but would only entitle him to have it reformed. *Solvency Mutual Guarantee Co.* v. *Freeman*, 7 H. & N. 17 ; 31 L. J., Ex. 197.

Breach—Music-hall Artiste—Construction.]—The plaintiff K., a music-hall artiste, entered into contracts with each of the three defendant companies by which she agreed to perform for ten weeks certain, commencing at a certain date, every evening at the time notified by the management, in "her usual entertainment as mimic" in two of the contracts, "as singer and mimic" in the other, at a salary of 8*l.* per week in respect of each hall, subject to the following conditions (inter alia)—namely, "that the said artiste shall not perform before nor during this

engagement at any theatre, music-hall, club, concert, or place of entertainment within one mile of the said music-halls respectively." At the end of the contract was this clause: "In the event of the above-named artiste not observing these conditions in every respect, the company shall have the option of cancelling this agreement." During the fulfilment of the engagement she went to a smoking concert at a certain club one Sunday evening within a mile of these music-halls by invitation. Nobody except members and their guests were admitted to this club, and no admission money was paid. At this concert she sang a song and danced for a few minutes. The following night she performed at the halls, but at one of them the manager asked if she had sung at the club, and she replied she had done so. He told her it was against the rules, and that she must not do it again. The following night a letter was handed her cancelling the three engagements, and signed by the manager of the halls. These actions were then brought by the plaintiff to recover damages for wrongful dismissal, and for breach of contract:—Held, that the word "engagement" did not include Sundays, that day in such contracts being a dies non. That the performance was not within the meaning of the word "perform" as contemplated by the parties, for the plaintiff did not use her powers of mimicry. That, although singing was included in one contract, singing before a private audience such as the present case was not a performance. *Kelly* v. *London Pavilion*, 77 L. T. 215.

Breach of School Rules by Parent—Right of Schoolmaster to refuse to complete Contract.]—The defendant's son was a pupil at the plaintiff's school, one of the rules of which—the defendant having notice of it—was that no "exeat," or permission to leave the school and remain away for one night, was allowed during Easter Term. During Easter Term the defendant requested that his son might be allowed to come home and remain for the night, which the plaintiff refused to allow; but subsequently, on the defendant repeating the request and sending a servant for the boy, the plaintiff allowed him to go home, writing to the defendant at the same time that he did so on the understanding that the boy returned the same night. On the boy reaching home, the defendant telegraphed to the plaintiff that it was not convenient to send the boy that day, but he could return the next morning, to which the plaintiff telegraphed in reply that unless the defendant's son returned that night he should not receive him back. In consequence of the last telegram the defendant did not send the boy back, and the present action was brought to recover the school fees due on the first day of Easter Term, of which term less than three weeks had expired when the boy left. The defendant paid 13*l.* into court with a denial of liability, and counter-claimed damages for breach of contract by the plaintiff:—Held, that the plaintiff's contract was to board, lodge, and educate the defendant's son for the term on the condition that he should be at liberty to enforce with regard to the boy the rules of the school, or such of them as were known to the defendant; that this condition having been broken by the defendant, the plaintiff had the right to refuse to complete his contract, and was consequently entitled to succeed in this action both on claim and counter-claim. *Price* v. *Wilkins*, 58 L. T. 680.

Leave and Licence.]—Leave and licence cannot be pleaded to a breach of contract; but the defendant must show an exoneration or a discharge. *Dobson* v. *Espie*, 2 H. & N. 79; 26 L. J., Ex. 240; 3 Jur. (N.S.) 470; 5 W. R. 560.

Revival of Creditors' Rights on Non-performance.]—A. obtained a judgment against B. for 563*l.* 12*s.* 10*d.*, but agreed to take 200*l.* in discharge, B. giving three acceptances for that sum, and depositing some waggons as security. If none of the bills were paid at maturity, the judgment to be enforceable against B. The last of the bills would mature in March, 1871. B. subsequently made payments on account of the bills, and another settlement of account took place in March, 1871, when A. claimed 118*l.* 11*s.* 5*d.*, as the balance due on B.'s three acceptances, and it was agreed that B. should give his acceptance for that sum in full of all demands under the three acceptances or otherwise, and deposit title deeds as security. B. did not pay the bill for 118*l.* 11*s.* 5*d.* at maturity, but tendered the money four days after it had been presented to his bankers, which A. refused, declining also to give up the waggons and title deeds:—Held, that as B. had not performed the terms of the first agreement, A. was remitted to his original right as existing at that time, and was at liberty to enforce the judgment. *Barton* v. *Hobson*, 30 L. T. 230.

Renunciation acquiesced in but not acted upon—Withdrawal of.]—The expression of a firm determination on the part of a promiser never to perform his part of the contract, when communicated to the promisee and acted upon by him (whether such determination can properly be termed a breach or not), gives the latter an immediate right of action, and he need not aver conditions precedent of any kind. The mere intimation of an intention of one party to an executory contract not to be bound by it communicated to the other party to the contract, unless final and conclusive in its nature, does not entitle the other party to treat the contract as rescinded. *Société Générale de Paris* v. *Milders*, 49 L. T. 55.

Injunction to Restrain.]—A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. The court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. *Wolverhampton and Walsall Ry.* v. *L. & N. W. Ry.* (L. R. 16 Eq. 433) considered. *Donnell* v. *Bennett*, 52 L. J., Ch. 414; 22 Ch. D. 835; 48 L. T. 68; 31 W. R. 316; 47 J. P. 342.

Action for Breach—General Principle.]—The rule of law in respect of breach of contract confines the remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued. The exception in the case of master and servant dates from the Statute of Labourers, 25 Edw. 3, and is limited by it. *Lumley* v. *Gye*, 2 El. & Bl. 216; 22 L. J., Q. B. 463; 17 Jur. 827; 1 W. R. 432.

—— **Jurisdiction — Place where Contract**

made.]—An order to make certain bets having been transmitted by postal telegraph from the plaintiff without the City of London to the defendant within it, he telegraphed from the City that the order had been obeyed:—Held, that the contract of agency was made in the City, and that an action for the breach of such contract was within the jurisdiction of the Mayor's Court. *Cowan* v. *O'Connor*, 57 L. J., Q. B. 401; 20 Q. B. D. 640; 58 L. T. 857; 36 W. R. 895.

Delay — Evidence of New Contract.] — The lapse of twenty years from the time of making a contract, to be performed in futuro, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Kirkman* v. *Siboni*, 4 M. & W. 339; 8 L. J., Ex. 304.

J. R.

CONTRACTOR.

See NEGLIGENCE—WORK AND LABOUR.

CONTRIBUTION.

Of Sureties.]—*See* PRINCIPAL AND SURETY.

In Case of Torts.]—*See* TORT.

CONTRIBUTORY.

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CONVENT.

See CHARITY—CONDITION—RELIGION.

CONVERSION.

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Of Wasting and Reversionary Property.]—*See* ESTATE.

CONVERSION AND RECONVERSION.

[BY J. F. WALEY.]

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A. CONVERSION.

1. PRINCIPLES.

Doctrine in Equity.] — The rule is that whatever ought to have been done shall in equity be looked upon as done; thus money agreed to be laid out in land shall be taken as land, et è converso. *Lechmere* v. *Carlisle*, 3 P. W. 211.

In equity, land agreed to be sold shall be taken as money, and money agreed to be laid out in land as land. *Best* v. *Stamford*, 1 Salk. 154.

—— **Scotch Law.**]—The doctrine of construc-

tive conversion appears to be the same in England and Scotland. In both countries the question is one of intention depending on the nature and effect of the directions given. *Buchanan* v. *Angus*, 4 Macq. H. L. 374. (And see *Annandale* (*Marquis*) v. *Annandale* (*Marchioness*), 2 Ves. sen. 381.)

—— **Actual Condition, Effect of.**]—If an absolute duty is imposed upon trustees to turn an estate into money, whether it has been so turned or not will be immaterial, for in whatever form it was then held, it would be treated for the purpose of succession as if it were money. *Ib.* See also *Basset* v. *St. Levan*, 71 L. T. 718; 43 W. R. 165.

—— **Real Estate—Mixed Fund.**]—Where a real estate is directed to be sold absolutely, and is blended with personal property, it becomes personalty, and shall go accordingly. *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497.

—— **Money—Agreement.**]—Money articled to be laid out in land is to be taken as land, even as to collateral heirs. *Lingen* v. *Sowray*, 1 P. W. 172; Pre. Ch. 400; Gilb. Exch. Rep. 91; 10 Mod. 39.

Money agreed to be laid out in land shall be taken as land, and go to the heir; and no difference where the money thus agreed to be laid out and settled is deposited in the hands of trustees, and where it remains in the hands of the covenantor. The agreement is binding in both cases, and makes it as land. *Lechmere* v. *Carlisle*, 3 P. W. 211.

Charges.]—Money vested in a trustee, to purchase and settle lands in tail, is considered as land, and is liable to any charges which would affect the land if it was purchased and settled. *Lismore* (*Lord*), *In re*, 1 Hog, 177. S.P., *Frederick* v. *Aynscombe*, 1 Atk. 392.

Trust for Sale.]—A trust for sale cannot, in equity, convert real into personal estate unless it is absolute and effective. *Goodier* v. *Edmunds*, 62 L. J., Ch. 649; [1893] 3 Ch. 455.

—— **Unattested Codicil before Wills Act.**]—Direction by will to sell real estates, and after the sale to pay certain legacies:—Held, upon the will, not a conversion out and out of the realty so as to give a testator before the Wills Act the right to treat it as personal property, capable of disposition as such. *Sheddon* v. *Goodrich*, 8 Ves. 481. S. P., *Hooper* v. *Goodwin*, 18 Ves. 156.

2. Operation of Doctrine.

a. Imperative and Discretionary Trusts, Distinction of.

Generally.]—To convert real or personal property, as between the real and personal representatives, from the state in which it is found at the death, the character of land or money must, by the trust, covenant, etc., be imperatively and definitively affixed to it: otherwise, if there was an option, there is no equity. The bill by the heir, claiming property as real estate, was dismissed without costs. *Wheldale* v. *Partridge*, 5 Ves. 388. Affirmed 8 Ves. 227. And see *Whitty, In re* Ir. R. 9 Eq. 41.

The rule, that money directed to be laid out in land shall be considered as land, holds only where the quality of land is imperatively fixed on the money. *Walker* v. *Denne*, 2 Ves. 184.

Personalty to be invested in Land or Securities.]—Personal estate under marriage articles to be invested in land, or government or other securities. The court, finding it in its original state, considers it as personal; but part having been laid out in land which was settled and afterwards sold, and the produce invested in stock till a proper purchase of land could be found to be settled to the same uses, that was considered as land. *Bristow* v. *Warde*, 2 Ves. 336; 2 R. R. 185.

Power to Invest Fund in Real or Personal Estate—Intention.]—Where discretionary power is given by will to trustees to invest fund in real or personal estate, and it is to be collected from the whole will that it shall be invested in real estate, though never invested, it shall be regarded as real estate. *Cowley* v. *Hartstonge*, 1 Dow, 361.

Personalty to be laid out in Land or any other Security, as Trustees think fit and convenient.]—M., by will, devises land to his wife for life, remainder over, with remainder to W. and P. in fee; he leaves 400*l.* to be laid out in the purchase of land or any other security, as his trustees should think fit and convenient, to be settled as his lands devised. The 400*l.* not being laid out in land:—Held, the trustees had no election to consider it as money or land. True construction, to be laid out in land, and on security till a purchaser could be found. *Earlom* v. *Saunders*, Amb. 241.

Money to remain at Interest or be laid out in Real Estates.]—Money bequeathed to A. to remain at interest or to be by him laid out in real estates, to go with other estates devised. A., being tenant in tail of the real estates, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will. The court inclined in favour of the disposition, upon the ground that A. might have called for the money, as absolute owner; but it was established, upon the option, to continue it personal estate. *Amler* v. *Amler*, 3 Ves. 583.

Money to be invested in Land or other Securities.]—A testator gave his residuary estate to his wife, and appointed her his executrix, with the tuition of his younger children, and to provide for them with regard to their fortunes, and he advised her thus: "As to my son John, I would have 250*l.* a year paid him until a sum of 10,000*l.* can be invested in land or some other securities, which is to be invested in trustees for his use, as to the interest of such money or produce of such lands, for his natural life; and if he marries with consent, etc., that he may make such settlement on such wife, etc., as you may judge proper, and that the remainder may go to such child or children he may have lawfully begotten, but in failure of these to my eldest son Isaac and his heirs for ever." The sum of 10,000*l.* was invested partly in personal securities and partly on mortgage of real estate:—Held, doubtful if the fund had been impressed by the will with the character of real estate. *Cookson* v. *Cookson*, 12 Cl. & F. 121;

9 Jur. 499. Affirming *Cookson* v. *Reay*, 5 Beav. 22.

"Shall and may" be laid out in Land—Intention.]—A proviso was in a settlement of 1,000*l.*, "shall and may" be laid out by the trustees in land. Per curiam, where there is a power to lay out money in land, but the original intention was it should be considered as money, if not vested in land, it shall not be considered as such, or go to the heir. *Stamper* v. *Miller*, 3 Atk. 212.

Money to be laid out in Land—Trusts to pay Money.]—3,000*l.* was vested in trustees in trust to pay 2,000*l.* to the eldest son, and 1,000*l.* for the benefit of younger children; and it was agreed that the 3,000*l.* should be laid out in land, and the estate so purchased should be to the same use, etc., and subject to the same conditions which were declared concerning the 3,000*l.*:—Held, that the lands should be taken as money; the laying it out upon real estate being merely to make the fund for the benefit of the children more permanent and secure. *Combe* v. *Combe*, 2 Atk. 188.

Fund to Purchase Land to go "as described"—No Description Found.]—A testator, after devising his real estate upon certain limitations, bequeathed all the residue of his property to trustees "to form a trust fund to purchase land to go with the inheritance in a manner described in a paper marked B*." After his death no such paper could be discovered:—Held, that, notwithstanding the non-existence of the paper, there was an imperative trust declared for the conversion of the residuary estate into land which was to go according to the limitations affecting the real estate. *Willoughby* v. *Storer*, 22 L. T. 896; 18 W. R. 658.

Land—Power of Sale—Trust to Reinvest in Land, or Government or Real Securities.]—When land is subject to a power of sale, and the power is exercised, it is converted into personalty from the time of the sale, unless the proceeds are reinvested in land, or are stamped with a trust for reinvestment in land. *Atwell* v. *Atwell*, 41 L. J., Ch., 23; L. R. 13 Eq. 23.

A trust to reinvest the proceeds in land, or government or real securities, with a direction superadded that these when purchased shall be and enure, and be made liable to the same uses, trusts, estates, limitations, and provisoes, as the land originally settled, does not amount to a trust for reinvestment in land, at least when the limitations of the land originally settled are applicable to personalty as well as realty. *Ib.*

—— **Trust to Re-invest in Realty or Leaseholds — Power of Interim Investment in Personalty.**] — Testator devised real estate to trustees, on trust to raise thereout certain sums, and subject thereto to pay the rents to his wife for life, with remainder to T. for life, with remainder to T.'s children living at testator's death—if sons, attaining twenty-one, and if daughters, marrying—absolutely. There was a power to sell the property, with a trust to invest the proceeds in real, leasehold, or copyhold hereditaments, to be held on the same trusts, with power to make an interim investment in personal estate, the income thereof to be applied as if it were rents of hereditaments so to be purchased. The trustees raised the sums directed, and, after the widow's death and during T.'s life, sold the property and invested the proceeds in consols. The proceeds never were invested in land. One of T.'s sons living at the testator's death attained twenty-one, and died in T.'s lifetime intestate:—Held, that his share in the proceeds of sale devolved on his heir on T.'s death. *Bird, In re, Pitman* v. *Pitman*, 61 L. J., Ch. 288; [1892] 1 Ch. 279; 66 L. T. 274; 40 W. R. 359.

—— **Trust to sell "as soon as Trustees shall see necessary."**—One devises land to trustees in fee, in trust to apply the profits until sale for the benefit of all his four children and the survivors and survivor of them equally, and in further trust that as soon as the trustees shall see necessary for the benefit of the children, they should sell the premises, and apply the money for the benefit of his four children, equally to be paid at twenty-one or marriage. A., the eldest of the four children, attained twenty-one and married, and died without issue, intestate, leaving a wife:—Held, the land, being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and A.'s widow must have a moiety of A.'s share, and the profits of the land, until sale, must go as the money arising upon sale would. *Doughty* v. *Bull*, 2 P. W. 320.

—— **Trust for Sale—Power to Direct Investment in Land.**] — Real estate devised to be sold, and the produce disposed of with the personal, with a power to direct the fund to be laid out in land; no such direction having been given, it was held personal property. *Maberly* v. *Strode*, 3 Ves. 451.

Heritable and Movable Estate—Direction to Pay over—Power "if necessary" to Convert.]—A testator conveyed his whole estate, heritable and movable, to trustees, directing them, after the discharge of legacies, to "pay over" the residue to his brother and sister equally, with power to the trustees, "if necessary, to convert the same into money":—Held, that the settlement did not convert the heritable or real into personal or movable estate. *Buchanan* v. *Angus*, 4 Macq. H. L. 374.

If the right to sell it is made to depend on the discretion of the trustees, or is to arise only in case of necessity, there is no change in the quality of the property. *Ib.*

Power to Manage Freeholds so that same might at Discretion be Sold.]—Testatrix, after expressing her intention to dispose of all her real and personal estate as thereinafter mentioned, gave certain legacies, and appointed A. and B. her executors; and gave to them and their heirs all lawful powers and authorities to conduct and manage her freehold estates, so as that the same might, at their discretion, be sold and converted into money, and the net money to form part of her personal estate; and for those and every purpose connected with her property, whether real or personal, she invested them, and the survivor of them, and his heirs, executors, and administrators, with her full authority; and she directed that any undisposed-of surplus moneys should be paid as she should, by any future writing or will, direct:—Held, that the real estate was converted

out and out into money, and subjected, in common with the personal estate, to the payment of the testatrix's debts and legacies. *Flint* v. *Warren*, 14 Sim. 554; 9 Jur. 420.

Desire that Estate may be sold unless Beneficiaries would rather divide on A. attaining Twenty-one.]—A testator devises real estate to his widow for life, and after her death, to six younger children, with a direction, that if any of these children die under twenty-one, his or her share is to go to the survivors. He then adds, that it is his desire, that, as soon as the youngest survivor shall attain his or her age of twenty-one years, the estate may be sold, and the produce divided amongst the survivors, unless they would rather mutually divide the estate amongst themselves.—Held, by the Lord Chancellor on appeal, that the share of a daughter who attained twenty-one, and died intestate in the lifetime of the widow, was transmissible as part of her personal estate. *Parish* v. *Parish*, 3 L. J. (o.s.) Ch. 21.

Mixed Fund—Income to A. for Life—Specific Gifts after A.'s Death of Realty included in Fund.]—The testator gave real property, by description, and funded property, and all his furniture, &c., to A. for life, begging, however, that according to the advice of his executors the same might be sold, and when so sold, the residue, after paying all debts and mortgages, to be invested. The income of those several estates, &c., to be given to his sister for life, and after her death the above property to be divided as follows:—To B. for his life only, one-third of the property arising from the sale of certain houses after his death, to be equally divided between his two sons; and one-third of the same property to C. and his daughter: leaving one-third undisposed of. The testator then proceeded to give other specific freeholds, which were included in the direction for sale, to other persons:—Held, that the real and personal estate were made a mixed fund only for the purpose of giving a life estate to A., and, subject thereto, must be applied in the usual order for the payment of debts. *Hill* v. *Twogood*, 1 Jur. 704.

Trust to Retain as long as Trustee thinks proper or to Sell.]—Testatrix devised all the residue of her real and personal estate, after payment of her debts, certain legacies, &c., to a trustee, his executors, &c., upon trust, to retain and keep the same in the state it should be in at the time of her death, as long as he should think proper, or to sell and dispose of the whole or such part thereof, as and when he or they from time to time should think expedient, &c.; and in speaking of the trust she used the words: "And for facilitating such sale and sales as are by me hereinbefore authorised to be made of my real and personal estate," &c.:—Held, that the testatrix did not intend an absolute conversion of the real property into personalty; and that until the trustee exercised the power, the property must be considered to remain in its original state. *Polley* v. *Seymour*, 2 Y. & C. 708; 7 L. J., Ex. Eq., 12; 1 Jur. 958.

Power of Sale—Trust for Division of Proceeds—Shall and May Divide.]—A testator gave to his widow, "for the benefit and advantage of his children," power of selling his W. estate. By a codicil he expressed himself (in effect) thus:—"I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife shall and may divide and proportion among my said children as she shall think fit and proper, or as she shall direct by will." The estate was neither sold nor appointed by the widow.—Held, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty. *Greeveson* v. *Kirsopp*, or *Cursop*, 2 Keen 653; 6 L. J., Ch. 261.

Power if Trustees think fit to Sell—Proceeds on Trusts of Residuary Personalty—Right of Residuary Legatee.]—Testator, after devising his real estates in strict settlement, subject to the payment of his debts and legacies, empowered his trustees, if they in their discretion should think fit, absolutely to sell his estate at C., and directed them to apply the proceeds on certain trusts therein before declared of his residuary personal estate. The sale of the estate was not required for payment of debts and legacies:—Held, that the power of sale vested in the trustees was discretionary, and that the residuary legatee of the personalty could not compel a sale. *Shipp rdson* v. *Tower*, 1 Y. & C. C. C. 441; 6 Jur. 658.

"Full Power" to sell after A.'s death—Gift to A. for Life—Trust for Division after A.'s death.]—A testator gave his residuary real and personal estate to his wife for life; and, after her death, he gave "full power" to his executors, their heirs or assigns, to collect all his property together, and sell the houses and other estates, and convert into money his funded property, and then to pay certain legacies; then the whole of his property was to be divided amongst his twelve first cousins:—Held, on the context, that the real estate ought to be considered as converted into personalty. *Burrell* v. *Baskerfield*, 11 Beav. 525; 18 L. J., Ch 422; 13 Jur. 311.

Power to Sell after Death of Life Tenant—Assignment during her Life of Personal Estate — Sale after her Death.] — A testator devised his real estate to trustees upon trust to pay the rents and profits to his wife during her life, if she should so long continue his widow; and from and after her death or second marriage he declared that they should stand possessed thereof upon trust for his children who should be then living, and their respective heirs, as tenants in common, but subject to a power for the trustees, if they should in their discretion think fit so to do, to sell the real estate: and in the event of such sale the trustees were to pay, divide, and apply the proceeds unto and among his children who should be then living, in equal shares. During the lifetime of the widow one of the children assigned all his personal estate in possession, remainder, or expectancy to trustees for the benefit of his creditors. Upon the widow's death the trustees of the will, in exercise of the power therein contained, sold the real estate:—Held, that the child's share of the proceeds did not pass to the trustees of the creditors' deed. *Ibbitson, In re*, L. R. 7 Eq. 226; 21 L. T. 163.

Trust for Division — Power to Sell for Specified Purpose.]—Devise of real estate to

trustees in fee, upon trust, to divide the same among certain persons; and the testator authorised his trustees to sell any part of the estates as they should think best, for the purpose of dividing the same:—Held, that this amounted to a mere permission, and not to an absolute direction to convert, and, in the absence of the exercise of the power, the will did not convert the real estate into personalty. *Lucas* v. *Brandreth*, 28 Beav. 273; 6 Jur. (N.S.) 945.

Real and Personal Estates—Direction for Sale on A. and B. attaining 21—Division of Proceeds.]—A testator directed his trustees to permit his wife to hold a house for her use to bring up their children, E. and M., and that at their arriving at the age of 21, all his estate, real and personal, should be sold and converted into money, and the proceeds divided between his wife and as many children as she might have at his death:—Held, that it was the intention of the testator, in the event of his wife and any of his children living at his death surviving him, that there should at some time or other be an absolute sale and conversion of his real estate for their benefit. *Tily* v. *Smith*, 1 Coll. C. C. 434; 9 Jur. 409.

Held, also, the wife and one of the daughters having survived the testator, that the daughter did not take by devise or descent from him any real estate descendible to her heir-at-law. *Ib.*

—— **Trust for Division—Division on A. attaining Twenty-one.**]—The testator gave his real and personal estate to trustees, upon trust to apply the rents, issues, and proceeds for the benefit of his two daughters, with a direction, on the youngest attaining twenty-one, to divide the whole into two equal moieties, of which the testator gave one to his two daughters equally; and directed the other to be placed out on government or real securities, and the dividends thereof to be paid to the daughters for their lives; and, upon their death, the said moneys and effects to be divided amongst their children:—Held, that there was no conversion by the will of the money of the real estate devised to the daughters on the youngest attaining twenty-one. *Cornick* v. *Pearce*, 7 Hare, 177: 12 Jur. 997.

—— **Power to convert Personal Estate—Limitations of Real and Personal Estate—Intention.**]—A testator made a will in the following form:—"Whereas I am seised in fee simple of divers freehold manors, etc., situate, etc.; and of a leasehold estate in, etc., and also of a copyhold estate situate, etc., and also of freehold estates in, etc., and of large sums in the funds of England: Now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid (which I order to be paid out of my personal estate), all my estates in the funds of England, and all my said manors," to three persons successively in tail male in strict settlement; "and for default of such issue, I give and devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, etc., and to settle the same, when purchased, to such uses as were declared of his "manors, etc., and premises, devised by this my will, as shall be then existing, undetermined or capable of taking effect, etc., to, etc., for no other estate, use, trust, or purpose whatsoever":—Held, first, that the power to trustees to convert personalty into realty did not operate as an absolute conversion: but, secondly, that on face of the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male, under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another. *De Beauvoir* v. *De Beauvoir*, 3 H. L. Cas. 524; 16 Jur. 1147. Affirming 15 Sim. 163; 15 L. J., Ch. 305; 10 Jur. 406.

—— **Full Power to Sell—Limitations of Real and Personal Estate.**]—A testator, by his will, dated in 1850, gave all his property, real and personal, including land in certain colonies, and funds specified by him, in trust for the benefit, in equal portions, to the extent of the annual income of his property, of his brothers E. and C., or the heirs of their bodies lawfully begotten; and the meaning of his will was, that if either brother should die leaving lawfully-begotten heirs of his body, then should the share or portion of such brother descend to such lawfully-begotten heirs; but if one brother should die without lawful issue, then should the whole annual income be paid to the surviving brother; or in case of his death also, to his lawfully-begotten heirs: but in case both brothers should demise without lawfully-begotten heirs, then should the whole property be divided among his nearest of kin. The testator then appointed executors, with power to appoint other executors; also with full power to get in all moneys, and to sell, dispose of, and convert into money all his real and personal estate, either by public auction or private contract, as to his executors should seem meet:—Held, in the court below (6 Jur., N.S., 138; 8 W. R. 176), and on appeal, that the testator's personalty was subject to an executory gift over, on the death of his two brothers without leaving issue living at his death. On appeal held also, reversing the court below, that there was no conversion of the realty; and that the brothers took an estate tail as tenants in common, with cross remainders between them, of such lands as were subject to English law. *Greenway* v. *Greenway*, 29 L. J., Ch. 601—L.JJ.

—— **Direction to Sell such Part as Trustees think necessary for Paying Debts—Presumption as to Other Parts.**]—When a residue comprising leaseholds, freeholds, and other property is devised in strict settlement, and a direction is given to the trustees to sell so much and such part as, in their sole discretion, they may think necessary for the purpose of paying all the testator's debts, a presumption is raised against the conversion of such parts as the trustees may not think necessary to sell for the purpose mentioned, and the court will not interfere with the discretion of the trustees. *L. & N. W. Ry., In re*, 19 W. R. 220.

Real Estate to be considered Personal "for Purpose of Distribution."]—A testator empowered his trustees to sell his real estate, and directed N., "for the purpose of distribution," to be considered personal estate. He then gave it and his personal estate to certain persons, with an ultimate limitation to "his own right heirs and next of kin, according to the respective

natures and qualities thereof." The prior limitations having failed:—Held, that there was no absolute conversion, but that the heir-at-law took the produce of the realty. *Edwards* v. *Tuck*, 23 Beav. 268.

Trust for Sale—Not until Trustees Judge most Beneficial—Power or Trust.]—A testator devised his real and personal estate to trustees upon trust, that a piece of land, part of his real estate, might be absolutely sold as soon as conveniently might be after his death, in such mode as his trustees should decide upon, but in case it should so happen that at the time the complying with his will in that particular would be a sacrifice of property, then it was his will that the piece of land should not be disposed of until such time as his trustees should judge most beneficial for his estate; and when all his children attained the age of twenty-one, then he devised his real and personal estate to his children equally as tenants in common. All the children attained the age of twenty-one. The trustees did not sell the piece of land:—Held, that the trustee had a discretionary power and not a trust for sale, and that there was no constructive conversion of the piece of land; and that, consequently, the heir-at-law, and not the next of kin of a deceased child, was entitled to the share of such child. *Glover* v. *Heelis*, 32 L. T. 534: 23 W. R. 677.

A testator gave an annuity to his wife, and he gave and bequeathed to his seven children all his real and personal estate after deducting the said annuity; and after his wife's decease the annuity, together with all rents, dividends and profits arising from his estate, to be divided between his seven children equally; and he directed his executors to sell and convert into money, his furniture, lands, houses, tenements, and other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all money arising from the sale to be invested for the benefit of his children:—Held, that the direction to convert was imperative, and operated from the death of the testator. *Raw, In re, Morris* v. *Griffiths*, 53 L. J., Ch. 1051; 26 Ch. D. 601; 51 L. T. 282; 32 W. R. 986.

—— **As and when if Trustees think fit.**]—Testator directed his trustees to sell his real estate "as and when, if they should, from time to time or at any time, think fit . . . as they should think proper," one-sixth part or share of the real and personal estate, or the produce, was to be paid, transferred and assigned to each of his children:—Held, that a share in the realty of a child who had died intestate passed to his heir-at-law in its unconverted state. A conversion qualified by a discretion not the same as an absolute conversion. *Harding* v. *Trotter*, 1 W. R. 502.

Personal Estate—Trust to Invest in Land or Stock—Limitations Appropriate to Real Estate.]—Where personalty is left by will to trustees with limitations applicable only to real estate, and it appears from the whole tenor of the will that such personalty is to pass as realty, a trust may be implied to invest such personalty in the purchase of real estate; but a mere gift of personalty with limitations appropriate to real estate, a great part of which must necessarily fail as applied to personalty, will not justify an implied trust for the conversion of that personalty into realty. Where a testator directed his trustees to invest the proceeds of the sale and conversion of his personal estate "in the purchase of land, or real securities, or stock," and to pay the "interest, dividends, and income of his trust estate" to B. for life, with remainder to the use of his first and other sons successively in tail male, with remainder to W. R. B. for life, with similar limitations in favour of his first and other sons in tail male, with remainder over, and the trust estate was not invested in land:—Held, that this did not necessarily lead to the inference that the testator did not intend to give the trustees an option to invest permanently in personal securities. *Evans* v. *Ball*, 47 L. T. 165; 30 W. R. 899.

Share of Realty — Settlement — Devise.]—Marriage articles included a policy of assurance, and declared the trusts upon which the policy was to be held in the usual manner. The ultimate trust which took effect, was for the husband, his executors, administrators, and assigns. By the same articles the mother of the intended wife covenanted to devise one-eighth of her lands which were held in fee-simple or a rent-charge, or a gross sum of money equivalent thereto, to the trustees, their heirs, executors, administrators, and assigns, upon trust to invest and re-invest the same if they should so think fit, and to hold the said shares upon the same trusts as were declared of the policy, or such of them as should be applicable thereto. The mother subsequently devised one-eighth of the lands to her daughter, and directed the trustees to convey it. This was not done. The husband survived the wife:—Held, that there was no conversion of the lands, and that accordingly they passed to the heir-at-law of the wife. *Owen* v. *Owen*, [1897]1 Ir. R. 580.

b. Request or Consent, Trust Depending on.

Money to be laid out — With Consent — No Consent given.] — Where money is, on marriage, to be laid out on a purchase, and settled to the uses of the marriage settlement, adding a clause, that the purchase shall be made with the consent of the husband and wife, it makes no difference, though no consent given to any purchase made during the life of the husband and wife, for still the money shall be taken as land. *Lechmere* v. *Carlisle* (*Earl*), 3 P. W. 218. See also *Symons* v. *Rutter*, 2 Vern. 227; Pre. Ch. 23.

—— **After Request — No Request Made.**]—As between representatives money was considered as land, under a direction in a settlement with all convenient speed, after request, to lay it out, though no request was made, upon the construction; all the limitations being adapted to real uses, and other circumstances. *Thornton* v. *Hawley*, 10 Ves. 129; 7 R. R. 359.

—— **On Government Securities or Particular Real Estate—No conversion without Consent.**]—Money charged on land by articles of marriage, to be laid out on government security, or freehold estate, in a particular situation, with consent of the wife, to be settled upon trust for her separate use for life, and after her death to be conveyed or assigned to her husband, his heirs, or executors; if she survives, for the issue; if more than one,

subject to her appointment by deed or will, equally at twenty-one; their heirs, if land; their executors, if money; if no issue, subject to her appointment; and in default, to his other next of kin, their heirs or executors. After the husband's death, having disposed of his personal estate by will, this property held personal; to the interest of which his widow was entitled for life, with power of appointment by implication in the event of an only child, dead, under age, and intestate, and liberty to apply. *Van* v. *Barnett*, 19 Ves. 102.

—— **With Consent and not without—No Conversion.**]—By a marriage settlement, the husband covenanted to pay to the trustees 1,200*l.* in trust with the consent of the husband and wife, and not without, to lay it out in the purchase of lands in fee, or for long terms of years, or of copyhold or of customary tenure, and to settle the same on the husband for life, without impeachment of waste, remainder to the wife for life, in bar of dower, remainder to the use of the children of the marriage, as the husband and wife, or the survivor of them should appoint, and in default of appointment to the use of all the children of the marriage in tail. The 1,200*l.* was invested in the funds, and so remained, with the acquiescence of husband and wife. There was one child of the marriage. The wife survived her husband, and afterwards died:—Held, that the fund had not ceased to be money. *Davies* v. *Goodhew*, 6 Sim. 585.

Money Charged upon Land—Power to lay out with Consent—Release of Jointure.]—A sum of money charged upon lands was, by a marriage settlement, assigned to trustees, to pay the interest to A., the husband, for his life, and after his death to pay the wife a jointure of 200*l.* a year, provided that it should be lawful for A., with the consent of the trustees, in writing, to call in the fund, and lay out and dispose of the same in the purchase of an estate of inheritance or freehold, for a term of at least three lives, or of a lease for a term of years, whereof ninety-nine years shall be unexpired, or otherwise advantageously, which purchase or disposal, when so made, should be settled and vested to the several uses, trusts, intents, and purposes thereinbefore mentioned in respect to the said sums. A portion of the fund was paid to the surviving trustee, who lent it to A., on a release being executed by A. and the wife, and C. their son, and acknowledged by her:—Held, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative. *Smithwick* v. *Smithwick*, 12 Ir. Ch. R. 181.

Money to be laid out with Consent—Power of Interim Investment with Consent—Conversion.]—By settlement 500*l.* was assigned to trustees in trust to lay the same out in land with the consent of the wife, and to pay the rents to the wife for her life, for her separate use, remainder for the husband for life, and after the death of the survivor, in trust to convey the same to such persons and for such estates as the wife should by will or deed appoint, and in default of appointment, in trust for the right heirs of the wife for ever; proviso, that until such purchase should be made, the trustees should invest the money in the public funds, with the consent of the wife, and pay the dividends to the wife for her separate use, and after her death to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid, and to pay or transfer the principal sum of 500*l.*, or the stock in which the same should be invested, to such person as, according to the limitations aforesaid, would be entitled to the inheritance of such lands. This 500*l.* was never paid to the trustees, but remained in the hands of the husband at the death of the wife. She having made no appointment, this 500*l.* vested in her heir-at-law (subject to the life interest of the husband), but the heir took it as money, and therefore at her death this interest passed to his personal representative. *Russell* v. *Smythies*, 1 Cox, 215.

—— **Strict Settlement — Conversion.**]—By a marriage settlement a sum of money, part of the fortune of the intended wife, was vested in trustees upon trust to call in the same, and, with the consent in writing of the intended husband and wife, or the survivor of them, to invest the sum in the purchase of real estate in such part of Ireland as the husband and wife should approve of, and it was declared that such lands, and, until the purchase, such sum of money, should be held upon trust, out of the income, to make up any deficiency in the wife's jointure, and, subject thereto, and to certain portions for younger children, in trust for the husband for life, and after his death to the use of or in trust for the issue of the marriage in strict settlement, with ultimate remainder to the right heirs of the husband: and it was provided, that in case the intended husband, who was a minor at the date of the marriage, should refuse to ratify it upon attaining full age, he should forfeit all interest in the money:—Held, that there was a constructive conversion of this sum into real estate. *Batteste* v. *Maunsell*, Ir. R. 10 Eq. 314.

Bequest of Personal Estate to be laid out with Consent—Trusts applicable to Realty—Conversion.]—A testator directed his trustees, with the consent of his widow, to invest his personal estate in freehold, leasehold, or copyhold messuages, tenements, or hereditaments, and settle them upon certain trusts which were applicable to realty:—Held, that a conversion into real estate was intended. *Hereford* v. *Ravenhill*, 5 Beav. 51; 11 L. J., Ch. 173.

Trust for Sale at Request of A. and B. or Survivor—No Conversion without Request.]—By a marriage settlement freehold estate and some personal estate were conveyed and assigned to trustees, upon trust on the request of the husband and wife during their joint lives, and after the death of either upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase money, in case the same should be sold upon trust for the husband for his life, and after his decease upon trust for the wife for her life, and after the death of the survivor of them to convey the estate, unless sold, and assign the personal estate unto the children and grandchildren of the marriage born in the lifetime of the husband and wife, as they or the survivor should appoint, and in default of appointment unto and amongst the children of the marriage equally. Held, that the estate having been real when settled, it was not meant by the settlement that it should become personal unless the

husband and wife or the survivor requested it to be sold; also that the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion as the context of the instrument might require. *Taylor's Settlement, In re*, 9 Hare, 596. And see *Rainy* v. *Ellis*, 27 L. T. 463.

Devise of Real and Personal Estate with "consent and approbation" of A. to Sell—Realty not Sold—Gift of Residue of Mixed Fund.]—A testator gave all his real and personal estate to trustees, upon trust, to permit his wife to have the enjoyment of the rents, issues, and profits thereof for her life, or otherwise, with her consent and approbation in writing, to sell the real and personal estate, and invest the moneys to arise from the sale of his real and personal estate on Government or real security, and pay the interest to her for life; and after her decease to pay two legacies of 50*l.* each, and divide the residue of the moneys to arise from his real and personal estate between his nephews and nieces living at the death of his wife. The real estate was not sold during the life of the widow:—Held, that the nephews and nieces were entitled to the produce of the real estate. *Waddington* v. *Yates*, 15 L. J., Ch. 223; 10 Jur. 241.

3. Application of Doctrine.

a. Sale and Purchase.

i. *Contract.*

Devise of Land—Subsequent Contract for Sale.]—Land devised, and afterwards contracted to be sold, becomes personal estate. *Mayer* v. *Gowland*, Dick. 563.

A testatrix devised a real estate and afterwards sold it. The purchase was not completed until after her death:—Held, that the purchase money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase money, and notwithstanding the 1 Vict. c. 26, s. 23. *Farrar* v. *Winterton (Earl)*, 5 Beav. 1; 6 Jur. 204.

Agreement between Claimants to Estate for Sale and Division of Purchase Money—Death of Party before Sale.] — A. and B. had conflicting claims to a freehold estate. A. proposed that the estate should be sold as soon as possible, and the produce divided between them, and that until the sale a receiver should be appointed to divide the rents in the same proportions. This was accepted by B. Before the sale, which was postponed, A. died intestate:—Held, that the property had been converted into personalty, and that A.'s next of kin, and not his heir, were entitled. *Hardey* v. *Hawkshaw*, 12 Beav. 552; 14 Jur. 707.

In such cases, the effect of the act is to be considered, and not the intention as affecting the real and personal representatives. *Ib.*

Land Contracted to be Sold—Purchaser without right to Specific Performance.]—A. contracted to sell an estate. The contract was valid at his death, but the purchaser lost his right to a specific performance by subsequent laches:—Held, that the estate belonged to the next of kin, and not to the heir-at-law. *Curre v. Bowyer*, 5 Beav. 6, n.

—— **Parol Contract by Intestate.**]—An owner in fee entered into a verbal contract for the sale of the land, and died intestate. After his death, a conveyance was made by the heir to the purchaser, in which the contract was recited, and that administration had been granted to the heir. The heir afterwards brought in his account of the residuary personal estate, in which he included the proceeds of the sale:—Held, that the heir had adopted the contract, and that the land must be considered as converted by the intestate. *Frayne* v. *Taylor*, 33 L. J., Ch. 228; 10 Jur. (N.S.) 119; 12 W. R. 287.

—— **Parol Contract by Testator—Contract in writing by Residuary Devisee.**]—A testator agreed verbally to sell land, and received a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit:—Held, that the devisee had not adopted his testator's parol contract so as to affect a conversion relating back to the testator's lifetime. *Harrison, In re, Perry* v. *Spencer*, 56 L. J., Ch. 341; 34 Ch. D. 214; 56 L. T. 159; 35 W. R. 196.

Contract to Purchase Estate.]—Where a man had agreed to lay out money in land generally, and devised his real estate before the purchase was completed, the money agreed to be laid out was held to pass to the devisee. *Green* v. *Smith*, 1 Atk. 572.

—— **Death of Purchaser—Rescission after.**]—A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after his death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which, if not complied with might have given the purchaser a right to compensation, but would not have entitled him to annul the contract:—Held, that the heir-at-law of the purchaser was entitled to have the amount of the purchase money paid to him out of the intestate's personal estate. *Hudson* v. *Cooke* or *Cook*, 41 L. J., Ch. 306; L. R. 13 Eq. 417; 26 L. T. 180; 20 W. R. 407.

Testator contracts for a particular estate, but dies before the purchase is completed; afterwards, from the state of his affairs, the contract is dissolved; yet the purchase money shall not be sunk into his personal estate, but shall be laid out in other lands to the same uses as he had devised the land contracted for. *Whittaker* v. *Whittaker*, 4 Bro. C. C. 31.

—— **Contract not Absolute.**]—Decree upon the answer admitting a contract, and a letter offering to sell at a valuation for a conveyance on payment of the purchase money into bank by the plaintiff on a certain day: in default of payment the bill to be dismissed with costs. No binding contract until payment. The estate therefore did not pass by a previous devise, but descended to the heir. *Gaskarth* v. *Lowther*, 12 Ves. 107; 8 R. R. 310.

Contract to Sell Land — Leaseholds — Subsequent Devise of "all Leasehold Estates."]—Leaseholds were contracted to be sold in 1808, but, the evidence of the vendor's title being defective, it was agreed that evidence

of the vendor's title being defective, it was agreed that until the defect was remedied the purchaser should occupy at a rent; and that on remedy thereof and payment of purchase money, the vendor would assign to the purchaser. The vendor in 1812 bequeathed "all his leasehold estates," and died before completion of the purchase:—Held, that the leaseholds did not pass under this bequest. *Gould* v. *Trague*, 5 Jur. (N.S.) 116; 7 W. R. 84.

—— **Death of Vendor before Completion—Defective Title.**]—Testator at the date of his death had contracted to sell certain lands for 3,000*l.* After his death the trustees found that no title could be made to part of the lands, and rescinded the contract. They then put up the lands to which they had a title for sale by auction, and sold them for 2,500*l.* to the same purchaser:—Held, that there was no conversion by the testator's contract of the property comprised therein. *Thomas, In re, Thomas* v. *Howell*, 56 L. J., Ch. 9; 34 Ch. D. 166; 55 L. T. 629. See also *Lysaght* v. *Edwards*, 45 L. J., Ch. 554; 2 Ch. D. 499; 34 L. T. 787; 24 W. R. 778.

ii. *Option to Purchase.*

Lease with Option to Purchase—General Devise of Lessor's Realty—Exercise of Option after Testator's Death—Conversion.]—A. makes a lease to B. for seven years, and on the lease is indorsed an agreement that if B. shall, within a limited time, be minded to purchase the inheritance of the premises for 3,000*l.*, A. would convey them to him for that sum. B. assigns to C. the lease and the benefit of this agreement. A. dies, and, by will, gives all his real estate (generally) to D., and all his personal estate to E. and D. equally. Within the limited time, but after the death of A., C. claims the benefit of the agreement from D., who accordingly conveys the premises to C. for 3,000*l.* This sum of 3,000*l.*, when paid, is part of the personal estate of A., and E. is entitled to one moiety of it as such. *Lawes* v. *Bennett*, 1 Cox, 167; 1 R. R. 10. S. P., *Townley* v. *Bedwell*, 14 Ves. 591. But see *Graves, In re*, 15 Ir. Ch. R. 357.

—— **Landlord and Tenant—Fire Insurance.**]—Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the demised buildings were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase:—Held, that under the circumstances the tenant had no claim to the insurance money. *Edwards* v. *West*, 47 L. J., Ch. 463; 7 Ch. D. 858; 38 L. T. 481; 26 W. R. 507.

There is no conversion of the estate, as between the person giving and the person exercising an option to purchase, from any date earlier than the exercise of the option. *Lawes* v. *Bennett*, 1 Cox, 167, considered. *Ib.*

Lease for Lives Renewable—Option to fine down Rent.]—Where C. made a lease for lives renewable for ever, reserving the yearly rent of 20*l.*, and thereby covenanted that if the lessee, his heirs or assigns, should be minded to fine down the said rent, it should be released on payment of 300*l.*:—Held, that the said sum of 300*l.*, being paid after the death of C., was personalty, and should go not to his heir but to his executor. *Crofton, In re*, Ir. R. 1 Eq. 204.

Lease with Option of Purchase — Exercise after Lessor's Death.]—Under an agreement to lease real estate, the tenant was to have the option of purchasing the premises at the expiration of the term, or sooner, if the lessor should wish to dispose thereof. The lessor died, and at the expiration of the term the lessee claimed to be entitled to a conveyance, which was executed:—Held, that the realty was converted, and the purchase money belonged to the personal representatives of the lessor. *Collingwood* v. *Row*, 26 L. J., Ch. 649; 3 Jur. (N.S.) 785; 5 W. R. 484.

—— **Option to Purchase after Death of Lessor — Intestacy.**] — The principle of *Lawes* v. *Bennett* (1 Cox, 167), that where an option of purchase of real estate given by contract is not exercised until after the death of the creator of the option, the proceeds of the sale form part of his personal estate, applies to the case of an intestacy, and notwithstanding the fact that the option is exercisable only after the death of the creator of such option. *Isaacs, In re, Isaacs* v. *Reginall*, 63 L. J., Ch. 815; [1894] 3 Ch. 506; 8 R. 660; 71 L. T. 386; 42 W. R. 685.

—— **Specific Devise.**]—Where lands let on lease, subject to an election in the lessee to purchase the fee simple, were devised by the specific description, not in general terms, and after the death of the testator the lessees elected to purchase:—Held, that the purchase money did not fall into the residue of the personal estate, but went to the specific devisees of the land. *Drant* v. *Vause*, 1 Y. & C. C. C. 580; 11 L. J., Ch. 170; 6 Jur. 313.

A testator devised an estate, N., by his will, the limitations of which he varied by a codicil, both dated prior to the Wills Act, and afterwards he entered into a contract by which he agreed to give, after his death, to A. alone the option of purchasing the estate N., and also another estate W., upon the purchase of which the contract for an option was entered into. By a second codicil, made after the Wills Act, reciting the purchase of the estate W., he devised that estate. A. enforced a sale to him by suit against the devisees of the testator:—Held, that the purchase moneys of estates N. and W. devolved according to the limitations of the will, which would have been applicable to these estates in case there had been no sale. *Emuss* v. *Smith*, 2 De G. & Sm. 722.

Where a testator, after having by his will specifically devised real estate, subsequently made a codicil confirming his will, but not in terms referring to his real estate, and also on the same day (but whether before or after the execution of the codicil did not appear) executed a lease of the real estate so devised, giving the lessee an option to purchase the same, and such option was exercised after the testator's death:—Held, that there was sufficient indication of intention on the part of the testator to take the case out of the rule established by *Lawes* v. *Bennett* (1 Cox, 167), and that the proceeds of sale of the real estate went to the specific devisee, and did not form part of the testator's residuary estate. *Emuss* v. *Smith* (2 De G. & Sm. 722) followed. *Pyle, In re, Pyle* v. *Pyle*, 64 L. J., Ch. 477; [1895] 1 Ch. 724; 13 R. 396; 72 L. T. 327; 43 W. R. 420.

Where, after making a will devising a specific estate and bequeathing the personal residue to other persons, a testator entered into a contract, giving an option of purchase over part of the estate, which option was exercised after the death:—Held, that the property was converted from the date of the exercise of the option, and went to the residuary legatees. *Weeding* v. *Weeding*, 1 John. & H. 424.

iii. *Statutory Powers.*

Purchase under — Death of Testator after Notice given and Price agreed.]—The common council of London being empowered by a local act of parliament to take a freehold house belonging to A. for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. The amount of the purchase-money was afterwards agreed upon, and an abstract of A.'s title was sent to the common council. In April, 1841, he died, having by his will, dated in 1837, devised his real estate to B., and his residuary personal estate to C.:—Held, that the purchase money (which after A.'s death was paid into court under the act) was to be considered, not as part of his real, but as part of his personal, estate, and that all his debts, &c., having been paid, it belonged to his residuary legatee. *Hawkins, Ex parte*, 13 Sim. 569.

Settled Land.]—Money paid by certain commissioners under act of parliament for land of which A. was seised in fee in remainder, and which money had been invested in 3*l.* per cent. annuities:—Held, to be real not personal estate. *Stewart's Trusts, In re, Cramer, Ex parte*, 1 Sm. & G. 32; 22 L. J., Ch. 369; 16 Jur. 1063; 1 W. R. 17.

Under the compulsory powers of the 5 & 6 Will. 4, c. 69, a poor-law union compulsorily took lands, and paid the purchase-money into court. On the petition of the tenant for life, the amount was invested in stock, and the dividends were, under an order of the court, paid to her for life. On her death, intermediate limitations having failed, her heir at law, to whom the ultimate remainder was limited, petitioned the court that the stock might be paid out to him:—Held, that the stock continued real estate, and the money was ordered to be paid to him. *Horner's Estate, In re*, 5 De G. & S. 483; 22 L. J., Ch. 369; 16 Jur. 1063.

By a marriage settlement freehold estate and some personal estate were conveyed and assigned to trustees, upon trust on the request of the husband and wife during their joint lives, and after the death of either upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase money, in case the same should be sold upon trust for the husband for his life, and after his decease upon trust for the wife for her life, and, after the death of the survivor of them, to convey the estate unless sold, and assign the personal estate unto the children and grandchildren of the marriage born in the lifetime of the husband and wife, as they or their survivor should appoint, and in default of appointment, unto and amongst the children of the marriage equally. The estate was taken by the corporation of London under the London Bridge Act (4 Geo. 4, c. 50), and, the price having been fixed by a jury, the purchase money was paid into court under the act,—the trustees of the settlement not making out a satisfactory title:—Held, that in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the act of parliament only, and therefore that the purchase money was impressed with the character of real estate under the thirty-fifth section of the London Bridge Act; also that if there had been any conversion, it must have been by the conjoint operation of the articles and settlement, and of the act of parliament, but that the settlement and act of parliament could not in this case have any conjoint operation. *Taylor's Settlement, In re*, 9 Hare, 596.

Stock produced by a real estate under the London Dock Act (39 & 40 Geo. 3, c. 47), subject to jointure, considered as real estate, the original character not having been displaced by a complete conversion. *Shard* v. *Shard*, 14 Ves. 348.

Land subject by Will to Option of Purchase.]—A testator directed his trustees to offer certain land to his son at a specified price on the death of his widow. The land was purchased by a railway company under its act for more than twice the specified sum:—Held, that the son's right of pre-emption was not affected by the purchase, and the son was entitled to the difference. *Cant's Estate, In re*, 4 De G. & J. 503; 28 L. J., Ch. 641; 6 Jur. (N.S.) 183; 7 W. R. 624.

Where Owner Incapacitated.]—In the absence of special clauses for that purpose, the effect of a railway act is not to alter the course of devolution of property without the consent of the owner; and, therefore, if a company, by virtue of its act, contract with an incapacitated person for the purchase of lands, the money is to be considered as real, and not as personal, estate. *Midland Counties Ry.* v. *Oswin*, 1 Coll. C. C. 80; 3 Railw. Cas. 497; 13 L. J., Ch. 209; 8 Jur. 138.

The Commissioners of Woods and Forests took real estate for public purposes from incapacitated persons. They paid the purchase-money into the Court of Exchequer. That court made an order for its investment at the cost of the commissioners. The stock was afterwards transferred into the Court of Chancery under the 5 Vict. c. 7. Upon an application by the parties who would have been entitled to the real estate:—Held, that they were entitled to a transfer of the stock, and that the costs of the petition and transfer must be paid by the commissioners. *Robertson, In re*, 26 L. J., Ch. 349.

Lands Clauses Act—Character of Purchase-Money under.]—The purchase-money of lands taken under the Lands Clauses Act, when paid into court under the 69th section, is realty; when under the 76th section, it is personalty. *Harrop's Estate, In re*, 3 Drew. 726; 26 L. J., Ch. 516; 3 Jur. (N.S.) 380; 5 W. R. 449.

—— **Purchase of Infant's Real Estate.**]—Purchase money paid into court by a railway company under s. 69 of the Lands Clauses Act, 1845, for land of which an infant is absolutely seised in fee, remains impressed with the character of the real estate, and on the death of the infant descends to his heir-at-law. *Kelland* v. *Fulford*, 6 Ch. D. 491; 25 W. R. 506.

Compulsory Powers — Death of Landowner after Agreement as to Price, but not as to

quantum of Land to be taken.]—An agreement was entered into between a landowner and a company having compulsory powers to take land, and if the company should make its line, it would pay for such, if any, of the land as it should so take at the rate of 500*l.* per acre; and in consideration of such agreement, the landowner agreed that he would permit the company to take such land under the authority of its act on those terms. The landowner died, and then the company took some of his land:—Held, that the money belonged to his real, and not to his personal, representatives. *Walker's Estate, In re*, 1 Drew. 508; 22 L. J., Ch. 888; 17 Jur. 706; 1 W. R. 378.

—— **Death of Testator after Agreement, but before Completion.**]—The owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company. The owner having died before the completion of the purchase without having altered his will:—Held, that his executors, and not the devisee, were entitled to the purchase money, and to the compensation for severance; and, secondly, that the railway company was bound to pay the costs of the infant devisee. *Manchester and Southport Ry., In re*, 19 Beav. 365.

—— **Notice to Treat, Effect of.**]—Where a notice to treat for the purchase of property was served by a railway company on the owner of such property, and nothing further was done until after the death of the owner, who had specifically devised the property comprised in the notice to treat:—Held, first, that the mere notice to treat served by the company did not constitute a contract by the owner for the sale of the property. *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; 30 L. J., Ch. 578; 7 Jur. (N.S.) 595; 4 L. T. 199; 9 W. R. 497.

Held, secondly, that if it did, a bill for specific performance would not lie against the owner; and, therefore, that the notice to treat did not effect a conversion of the property comprised in the notice. *Ib.*

A public body gave notice to the owner of land of their desire to treat with him under their parliamentary powers for the purchase of it. He offered to take 1,250*l.* for the land, and afterwards died intestate, nothing further having been then done on either side. The purchasers subsequently proceeded with the transaction, and paid the money into court. Upon a question whether the heir-at-law or the administrator of the intestate was entitled to the money:—Held, that as the purchase-money had not been finally ascertained in the lifetime of the intestate, that there was no contract in existence at his death; that there had been no conversion of the land into money in his lifetime; and that the heir-at-law was entitled to the money. *Arnold, Ex parte, Battersea Park Acts, In re*, 32 Beav. 591; 8 L. T. 623; 11 W. R. 793.

A railway company gave notice to a landlord to treat for the purchase of land. The company was let into possession under a verbal arrangement. The price had not been fixed when the landowner died:—Held, that there was no conversion. *Righton* v. *Righton*, 36 L. J., Ch. 61.

—— **Valuation.**]—W., by will, in 1859, bequeathed leaseholds to his sister A., and the residue of his estate to his sister E., and in 1865 was served with a notice on the part of a railway company to treat for the purchase, under the provisions of its acts, of the leaseholds for the purposes of the railway. Surveyors appointed by W. and the company, but not in writing, settled the value of the leaseholds, and the former verbally agreed to accept the sum named. W. died in February, 1869, the matter remaining in abeyance till April, 1870, when the sale was completed by his executor:—Held, that the notice to treat, followed by the valuation of the surveyors, was, notwithstanding the Statute of Frauds, a valid contract; that there had been an ademption of the bequest to A.; but that she was entitled to the rents which had accrued between the death of the testator and the completion of the purchase by the company. *Watts* v. *Watts*, L. R. 17 Eq. 217.

—— **Award as to Value.**]—Where a vendor of freehold land died after an award had been made under the compulsory clauses of the 8 & 9 Vict. c. 18, and the amount of the award had been paid into court, the personal representative of the vendor was held entitled to the amount so paid in as part of the personal estate of the testator. *Wootton, In re*, 1 N. R. 193; 7 L. T. 620.

Real Estate taken under Compulsory Powers, Proceeds of—"Moneys" or "Real Estate" of Testator.]—A testator gave to his wife all the residue of his personal estate, including all moneys to which he was entitled under his father's marriage settlement, and declared it was not his intention to make any disposition of his real estate. He was entitled, under his father's marriage settlement, to consols, the proceeds of the sale of real estate, taken under compulsory powers, and paid into court:—Held, that this sum was not included in the moneys bequeathed, but went as real estate to the heir. *Skeggs, In re*. 11 Jur. (N.S.) 274; 12 L. T. 166; 13 W. R. 512. S. C., on appeal, 2 De G. J. & S. 533; 13 W. R. 567.

Contract for Purchase of Settled Estate with Tenant for Life and Ultimate Owner in Fee.]—A. being tenant for life of real estate, under a marriage settlement, and ultimate owner in fee, subject to intervening interests, contracted to sell the estate to a railway company absolutely. A., by his will, made previous to the contract, had specifically devised this estate, and there was no general devise in the will. No conveyance having been executed to the company, it paid interest upon the money to the tenant for life; and upon his death, and failure of all the intervening interests, the company paid the principal and arrears of interest into court under its special act, the clauses of which correspond with the Lands Clauses Act:—Held, that there was no conversion of the real estate; that the specific devise failed; and that the purchase money descended to the heir of A., and the devisees under the will of the heir were entitled. *Bagot, In re*, 31 L. J., Ch. 772; 6 L. T. 774; 10 W. R. 607.

Settlement to such uses as D. should appoint—Contract for Sale to Railway Company—Power Executed by.]—Under a settlement lands stood limited to such uses as D. should by deed appoint, and subject thereto to the use of D. and the heirs of his body, with remainders over. D. was also absolutely entitled in fee to other lands. A rail-

way company required part both of the settled estate and of the lands to which D. was absolutely entitled. By an agreement, not under seal, made between D. and two of the directors of the company, the parties thereto bound themselves to abide by the determination of the arbitrators and umpire therein named as to purchase money and compensation to be paid. The schedule comprised the lands required by the company, without any distinction as to the titles under which they were held; and a single sum was awarded to D. as the purchase money for the whole thereof. Before any conveyance was executed, D. died:—Held, that the agreement operated in equity as an execution of the power of appointment in the settlement; and that the purchase money was payable to the legal personal representative of D. as part of his personal estate. *Dykes, In re*, L. R. 7 Eq. 337; 20 L. T. 292; 17 W. R. 658.

b. Mortgages.

Power of Sale—Trust of Surplus Produce.]—Mortgage deed containing power of sale, and that surplus of produce shall be paid to mortgagor, his executors, &c., if sale takes place in lifetime of mortgagor, surplus is personal estate; but if after his death, it is real estate, as equity of redemption descends to heir-at-law. *Wright* v. *Rose*, 2 Sim. & S. 323; 25 R. R. 209.

Sale after Mortgagor's Death.]—Real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and, upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to the mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee should enter into possession of the premises, and, at his discretion, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs) to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the plaintiffs for life, with remainder over in tail:—Held, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. *Bourne* v. *Bourne*, 2 Hare, 35; 11 L. J., Ch. 416; 6 Jur. 775.

Sale during Mortgagor's Life—Surplus Paid into Court.]—A mortgagee, in pursuance of a power in his mortgage deed, sold the real estate comprised therein and paid the surplus moneys into court to the credit of the mortgagor. The moneys were not claimed by the mortgagor during her lifetime:—Held, that her administrator was entitled to have the fund in court paid out, although the application was opposed by the heir of the mortgagor, upon the ground that the mortgagor, at the time of executing the mortgage, was not of sound mind, and that an ejectment had been brought by the heir against the purchaser of the property. *Smith, In re*, 7 Jur. (N.S.) 903; 9 W. R. 799.

Trust of Surplus for Mortgagor, his Executors, Administrators, or Assigns.]—In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be repaid by a given day for the borrower, his heirs or assigns; but in case default should be made, then upon trusts for sale, and the trusts of the purchase-money were declared to be for payment of the principal money, interest, and costs, and subject thereto for the borrower, "his executors, administrators, or assigns." Default having been made:—Held, that the trust of the surplus being for the borrower, "his executors, administrators, or assigns," and not for him, "his heirs or assigns," the deed operated to convert the property as between his real and personal representatives. *Underwood, In re*, 3 K. & J. 745.

A. mortgaged real estate to B, and gave B. a power of sale, and the trusts of the surplus purchase-moneys were declared to be for A., his executors, administrators, and assigns. A. died. After A.'s death the estate was sold under the power of sale:—Held, that A.'s real, and not his personal representatives, were entitled to the surplus purchase-money. *Clarke's Trusts, In re*, 22 L. J., Ch. 230.

Inconsistency between Reservation of Equity of Redemption and Trust of Surplus Proceeds.]—By a marriage settlement land belonging to the husband was conveyed, for making a provision for the wife and the issue of the marriage, to such uses as the husband and wife should by deed jointly appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to uses in favour of the children of the marriage, with ultimate remainder to the use of the heirs and assigns of the husband. A right of entry was given to the trustees in the event of the death of the parents during the minority of the children. There was no settlement of any money, and no power of sale. The husband and wife exercised their joint power of appointment, and mortgaged the property comprised in the settlement. There was a proviso for redemption which provided that, on payment of the mortgage debt, the mortgagee should reconvey the property to the uses of the settlement. The mortgage contained a power of sale which provided that the mortgagee should pay over the surplus proceeds of the sale to the husband, "his heirs, executors, administrators, and assigns." The husband died, and the mortgagee exercised his power of sale, and after payment of the mortgage debt, interest, and expenses, had a surplus in his hands:—Held, that there was no resulting trust of the surplus, and that the husband's legal personal representative was entitled to the fund, and not his heir-at-law. *Jones* v. *Davies*, 47 L. J., Ch. 654; 8 Ch. D. 205; 38 L. T. 710; 26 W. R. 554.

Right to Interest—Death of Mortgagee under Contract to Purchase Estate.]—Where a testator, having contracted to purchase an estate, and taken a transfer of a mortgage on it, specifically devised it:—Held, that the devisee was not entitled to the interest on the mortgage between the testator's death and the completion of the purchase. *Puxley* v. *Puxley*, 1 N. R. 509; 8 L. T. 570.

c. Order for Sale.

Power of Sale—Consent of Trustee—No Sale.]—Where parties interested under a will which gave to the devisee in trust a discretion as to whether he should convert the realty or not, had filed a bill to carry the trusts of the will into effect, and upon consent of the trustee the court had directed a sale of a certain freehold

estate; but, after various attempts to sell, no sale had taken place, and the master to whom the matter had been referred had reported against the expediency of a sale:—Held, that the nature of the property was not altered by such proceedings. *Polley* v. *Seymour*, 2 Y. & C. 708; 7 L. J., Ex. Eq. 12; 1 Jur. 951.

Sale under Decree for raising Charge — Surplus.]—A party seised in fee of real estate, subject to a term for raising charge, devised in general terms, sufficient to comprise the estate charged, part thereof was afterwards sold under a decree for raising the charge, and the testator afterwards sold the reversion, and part of the purchase-money remained in court, after paying off the charge, until after the death of the testator:—Held, that such surplus still retained the character of real estate. *Jermy* v. *Preston*, 13 Sim. 356. See also *Scott* v. *Scott*, 9 L. R., Ir. 367. But quære, see *Steed* v. *Preece*, post.

Administration Suit — Sale — Surplus after Payment of Debts.]—Subject to the debts, real estates were devised to A. They were all sold in an administration suit, to which the devisee was a party. After payment of the debts, there remained a sum in court at the death of the devisee:—Held, that it was of the character of real estate, and passed to her heir. *Cooke* v. *Dealey*, 22 Beav. 196. *But see next case.*

Suit for Administration of Trusts—Sale under Decree for Infants' Real Estate.]—It a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow, and there is no equity in favour of the heir or anyone else to take the property in any other form than that in which it is found, and the whole question to be considered is, whether the estate has been rightfully or wrongfully sold. *Jermy* v. *Preston*, 13 Sim. 356, and *Cooke* v. *Dealey*, 22 Beav. 196, doubted. *Steed* v. *Preece*, 43 L. J., Ch. 687; L. R. 18 Eq. 192; 22 W. R. 432.

Presumption of Lawfulness of Order.]—The court must be assumed and presumed to have acted rightly and lawfully, and not to have done anything that it could not rightfully and lawfully do. *Smith, In re*, L. R. 10 Ch. 79; 23 W. R. 297.

Sale for Purpose of Paying off Mortgage—Power of Sale—Consent of Beneficiaries—Surplus.]—A brother gave the residue of his real and personal estate to his three sisters as tenants in common, and he empowered his executor to sell all or any part of his real estate, and to stand possessed of the clear proceeds upon trust to pay his debts, funeral and testamentary expenses, and legacies, and to hold the residue in trust for his said three sisters as tenants in common, and to pay and divide the same accordingly. A portion of the real estate was sold under an order of the court, with the concurrence of the sisters, for the purpose of paying off a mortgage on another part of the estate. The purchase-money was paid into court. The mortgage did not exhaust the proceeds of the sale:—Held, that the conversion was absolute, and that the surplus was personal estate. *Crowther* v. *Bradney*, 28 L. T. 464.

Order for Sale—Death of Party before Sale—Sale under Decree.]—When, in an administration suit asking also for partition of real estate, the court directed a sale, but before it was effected one of the parties interested in the real estate died:—Held, that the estate was sufficiently converted, and the estate having been sold, the share of the deceased beneficiary passed to his legal personal representative. *Steed* v. *Preece*, supra, followed. *Arnold* v. *Dixon*, L. R. 19 Eq. 113; 23 W. R. 314.

—— **Power of Sale in Trustees—Administration Action.**]—An absolute order for sale made within the jurisdiction of the court in an administration suit operates as a conversion from the date of the order and before any sale has taken place. *Hyett* v. *Mekin*, 53 L. J., Ch. 241; 25 Ch. D. 735; 50 L. T. 54; 32 W. R. 513.

—— **Death of Party before Sale—Part only Sold.**]—One of several tenants in common of an unincumbered estate, who had presented a petition as owners and obtained an absolute order for sale, died intestate before any sale. Part was afterwards sold, and part remained unsold.—Held, that the order for sale operated as conversion into personalty of the share of the deceased in the estate. *Beamist's Estate, In re*, 27 L. R., Ir. 326.

d. Act of Parliament.

Abolition of Slavery Act—Compensation.]—The compulsory manumission or sale of slaves, effected by the Abolition of Slavery Act, 3 & 4 Will. 4, c. 73, so impressed slaves with the character of personal estate from the passing of the act, that the compensation money for slaves passed under the will of a testator made after the passing of the act, and who died before the period of manumission had arrived, although the will was not attested so as to pass real estate. *Richards* v. *Att.-Gen. for Jamaica*, 6 Moore, P. C. 381; 13 Jur. 197.

It is difficult to distinguish between the case of a conversion by a voluntary agreement for sale, and a conversion effected by a sale which the legislature has rendered compulsory on the vendor, and which acts as a conveyance of the vendor's interest. *Ib.*

Irish Church Act, 1869—Abolition of Advowsons—Compensation.]—A testator made a devise of advowsons in Ireland. The Irish Church Act, 1869, 32 & 33 Vict. c. 42, was afterwards passed abolishing advowsons and giving their owners a right to compensation. The testator after the passing of the act made a codicil to his will and then died. Compensation for the advowsons was claimed on behalf of the devisee, and was ascertained and made payable to the executors of the testator:—Held, that the compensation money was payable to the executors of the testator, and not to the devisee of the advowsons. *Frewen* v. *Frewen*, L. R. 10 Ch. 610; 33 L. T. 43; 23 W. R. 864.

Railway Act — Extinguishment of Freehold Rights in Shares of a Company by.]—After a devise of "all my real estate" upon certain trusts, the testator appointed his executor, and gave to him "all my railway, canal, and navigation shares, moneys, and personal estate," for payment of debts and legacies, and gave "the residue and overplus of my personal estate and effects," after the payments therein before

mentioned, unto C., her executors, and administrators absolutely. The navigation undertaking, in which testator held two shares, became vested in a railway company under an act of parliament which provided for the extinguishment of the freehold rights in the shares upon a conveyance to the railway company by the holder, who was to be thereupon entitled to receive shares in the railway company. No conveyance of the shares to the railway company was executed by the testator, and they were at his death standing in his name in the share register of the navigation company in possession of the railway company:—Held, that the effect of the act of parliament was to convert the shares into personal estate. *Cadman* v. *Cadman*, 41 L. J., Ch. 468; L. R. 13 Eq. 470; 20 W. R. 356.

4. Effect of Disability.

a. Infant's Property.

Principle.]—In all cases the court will so guard the property of an infant, as that the conversion of it shall not change the nature of it, between the representatives. *Ware* v. *Polhill*, 11 Ves. 278; 8 R. R. 144.

Infant's Personalty laid out in Real Estate.]—Upon the application to lay out part of an infant's money in land, if he dies before twenty-one, or disapproves of the purchase, the property will not alter. *Sergison* v. *Sealey*, 2 Atk. 413.

Lands purchased by guardian for infant, during his minority, considered as personalty. *Gibson* v. *Scudamore*, Dick. 45.

An executor in trust for an infant of a lease for 99 years, determinable on three lives, on the lord's refusing to renew but for lives absolutely, complies with the lord, and changes the years into lives; on the infant's dying under twenty-one and intestate, this shall be a trust for his administrator, and not for his heirs. *Witter* v. *Witter*, 3 P. W. 99.

Personal property of infant ordered to be laid out in land, though there were no directions in will for changing nature of it; the estate to be conveyed in trust for him, his executors, &c., till twenty-one, and after to him and heirs. *Ashburton* v. *Ashburton*, 6 Ves. 6; 5 R. R. 201.

Purchase of Mother's Jointure.]—Infant entitled in remainder, under a reference to the master and order of court, purchases her mother's jointure, and having attained twenty-one, receives one year's rent and dies:—Held, the purchase was to be considered real estate, though made during infancy. *Inwood* v. *Twyne*, Ambl. 417; 2 Eden, 152.

Money paid for Replacing burnt Tenement—Infant Tenant in Tail.]—A sum of 96*l.* paid to guardian of an infant, tenant in tail, for building a copyhold tenement that had been burnt down, but which had never been so applied during the infant's life:—Held, to belong to the succeeding remainderman in tail, subject to a deduction of interest upon a larger sum at which the loss was computed, such interest to belong to the personal representatives as a compensation for the loss of the rents and profits sustained by the infant, who could not alien. *Rook* v. *Worth*, 1 Ves. sen. 460.

Proceeds of Timber cut by Guardian—Infant Tenant in Tail.]—Where guardian of an infant tenant in tail cut down timber, the money for it shall be personal estate of the infant; but, if the infant has the fee, it shall be considered as real estate. *Tullit* v. *Tullit*, Ambl. 370; Dick. 322.

Proceeds of Timber cut and sold by Order of Court—Infant entitled in Fee, with Executory Devise over.]—An estate being devised to A. in fee, with an executory devise over in the event, which happened, of his dying under twenty-one without issue:—Held, that a fund produced by the sale of timber on the estate, cut and sold by order of the court in the lifetime of A., was the personal property of A. *Dyer* v. *Dyer*, 34 Beav. 504; 34 L. J., Ch. 513; 12 L. T. 442; 13 W. R. 732.

Land subject by Will to Option of Purchase—Purchase under Compulsory Powers during Infancy of Beneficiaries—Shares of Beneficiaries dying under Age.]—A testator gave to his children, in succession, the option of purchasing his real estate, and in the meantime the rents were to be divided equally between them. Before an option had been exercised, and while some of the children were infants, a corporation purchased part of the property for public improvements under compulsory parliamentary powers:—Held, that the shares of children who had died infants remained real estate until the option had been exercised. *Hardy, Ex parte*, 30 Beav. 206.

Lease with Option of Purchase—Exercise after Lessor's Death—Infancy of Lessor's Heir.]—A lease for 21 years contained a proviso, that if the lessees should be desirous of purchasing the fee, and should give to the lessor, his heirs or assigns, notice of such desire, they should be entitled to become the purchasers of the premises at the price named, and the lessor, his appointees, heirs, or assigns, would, on payment of the purchase money, do all acts for conveying the premises to the use of the purchasers. The lessor died, having devised all his real estate to trustees, who disclaimed, and leaving an infant heir. The lessees having served on the infant and his guardian notice of their election to purchase:—Held, that such notice was effectually served, and constituted a valid and binding contract, which the court would not refuse to carry out, on the ground that the infant could not give a discharge for the purchase-money. *Woods* v. *Hyde*, 31 L. J., Ch. 295; 6 L. T. 317; 10 W. R. 339.

Lands Clauses Act, s. 69—Purchase of Infant's Real Estate.]—Purchase money paid into court under s. 69 of the Lands Clauses Act, 1845, for land of which an infant is seised in fee remains real estate. *Kelland* v. *Fulford*, 6 Ch. D. 491; 25 W. R. 506.

Suit for Administration of Trusts—Sale under Decree of Infant's Real Estate.]—In a suit for the division of real estate devised in trust for tenants in common in tail male, one of whom was an infant, the court declared the infant's costs a charge on his share, and, being of opinion that a sale would be for the benefit of the infant, and the adult consenting, ordered a sale of the entirety. After sale the infant died:—Held, as between his real and personal representatives, that the surplus which remained in court after payment of costs was converted into personalty.

Steed v. *Preece*, 43 L. J., Ch. 687; L. R. 18 Eq. 192; 22 W. R. 432.

Partition Suit—Sale under Decree—Partition Act, 1868, s. 8.]—The sale of infant's real estate under a decree in a partition suit does not work a conversion. *Foster* v. *Foster*, 45 L. J., Ch. 301; 1 Ch. D. 588; 24 W. R. 185.

A decree for the sale of infant's real estate having been made in a partition suit, the property was sold, and the proceeds of sale were paid into court. They afterwards attained twenty-one, but died intestate before the money was distributed, leaving their father their heir-at-law and sole next-of-kin. He took out administration to each of them, and then died intestate:—Held, that the father took his children's shares of the money as their heir-at-law. *Mordaunt* v. *Benwell*, 51 L. J., Ch. 247; 19 Ch. D. 302; 45 L. T. 585; 30 W. R. 227.

See also A. 3, a. (ii.), (iii.), c. ante; C. 2, a. post.

b. Lunatic's Property.

Lunacy Act, 1890 (53 *Vict. c.* 5), *p. iv. s.* 123. *provides that a lunatic's interest in property is not to be altered by any disposition thereof under the powers of the act.*

Lunatic—Money secured on Scotch realty to be laid out in English land—Proceeds of Heritable Jurisdiction in Scotland.]—A sum devised to be laid out in land in England, in trust for A., with remainders over, was, by act of parliament, secured on A.'s estate in Scotland during his minority. A. attained twenty-one, and became a lunatic:—Held, it might be called in, and laid out pursuant to the trust, and that it was to be considered as if it were a real estate in England, the interest thereon, however, to be considered as personal estate in England. Another sum in the exchequer in England, arising from the sale of heritable jurisdiction in Scotland, considered as real estate in Scotland. *Annandale* (*Marquis*) v. *Annandale* (*Marchioness*), 2 Ves. sen. 381.

Investment by Committee of Lunatic—Personalty in Land.] — Committee of a lunatic invests part of his personal estate in the purchase of lands in fee. This shall be taken as personal estate, and in case of his death shall go to the next-of-kin, and not to his heir. *Awdley* v. *Awdley*, 2 Vern. 192.

Railway Company—Contract with Imbecile.]—A railway company having powers to contract with incapacitated persons for the purchase of lands, and acquire a title to the fee simple, upon payment of the price into the bank, and having so contracted with a person of weak mind who died before payment of the money:—Held, the nature and quality of the estate not changed in point of devolution. *Midland Counties Ry.* v. *Oswin*, 1 Coll. C. C. 74; 3 Railw. Cas. 497; 13 L. J., Ch. 209; 8 Jur. 138.

Compulsory Purchase of Land of Lunatic not so found.]—Sect. 7 of the Land Clauses Consolidation Act, 1845, does not authorise a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorises the committee of a lunatic to sell. A public body having given notice under their statutory powers to take land belonging to a lady of unsound mind not so found, the value of the land was ascertained by two surveyors, one appointed by an uncle of the lady, who purported to act on her behalf, and the other by the public body; the sum thus ascertained was paid into court, and the public body took possession of the land. The lady afterwards died intestate, being still of unsound mind, and her heir-at-law petitioned for payment of the money to him:—Held, that the land had never been converted into personalty, and that the heir was entitled to the money. *Flamank, Ex parte*, post, dissented from. *Tugwell, In re*, 53 L. J., Ch. 1006; 27 Ch. D. 309; 51 L. T. 83; 33 W. R. 132.

Money paid into court by a railway company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death, not to be reinvested in or considered as land, but to be paid to his executors. *Flamank, Ex parte, East Lincolnshire Railway Act, In re*, 1 Sim. (N.S.) 260.

Lunatic's Real Estate—Partition Act, 1868, s. 8.]—By an order made in a partition suit a share of real estate belonging to a lunatic was sold, and the proceeds paid into court to the credit of the matter of the lunacy, but they were not carried to a real estate account. The lunatic died intestate, and his administrator claimed the money as part of the lunatic's personal estate:—Held, that the money retained the character of real estate, and passed to the lunatic's heir-at-law. *Barker, In re*, 50 L. J., Ch. 334; 17 Ch. D. 241; 44 L. T. 33; 29 W. R. 873.

Proceeds of Timber on Estate of Lunatic.]—Timber on estate of lunatic, cut under order of court, sold, and produce paid into the bank on account of the lunatic; after his death on petition by his heir for the money, Lord Chancellor was of opinion that the court may do it for lunatic's benefit, but only on pressing occasions; that when property is converted, equity will recall it for the representative if done by breach of trust, not if by accident, the court, or the tort of a stranger. *Bromfield, Ex parte*, 1 Ves. 455; 2 R. R. 126.

There is no equity between the real and personal representatives, after the death of a lunatic, to have property which was altered by the court restored; therefore the produce of timber on estate of a lunatic, cut and sold by order, on report that it would be for his benefit, is personal assets. *Oxenden* v. *Compton* (*Lord*), 2 Ves. 69; 2 R. R. 131.

If a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets; and the heir has no action against the personal representative, nor is there any equity between them on the subject. *Ib.*

Timber on a lunatic's estate, ex parte paternâ, cut and applied in discharge of a mortgage on his estate ex parte maternâ: no equity between the heirs. *Phillips, Ex parte*, 19 Ves. 123; 12 R. R. 151. See also *S. C., ib.* 118.

See also A. 3, a. (iii.), c. ante; C. 2, b. post.

c. Married Woman's Property.

Real Estate—Partition Action—Sale—Partition Act, 1868, s. 8.]—In a partition suit a sale

was ordered of real estate, to seven-eighths of which the plaintiff was entitled, and to one-eighth of which a married woman was entitled. It was then arranged between the parties that the plaintiff should purchase her share, and by an order of the court it was ordered that the plaintiff should pay 1.200*l.* as the purchase money of such share into court, and that on such payment the plaintiff should be let into possession, and all proper parties sign and execute a proper conveyance. The plaintiff paid the purchase money, but then, before any conveyance was executed, she died:—Held, that the purchase money of her share must be treated as real estate, *Mildmay* v. *Quicke*, 46 L. J., Ch. 667; 6 Ch. D. 553; 25 W. R. 788.

Partition—Partition Act, 1876, s. 6—Separate Examination.]—In a partition action, an order for sale of a married woman's share of real estate, when made with her consent or at her request under s. 6 of the Partition Act, 1876, operates as a conversion of such share into personal estate. *Wallace* v. *Greenwood*, 50 L. J., Ch., 289; 16 Ch. D. 362; 43 L. T. 720.

Where, in a partition action, the share of a married woman in the proceeds of sale of real estate is under 200*l.*, the court will order the same to be paid out to her upon her separate receipt and upon an affidavit of no settlement, and will dispense with her separate examination as to her election to take the money as personal estate. *Shaw, In re*, post, not followed. *Ib.*

A married woman will not be allowed to elect to take as personalty her share in the proceeds of sale of real estate sold under an order in a partition action without being separately examined either in court, in chambers, or by commission, even where her share is under 200*l.* *Shaw, In re, Topham* v. *Burgoyne*, 49 L. J., Ch. 213; 41 L. T. 670.

The share of a married woman in the proceeds of the sale of real estate devised to her in fee, which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in court to take the money as personal estate. *Standering* v. *Hall*, 48 L. J., Ch. 382; 11 Ch. D. 652; 27 W. R. 749.

Interest in Land—Land Devised on Trust for Sale—Fines and Recoveries Act (3 & 4 Will. 4, c. 74).]—Lands to be sold under a trust for sale created by will, are not, where the cestuis que trustent are married women, so absolutely personal that their husbands can give valid discharges for the proceeds. *Franks* v. *Bollans*, 37 L. J., Ch. 664; L. R. 3 Ch. 717; 18 L. T. 623; 16 W. R. 1158.

The interest of a married woman in the proceeds of real estate devised by the will under which she took such interest, upon trust for sale:—Held, to pass by her deed executed and acknowledged according to the provisions of the 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, and substituting more simple modes of conveyance, whether such interest be in possession or reversion, and whether the sale of real estate be or be not made. *Briggs* v. *Chamberlain*, 11 Hare, 69; 23 L. J., Ch. 635: 18 Jur. 56.

Though no assignment can be made of the reversionary interest of a married woman, so as to bind her, in the event of the death of her husband in her lifetime, and before it falls into possession, yet a perfect conveyance may be made by her and her husband under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 77, of a reversionary interest in the produce of real estate directed to be sold. *Tuer* v. *Turner*, 20 Beav. 560; 24 L. J., Ch. 663; 3 W. R. 583.

Appointment by Will.]—There is a distinction between a will made by a married woman under a power and when disposing of property in her own right as a feme sole. The power must be looked at to see in what character the property was held when disposed of by the testator, and where by virtue of the power it has been converted into personalty, she is in fact disposing of personalty. *Gunn, In Goods of*, 53 L. J., P. 107; 9 P. D. 242; 33 W. R. 169; 49 J. P. 72.

See also A. 3, c. ante; C. 2, c., g., post.

d. Alien's Property.

Naturalisation Act, 1870 (33 *Vict.*, *c.* 14), *s.* 2, *enacts that real and personal property of every description may be taken, held or disposed of by an alien, and the cases turning on the disability of an alien, prior to the act, to hold land are omitted as obsolete.*

Trust of Land for Alien—Naturalisation Act, 1870, ss. 2, 18.]—In March, 1862, L. and S. (the wife of an alien) conveyed land of which they were tenants in common to a trustee, upon trust to sell and stand possessed of the proceeds for L. and S. in equal shares, the share of S. to be for her separate use. In April, 1862, L. and S. entered into an agreement to allot the lands in severalty, and that the trustee should stand possessed of each such respective allotment on the respective trusts declared by the deed of March, and that nothing in the agreement should prejudice or affect any of the powers or trusts of the deed. No sale was ever effected, and S. died in 1866, having by her will given to her husband, the alien, her personal estate absolutely and a life interest in her real estates:—Held, first, that the land was not in equity converted into money. *Sharp* v. *De St. Saveur*, 41 L. J., Ch. 576; L. R. 7 Ch. 343; 26 L. T. 142; 23 W. R. 269.

Held, secondly, that the title of the alien having accrued before the passing of the Naturalisation Act, 1870, that act did not remove his disability to hold land. *Ib.*

Held, thirdly, that the trust for the alien could be enforced for the benefit of the crown. *Ib.* S. P., *Barrow* v. *Wadkin*, 24 Beav. 1; 3 Jur. (N.S.) 679; 5 W. R. 695.

5. Effect of Conversion on Devises and Bequests.

Agreement to buy Land.]—A. articles to purchase lands in trust for B., and, before any conveyance made, B., by will, directed all his freehold estate to be settled on C., and his first son, &c. The lands articled for will pass by the will. *Greenhill* v. *Greenhill*, 2 Vern. 679; Pre. Ch. 320.

In all cases where money is agreed to be laid out in the purchase of lands, for the benefit of a person and his heirs, though such person dies before the purchase is made, yet if he makes no disposition of the moneys, the benefit thereof shall go to his heirs; in the same manner as the lands would have gone, had the purchase been actually made. *Warwick (Countess of)* v. *Edwards*, 1 Bro. P. C. 207; 2 P. W. 171. See

also *Kettleby* v. *Atwood*, 1 Vern. 298; *Lancy* v. *Fitzchild*, 2 Vern. 101.

Money was to be laid out in land, to be settled to the husband for life, remainder to raise portions for younger children. The money was afterwards invested, by direction of the husband, in South Sea annuities; afterwards, by will, he devised generally all his manors, &c., to certain uses. The money in the funds must be laid out in land. *Hickman* v. *Bacon*, 4 Bro. C. C. 333.

—— **Devise of all my Estates.**]—Personal estate to be laid out in land but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession, and passed by such general words in a will as would pass land, as "all my estates, &c., whatsoever and wheresoever." *Rashleigh* v. *Master*, 1 Ves. 201; 3 Bro. C. C. 99.

—— **Gift of the "Money and Land."**]—Money under the direction to be laid out in land considered as real estate, under a general disposition, by the will of a person entitled absolutely in either shape, of the "money and land," in the absence of intention, the word "money" being answered by another fund of stock. *Biddulph* v. *Biddulph*, 12 Ves. 161.

—— **Devise of Real Estate.**]—By articles previous to the marriage of A. G. with the plaintiff, reciting her portion to be 2,800*l.*, and that the defendant as an advancement of his brother, &c., had agreed to pay 4,000*l.*, it was agreed to be laid out in the purchase of lands, or in some church, college, or other renewable lease, to be settled to the same uses as the freehold and leasehold estates, which A. G. was seised and possessed of, were appointed to be settled; the last limitation to A. G. and his heirs. The 2,800*l.* and 4,000*l.* remained in money to A. G.'s death: he by will devised all his freehold, leasehold, and copyhold lands, lying in Islington, and in Hampshire or elsewhere, to the plaintiff for life, and after her death to the defendant and his heirs; and his personal estate, after paying his debts and legacies, he gave to the plaintiff, and made her and the defendant executors. The 2,800*l.* and 4,000*l.* must be laid out in the purchase of lands of inheritance, or in church or leasehold, for the court was of opinion if there had been only a general devise of his lands, this money would certainly have passed. *Guidot* v. *Guidot*, 3 Atk. 254.

Real Estate directed to be Sold after Life Tenancy—Devise of Share.]—Testator devised a real estate to his daughter for life, and then to be sold, and the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son:—Held, that the deceased child took his share of the estate as personalty in reversion, expectant on his mother's death, and consequently that his executrix, and not his son, was entitled to it. *Elliot* v. *Fisher*, 12 Sim. 505.

Land subject by Will to Option of Purchase—Purchase under Railway Act—Effect on Option.]—Land was devised in trust for the testator's widow for life, and after her death for sale and division of the proceeds among his children equally, with a direction that the trustees should offer the land to the testator's son at a specified price upon the death of the widow. The land was purchased by a railway company, under the powers given by its act, for more than twice the specified sum:—Held, that the son's right of pre-emption was not affected by the purchase, and the son was entitled to the difference. *Cant's Estate*, *In re*, 4 De G. & J. 503; 28 L. J., Ch. 641; 6 Jur. (N.S.) 183; 7 W. R. 624.

Money liable to be Invested in Land—Fund in Court—Accumulations—Devise of Real Estate.]—Freeholds in which a lunatic was interested were taken compulsorily by a company, and the purchase-money, which, under the act of parliament, was liable to be invested in land, was paid into court, and laid out in the government funds. The existence of the fund was overlooked, and it went on accumulating. A., who became tenant in tail in possession, with immediate remainder to her in fee, devised her real estate, and bequeathed "all such capital, stock, and moneys as she should be possessed of, or interested in, at her death, in the public government, or parliamentary funds"; but she expressed no further intention as to conversion:—Held, that the principal fund passed as real estate, and the accumulations as personal estate. *Dixie* v. *Wright*, 32 Beav. 662.

Real Estate taken under Compulsory Powers, Proceeds of—"Moneys" or "Real Estate" of Testator.]—Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of its act, and the proceeds were paid into court and invested. Afterwards, the tenant for life, under the power in the settlement, appointed by will to his son the whole of the settled estate, and the purchase money of the part which had been sold. The son by will disposed of his residuary personal estate of which he might be possessed, or over which he might have any power of disposition at his death, including in such personal estate "all moneys to which I may be entitled under the marriage settlement of my father and mother"; and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living:—Held, that the fund arising from the sale did not pass by the will. *Skeggs*, *In re*, 2 De G. J. & S. 533; 13 W. R. 567.

Trust to Reinvest in Land, Stock, subject to—Will of Personal Estate—Intestacy.]—In 1789, money belonging to a married woman was, with consent of herself and husband, laid out in land, settled upon trust for the wife for life, for her separate use, and after her death, upon trust, for the children equally, and "in default of such child or children without lawful issue," in trust for the husband, his heirs and assigns. Then followed a power of sale by the direction of the husband and wife, the produce to be laid out in land, and settled upon the like trusts. In 1801 the lands were duly sold, and the money was invested in the funds, the dividends being paid to the wife for her life. The husband, wife, and the surviving trustee, by a deed, declared the stock to be held on the trusts of the deed of 1789. The husband died, in the wife's lifetime, intestate. She made her will after his death, whereby she gave all her personal estate and effects, "whatsoever and wheresoever," and

of every kind soever, which she should be possessed of or entitled to at the time of her death, in "possession, remainder, reversion, or expectancy," to her two daughters. The produce of the sale of the land was never reinvested in land, pursuant to the trusts of the original settlement:—Held, that the deed of 1789 gave a life estate to the wife with remainder to her children for life, but no more, the remainder to the husband being void; that the stock was to be treated as real and not personal estate; that it did not pass by the will of the wife, the words there used relating exclusively to personal estate; and that it descended to the heir-at-law. *Gillies* v. *Longlands*, 4 De G. & Sm. 372; 20 L. J., Ch. 441; 15 Jur. 570.

—— **Money subject to.**]—Money arising from the sale, under a power, of lands in Staffordshire, forming part of the C. settled estates, was held upon trust to invest it in lands in England or Wales, to be settled upon the limitations of the C. settlement. Under that settlement C. was tenant for life, with remainder to his first and other sons successively in tail male, with remainder to himself in fee. He died without issue, leaving a will by which he gave all his lands in Staffordshire to trustees upon trusts for the benefit of one family, and gave all his real and personal estate not otherwise disposed of to trustees for another family:—Held, that the moneys, being impressed with a trust to invest in land, were to be treated as land and would pass under a devise of land. Observations of Jessel, M.R., in *Chandler* v. *Pocock* (15 Ch. D. 491), considered: but held that, as under the trust the money might have been invested anywhere in England, it would not pass under a devise of lands in Staffordshire; and that, therefore, it passed under the residuary devise of real estate. *Cleveland's (Duke) Settled Estates, In re*, 62 L. J., Ch. 955; [1893] 3 Ch. 244; 13 R. 235, n.; 69 L. T. 735—C. A.

Referential Trust for Conversion of Real Estate—Deferred Period for Sale—Death of Testator before.]—By articles, previous to the marriage of F. N. and E. S., the wife grants to trustees, &c., an undivided sixth part of certain estates for eighty years, if S. N. should so long live, and then, upon trust (as soon as convenient after the death of S. N., and after settlement made by the husband of an estate called the F. estate, and of a rent charge of 260*l.*, to which he was entitled in reversion, expectant on the death of S. N.), absolutely to sell and dispose of the same, and apply the money arising from the sale thereof, and of the other premises after mentioned, upon the trusts after mentioned. By the same articles, the husband covenants, within two years, to convey the F. estate to the same trustees, upon the like trusts as were declared as to the said undivided sixth; and likewise covenants, within six months after the death of S. N., to settle upon them the said rent charge upon the trusts therein mentioned. The trusts of the moneys to arise by sale of all the premises directed to be sold are then declared, to the husband for life, then to the issue of the marriage, and in default of issue as the husband should appoint. The husband dies in the lifetime of S. N. without issue, having by his will, after confirming the marriage articles, given to his wife all the real and personal estate to which he became entitled by his marriage, and which should remain undisposed of at his death, and the residue of his personal estate, and appointed her his executrix, and having devised all other his real estate to his wife for life, with remainder to the defendant. S. N. afterwards dies. No sale takes place; and no settlement is made of the F. estate, according to the articles. The widow enters into possession of that estate, conceiving herself to be only entitled as tenant for life under the will of her husband; and, upon her death, the defendant enters, as entitled in remainder under the same will. Upon a bill filed by the executor of the widow, to whom she had devised all the residue of her estate, real and personal, claiming to have the F. estate sold under the covenant in the marriage articles, and the produce paid to him as part of the personal estate of the widow, it was decreed accordingly: his honour being of opinion, that the covenant to convey, being absolute and unqualified, the estate must be considered as having been converted into personalty by the marriage articles; that the testator could not be held to have elected to take it otherwise, the period of sale not having arrived when he died; that the will afforded no evidence of an intention to pass it as real estate; and, lastly, that the widow could not, by any conduct tending to show in what light she considered it, at all affect the question. *Stead* v. *Newdigate*, 2 Mer. 521.

Devise in Trust for Sale—Executory Gift Over of Money or Unsold Real Estate—Intention.]—Devise of real estate in trust to sell, and out of the money to pay debts, &c., and with the surplus to maintain and educate the daughter of the testatrix until twenty-one or marriage; but if she should die unmarried under twenty-one, all such money as should remain in the hands of the trustees, or such parts of the real estates as should remain unsold (if any), to be to the use of A. The daughter lived to attain twenty-one. This is a conversion out and out, and the real estate remaining unsold at her death goes to her personal representative. *Ashby* v. *Palmer*, 1 Mer. 296; 15 R. R. 116.

Gift of Corpus of Produce of Realty to Charity after Life Estate.]—Real estates were devised to trustees, upon trust to sell and pay the income of the produce to the testator's wife for life; and after her death, upon trust to pay the principal to a charitable institution. The ultimate gift to the charitable institution was held to be void:—Held, that the trust for conversion took effect immediately upon the testator's death, and did not operate only upon the interest given to the charitable institution. *Wilson* v. *Coles*, 28 Beav. 215; 6 Jur. 1003; 8 W. R. 383.

Residuary Real and Personal Estate of B., Produce of—Bequest by A. of his "Moneys."]—A. bequeathed to his wife his pay, "clothing, money, and moneys that may be now due or may become due to me at my decease; also, the whole of my property and effects; that is to say, my box, clothes, bedding, &c.":—Held, that the whole residue passed, including a reversionary interest in the produce of the sale and conversion of a residuary real and personal estate of another testator. *Gover* v. *Davis*, 29 Beav. 222.

Real Estate—Contract for Sale by equitable Life Tenant—Trustees with Power of Sale—

Bequest of Money arising from Sales.]—An equitable tenant for life, with remainder in tail male and reversion in fee, of estates vested in trustees with powers of sale and exchange, contracted to sell a portion, and died without issue male before the purchase was completed, having by his will directed that all sums of money which might have arisen from sales of the estates, and were subject or applicable to the same uses as the estates, should be applied towards payment of certain incumbrances:—Held, that as the purchase-money did not arise from a sale of the estate by the trustees, the purpose of which would be convenience, and not conversion, but from a sale of the testator's limited interest therein, it was not to be applied under the direction in the will as money arising from sales of the estates, but that it formed part of the testator's personal estate, and must be dealt with under the clauses relating thereto. *Saville* v. *Kinnaird*, 11 Jur. (N.S.) 195; 11 L. T. 687; 13 W. R. 308.

Devise of Real and Personal Estate—Contingent Trust for Sale—Occurrence of Contingency.]—Testator gave all his estate and effects of what nature, kind, or quality soever, after payment of his debts and funeral and testamentary expenses, to trustees, their heirs, executors, &c., in trust, in case there should not be sufficient to pay the annuity thereinafter given to his wife, to sell all his real and personal estate and invest the proceeds in the funds, and out of the dividends or the rents of his real estate, until the same should be sold, to pay his wife an annuity of 300*l*., and, after paying an annuity to another person, to pay the residue of the rents and dividends to his wife for her life: and he gave all the rest of his estate and effects, after payment of his debts, legacies, and funeral and testamentary expenses, and the before-mentioned annuities, to his four sisters, to be equally divided between them, share and share alike; but if any of them should die before their shares should become due and payable, leaving a child or children, then he gave the share of such of them so dying unto such child or children. The testator left no residuary personal estate; and the rents of his real estate were not nearly sufficient to pay his wife's annuity; but nevertheless the real estate remained unsold long after her death:—Held, that, under the circumstances, it was to be considered as converted into personalty by the will. *Ward* v. *Arch*, 15 Sim. 389; 10 Jur. 977.

See A. 3, a. (iii.), ante; B. 3, C. 3, post.

6. Time when Conversion takes Place, and Right to Income.

Will—Death of Testator.]—A will is ambulatory till testator's death, nor till then can money directed to be laid out in land be considered as land. *Beauclerk* v. *Mead*, 2 Atk. 167.

—— **Direction for Sale with all convenient speed.**]—Estate by will directed to be sold with all convenient speed after the death of A., and interest of produce bequeathed to plaintiff; estate continued unsold: this is primâ facie a direction for an immediate sale after A.'s death. *Fitzgerald* v. *Jervoise*, 5 Madd. 25; 21 R. R. 268. See also *Hutchin* v. *Mannington*, 1 Ves. 367; 2 R. R. 115.

Plaintiff, on construction of will, held to be entitled to rents and profits of first year after testator's death. *Ib.*

—— **Sale at such Time as Trustees think Proper.**]—Devise in trust to sell in such manner, and at such time, as the trustees shall think proper. The period of conversion as between those entitled for life and in remainder, depends not upon an arbitrary discretion, nor even a sound discretion in each case, but upon some fixed rule ascertaining a given period, as upon a trust to sell with all convenient speed; controlled in this instance by consent. *Walker* v. *Shore*, 19 Ves. 387.

—— **Sale when it should appear to Trustees Advantageous.**]—A testator devised his real estate to trustees to sell, whenever it should appear to them advantageous. He directed annuities to be paid to charities out of his personal estate until his real estate should be sold, when he gave the produce to charities. But if the charity bequests should be defeated, he gave the principal money to the plaintiffs. No sale of the realty took place; the infant plaintiffs (under the chief clerk's certificate, finding it for their benefit) elected to take the land in lieu of the produce:—Held, that the real estate must be considered as converted from the death of the testator, from which time the plaintiffs were entitled to the rents. *Robinson* v. *Robinson*, 19 Beav. 494.

Held, secondly, that the charity annuities ceased to be charges on the personal estate from the date of the chief clerk's certificate. *Ib.*

—— **Conversion or Not according to Circumstances at Testator's Death.**]—The time of the testator's death is the period at which to look whether there is a conversion of real estate out and out, or whether circumstances may have made it unnecessary to convert real estate into personalty, for the purposes of the devise. And therefore, where at the death of the testator, it was uncertain whether, as to one moiety of the property, the purposes of the devise might ever require the conversion, and ultimately before a sale of the property the purpose as to that moiety failed:—Held, that the property took the character of personalty at the death of the testator. *Carr* v. *Collins*, 7 Jur. 165.

Deed—Conveyance of Equity of Redemption on Trust for Sale—Conversion from Delivery of Deed.]—Conversion of real estate into personalty from the delivery of the deed as between the real and personal representatives of a party who conveyed the equity of redemption thereof to trustees for sale for benefit of creditors, and to pay surplus to himself. *Griffith* v. *Ricketts*, 7 Hare, 299; 19 L. J., Ch. 100; 14 Jur. 166.

—— **Trust to Arise after Settlor's Death.**]—Settlement of real estate by deed (not enrolled) to use of settlor for life, with remainder (subject to a power of revocation, which he never exercised) to use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at settlor's death, and to apply the residue to charitable purposes:—Held, that notwithstanding the trust was not to arise until after settlor's death, the property was impressed with the character of personalty immediately upon

the execution of the deed, and the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty. *Clarke* v. *Franklin*, 4 Kay & J. 257; 27 L. J., Ch. 567; 6 W. R. 836.

Power of Sale—Exercise—Conversion from Time of Sale.]—When land is subject to a power of sale, and the power is exercised, it is converted into personalty from the time of the sale, unless the proceeds are reinvested in land, or are stamped with a trust for reinvestment in land *Atwell* v. *Atwell*, 41 L. J., Ch. 23; L. R. 13 Eq 23.

Income, Right to—Money to be laid out.]—Where money is given to be laid out in lands, and when bought to be settled on such and such persons, on a bill brought here, the course is to direct a purchase, and the profits of the money to go as the land would itself, till purchased *Coventry* v. *Coventry*, 2 Atk. 369.

Suppose a direction by will to purchase an estate, which is afterwards swallowed up by an inundation, the money so devised shall not go to an executor, but as the rents would have done when the land was purchased. *Ib.*

T. devised his real estates to trustees, on trusts, one of which was a disposition, good as an executory devise, which could not take effect until the death of his daughter. He directed the residue of his personal estate to be divided into three equal parts, and gave the same to the trustees (who were also his executors) to invest two third parts in the purchase of real estate to be settled to the same purposes as those directed as to his original real estate; the other third to be also invested in the purchase of real estate to be conveyed to the use of a person then in being:—Held, that the intermediate income of these two-thirds was not undisposed of by the will, but must be laid out in the purchase of real estate, according to the directions in the will, until such time as some person should be entitled to possession under the limitations declared by the will so far at least as not to exceed the period allowed by law for accumulation. *Beetue* (*Countess*) v. *Hodgson*, 10 H. L. Cas. 656.

—— **Real Estate—Devise on Trust for Sale.**]—S. devised real estates to trustees, upon trust "as soon as conveniently may be after my death," to sell and dispose of the same, either by public or private sale; and to stand possessed of the proceeds on certain trusts for several persons respectively for life, and after their respective deceases for their children. The decree declared, that the devisees for life named in the will are entitled to the rents and profits of the real estates thereby devised from the decease of the testator; and directed a sale; the produce to be paid into the bank, subject to further order. *Casamajor* v. *Strode*, 19 Ves. 390.

—— **Real Estate—Agreement for Sale—Intestacy.**]—An agreement was made for the sale of an estate at a future time. Before that time arrived the vendor died intestate.—Held, that the rents accrued between the vendor's death and time for completing the contract belonged to the vendor's heir, and not to his executor. *Lumsden* v. *Fraser*, 12 Sim. 263; 10 L. J., Ch. 362.

—— **Option to Purchase—Rents until Option made.**]—Option to a tenant to purchase; the rents, until the option made, belonging to the heir, from that time the conversion takes place, and the purchase money belongs to the personal representative. *Townley* v. *Bedwell*, 14 Ves. 591; 9 R. R. 352.

—— **Real Estate—Agreement for Sale—Intention.**]—Where upon the sale of real estate the intention of the vendor was clear, that it should be kept as realty up to the time when converted absolutely into personal estate:—Held, that upon his death before the purchase completed, the intermediate rent belonged to the heir. *Shadforth* v. *Temple*, 10 Sim. 184.

—— **Brickfield—Trust for Sale at Discretion of Trustees—Royalties.**]—A testator devised a brickfield to trustees for sale when they should think desirable. They deferred the sale in the exercise of their discretion:—Held, that the tenant for life was entitled to the royalties as income. *Miller* v. *Miller*, 41 L. J., Ch. 291; L. R. 13 Eq. 263; 20 W. R. 324.

—— **Specific Devise of Land—Agreement for Sale.**]—When a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed:—Held, that the rents received between his death and the conveyance of the property passed to the devisee. *Watts* v. *Watts*, 43 L. J., Ch. 77; L. R. 17 Eq. 217; 29 L. T. 671.

—— **Land subject by Will to Option of Purchase—Purchase under Compulsory Powers during Infancy of Beneficiaries—Shares of Beneficiaries Dying under Age.**]—A testator gave to his children in succession an option to purchase certain real estate, and in the meantime the rents were to be equally divided between them. Before the option was exercised part was purchased under compulsory powers:—Held, that the shares of some children who had died infants remained real estate, until the option had been exercised, and that the interim income belonged to their heir-at-law. *Hardy, Ex parte*, 30 Beav. 206.

—— **Land—Trust for Sale and Purchase of other Land—Timber—Right to Cut**]—Devise of lands to be sold, and other lands to be purchased in another county; A. to be tenant for life (sans waste) of the lands to be purchased; and the rents and profits of the lands to be sold to be to the same uses: A. cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plymouth* v. *Archer*, 1 Bro. C. C. 159. See also *Burges* v. *Lamb*, 16 Ves. 174; 10 R. R. 150.

See also A. 3, a. (ii.), ante.

7. Effect on Rights and Liabilities.

a. Curtesy.

Money to be Laid Out.]—A. devised 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if she died without issue to go over. She married B., and had a child by him, and she and the child being dead, and the money not laid out, on a bill brought by B.:—Held, the money to be considered as land, and the plaintiff to be tenant by the curtesy. *Sweetapple* v. *Bindon*, 2 Vern. 536.

Money by marriage articles to be laid out in land to uses of husband and wife for life, then

to the children, as they should appoint, in default of appointment equally; but if one, to that one in tail, reversion to husband in fee. There is one daughter; the trustee pays it to her and her husband, she not being sui juris, not separately examined; the payment not sufficient to make it considered as money, the sister of the half-blood may claim the reversion in fee from the father; but the husband of the other sister, who was tenant in tail, will be tenant by curtesy. *Cunningham* v. *Moody*, 1 Ves. sen. 174.

Where money is given to be laid out in land for a place of retirement for testator's sister, to be for ever entailed on her issue, the husband of one of the daughters of the sister entitled as tenant by the curtesy to one-third. *Dodson* v. *Hay*, 3 Bro. C. C. 404.

Real Estate—Settlement—Power of Sale—Proceeds impressed with Trusts of Realty.]—By a marriage settlement, the wife's freehold estates were vested in a trustee, in trust for her separate use during her life, remainder for such persons as she should appoint by deed or will, and in default of appointment, in trust for her right heirs. The wife died without having made any appointment, leaving her husband and a son surviving. After her death the trustee sold the estate under a power in the settlement, which directed the proceeds to be invested in the purchase of other lands, or on mortgage, or in the funds, and the securities to be held on the trusts aforesaid:—Held, that on the wife's death the husband became equitable tenant by the curtesy of the estates, and therefore was entitled to the interest of the purchase-money during his life. *Follett* v. *Tyrer*, 14 Sim. 125; 13 L. J., Ch. 441; 8 Jur. 528.

b. Escheat.

The Intestates Estates Act, 1884 (47 & 48 *Vict. c.* 71), *s.* 4, *expressly extends the law of escheat to any estate or interest, whether legal or equitable, in any incorporeal hereditament.* See also *s.* 7.

Money to be Laid Out—Crown—Next of Kin—Equities as Between.]—Testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estate; money not having been laid out, the crown, on failure of heirs, has no equity against next of kin to have it laid out in real estate, in order to claim by escheat. *Walker* v. *Denne*, 2 Ves. 169; 2 R. R. 185.

Real and Personal Estate—Devise in Trust for Sale—Undisposed-of Residue—Crown—Trustees—Equities as between.]—Where a testatrix devised real and personal estate to executors and three trustees, in trust to sell, immediately after her death, and invest the proceeds, and out of the income to pay certain annuities, and the residue in trust for such persons as by any codicil she should direct. She made no codicil, and died, leaving no heir or next of kin:—Held, that the crown was entitled only to the residue of the personal estate, and that the proceeds of the real estate belonged to the trustees, the crown having no equity to compel the conversion of the real into personal estate. *Taylor* v. *Haygarth*, 14 Sim. 8.

Real Estate—Money Charged on—Mortmain—Crown—Devisee—Equities as between.]—Devise of copyhold land in fee, upon condition that the devisees within one month pay 2,000*l.* to the testator's executor, to be applied, after payment of debts and legacies, to charitable purposes. The testator died without leaving any customary heir or next of kin:—Held, upon appeal, that the proportion of the 2,000*l.* which was void by the Mortmain Act was to be considered as real estate undisposed of, and that the devisee, and not the crown, was entitled to it. *Henchman* v. *Att.-Gen.*, 3 Myl. & K. 485. Reversing 2 Sim. & S. 498; 4 L. J., Ch. (o.s.) 155; 25 R. R. 255.

—— Trust for Sale — Proceeds of Sale not effectually disposed of—Executors or the Crown entitled—Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), ss. 4, 7.]—A testatrix died without an heir, having devised a house of which she was legally seised in fee simple to her executors, upon trust for sale, and out of the proceeds to pay her debts, funeral expenses, and legacies. There was no gift of residue:—Held, that the balance of proceeds of sale, after paying the debts, expenses, and legacies, did not belong to the executors for their own benefit, but escheated to the crown. *Wood, In re, Att.-Gen.* v. *Anderson*, 65 L. J., Ch. 814; [1896] 2 Ch. 596; 75 L. T. 28; 44 W. R. 685.

c. Forfeiture.

The Act 33 & 34 *Vict. c.* 23, *abolishes the forfeiture of lands and goods for treason and felony, and the cases under this head are omitted as obsolete.*

d. Liability to Debts.

Land devised for Sale for Payment of Debts.]—Where lands are devised to executors to be sold for payment of debts, the money becomes legal assets, and shall be paid in a course of administration. *Cutterback* v. *Smith*, Pre. Ch. 127.

Real Estate—Conversion for Special Purposes.]—Real estate to be converted into personal for special purposes, not personal property to all intents, so as to let in creditors by simple contract. *Gibbs* v. *Ougier*, 12 Ves. 413; 8 R. R. 348.

Money to be Laid Out and Settled.]—Plaintiff lent B. 500*l.* on note, on assurance that an aunt had left him 4,000*l.* by will; B. dies soon after; and his representative refused to pay the 500*l.*, as the legacy was directed to be laid out in land and settled on B. in fee:—Held, that as money devised to be laid out in land is land, the plaintiff can have no remedy. *Trelawney* v. *Booth*, 2 Atk. 307.

Land agreed to be Sold—Bankruptcy—Judgment Creditors.]—Judgment creditors have no lien upon lands articled to be sold before a bankruptcy, the conveyance to which remains unexecuted at the bankruptcy. *Sharpe* v. *Rhoade*, 2 Rose, 192.

B. RESULTING TRUST ON FAILURE OF GIFT.

1. Principles.

Trust for Conversion—Failure of Purpose—Resulting Trust.]—It is a clear rule in equity,

that where real estate is directed to be converted into personal for a purpose which fails, either wholly or partially, to that extent the money is considered real estate. *Hill* v. *Cock*, 1 Ves. & B. 174.

Where a testator means to convert real estate into personal for a particular purpose, if that purpose cannot be served, the court will not infer any other purpose. *Ib.* 175.

It is a general principle, that where a person dealing upon his own property only has directed a conversion for a particular purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails, and this court regards him as not having directed the conversion. *Ripley* v. *Waterworth*, 7 Ves. 425.

—— **No Disposition.**]—Land devised to be sold, the produce to be applied as after mentioned; if no disposition is made, the heir shall take. *Sheldon* v. *Barnes*, 2 Ves. 447.

—— **Mixed Fund.**]—Where a testator by will directs his real estate to be sold, and the produce to be invested in the same manner as his personal estate, that produce, so far as it is not disposed of by the will, goes to the heir, unless there is on the will satisfactory proof of the intention of the testator, that the money to be raised by the sale should go to the same persons, who would be entitled to his original personal estate. *Madgin* v. *Lumley*, 1 L. J. (O.S.) Ch. 236.

Testatrix directed her real estate to be sold, and all her estate to be converted into money for the purpose of her will. The will was satisfied without touching the real: no equity for the next of kin against the heir. *Chitty* v. *Parker*, 2 Ves. 271; 4 Bro. C. C. 411.

Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed, and so far as they are constituted by personal estate, shall go to the person next of kin; and so far as they consisted of real estate, to the heir-at-law. *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503; 3 P. W. 22, n. See 7 Price, 258.

Term raised for Particular Purpose.]—Term raised for a particular purpose when that purpose is answered the term shall be in trust for the heir. *Levet* v. *Needham*, 2 Vern. 139.

Legacy to Heir—Residuary Legatees "Appointed and Devised" by Testator.]—The intention of the testator being to provide an auxiliary fund for legacies, and not a complete conversion out and out, the residue of the real estate, after making good the deficiency of the personal in payment of legacies, is a resulting trust for the heir, notwithstanding a legacy given him, and the testator "appointed and devised residuary legatees." *Kellet* v. *Kellet*, 1 Ball & B. 533; 12 R. R. 54. Affirmed, 3 Dow, 248; 15 R. R. 63.

Personal Estate to be Converted into Real.]—Where a testator directs his personal estate to be converted into real estate for several purposes, some of which fail, the heir is not, after satisfying the purposes which can take effect, entitled to the personalty as being impressed with the character of realty. *Hereford* v. *Ravenhill*, 1 Beav. 481.

If a testator devised land for purposes altogether illegal, or which altogether fail, the heir takes it as undisposed of; so if he bequeath personalty under the same circumstances, the next of kin are entitled. *Cogan* v. *Stephens*, 1 Beav. 482, n.; 5 L. J., Ch. 17.

If a testator devise land for purposes which are in part illegal, or which partially fail, or which require part only of the land devised, the heir takes the part which fails, or is not required for the purposes of the will; and so conversely in the case of personal estate, the next of kin are entitled *Ib.* But see *Fletcher* v. *Chapman*, 3 Bro. P. C. 1.

Actual Conversion of Land—Intention of Testator.]—The heir is not affected by the actual conversion of land into money, and so much of the interest as is not exhausted by the disposition belongs to him; but when it can be clearly ascertained that the intention of the testator is, that the produce of his real estate shall, to all intents and purposes, be treated as personal estate, so as to devolve upon the persons entitled thereto, the court will give effect to that intention, whether directly expressed, or necessarily to be inferred. *Johnson* v. *Woods*, 2 Beav. 409; 9 L. J., Ch. 244. And see *Norreys* v. *Frank*, Ir. R. 9 Eq. 18.

Where, for the purpose of a disposition in a will, real estate is directed to be converted into money, or money to be converted into real estate, and the disposition fails, though the conversion has actually taken place, the real estate, or the money, will retain its original character for the purpose of ascertaining the ownership of it. *Bective* (*Countess*) v. *Hodgson*, 10 H. L. Cas. 656.

The rules which are applicable to a gift of a residue are applicable to the parts into which that residue may be divided. *Ib.*

—— **Bankruptcy—Sale after Owner's Death—Surplus.**]—Partnership become bankrupt, real estate of one sold to make up the deficiency, part during owner's life, and part after, leaving surplus:—Held, heir has no claim as to those sold before the death, but he has for the surplus of those sold after with 4 per cent. interest. *Banks* v. *Scott*, 5 Madd. 493. And see *Bromley* v. *Goodere*, 1 Atk. 75.

Real Estate—Conversion for Purposes of Will—Surplus.]—Held, upon the construction of a will, that the real estate had not been converted out and out, that is, for all purposes which would attach to personal estate in the hands of the testator; but only for the purposes of the will. Therefore, to determine whether it is to go to the heir or next of kin, the only thing to be considered is the nature of the resulting trust. *Hopkinson* v. *Ellis*, 10 Beav. 169; 16 L. J., Ch. 59.

—— **Trust for Sale—Deed.**]—When a settlor conveys real estate upon trust for sale, and directs the proceeds to be applied to certain purposes, some of which fail, whether the sale is directed to be made in the lifetime of the settlor or after his decease, the property will, to the extent to which the purposes fail, result to the settlor as personal estate. *Clarke* v. *Franklin*, 4 Kay & J. 257; 27 L. J., Ch. 567; 6 W. R. 836.

Secus, if there is a failure of the whole purposes for which the sale is directed. *Ib.*

Resulting Trust—Limit of Doctrine.]—Question of a resulting trust only arises between the real and personal representatives of the testator, not between the representatives of a party taking under the will. *Ashby* v. *Palmer*, 1 Mer. 296; 15 R. R. 116.

—— **Intention.**]—Wherever lands, &c., which would descend to heir-at-law are devised for the purposes which law will not suffer to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether the testator intended he should have it or not. *Tregonwell* v. *Sydenham*, 3 Dow. 196.

2. Application of Doctrine.

a. Creditors' Deeds.

Real Estate—Trust for Sale—Intention.]—Real estate held upon the particular expressions of a deed to be converted into personal out and out, under a trust to sell for the payment of debts, and to pay the residue to the grantor, his executors, &c. *Van* v. *Barnett*, 19 Ves. 102.

A., after reciting that he was desirous that his real estates should be sold, conveyed them to trustees, in trust to sell or mortgage the same, and to stand possessed of the money to be raised, in trust for him, his executors, &c. By deed of even date, he assigned all his personal property to the same trustees, in trust for himself, his executors, &c. By a third deed of even date, after reciting that he was indebted to various persons, and was desirous that his affairs should be wound up, and his real and personal property converted into money, and his debts paid, and that the conveyance and assignments were made to enable his trustees, in the first place, to pay his debts; he declared that the trustees should stand possessed of the money to arise from the sale or mortgage of his real and personal property, in trust to pay his debts, and then in trust for him, his executors, &c. The trustees sold part of the real estate, and the proceeds were more than sufficient to pay A.'s debts. Shortly afterwards A. died intestate:—Held, that the unsold estates were to be considered as personalty. *Biggs* v. *Andrews*, 5 Sim. 424.

C. S. by deed conveyed lands in fee to trustees, upon trust to obtain possession and absolutely dispose thereof, and convey the fee simple and inheritance to the purchaser without the concurrence of C. S., and after defraying expenses to apply the moneys to arise from the sale in payment of certain debts mentioned in the deed, and pay the surplus to C. S., his executors, administrators, or assigns. C. S. survived the execution of the deed three years, and died without anything having been done in performance of the trusts. Immediately before his decease he had agreed to execute a further charge upon the property:—Held, that there had been an absolute conversion of the land into personal estate. *Bayden* v. *Watson*, 12 L. J., Ch. 277; 7 Jur. 245.

Conversion of real estate into personalty as between the real and personal representatives of a party who conveyed the equity of redemption thereof to trustees, for sale for benefit of creditors, and to pay surplus to himself. *Griffith* v. *Ricketts*, 7 Hare, 299; 19 L. J., Ch. 100; 14 Jur. 166.

S., on his marriage in 1812, settled real estate upon trusts for himself for life, remainder to his wife for life, remainder to their children as tenants in common (without the word heirs), remainder in default of children of the marriage to himself in fee. In 1830 he executed a creditor's deed conveying all his real estate to trustees for payment of his debts. There were several children of the marriage, and it being thought that he had only a life estate in the settled property that alone was sold, and the creditors being satisfied, the question arose as to whether his reversion in fee had been converted into personalty by the deed:—Held, that the surplus property not sold for the purposes of the deed of 1830 was not converted. *Clissold* v. *Cook*, 27 L. T. 143; 20 W. R. 796.

b. Illegal Disposition.

1. *Mortmain.*

By the Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *s.* 5, *land may be assured by will to or for the benefit of any charitable use, and the law relating to Mortmain was otherwise amended by the act.*

Money to be Laid Out—Real Estate to be Sold.]—Money directed to be laid out in lands for an illegal purpose (charity), shall not be laid out for the heir, and the trust is void altogether; as to the testatrix's real estate, which was devised to be sold partly for such purposes, the heir was declared entitled to the surplus proceeds. *Mogg* v. *Hodges*, 2 Ves. sen. 52.

A testator devised certain freeholds to trustees to sell, and he directed the proceeds to be carried to the fund of his personal estate:—Held, not to be a conversion from realty to personalty, so as to entitle the next of kin to take a part of the produce, which being given to charity was void, under the Statute of Mortmain, but that the heir was entitled. *Williams* v. *Williams*, 5 L. J., Ch. 84.

A testator directed his executors immediately to lay out 30,000*l.*, in the purchase of an estate in his name, the income of which he settled to one for life, with remainder to others in tail, with remainder to a charity; the money was not actually laid out previous to the estate for life and the estates tail being spent. The gift of the charity failing by reason of the Mortmain Act, and the estates tail not having been barred:—Held, that the next of kin, and not the heir-at-law, were entitled to the 30,000*l.* *Cogan* v. *Stephens*, 1 Beav. 482, n.; 5 L. J., Ch. 17.

Mixed Fund—Actual Conversion.]—Upon a direction to convert all testator's real and personal estate into money, and at a certain time to invest a sum out of personal estate for a charity, and at the end of twelve months to lay out the residue, "all his property being personal," for other charitable purposes:—Held, that the charitable purposes failed, so far as the fund arose from the real estate, or any other than pure personal property, and that the heir was entitled to so much of the residue of the mixed fund as arose from the sale of the real estate. *Johnson* v. *Woods*, 2 Beav. 409; 9 L. J., Ch. 244.

See also 3, post.

ii. *Accumulation and Remoteness.*

Rents and Profits, Accumulations of—Not Disposed of.]—Rents and profits under a trust to accumulate, being in the event not disposed of, belong to the heir-at-law. *Stanley* v. *Stanley*, 16 Ves. 491.

—— Void under Thellusson Act—Unexhausted Interest out of Real Estate.]—The 39 & 40 Geo. 3, c. 98, was not intended, nor does it operate, to alter any disposition of a testator, except his direction to accumulate; and the income which the statute forbids to accumulate must go as in the case of intestacy. Where the testator empowered trustees to sell the real estate when they pleased after his death, but if not done before the death of his youngest child then to sell for the benefit of the grandchildren or their children, and his youngest child survived him twenty-nine years:—Held, that the direction that the income should accumulate after twenty-one years was void, and that the void accumulation belonged to the next of kin, but the unexhausted interest arising out of the real estate to the heir. *Eyre* v. *Marsden*, 2 Keen, 564; 4 Myl. & C. 231; 7 L. J., Ch. 220; 3 Jur. 450; 2 *ib.* 583.

Charge on Estate—Trusts of Fund declared by Reference—Trusts of Principal Fund for Accumulation—Void under Thellusson Act—Effect of Charge—Conversion.]—By a settlement, a moiety of freehold estates was limited by the settlor for uses, with an ultimate remainder to himself in fee. Power was reserved to the settlor to charge the moiety, by deed or will, with 6,000*l.*, to be raised and paid as he should think fit. By a deed poll, the settlor charged the moiety with 6,000*l.*, and directed that it should be raised and held upon such trusts as he should by his will direct. And by his will he directed the 6,000*l.* to be retained and held upon the trusts thereby declared of his residuary personal estate. The trusts declared by the settlor's will of his residuary personal estate partly failed, by reason of the accumulations directed being void:—Held, that although there had been a failure of the purposes for which the residuary estate was given, it did not follow that there had been a failure of the purposes for which the conversion of part of the moiety into the 6,000*l.* had been directed, for that conversion had been complete; that there was no resulting trust of any part of the 6,000*l.* in favour of the persons entitled to the real estate; and that therefore the whole of the 6,000*l.* must be raised out of the real estate on which it was charged. *Simmons* v. *Pitt*, 28 L. T. 327. Affirmed, L. R. 8 Ch. 978; 21 W. R. 860.

Devise for Conversion Void for Remoteness—Heir—Law of Descent.]—Under a devise, previously to the 3 & 4 Will. 4, c. 106, to trustees, one being the testator's heir-at-law upon trust (subject to prior estates) for conversion, the trust for conversion being void for remoteness, the equitable reversionary interest thus left undisposed of results as part of the old use, and descends to the heir in his character of heir, and does not so merge in his legal interest, under the devise to him as a trustee, as to break the descent and constitute him a fresh stock, from which, on decease intestate, the descent is to be traced. *Buchanan* v. *Harrison*, 1 John. & H. 662.

See also 3, post.

c. Gift for Payment of Debts and Legacies.

Real Estate, Direction to Sell and Pay Surplus — Part Unsold.]—Where trustees were directed to sell the whole real estate to pay debts, and to pay surplus to A. and B., if only part of estates are sold, and fully pay the debts, the remainder unsold shall go to A. and B., as if actually sold. *Collingwood* v. *Wallis*, 1 Eq. Abr. 395. S. P., *Davers* v. *Folkes*, *ib.* 396.

Lands Appointed to Pay Debts—Lands to be Sold.]—If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper* v. *Aston*, 2 Ch. Ca. 115.

Quære, if a purchaser with notice might not be affected. *Ib.*

Lands Devised for Sale in aid of Personal Estate—Devise to Wife and Heirs.]—Lands devised to his wife and heirs, to be sold for the payment of debts and legacies, in aid of the personal estate, and not being sold, if the personal estate is sufficient to discharge the whole, the heir shall have the lands as a resulting trust. *Buggins* v. *Yates*, 9 Mod. 122.

Lands Devised for Sale to Executors.]—One devises lands to his executors (who are not relations) to sell for the best price, and to pay his debts, legacies, and funerals, so far as the same will extend, and gives legacies to his heir-at-law, and 100*l.* to the children of one of his executors, but nothing to his executors; in such case the executors shall be but trustees for the heirs-at-law after debts paid. *Starkey* v. *Brooks*, 1 P. W. 390. But see *Cunningham* v. *Mellish*, Pre. Ch. 31; 2 Vern. 247.

Real Estate—Conversion for Answering Legacies.]—Conversion directed by will, of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities; subject to that as to the real estate a resulting trust for the heir. *Hooper* v. *Goodwin*, 18 Ves. 156.

—— Direction for Sale or Charge for Payment of Debts.]—The distinction between a direction to sell real estate out and out for payment of debts, and a charge for payment of debts, is exploded as to any effect in exempting the personalty. In either case the residue, if undisposed of, goes to the heir, unless there be a disposition made demonstrative of an intent that it shall change its nature and become personal. *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538.

—— Particular Property — Intention.]—A testator gave his real and personal estate to persons whom he appointed his executors, in the first place to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and if they should be insufficient, then to cut timber to the value of 500*l.*, and if that should not be sufficient then to raise the deficiency by sale or mortgage of his real estate; and he directed his executors to retain their expenses, but he did not expressly declare any trust of his personal estate. A suit was instituted, in which it was decided that the personal estate was

primarily liable to the payment of the debts and legacies :—Held, that the money raised by sale of the advowson and timber constituted personal and not real estate. *Bowra* v. *Rhodes*, 31 L. J., Ch. 676 ; 6 L. T. 560 ; 10 W. R. 456.

See also 3, post.

d. Partial Disposition.

Produce of Real Estate not Exhausted—Mixed Fund.]—Resulting trust for the heir-at-law as to the produce of the sale of real estate, not exhausted by a trust in which it was combined with the personal. *Robinson* v. *Taylor*, 1 Ves. 44.

Devise, after payment of debts, legacies, &c., of specific freehold and leasehold estates, to A., subject to incumbrances, and of all other his freehold and leasehold estates, together with all his personal estate, to trustees, to sell, and out of the money, in the first place, to pay their expenses in execution of the will or trust, and, without further disposition, appointing the trustees executors :—Held, a resulting trust as to the produce of the real estate for the heir-at-law. *Hill* v. *Cock*, 1 Ves. & B. 173.

A testator directed the proceeds of the sale of his estate to be invested for the benefit of his three daughters, and the interest thereof to be paid to each of his said daughters during their respective natural lives ; and after the decease of each of them he directed that one-half of the fund or share, the income of which was thereby directed to be paid to the parent respectively for life as aforesaid, should be paid to the children of each of his said daughters :—Held, that the daughters did not take absolute interests, and that the testator's heir was entitled to the undisposed-of portion of the real estate, whether converted or not. *Whitehead* v. *Rennett*, 22 L. J., Ch. 1020 ; 18 Jur. 140 ; 1 Eq. Rep. 561 ; 1 W. R. 406.

—— **Gift for want of Appointment—Resulting Trust.**]—A. by will devises his lands to trustees to sell, and to dispose of the money as he by writing should appoint, and for want of appointment, to his four nephews, and by writing appoints his trustees to pay several sums to several persons, but not near the value of lands : —Decreed, the surplus to the heir, and not to the nephews, as an interest resulting, and not disposed of. *London Corporation* v. *Garway*, 2 Vern. 571.

—— **Legacy to Heir.**]—Land is devised to trustees to sell, and out of the money arising by the sale, amongst other sums to pay 100*l.* to his heir-at-law, and no disposition is made by the testator of the surplus of his estate. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacy ; and the heir shall have the surplus. *Randall* v. *Bookey*, 2 Vern. 425 ; Pre. Ch. 162.

—— **Settlement—Sum Reserved to Settlor.**]—Upon settlement of lands, to be sold in trust for several purposes, the residue is given to B. and his assigns, reserving only 200*l.* to appointee or settlor. Settlor died without appointing : the 200*l.* shall go to his heir, and not to B. or his assigns. *Anon.*, Comb. 345.

A. directs that his estate should be sold after his death, for several purposes, and, amongst others, that 200*l.* should be disposed of as he by a note should appoint, and dies intestate, having given no directions. This 200*l.* shall be a resulting trust for the heir-at-law. *Emblyn* v. *Freeman*, Pre. Ch. 541.

—— **Sum Reserved to Answer Annuity.**]—Estates devised to executors upon trust for the purposes after-mentioned. The testator proceeded to direct a sale of the estates, and the division of the produce among his five children, after first reserving a sufficient capital, the interest arising from which should be sufficient to pay an annuity of 400*l.* to his wife for her life ; but he did not declare any trust, at the wife's death, of the sum to be so reserved :—Held, a resulting trust for the heir. *Watson* v. *Hayes*, 5 Myl. & C. 125 ; 9 Sim. 500 ; 9 L. J., Ch. 49 ; 8 *Ib.* 169 ; 4 Jur. 186 ; 3 *Ib.* 143.

—— **Life Interest in Proceeds of Realty, Gift of — Bequest of all Testator's Effects.**]—Testator devised a copyhold estate to his wife, upon trust to sell and invest the money in the funds, and gave the interest and dividends to her use. He also gave and bequeathed to her all his effects whatsoever and wheresoever, for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise to his children :—Held, the widow, executrix, entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. *Wilson* v. *Major*, 11 Ves. 205.

—— **Devise for Sale of Rent-charges to pay Pecuniary Legacy — Surplus.**] — One devises a rent charge to be sold to pay legacies amounting to 800*l.*, and if the rent charge should sell for 1,000*l.* the testator gives a further legacy of 200*l.* The rent charge sells for above 800*l.*, and less than 1,000*l.* ; what exceeds the 800*l.* shall belong to the heir as a resulting trust. *Stonehouse* v. *Evelyn*, 3 P. W. 252.

Money to be laid out — Resulting Trust whether as Real or Personal Estate.]—A testator directed a part of his personal estate to be converted into realty and settled on certain trusts. These being exhausted, and no investment having been made :—Held, that the residuary legatee was entitled to the fund, and took it in the character of personalty. *Hereford* v. *Ravenhill*, 5 Beav. 51 ; 11 L. J., Ch. 173 ; 6 Jur. 228.

Personalty directed by will to be laid out in land, to be held on trusts which do not exhaust the absolute interest, devolves, after the expiration of the specified trusts, upon the executors of the testator for the benefit of his next of kin, and not upon his heir. Such personalty is not taken by the next of kin as realty, but, notwithstanding the constructive or actual conversion, goes to the executors to be dealt with as personal estate. *Head* v. *Godlee*, Johns. 536 ; 29 L. J., Ch. 633 ; 6 Jur. (N.S.) 499 ; 8 W. R. 147. *But see next case.*

Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate. *Head* v. *Godlee*

ante, overruled. *Curteis* v. *Wormald*, 10 Ch. D. 172 ; 40 L. T. 108 ; 27 W. R. 419.

—— **Trusts by Reference—Uncertainty—Ineffectual Disposition.**]—E. by deed conveyed several sums of money, secured by mortgages, amounting to 60,000*l.*, to trustees in trust to be laid out in the purchase of lands to the use of himself for life, remainder as to sums to the amount of 28,000*l.* to his wife for life, remainder to his son R. for life, with several remainders over, remainder to J. in fee : and as to sums amounting to 23,000*l.* to R. for life, with several intermediate remainders, remainder to J. in fee ; and as to one particular mortgage of 8,500*l.* and some leasehold estates to secure annuities, the surplus to R. in fee with power of revocation. By his will he gave these leasehold estates and the mortgage for 8,500*l.*, together with another mortgage of 6,700*l.*, in trust to secure the annuities, the surplus, interest, or rents of the lands purchased to be paid to R. for life, and to be settled in the same manner as his other estates :—Held, first, these mortgages are to be considered as real estate ; secondly, it being uncertain which of the limitations they were to follow, they are undisposed of and passed to R. as heir-at-law, and from him to his general devisee, E., who having died intestate as to the real estate, they go to the heir-at-law, D. *Leslie* v. *Devonshire* (*Duke*), 2 Bro. C. C. 189.

See also 3, post.

e. Lapse.

Mixed Fund.]—Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed, and so far as they are constituted by personal estate shall go to the person next of kin ; and so far as they consisted of real estate, to the heir-at-law. *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503.

See 7 Price, 258. See also *Roberts* v. *Walker*, 1 Russ. & M. 752.

Real and personal, by will, to be sold ; legacies, &c. therewith to be paid ; residue by fifths to five persons. One dies before testator : —Held, to be real estate to heir of testator. *Digby* v. *Legard*, Dick, 500.

A testator devised real estate to trustees upon trust to sell, and as to the moneys to arise by such sale, directed that they should sink into, and be deemed part of, the residue of his personal estate, and be applied accordingly ; he then bequeathed all the residue of his personal estate to the same trustees upon trust for his sons and daughters in equal proportions. One of the sons died in the testator's lifetime : —Held, that the share of the deceased son in the produce of the real estate was to be deemed real estate and as undisposed of by the will, and that it went to the heir-at-law of the testator. *Taylor* v. *Taylor*, 3 De G. M. & G. 190 ; 22 L. J., Ch. 742 ; 17 Jur. 583 ; 1 W. R. 398.

The decision in *Phillips* v. *Phillips*, post, overruled. *Ib.*

In case of a lapsed legacy, to be paid out of a mixed fund of real and personal estate, the next of kin will take the whole benefit of the lapse, if it appears upon the will to have been the testator's intention that the produce of his real estate directed to be sold after his death should, for all purposes, have the same quality as if it had been part of his personal estate at his death. *Phillips* v. *Phillips*, 1 Myl. & K. 649 ; 1 L. J., Ch. 214.

A testator devised and bequeathed his real and personal estate, in trust to sell and constitute a mixed and blended fund. He thereout gave J. B. 100*l.* and one-eighteenth of the residue, and he gave the remaining portions of the residue to other persons. J. B. died in the testator's lifetime :—Held, that the next of kin and heir were entitled to their proportionate part of the lapsed share of the residue, and that the legacy of 100*l.* fell into the residue, and passed by the gift thereof. *Salt* v. *Chattaway*, 3 Beav. 576 ; 10 L. J., Ch. 234.

Testator gave, devised, and bequeathed all his real and personal estate to trustees, upon trust to sell, and pay and apply the proceeds of such real and personal estates, and also all the rents, interest, and profits thereof until sale, in such manner as thereinafter mentioned ; and, after making a provision for his wife for her life out of the said proceeds, he directed that the residue of the said fund should be divided into fifty equal shares, which he bequeathed amongst various legatees, giving a certain number to each, and directing that, in case either of such legatees should die before his shares should become vested, such shares were to sink into the residue : —Held, upon the construction of the will, that certain portions of the residue (which was wholly made up of proceeds of realty) which had lapsed by the death of the legatees thereof in the lifetime of the testator belonged to the heir at law, and not to the next of kin of the testator. *Fairbairn* v. *Rothwell*, 9 Jur. 787.

Real Estate — Conversion — Legacy.] — F., having an estate which came to her ex parte maternâ, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will, she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life ; then, after the deduction of 3,500*l.* to uses which vested in the plaintiff A., and after payment of 1,000*l.* to G., to pay the residue of the purchase-money to the three defendants. G. died, leaving the testatrix. The 1,000*l.* is real, not personal, and shall not go to the executors of G. (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir-at-law ex parte maternâ (the side from which the estate came). *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128.

—— **Conversion for Payment of Legacy.**] — Conversion of real estate into personal, by will, for payment of a legacy which lapsed :—Held, a resulting trust, for heir. *Williams* v. *Coade*, 10 Ves. 500.

Resulting trust for the heir ; a special disposition of the money to be raised by sale of real estate failing by lapse. *Gibbs* v. *Ougier*, 12 Ves. 416 ; 8 R. R. 348.

—— **Conversion for Division among Legatees.**] —Upon the construction of a will the court held that a testator intended a conversion of real estate for the sole purpose of division amongst specific persons, and that, the purpose for con-

version having failed, so far as regarded one who predeceased him, the heir-at-law was entitled. *Pring, Ex parte*, 4 Y. & C. 507 ; 5 Jur. 529.

See also 3, post.

f. Contingent Gifts.

Gift if B. dies to C.—Money to be Laid Out.]—One devises 8,000*l.* to be laid out in a purchase, and settled to A. for life, remainder to B. and his heirs ; but if B. dies in the lifetime of A., then to C. and his heirs. B. and C. both die in the lifetime of A., the money not being laid out upon the death of A. ; this money shall be considered as lands, and shall go to the heirs of C., and not to his executors. *Scudamore* v. *Scudamore*, Pre. Ch. 543.

Gift to A. at 21—Mixed Fund.]—Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death, under that age, a resulting trust for the respective representatives. *Chambers* v. *Brailsford*, 18 Ves. 368. Affirmed, 19 Ves. 652 ; 11 R. R. 214. And see *Spencer* v. *Wilson*, 42 L. J., Ch. 754 ; L. R. 16 Eq. 501 ; 29 L. T. 19.

—— **Legacy out of Proceeds of Lands to be Sold.**]—One has two sons, A. and B., and three daughters, and devises his lands to be sold, to pay his debts, and as to the moneys arising by sale after debts paid, he gives 200*l.* thereout to his eldest son A., at twenty-one, the residue to his four younger children equally. A., the eldest, dies before twenty-one, the 200*l.* shall go to the heir of the testator. *Cruse* v. *Barley*, 3 P. W. 19.

Gift to Children at 21 or Marriage—Mixed Fund—Death under 21 and Unmarried of Daughter and Heir.]—A testator directs a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one, if sons, and twenty-one or marriage, if daughters ; and if no child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried :—Held, that so much of the residuary fund as was constituted of real estate descended to the heir, but in the character of personal estate, and that such personal estate, together with the residuary personal estate of the testator, was, in the event which had happened, undisposed of, and divisible under the Statute of Distributions. *Jessopp* v. *Watson*, 1 Myl. & K. 665 ; 2 L. J., Ch. 197.

Discretionary power of Sale—Sale during existence of Contingent Interest.]—C., by will, devised real and personal estate to trustees upon trust for his two children, a son and daughter, in equal shares, and gave the trustees a power of sale at discretion. One half the daughter's share was settled by the will. On the marriage of the daughter, E. R. C., in 1865, a deed was executed appointing new trustees of the will, and declaring that they should stand possessed of the settled half of the daughter's share on the trusts of the will, and the unsettled half upon the trusts declared by a settlement of even date. By the settlement the unsettled share and certain other property were conveyed to the same trustees upon trust for the said E. R. C. (with no words of limitation) until her marriage, then upon trust to invest and to hold the investments upon the usual trusts in favour of her, her husband and children, with an ultimate trust for her, her executors, administrators, and assigns. At the date of the settlement a large part of the real estate devised by the will remained unsold. E. R. C. afterwards survived her husband and died, leaving an infant daughter who died without ever attaining a vested interest under the settlement. A part of the real estate was sold during E. R. C.'s life, and the residue during the life of her daughter, who had a contingent, though not a vested interest :—Held, that no conversion of the real estate devised by the will was effected by the settlement, but the whole having been sold while there was in existence an interest, though not a vested interest, under the trusts of the settlement, the whole property so sold, and not only that sold in E. R. C.'s lifetime, was converted, and must be taken by her personal representatives. *Sinclair's Settlement, In re*, *Crump* v. *Leicester*, 56 L. T. 83.

3. Residuary Gifts, Operation of.

a. Conversion Out and Out.

Produce of Real Estate—Absolute Gift to Trustees and Executors.]—Residuary bequest to trustees and executors, describing both by their character and names, to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money as they in their discretion shall think proper and expedient :—Held, an absolute interest to them beneficially, or an absolute power of appointment, excluding the next of kin and the heir, as to the produce of real estate. *Gibbs* v. *Rumsey*, 2 Ves. & B. 294 ; 13 R. R. 88.

Testator, after reciting that his property consisted of a house at C—— (which was freehold) and of mortgages, &c., directed the house to be sold, and then gave several pecuniary legacies, and amongst them 300*l.* to G. and 100*l.* to P., whom he appointed his executors. The will concluded thus : "And to Mr. G., who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled." G. died the day after the testator, without having proved the will :—Held, in a suit by his executors against the testator's heir and next of kin, that the plaintiffs were entitled to the residue of the testator's estate, including the proceeds of the house. If an executor is also the residuary legatee, he is entitled to the residue, although he does not prove the will. *Griffiths* v. *Pruen*, 11 Sim. 202.

—— **Devise of Personal Estate.**]—Where a man devises his real estate to be sold to pay debts and certain pecuniary legacies, and subject to his debts and legacies devises his personal estate to his sister :—Held, that the proceeds of the real estate passed. *Mallabar* v. *Mallabar*, Cas. t. Talb. 78.

—— **Trusts by Reference—Charge of Debts.**—A., by will, devises his real estate to trustees in trust, to sell the same, in order to pay off the incumbrances, and apply the residue as he directed with respect to residue of his personal estate ; he devises the residue of his personal estate, after payment of debts and legacies, to

executors on trusts :—Held, on construction, that surplus money produced by sale of real estates. was charged with the payment of simple contract debts. *Kidney* v. *Coussmaker*, 7 Bro. P. C. 573 ; 2 R. R. 118.

—— **Legacy — Lapse.**] — A legacy out of the produce of a copyhold estate directed to be sold, failing, was held to pass by the residuary clause against the heir, the object being a general conversion out and out. *Kennell* v. *Abbott*, 4 Ves. 802.

Devise in trust to sell, but not for less than 10,000*l*., and to pay several sums amounting to 7,800*l*., and the overplus moneys arising from the sale to A. :—Held, a specific legacy of 10,000*l*., and the sale producing less, A. and the others to abate ; legacies to charity, void by the stat. 9 Geo. 2, c. 36, fell into the general residue. *Page* v. *Leapingwell*, 18 Ves. 463 ; 11 R. R. 234.

Devise of freeholds to be sold, and after payment of debts the residue to be invested on certain trusts :—Held, a conversion even as to a share of which the gift lapsed. *Barber* v. *Barber*, 3 Myl. & C. 688 ; 8 L. J., Ch. 36 ; 7 *Ib.* 70 ; 2 Jur. 1029 ; 1 *Ib.* 915.

—— **Residuary Legatees.**]—A testator directed the payment of his funeral expenses and lawful debts out of the proceeds of his property, and directed the sale of all his landed property in the Landed Estates Court, for its full value, with the exception of one estate, which he devised to A. for life. and at her death to B., with remainder to T., who was constituted residuary legatee. He left several pecuniary legacies, not stating out of what fund they were to be paid :—Held, that the direction for sale of the real estate amounted to a conversion of it out and out into personalty, for the general objects of the will, and that the surplus of the proceeds of the sale passed to the residuary legatee, and not to the heir-at-law. *Singleton* v. *Tomlinson*, 3 App. Cas. 404 ; 38 L. T. 653 ; 26 W. R. 722.

Mixed Fund—Interest of Produce of Real Estate.]—A bequest of a moiety of the interest of the residue of the testator's personal estate :—Held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty. *Byam* v. *Munton*, 1 Russ. & M. 503; 8 L. J. (o.s.) Ch. 156.

—— **Charitable Legacies.**]—Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to A. and B. :—Held, the failure of the charitable legacies to enure to the benefit of A. and B. *Green* v. *Jackson*, 2 Russ. & M. 238. Affirming, 5 Russ. 35.

Real estate directed to be sold, and together with personal applied (inter alia) in charitable purpose and "that the trustees should place out all the residue of testator's estate, and the interest thereon, on securities, and divide it, &c." :—Held, first, that the bequest as to the charity was void ; and next, that the whole, as to the other matters, was turned into personalty. *Durour* v. *Motteux*, 1 Ves. sen. 320.

—— **Residuary Gift of Personal Estate.**] — A testator gave all his real and personal estate to trustees to convert into money, and out of the proceeds of the conversion to pay certain legacies and annuities, and he directed his trustees to hold the residue of his personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his death, until they should attain twenty-one or marry, and when they attained that age upon trust to pay or transfer the residue of his personal estate unto the four children in equal shares as tenants in common :—Held, first, that the residuary clause passed all the real estate which he had before directed to be converted as well as all the personalty. *Spencer* v. *Wilson*, 42 L. J., Ch. 754 ; L. R. 16 Eq. 501; 29 L. T. 19.

Held, also, that the shares of the four children did not vest till twenty-one, and that the share of one child who died under twenty-one was undisposed of, and passed as to the realty to the heir-at-law, and as to the personalty to the next of kin of the testator. *Ib.*

A testator, by his will, made in 1872, after certain legacies, devised his real estate and bequeathed the residue of his personal estate to trustees to sell, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of his debts, funeral and testamentary expenses, and legacies), "according to the trusts thereinafter declared concerning the same," with a discretionary power for the trustees to postpone the sale, and let and manage his unsold real estate, and with a declaration that the unsold real estate and outstanding personal estate should be subject to the trusts thereinafter declared concerning the net moneys, and that the rents should be annual income for the purpose of the same trusts, and such real estate should be considered as converted in equity. And he directed his trustees to stand possessed of the net moneys to arise as aforesaid, upon trust to pay an annuity, and subject thereto, and to the payment of his debts, legacies, funeral and testamentary expenses, to stand possessed of his "residuary personal estate" upon trust as to one moiety for his son absolutely, and as to the other moiety, for his daughter for her life, with remainder for her children :—Held, that though there was no express direction as to the proceeds of the sale of the real estate, they did not go to the heir-at-law, but were included in the trusts of the residuary personal estate. *Court* v. *Buckland*, 45 L. J., Ch. 214 ; 1 Ch. D. 605.

A testator, by his will, empowered his executors to pay his debts and funeral and testamentary expenses out of the proceeds of his property, and, after reciting that he was possessed of landed and chattel property, as stated in a schedule, directed his executors to sell his landed property, and then proceeded to give a number of large pecuniary legacies, without stating out of what fund they were to be paid. and appointed a residuary legatee. The amount of the legacies far exceeded that of the testator's pure personalty as set out in the schedule, or at the time of his death a year afterwards, when he had practically no debts :—Held, that the direction to sell the real estate amounted to a conversion of it out and out into personalty so as to make the legacies payable thereout, and to cause the surplus to pass to the residuary legatee. The unsuccessful heir ordered

to abide his own costs. *Watson* v. *Arundell*, Ir. R. 11. Eq. 53.

b. Conversion Incomplete.

Charitable Legacy raisable out of Real Estate —"After Payment of."]—Where devisor directs that after payment of 800*l.* to charity, to be raised by sale of real estate, the residue thereof should go to the residuary devisee :—Held, legacy to charity being void, 800*l.* goes to heir, and not to residuary devisee. *Jones* v. *Mitchell*, 1 Sim. & S. 290 ; 1 L. J. (o.s.) Ch. 163.

Proceeds of Land—Charitable Legacy out of.] —Devise of lands to be sold, and part of the money arising by sale to go to charitable uses, and the residue of the money is given over. So much as is given in mortmain shall lapse to heir, and not go to the residuary legatees. *Gravenor* v. *Hallum*, Ambl. 643.

—— **Surplus—Gift of all Personal Estate and Effects.**]—A testator devised his real estate to trustees in trust for sale, and out of the proceeds and out of the rents, till sale, to pay his debts and the trustees' costs, charges, and expenses, and then upon trust to pay three legacies of 500*l.* each ; and, as to all his personal estate and effects, the testator gave the same to T. R., his executors, administrators, and assigns : — Held, that the will did not give to T. R., nor dispose of, the surplus of the beneficial interest in the produce of the testator's real estate, after paying the charges which ought to be considered as imposed thereon ; and that such surplus belongs to the heir-at-law. *Collis* v. *Robins*, 1 De G. & Sm. 131 ; 16 L. J., Ch. 251 ; 11 Jur. 362.

—— **Freeholds and Leaseholds—Surplus—Marshalling.**]—Testatrix devised all her messuages, &c., and real estate to trustees, to sell and pay funeral, &c., expenses and legacies, except her charitable legacies, which she directed to be paid out of her personal estate legally applicable for that purpose, not out of any part of her said messuages, &c. ; and she also directed her trustees to keep separate accounts of the proceeds of her messuages, and of her personal estate legally applicable, as aforesaid ; and that if proceeds from messuages should be insufficient to pay the legacies, trustees to apply her personal estate, and she gave her personal estate and effects undisposed of to A. :—Held, first, that though personal estate was more than sufficient for charity, no part of it could be applied to pay other legacies, until proceeds of real estate were exhausted ; secondly, that testatrix's leasehold passed to trustees under devise of all her messuages, &c. ; thirdly, that her heir and next-of-kin, and not residuary legatee, were entitled to surplus proceeds of freeholds and leaseholds ; and, fourth, that freeholds having been properly sold in heir's lifetime, the surplus was part of his personal estate. *Dixon* v. *Dawson*, 2 Sim. & S. 327 ; 3 L. J. (o.s.) Ch. 195.

—— **Charge of Legacies—Surplus Personalty after Charges—Marshalling.**]—Devise of freehold estate, in trust to sell and apply the money towards payment of the legacies ; the residue of the personal estate, after payment of debts, legacies, &c., upon trust to convert all the said residue of testator's personal estate into ready money to be laid out in freehold property, to be settled. The personal estate leaving a residue beyond the charges, the real estate a resulting trust for the heir-at-law, and charged with the legacies, not primarily, but as an auxiliary fund to the personal estate. *Maugham* v. *Mason*, 1 Ves. & B. 410 ; 12 R. R. 251.

Mixed Fund—Legacy—Lapse—Intention.]—A testator gave her real estates upon trust to be sold, and directed the moneys to arise from such sale to be considered and taken as part of her personal estate ; she then willed that out of the moneys to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid, and bequeathed all the residue of her personal estate, and of the moneys arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees died in the testatrix's lifetime : — Held, that the conversion of the real estate into personal, directed by the will, was not absolute but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir at law. *Amphlett* v. *Parke*, 2 Russ. & M. 221 ; 9 L. J. (o.s.) Ch. 161. Reversing on these points *S. C.*, 1 Sim. 275 ; 4 Russ. 75 ; 5 L. J. (o.s.) Ch. 139. The suit was compromised on appeal to the House of Lords. See 1 Myl. & K. 653, 660, n.

—— **Pecuniary Legacy not Disposed of.**]—Testator gave real estate to be sold and the produce to be considered as part of his personal estate, and thereout and out of his personal estate gave legacies to his next of kin, heir, and others ; he gave other estates to be sold and the produce to be considered from henceforth as other part of his said personal estate, and to be disposed of in manner following ; he then gave legacies, and some estates specifically, and other legacies out of his said trust moneys, and personal estate ; and gave his executor 1,000*l.* to be disposed of according to any instructions he might leave in writing ; and gave all the residue of his goods and chattels, and personal estates and effects, whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1,000*l.* *Collins* v. *Wakeman*, 2 Ves. 683.

—— **Appointment of "Residuary" Executors.**]—Devise of real estate to be sold, the object being a provision for legacies, is not an absolute conversion, and is therefore a resulting trust for heir-at-law as to surplus, though a residuary legatee is appointed. *Berry* v. *Usher*, 11 Ves. 87.

—— **Residuary Legatees "Appointed and Devised"—Legacy to Heir.**]—The intention of testator being to provide an auxiliary fund for legacies, and not a complete conversion out and out, the residue of the real estate, after making good the deficiency of the personal in payment of legacies, is a resulting trust for the heir, notwithstanding a legacy given him, and the testator "appointed and devised residuary legatees." *Kellett* v. *Kellett*, 1 Ball & B. 533 ; 12 R. R. 54. Affirmed, 3 Dow, 248 ; 15 R. R. 63.

A legacy to the heir not sufficient to defeat his claim to the undisposed real estate. *Ib.*

Whether the case of resulting trust arise between the heir and next-of-kin, or heir and

residuary legatee, the question is, what is the residue? *Ib.*

—— **Residuary Legatee.**]—In December, 1867, J. devised her moiety of the freehold lands of B. to her sister L., for life, to whom she also left certain personalty absolutely, and appointed her "residuary legatee." The testatrix then proceeded, subject to L.'s life estate, to declare a trust for the sale of the premises, and out of the proceeds gave two effectual legacies, and several charitable bequests which subsequently failed from her dying within three months of the date of her will. L. having died in July, 1869:—Held, that the words "residuary legatee" referring primâ facie to personalty, there was nothing in the context of J.'s will to enlarge their operation into a gift of real estate, and that, consequently, her heir-at-law took the realty or its proceeds, which became undisposed of from the failure of the charitable bequests charged thereon; but that, since the purpose for which a conversion had been directed had not wholly failed, he took such real estate as personalty. *Hamilton* v. *Foot*, Ir. R. 6 Eq. 572.

Real and Personal Estate—Devise to Executor to Pay Debts and Legacies—Gift to Executor of "Rest and Residue."]—Real and personal estate devised to the executor in trust to pay debts and legacies, the rest and residue to himself, the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir:—Held, only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday* v. *Hudson*, 3 Ves. 210.

—— **Gift to Executor for Purposes of Will—Construction.**]—Under a gift of real and residuary personal estate to a person appointed executor, "to enable him to carry into effect the purposes of this my will," the court refused to admit extrinsic evidence to show that the executor was entitled beneficially, and was not a trustee merely for the heir of the surplus real estate, the heir being entitled by construction, and not by implication of law. *Barrs* v. *Feukes*, 11 Jur. (N.S.) 669; 12 L. T. 727; 13 W. R. 987.

Real Estate—Will—Power of Sale.]—The produce of real estate, sold under a power in a will, passed by a residuary clause with the personal estate, the object being a conversion out and out; but part remaining unsold:—Held, a resulting trust for heir-at-law. *Brown* v. *Bigg*, 7 Ves. 279.

Money to be Laid Out—Settlement, Articles for—Money at Home.]—Money, by marriage articles, agreed to be laid out in land, and settled on the husband and wife, and their issue, remainder to the right heirs of the husband; though the money at first is bound by the articles, yet when the husband and wife are dead without issue, the money is in the disposal of the husband, and will be assets, and go to his executor and administrator, and à fortiori to his residuary legatee. *Chichester* v. *Bickerstaff*, 2 Vern. 295.

See also *Bowes* v. *Shrewsbury*, 5 Bro. P. C. 144.

4. EXPRESS DECLARATION, EFFECT OF.

Direction to Convert — "All Property being Personal."] — Upon a direction to convert all testator's real and personal estate into money, and at a certain time to invest a sum out of personal estate for a charity, and at the end of twelve months to lay out the residue, "all his property being personal," for other charitable purposes:—Held, that the charitable purposes failed, so far as the fund arose from the real estate, or any other than pure personal property, and that the heir was entitled to so much of the residue of the mixed fund as arose from the sale of the real estate; the heir is not affected by the actual conversion of land into money, and so much of the interest as is not exhausted by the disposition belongs to him; but when it can be clearly ascertained that the intention of the testator is, that the produce of his real estate shall, to all intents and purposes, be treated as personal estate, so as to devolve upon the persons entitled thereto, the court will give effect to that intention, whether directly expressed or necessarily to be inferred. *Johnson* v. *Woods*, 2 Beav. 409; 9 L. J., Ch. 244.

Negative Words — Next of Kin.] — Where there is no gift of the undisposed-of residue, a testator cannot by negative words exclude one of his next of kin from participating in it. *Johnson* v. *Johnson*, 4 Beav. 318.

—— **Heir.**]—Upon a devise of personal and real estate for sale, to be held by the trustees as a fund of personal estate only, and no part by reason of any event to lapse or result for the benefit of the heir-at-law; and the testatrix, after bequeathing certain legacies, directed the residue of her estate to be paid and applied as she should thereafter appoint, and she made no appointment:—Held, that the heir was entitled to the proceeds of the real estate undisposed of by the will. *Fitch* v. *Weber*, 6 Hare, 145; 17 L. J., Ch. 361; 12 Jur. 645.

Proceeds of Realty to be Considered "Personal Estate to all Intents and Purposes."]—Devise and bequest of freehold, copyhold, and leasehold estate, upon trust for sale, with a direction that the proceeds, after payment of all costs, charges, and expenses attending the same, shall be considered, to all intents and purposes, as part of the testator's personal estate; and a gift of the residue of his money, London Assurance stock, securities for money, &c., to the London Hospital for the purposes of the charity:—Held, that the real and personal estate were thrown into one mass; and that the charge of debts, legacies, and costs were to be apportioned between the real and personal estate pro ratâ. *Robinson* v. *London Hospital (Governors)*, 10 Hare, 19; 22 L. J., Ch. 754.

A direction that the proceeds of the real and leasehold estate should be considered as part of the personal estate, does not take away the right of the heir; nor does the addition to that direction, that the real estate shall be taken to be personal estate "to all intents and purposes" take away that right. *Ib.*

Intention to Dispose of all Real and Personal Estate — Surplus Undisposed of.]—Testatrix by her will, after expressing an intention to dispose of all her real and personal estate as thereinafter mentioned, gave certain legacies and appointed A. and B. her executors, and gave

to them and their heirs all lawful powers and authorities to conduct and manage her freehold estates, so as that the same might at their discretion be sold and converted into money, and she directed that the net money should form part of her personal estate; and for those and every other purpose connected with her property, whether real or personal, she invested A. and B., and the survivor of them, and his heirs, executors, and administrators, with her full authority; and she directed that any undisposed-of surplus of moneys should be paid as she should by any future writing or will direct; she did not, however, make any future writing or will. After her death A. and B. sold her real estates. Her personal estate was sufficient to pay her debts and legacies:—Held, that her heirs, and not her next of kin, were entitled to the moneys produced by the sale. *Flint* v. *Warren*, 16 Sim. 124; 12 Jur. 810.

Proceeds of Realty to be deemed Personal Estate—Share Undisposed of.]—A testator devised freehold estates upon trust to sell, with a declaration that the moneys to arise from such sale should be deemed part of his personal estate, and that the income thereof till sale should be considered as part of the income of his personal estate, and be subject to the disposition of his personal estate thereinafter made. The testator then gave his personal estate upon trust for four persons as tenants in common. By a codicil the testator revoked the residuary gift to one of the four, who was also the testator's heir-at-law and customary heir:—Held, that the heir was entitled to so much of the lapsed residue as consisted of real estate. *Gordon* v. *Atkinson*, 1 De G. & Sm. 478.

—— **Lapse.**]—A testator devised real estate to trustees upon trust to sell, and as to the moneys to arise by such sale, directed that they should sink into and be deemed part of the residue of his personal estate, and be applied accordingly; he then bequeathed all the residue of his personal estate to the same trustees upon trust for his sons and daughters in equal proportions. One of the sons died in the testator's lifetime:—Held, that the share of the deceased son in the produce of the real estate was to be deemed real estate and as undisposed of by the will, and that it went to the heir-at-law of the testator. *Taylor* v. *Taylor*, 3 De G. M. & G. 190; 22 L. J., Ch. 742; 17 Jur. 583; 1 W. R. 398.

The decision in *Phillips* v. *Phillips* (1 Myl. & K. 649), overruled. *Ib.*

A testator gave his real and personal estate to trustees, to raise an annuity for his widow and invest the surplus; and after her death he directed a sale of his real estate, and declared that the produce should be deemed to be part of his personal estate, and should be subject to the disposition of his personal estate, which he gave to his children:—Held, that the realty was converted into personalty only for the purposes of the will, and that the heir of the testator was entitled to so much of the real estate as had lapsed by the death of a child in the testator's lifetime. *Bedford* v. *Bedford*, 35 Beav. 584.

—— **Surplus to Executors.**]—Lands devised to be sold for payment of his debts, and that the surplus should be deemed part of his personal estate, and to go to his executors; and gives his executors 100*l.* a-piece as a legacy: the surplus decreed a trust in the executors, and subject to distribution. *Bristol (Countess)* v. *Hungerford*, Pre. Ch. 81; 2 Vern. 645.

—— **Surplus "as part of Personal Estate."**]—A testator devised his real estates to A. and B., in trust to sell and pay off all incumbrances thereon, and stand possessed of the residue "as part of his personal estate." He bequeathed his personal estate to the same persons, in trust to convert, and with the produce thereof, and of the sales of his real estates, to pay his debts, &c., and the legacies, and to pay the residue to whom he should give the same by codicil. He made no gift of the residue:—Held, first, that the incumbrances were payable out of the real estate; secondly, that the debts and legacies were payable pari passu out of the mixed fund composed of the produce of realty and personalty; and, thirdly, that of the surplus, the part arising from realty belonged to the heir, and that from the personalty to the next of kin. *Shallcross* v. *Wright*, 12 Beav. 505.

Real Estate—Direction, "for Purpose of Distribution" N. to be Considered Personal.]—A testator empowered his trustees to sell his real estate, and directed N., "for the purpose of distribution," to be considered personal estate. He then gave it and his personal estate to certain persons, with an ultimate limitation to "his own right heirs and next of kin, according to the respective natures and qualities thereof." The prior limitations having failed:—Held, that there was no absolute conversion, but that the heir-at-law took the produce of the realty. *Edwards* v. *Tuck*, 23 Beav. 268.

—— **Settlement—Power of Sale—Appointed Share—Declaration, Proceeds of Sale to be Personalty.**]—Parents having, under a settlement of real estate, which contained powers of sale and exchange, with a trust for reinvestment of purchase moneys in land, a power of appointment amongst their children, appointed a share to H. R. S., one of the children, and declared that the shares and interests of the persons beneficially interested in the moneys arising from any sale of the premises, should be of the quality of personal estate:—Held, that the share of H. R. S. was converted in equity into personalty by the terms of appointment. *Webb* v. *Sadler*, 42 L. J., Ch. 498; L. R. 8 Ch. 419; 28 L. T. 388; 21 W. R. 394.

Sole Heiress and Executrix, Appointment of.] — One makes his wife his sole heiress and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure to pay his debts and legacies, and gives his brother (who was his next of kin and heir) 5*l.*; the wife has the residue to her own use, and not as a trustee. *Rogers* v. *Rogers*, 3 P. W. 193; Sel. Ch. Ca. 81; Ca. t. Talb. 268.

5. Distinction of Charge upon and Exception from Devise.

Charitable Gift — Charge.] — Money charged upon a real estate for a charity, void by the Statute of Mortmain, shall sink in favour of the specific devisee; not to go to the heir at law or residuary legatee. Secus, when it is an exception out of the devise. *Wright* v. *Rose*, 1 Bro. C. C. 61.

—— **Exception.**]—Where a real estate is directed to be sold, and a part of the produce is to be applied to a purpose, viz. a charitable legacy, which fails, and the residue of the produce is given over, the heir, and not the residuary devisee, will take the sum intended for the particular purpose. Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the corpus of the estate, then if a gift intended for a particular purpose which fails is to be considered as an exception from the residuary gift, the heir will take; if it is to be considered as a charge upon the devised estate the residuary devisee will be entitled to the benefit of the failure. *Cooke* v. *Stationers' Co.*, 3 Myl. & K. 262.

Trust to Raise Sum — Gift of Estate "After Raising as Aforesaid" — Charge.]—Freeholds were devised upon trust to raise 2,000*l.* "by sale or otherwise,' and to permit the testator's son, P., to enjoy the estate, "after raising as aforesaid," for his life, with trusts in remainder for P.'s children; and in the event (which happened) of P. dying without leaving issue, in trust for S. and T. in common in fee. Trusts were declared of the 2,000*l.*, which, as to 1,000*l.*, were for a daughter of the testator for life, and, after her death, for her children. The 2,000*l.* were not raised till after the death of P., who survived S. and T., and kept down the interest of the 2,000*l.* The daughter afterwards died without ever having had a child:—Held, first, that the 2,000*l.* was a charge upon the devised estate, and not an exception out of the devise, and therefore, as to the above, 1,000*l.* sank upon the daughter's death for the benefit of the inheritance. Secondly, that the 1,000*l.* formed part of the real estates of S. and T. at their decease. *Cooper, In re*, 4 De G. M. & G. 757; 17 Jur. 1087; 1 W. R. 231. And see *Newbury, In re*, 46 L. J., Ch. 612; 5 Ch. D. 746; 25 W. R. 747.

Trust of Real and Personal Property for A. — Direction for Sale of Part — Trust of Produce to Answer Annuities—Charge.]—C., in 1854, gave to trustees, their heirs, executors, administrators, and assigns, all his real and personal property, of whatever nature or kind, in trust for his sister S. The testator directed that certain farms should be sold, and that the money obtained, together with moneys due to him, should be vested in the names of the treasurers of the Wesleyan Methodist Missionary Society on annuity such as the law directed, such annuity to be paid to his sister as she might direct. After the decease of a brother and another sister and C., the claim to the annuity was to cease:—Held, that the testator had given his property, of every description, upon trust for one particular person, and everything given to the Wesleyan Methodist Missionary Society was given by way of a charge thereon, which, having failed, there was an absolute trust in favour of C. *Carter* v. *Haswell*, 26 L. J., Ch. 576; 3 Jur. (N.S.) 788; 5 W. R. 388.

The 25th section of the 7 Will. 4 and 1 Vict. c. 26, is to be construed upon the principle of assimilating a residuary devise of real estate with a similar bequest of personalty; and therefore a devise which was, by construction, residuary, was held to pass lands which had been included in a devise void as being contrary to law. *Ib.*

Trust for Sale of Real Estate—Direction to Pay out of Produce—Charge.]—A testator devised estates to be sold, and directed a sum of 5,000*l.* to be paid out of the produce, in satisfaction of a similar sum settled upon the wife in the event of her surviving her husband:—Held, the wife not having survived him, that this sum sunk for the benefit of the persons entitled to the residue of money arising from the sale, and was not a resulting trust for the heir. *Noel* v. *Henley (Lord)*, Dan. 322; 26 R. R. 660. *S. C.*, 12 Price, 213; 7 *Ib.* 241.

Devise for Term to pay Debts — After and subject to Term in Strict Settlement — Right to Residue of Term.] — A., by will, gave lands to trustees for terms, remainder to Lord F. and C. F. for life. The trusts of the terms were for payment of scheduled debts, and to make an allowance to Lord F. and C. F.; the debts being stated to be paid, a trust results to the tenants for life; a demurrer by the trustees to a bill by creditors for an account as having no interest, therefore, overruled. *Davidson* v. *Foley*, 2 Bro. C. C. 203.

See also Residuary Gifts, col. 326, ante.

6. Devolution as Realty or Personalty.

Mixed Fund — Gift to Children at 21 or Marriage—Death under 21 of Daughter and Heir.]—A testator directs a mixed fund composed of the produce of his real and personal estate to be applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one if sons, and twenty-one or marriage if daughters; and if no child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried:—Held, that so much of the residuary fund as was constituted of real estate descended to the heir, but in the character of personal estate. *Jessopp* v. *Watson*, 1 Myl. & K. 665; 2 L. J., Ch. 197.

Real Estate—Conveyance on Trust for Sale—Sum Directed to be Raised.]—W. conveyed estates in fee to trustees to sell and pay debts, &c., and afterwards to apply the residue as follows: to raise a sum of 1,500*l.* and pay the interest to D. till marriage, and pay the principal to D. within twelve months after marriage, then to divide the residue in shares among the plaintiffs. By will, he gave out of other lands a charge for another daughter, the residue to plaintiffs. D. died unmarried; the 1,500*l.* resulted to the settlor as a resulting trust; but in his hands was personal estate, and passed as the residue thereof under the will, and not under the deed. *Hewitt* v. *Wright*, 1 Bro. C. C. 86.

—— **Power of Sale—Conversion of Part.**]—The real estate, except what was converted in execution of the power, taken by the next of kin as real, the will not operating a conversion out and out; the representatives, therefore, the trust being disappointed, taking the respective estates as they find them, having no equity against each other. The costs apportioned according to the value of the real and personal estates. *Walter* v. *Maunde*, 19 Ves. 424; 13 R. R. 230.

—— **Trust for Sale — Division of Proceeds — Lapsed Shares.**] — Testator devised his real estates to his daughter for life, and after her death devised them to his executors, with a direction to sell them and divide the sum arising from the sale amongst "my grandchildren that are living at my daughter's death, and by the present marriage, in the following manner: I give and bequeath to my grandson A. one-fifth, to B. one-fourth, to C. one-fifth, and the other parts, to be equally divided amongst the other children living at the death of my daughter by this present marriage." The testator died, leaving his daughter his heiress-at-law and also next of kin. She had at that time seven children, of whom A., B., and C. were three. A. and B. died in their mother's lifetime:—Held, that their shares lapsed to their mother, as the testator's heir-at-law, as personal estate. *Hatfield* v. *Pryme*, 2 Coll. C. C. 204; 9 Jur. 838.

—— **Lapse—Actual Sale.**]—Testator devised his real estates to trustees in trust to sell, and to pay the proceeds to the person or persons who, at the decease of S. M. and M. W., was or were their heirs or co-heirs at law respectively, in equal moieties. One of the trustees was the testator's heir; and he and his co-trustees sold part of the estate shortly after the testator's death. The heir then died; and, after his death, it appeared that the persons who were the heirs of S. M. and M. W. at their respective deaths had died in the testator's lifetime, and consequently the trusts declared in their favour failed:—Held, that the testator's real estates were not absolutely converted by his will into personalty, but only for the purpose expressed therein, and, that purpose having failed, that they descended to his heir. *Davenport* v. *Coltman*, 12 Sim. 610; 6 Jur. 404.

Held, also, that the proceeds of that part of the estate which had been sold by the testator's heir and his co-trustees was sold under an erroneous impression that one or more of the intended cestuis que trustent might be in existence, and, consequently, that those proceeds also must be considered as part of the real estate of the heir. *Ib.*

—— **Lapse—Partial Failure.**]—Where land is to be sold for benefit of A. and B., so that either dying, his moiety lapses to devisor, and A. dies in lifetime of devisor, whereby devisor's heir is entitled to that moiety, the heir takes the benefit of the partial failure as money, and not as land: but if both A. and B. die, the devisor's intention, as to the sale, is to be considered as not applying in case of the events which have happened; and the heir takes the land as real estate. *Smith* v. *Claxton*, 4 Madd. 484; 20 R. R. 320.

When a settlor conveys real estate upon trust for sale, and directs the proceeds to be applied to certain purposes, some of which fail, whether the sale is directed to be made in the lifetime of the settlor or after his decease, the property will, to the extent to which the purposes fail, result to the settlor as personal estate. *Clarke* v. *Franklin*, 4 Kay & J. 257; 27 L. J., Ch. 567; 6 W. R. 836.

Secus, if there is a failure of the whole purposes for which the sale is directed. *Ib.*

—— **Surplus Proceeds.**]—Testatrix devised all her messuages, &c., and real estates to trustees, to sell and pay funeral, &c., expenses and legacies, except her charitable legacies, which she directed to be paid out of her personal estate, legally applicable for that purpose, and not out of any part of her said messuages, &c.:—Held, that heir and next of kin, and not residuary legatee, were entitled to surplus proceeds of freeholds and leaseholds; and, freeholds having been properly sold in heir's lifetime, that the surplus was part of his personal estate. *Dixon* v. *Dawson*, *Slawin* v. *Farside*, 2 Sim. & S. 327; 3 L. J. (O.S.) Ch. 195.

Devise of real estate in trust to sell; if a conversion to personal property not absolutely, but for partial purposes, as the payment of debts, is a resulting trust, as to the surplus for the heir; but goes as personal property. *Wright* v. *Wright*, 16 Ves. 188; 10 R. R. 161.

—— **Sum out of Proceeds.**]—Testator directed the trustees of his will to sell his real estates, and retain 5,000*l.* out of the proceeds, and to stand possessed of that sum in trust for A. for life, remainder in trust for A.'s son for life, with divers remainders over, all of which were void for remoteness. And he gave his personal estate, after payment of the legacies thereinafter given, and the residue of the money to arise by the sale of his real estates, after making good the 5,000*l.*, to B. A. died a bachelor. The testator's heir also died:—Held, that the heir's personal representative was entitled to the 5,000*l.* *Burley* v. *Evelyn*, 16 Sim. 290; 12 Jur. 712.

—— **Trust for Sale after Death of M.**]—In 1822 a testator, by his will of that date, devised his real estate to trustees, upon trust, after the decease of his wife, to receive the rents during the life of his son M., and to apply the same for his benefit during his life; and from and immediately after the decease of his said son, upon trust to sell, and the net proceeds of such sale he directed to be applied "in manner to be hereinafter mentioned." If it should be more to the interest of his estate that the said estates, or any part thereof, should be demised during his son's life, then the testator directed the trustees to demise the same during his said son's life. Then, after bequeathing certain legacies, the testator directed the said trustees to invest all moneys due to him, and all other his moneys, and to apply the income of his capital stock or fund for the maintenance of his said son's children, and, on their severally attaining twenty-one, to pay, assign, transfer, and "convey the aforesaid capital stock or fund, estate, and effects" to such children; and in case they should all die under age, and without leaving issue, upon the further trusts therein mentioned. The testator died in 1824; his widow died in 1834; M. the son died in 1850, a bachelor:—Held, that the trust for sale was absolute, and the property must be considered as personalty, and the son of the testator, in the events that had happened, took it as personalty, if he took it at all, as heir of the testator. *White* v. *Smith*, 15 Jur. 1096.

But, quære, whether the gift over on failure of issue of the son did not take effect; and, quære, also, whether any beneficial interest in the produce of the real estate was given by the will after the death of the son. *Ib.*

A testator gave an estate to his daughter E. for life, and after her death to his executors in trust to sell and to divide the proceeds equally

between her children, their shares to be vested in them at twenty-one, with clauses of survivorship and accruer, and a direction for maintenance out of the interest and proceeds of their shares after E.'s decease till their shares vested. He made similar dispositions of other estates in favour of his children, A., J., W. respectively, and their respective children. He then gave the residue of his property to E. and A., and if any of the four children should die under twenty-one, he gave the part or parts intended for them respectively to the survivors or survivor of them for life, and after the decease of such survivors or survivor he gave such part or parts to his executors in trust to sell and pay the proceeds to their, his, or her children. E. and W. attained twenty-one, and died without having had any child:—Held, that the trusts for sale of the estates devised to E. and W. respectively for life were absolute, and did not depend on E. and W. having children; and that the interests which E. and A. took in those estates under the residuary gift were personal estate. *Wall* v. *Colshead*, 2 De G. & J. 683; 4 Jur. (N.S.) 985; 6 W. R. 761.

—— **Direction for Sale—Power or Trust.**]—A testator gave to his widow, "for the benefit and advantage of his children," power of selling his W. estate. By a codicil he expressed himself (in effect) thus: "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife shall and may divide and proportion among my said children as she shall think fit and proper, or as she shall direct by will." The estate was neither sold nor appointed by the widow:—Held, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty. *Grierson* v. *Kirsopp*, 2 Keen, 653; 6 L. J., Ch. 261.

—— **Trust to Invest in Land or Government Securities to be Settled.**]—A will contained a power to sell some real estate, and a power to reinvest in real estates or in government securities to be settled as real estate. The property was personalty during the whole of the life of the first tenant in tail:—Held, that it went to her personal representative at her death. *Rich* v. *Whitfield*, L. R. 2 Eq. 583; 14 W. R. 907.

Discretionary Power of Sale—Direction, Proceeds to be considered Personalty—Actual Conversion.]—Testator gave his real and personal estate upon trusts for the benefit of his wife and children, and empowered his trustees, as they in their discretion should think proper, to sell the real estate, the proceeds to be considered as personalty:—Held, that the shares of a child, who died, in the proceeds of real estate which had been sold devolved as personal estate. *Cowley* v. *Smith*, 2 W. R. 327.

Money to be Laid Out — Real and Personal Property directed by B. to be Settled and Accepted as an Equivalent — Conversion of B.'s Personalty.]—A. devised his estates to B., his son, for life, remainder to the first and other sons of B. in tail, remainder to his daughters as tenants in common with remainders over, remainder to the testator's own right heirs of his name; and he directed the residue of his personal estates to be laid out in lands to be conveyed to the same uses as his devised estates. B., his son and executor, did not lay out the personal estate as directed by the will, but by his will he directed that certain real and personal estates should be conveyed and assigned to the trustees under the will of A., upon the trusts of that will or such of them as could then be executed; adding, that he deemed such property an equivalent in value for the residuum of his father's personal estate; and he directed that the same should be settled and accepted accordingly. The real and personal estate were not conveyed or assigned according to the will. B. died without issue:—Held, that the personal estate bequeathed by the will of B., though not actually converted, must be deemed to be converted into and to have descended as real estate. *Wrightson* v. *Macaulay*, 4 Hare, 487. And see *S. C.* at law, 14 M. & W. 214; 15 L. J., Ex. 121.

—— **Settlement.**]—By settlement 500*l.* was assigned to trustees, in trust to lay the same out in land, with consent of wife, and to pay rents to wife for life, for her separate use, remainder to husband for life, and after the death of survivor, in trust, to convey same to such persons, and for such estates as wife should by deed or will appoint; and in default of appointment, in trust for the right heirs of wife for ever, proviso, that until such purchase should be made, trustees should invest the money in the public funds, with the consent of wife, and pay the dividends to wife for life, for her separate use, and after her death to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid, and to pay or transfer the principal sum of 500*l.* or the stock in which the same should be invested, to such person as, according to the limitations aforesaid, would be entitled to the inheritance of such lands. This 500*l.* was never paid to trustees, but remained in the hands of husband at the death of wife. She having made no appointment, this 500*l.* vested in her heir-at-law (subject to the life interest of the husband), but the heir took it as money, and therefore at her death this interest passed to his personal representatives. *Russell* v. *Smythies*, 1 Cox, 215.

—— **After Failure of Trusts.**]—Personalty directed by will to be laid out in land, to be held on trusts which do not exhaust the absolute interest, devolves, after the expiration of the specified trusts, upon the executors of the testator, for the benefit of his next of kin, and not upon his heir. Such personalty is not taken by the next of kin as realty, but, notwithstanding the constructive or actual conversion, goes to the executors to be dealt with as personal estate. *Head* v. *Godlee*, 1 Johns. 536; 29 L. J., Ch. 633; 6 Jur. (N.S.) 499; 8 W. R. 147. *But see next case.*

A testator directed his residuary personal estate to be employed in the purchase of real estate, which was to be considered subject to the direction and disposition of his will respecting his real estate, as fully and effectually as if then in his actual possession. The reversion of the real estates was not disposed of by the will:—Held, that the real estate which had been purchased went to the testator's next of kin as undisposed-of personalty, after the satisfaction of debts by the executor; and that a person

claiming as heir under one of those next of kin had no locus standi. *Ib.*

Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate. *Head* v. *Godlee*, ante, overruled. *Curteis* v. *Wormald*, 10 Ch. D. 172; 40 L. T. 108; 27 W. R. 419.

Land Devised on Trust for Sale—Partial Failure of Trusts—Real or Personal Estate.]—Where real estate is devised upon trust for sale and conversion into personalty to be held on trust for tenants for life and in remainder, and the trusts in remainder ultimately fail after the death of the person who was heir-at-law of the testator at his death, the proceeds of sale and the real estate, if any, still unsold at the time of such failure both go to such heir as personal estate. *Curteis* v. *Wormald* (10 Ch. D. 172), *Jessopp* v. *Watson* (1 Myl. & K. 665), and *Att.-Gen.* v. *Lomas* (L. R. 9 Ex. 29), discussed and approved. *Richerson, In re. Scales* v. *Heyhoe*, 61 L. J., Ch. 202; [1892] 1 Ch. 379; 66 L. T. 174; 40 W. R. 233.

Residuary Gift.]—A testatrix gave her real and personal estate to three trustees, upon trust, as soon as they, in their discretion, should think most advantageous, to sell and convert into money her real estate, and pay her debts and legacies. She gave the residue of her estate and effects to her son, J. B.:—Held, that J. B. took the residue of the realty in the character of personalty. *Griesbach* v. *Freemantle*, 17 Beav. 314.

—— **Failure of Purposes.**]—Where a testator directs a sale of his real estate for purposes which wholly fail, the heir takes it as realty; but if the failure be only partial, he takes it as personalty. *Bayster* v. *Fuckerell*, 26 Beav. 469.

—— **Charitable Gift after Life Interest to A.**]—A testator devised real estate to trustees, to sell and invest, and pay the dividends to his wife for life, and at her death to transfer the principal to a charity. The gift to the charity being void:—Held, that there was a complete conversion of the realty into personalty, and that (subject to the life estate) the heir of the testator took the produce in the character of personalty, and that on the heir's death intestate, it passed to his legal personal representatives, and not to his heir-at-law. *Wilson* v. *Coles*, 28 Beav. 215.

Money to be Laid Out—Settlement of Real Estate—Legal Jointure.]—Where money was liable to be invested in land to be settled to uses in strict settlement, and all the uses were exhausted except a legal jointure:—Held, that the jointress had an equity to compel the investment of the money in land; and that, consequently, the money must be treated as real estate as between the real and personal representatives of the person who, subject to the jointure, was entitled thereto. *Walrond* v. *Rosslyn*, 48 L. J., Ch. 602; 11 Ch. D. 640.

Covenant to Convey Estate — Breach — Damages.]—A certain estate is covenanted to be conveyed and is not so, the breach of the covenant is in damages. Such damages are money, not land in the hands of the party injured. *Wade* v. *Paget*, 1 Bro. C. C. 364; 1 Cox, 74.

Charge on Real Estate—Failure of Purpose—Money raised whether Real or Personal Estate.]—An estate was appointed by will subject to a charge for raising a sum of money to be applied upon certain trusts. The money was duly raised in the lifetime of the appointee. After his death the trusts failed, and the charge sank for the benefit of the estate:—Held, that the money belonged to the legal personal representatives of the appointee. *Newbery, In re*, 46 L. J., Ch. 612; 5 Ch. D. 746; 25 W. R. 747.

C. RECONVERSION.

1. Principles.

Generally.]—Where money is agreed to be laid out in land, the party who would have the sole interest in the land, when bought, may (if of age) have the money paid to him. *Benson* v. *Benson*, 1 P. W. 130.

Money given to be laid out in land to be conveyed, or land to be sold, and the produce paid to A., though in one case the money is not given to him, and in the other no interest expressly in the land, he is in equity the owner, and may elect to have the money or the land conveyed, as he shall direct. *Pearson* v. *Lane*, 17 Ves. 104.

It is optional in the parties interested in money to be produced by the sale of land to keep the land. *Walker* v. *Shore*, 19 Ves. 392.

Money being once clearly impressed with real uses, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to it in a question between the heir and executor, either the money must come to the possession of the person from whom they claim in those characters, or he must, if it is in the hands of a third person, do some act denoting a change of intention. *Wheldale* v. *Partridge*, 8 Ves. 235; 7 R. R. 37.

Onus of Proof.]—The onus of proving reconversion is on the plaintiff who claims under the heir-at-law of the author of the deed. *Griffith* v. *Ricketts*, 7 Hare, 299, 19 L. J., Ch. 100; 14 Jur. 166.

Right of Persons having Defeasible Title to Proceeds of Land.]—Land which, from being impressed with an absolute trust for sale, is personal estate in equity, cannot be reconverted into real estate by persons having only a defeasible title to proceeds of sale. To effect a reconversion, there must be the concurrence of the absolute owners. *Sisson* v. *Giles*, 3 De G. J. & S. 614; 32 L. J., Ch. 606; 8 L. T. 233.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death. *Meek* v. *Devenish*, 6 Ch. D. 566; 36 L. T. 911; 25 W. R. 688.

2. Capacity to Elect.

a. Infant.

Money to be laid out—Will.]—Money to be laid out in land:—Held (prior to the Wills Act), that an infant cannot dispose of it by will as

money, but it will on the infant's death descend to his heir, who may take either way. *Carr* v. *Ellison*, 2 Bro. C. C. 56; Dick. 796. See also *Pierson* v. *Shore*, 1 Atk. 480.

—— **Tenant in Common.**]—One devises 1,000*l.*, to be laid out in a purchase of lands in fee, for the benefit of A., B., and C., and their heirs, equally to be divided. A. dies, leaving an infant heir. B. and C. may have their share paid them in money, but the infant cannot. *Seeley* v. *Jago*, 1 P. W. 389.

Real Estate to be Sold.]—Real estate converted into personal out and out, under a trust to sell for the payment of debts, and to pay the residue to the grantor, his executors, &c., and falling thus impressed with the character of money to one who died an infant (incompetent therefore to elect to have it reconverted) passed to his administratrix. *Van* v. *Barnett*, 19 Ves. 102.

Election by Court.]—A testator devised and bequeathed to his trustees all his real and personal estate upon trust to convert such part thereof as should not consist of investments producing interest and invest the proceeds and receive the income of all property, and thereout to pay to his wife an annuity of 140*l.* for her life, and to pay out of the remaining income to his son George such a sum as in the discretion of his trustees should be proper and sufficient for his maintenance, but so that he should not have power to mortgage or anticipate the same. After the son's marriage, in the event of there being any issue, the trustees were to apply such part of the income as they might think reasonable in the maintenance and bringing up of such issue. After the death of the wife and son the trustees were to pay and divide the capital of the trust estate unto and amongst such issue equally. The testator's wife died in his lifetime. His son George survived him, and died in 1884, leaving an only child, a son, R. W. S. The testator left real estate. In 1882 an order was made for the administration of the testator's estate. In 1885 an order was made directing an enquiry whether it would be fit and proper and for the benefit of R. W. S. (who was an infant) that any and what part of the testator's estate should be retained in the condition in which the same was at the testator's death. R. W. S. died an infant in 1888, before any certificate had been made in answer to the enquiry. After the infant's death the question was raised whether, in the events that had happened, the real estate remaining unsold passed to the infant's heir-at-law or to his legal personal representative:—Held, that the real estate passed to the legal personal representative of the infant as personalty. *Wragg, In re, Wragg* v. *Small*, 63 L. T. 219.

A testator devised his real estate to trustees to sell whenever it should appear to them advantageous. The produce was given to charities. No sale took place, and infants, to whom such produce was bequeathed if the charity bequests should be defeated, under the chief clerk's certificate finding it for their benefit, elected to take the land instead of the produce. *Robinson* v. *Robinson*, 19 Beav. 494.

See also Order for Sale, col. 296; Infant's Property, col. 299, ante.

b. Lunatic.

Presumption.]—No presumption of election to take as real estate where there is incapacity, as lunacy. *Ashby* v. *Palmer*, 1 Mer. 296.

Real Estate—Order for Sale—9 Geo. 4, c. 78, s. 2—Fund in Court.]—Where freeholds of inheritance belonging to a lunatic were sold by order of the court, under the stat. 9 Geo. 4, c. 78, and the surplus proceeds, not required for the purposes for which the sale was directed, had been paid into court and invested:—Held, that the character of realty impressed upon such surplus proceeds, by the language of the 2nd section of the statute, continued through successive descents, till a person capable of electing to take the fund as personalty should have so elected. *Wharton, In re*, 5 De G. M. & G. 33; 23 L. J., Ch. 522; 18 Jur. 299; 2 W. R. 248.

See also Lunatic's Property, col. 301, ante.

c. Married Woman.

Money to be Laid Out—Separate Examination.]—Where money was articled to be laid out in land to which feme covert was to be entitled, before she could alter the property or course of descent, the money must be invested in land, and then she may levy a fine and give it away, or upon coming into court and consenting to take the money as personal estate, and being examined as to such consent, it binds the money articled to be laid out in land as much as a fine at law would the land, and she may dispose of it. *Oldham* v. *Hughes*, 2 Atk. 452.

See also *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Binford* v. *Bawden*, 1 Ves. 512; 2 *Ib.* 38; 2 R. R. 162; *Hayes, In re*, 9 W. R. 769; *Standering* v. *Hall*, 48 L. J., Ch. 382; 11 Ch. D. 652; 27 W. R. 749.

At law, money articled to be laid out in land is considered barely as money till actual investiture: and equity alone views it as real estate, and will therefore do what a fine at common law would as to land. *Ib.*

—— **Tenant in Tail in Remainder.**]—A feme covert tenant in tail in remainder of money to be laid out in land by agreement with the tenant for life and on a private examination under the 7 Geo. 4, c. 45, consented to the payment of a proportion of the money to her husband, and the order was made accordingly. *Silcocks, In re*, 3 Russ. 369.

Appointment by Deed by Feme Covert.]—Testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estate; money not having been laid out, the devisees, on becoming absolutely entitled, have the option given by the will, and a deed of appointment by one, a feme covert, was held sufficient indication of her intention that it should continue personal property, against her heir claiming it, as ineffectually disposed of for want of her examination. *Walker* v. *Denne*, 2 Ves. 170; 2 R. R. 185.

Real Estate to be Sold, Conveyance of—Devise of "Landed Property"—Election to Take as Personalty.]—By an indenture in March, 1862, the Baroness de St. Sauveur conveyed and covenanted to surrender to a trustee freehold and copyhold property at Ealing, upon trust to sell, exchange, or make partition of it, and, until sale, to pay the rents as she should appoint, and in

default of appointment, to her absolutely. By her will in August, 1862, she gave to her husband, who was an alien, all her landed property at Ealing for his life. She died in 1866. The property at Ealing remained unsold at her death:—Held, that she had by her will elected to take the property as personalty. *Sharp* v. *De St. Sauveur*, 20 L. T. 799; 17 W. R. 1002. And see *S. C.*, 41 L. J., Ch. 576; L. R. 7 Ch. 343; 26 L. T. 142; 23 W. R. 269.

See also Married Woman's Property, col. 302, ante.

d. Tenant in Tail.

The Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *s.* 71, *enacts that money to be invested in land shall for all the purposes of the act be treated as the lands to be purchased, and the act shall apply to such money accordingly, and the cases on the earlier law are mostly omitted.*

Money to be Laid Out—Tenant in Tail Reversioner in Fee.]—Money directed to be laid out in land, and limited to A. in tail with several remainders in tail, the court will order it to be laid out if nothing has been done to the remainders. Where a person is tenant in tail, reversion in fee to himself, the court will give him the money, because by a common conveyance he may bar the entail and reversion. *Trafford* v. *Boehm*, 3 Atk. 447.

—— **Remainder Over.**]—Money devised to be laid out in land for A. in tail, with remainder over, will not be ordered to be paid to A. *Anon.*, 2 Anstr. 453.

Party entitled as tenant in tail to land to be purchased, held not entitled to elect to take money or land. *Collet* v. *Collet*, 1 Atk. 11.

—— **Agreement for Division—Tenant in Tail and Remainderman—Death of Tenant in Tail without Issue.**]—An agreement between tenant in tail and a remainderman, to divide money which was to be laid out in land and settled, carried into execution in this court after the death of the tenant in tail without issue in favour of his executor. *Carter* v. *Carter*, Cas. t. Talb. 271.

See also c, col. 344, ante; 3, col. 349, post.

e. Remainderman.

Money to be Laid out—Determination of Prior Interests.]—A. agreed, on marriage, to lay out 4,000*l.* in land in strict settlement, with remainder to himself. Wife and issue died, living A. A. may bequeath the 4,000*l.* as money. *Fulham* v. *Jones*, 2 Eq. Abr. 296. And see *Lingen* v. *Sowray*, 1 P. W. 172; *Harcourt* v. *Seymour*, 2 Sim. (N.S.) 12; 20 L. J., Ch. 606; 15 Jur. 740.

Proceeds of Sale under Compulsory Powers.]—Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of its act, and the proceeds were paid into court and invested. Afterwards, the tenant for life, under the power in the settlement, appointed by will to his son the whole of the settled estate, and the purchase money of the part which had been sold. The son by will disposed of his residuary personal estate of which he might be possessed, or over which he might have any power of disposition at his death, including in such personal estate "all moneys to which I may be entitled under the marriage settlement of my father and mother"; and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living:—Held, that the fund arising from the sale did not pass by the will. *Skeggs, In re*, 2 De G. J. & S. 533.

—— **Fund in Court.**]—A portion of real estate was taken under the compulsory powers of an act of parliament, and 2,000*l.*, the purchase money, was paid into court to the account of the estate in 1836. The tenant for life continued to receive the dividends until 1849, when she died. The person entitled to the real estate in remainder never sought to have the money reinvested in land, and made his will in the year 1844, and thereby gave the residue of his personal estate to his executors, and died intestate as to real estate. He had no personal estate of value, unless the fund in court was personalty. He died in 1844. On the petition of his heir-at-law:—Held, that the money remained impressed with the quality of real estate, and the fund was paid to him. *Stewart, In re, Cramer, Ex parte*, 1 Sm. & G. 32; 22 L. J., Ch. 369; 16 Jur. 1063; 1 W. R. 17.

Quære, whether it is competent for a tenant in fee in remainder of land expectant on the decease of a tenant for life, to elect to convert the character of real estate impressed on money in court, the produce of a compulsory purchase of the land during the life of the tenant for life. *Ib.*

Converted Real Estate—Freehold in Possession—Copyhold in Remainder.]—A. being under a will entitled to freeholds in possession and copyholds in remainder, which were both impressed with the character of personalty, did acts expressive of an intention to reconvert, as regarded the freeholds only:—Held, that the copyholds still retained the character of personalty. *Meredith* v. *Vick*, 23 Beav. 559; 27 L. J., Ch. 162; 3 Jur. (N.S.) 1234; 5 W. R. 639.

—— **Executory Devise Over—Defeasible Interests.**]—Real estate was devised to trustees, to sell and hold the proceeds for M., the wife of G., and N., as tenants in common, with a direction that if either of them should die without leaving issue, the share of the one dying should go to the survivor, and if both should die without leaving issue, then the property was to go to the testator's next of kin. By a deed, twelve years after the testator's death, executed by G. and M., his wife, and by N. (but not acknowledged by M.), they discharged the trustees from the trusts, except so far as related to their right to a reconveyance of the real estate when they should become absolutely entitled thereto. M. and N. received the rents in moieties till the death of N., who devised his real estate at F. and elsewhere, and his personal estate, to the plaintiffs. A bill was filed by them, who claimed under N., against the trustee of the will and G. and M., his wife, praying a sale of the real estate:—Held, that as the interest of M. was defeasible, neither she nor her husband could elect to take the property as real estate; that there had been no conversion, but that it retained its original character, and was liable to be sold. *Sisson* v. *Giles*, 3 D. J. & S. 614; 9 Jur. (N.S.) 951; 8 L. T. 780; 11 W. R. 971.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death. *Meek* v. *Devenish*, 47 L. J., Ch. 57; 6 Ch. D. 566; 36 L. T. 911; 25 W. R. 688.

A testator devised all the residue of his real estate to trustees upon trust for sale; and declared that they should stand possessed of the money arising therefrom upon trust, during the widowhood of his wife, to pay her an annuity, and to pay the residue of the income to his son until bankruptcy; and, after the death of his wife, upon trust, as to one moiety of the trust premises for his son absolutely; and, as to the other moiety, in case his son should not have become bankrupt, for him absolutely, and, in case of his bankruptcy, upon certain trusts in favour of his wife and children. The widow never married again. The son never became bankrupt. During his life he resided at his father's house in Sussex, and by his will devised the same in strict settlement:—Held, that the son had power to elect; and had, by his conduct in his lifetime, elected to take the house as reconverted into real estate. *Ib.*

Real Estate—Power of Sale—Produce to be Laid out in Land—Sale—Concurrence of all Parties Interested—Remainderman in Fee.]—A reversion of real estate, which, subject to an old life estate was vested in trustees, was sold. The trustees of the settlement had power of sale, with a direction to lay out the produce in land, to be settled to the same uses. Upon the sale, the trustees, instead of paying the value of the old life estate to the tenant for life, invested the whole in their names, and paid that person the dividends for her life. The old tenant for life, the tenant for life under the settlement, and the party ultimately entitled to the fee simple under that instrument, concurred in the sale, and in this dealing with the purchase money. Upon the death of the old tenant for life, questions were raised as to whether the money representing the sold estate was realty, or whether the acts of the party ultimately entitled to the fee simple did not amount to an election on his part to take the fund as money; and the vice-chancellor decided in favour of the latter view; but, upon appeal:—Held, that the money represented and must be treated as real estate. *Pedder's Settlement, In re*, 5 De G. M. & G. 890; 24 L. J., Ch. 313; 3 Eq. Rep. 157; 3 W. R. 136.

See also 3, col. 349, post.

f. Undivided Interests, Owners of.

Money to be Laid out—Infant Tenant in Common.]—One devises 1,000*l.* to be laid out in a purchase of lands in fee, for the benefit of A., B., and C., and their heirs, equally to be divided. A. dies, leaving an infant heir. B. and C. may have their share paid them in money, but the infant cannot. *Seeley* v. *Jago*, 1 P. W. 389.

Land to be Sold.]—Lands devised to be sold and the money divided among several persons, they cannot elect to take the lands instead of money, if one desired a sale. *Deeth* v. *Hale*, 2 Moll. 317.

Undivided Share of Land.]—Where an undivided share of real estate is devised, with a trust for conversion, the devisee cannot, without the consent of the persons interested in the other shares, elect to take it as realty. *Holloway* v. *Radcliffe*, 23 Beav. 163; 26 L. J., Ch. 401; 3 Jur. (N.S.) 198; 5 W. R. 271.

A. was entitled to two-thirds of an estate directed to be converted into personalty:—Held, that it had not been reconverted into realty by acts of A. done independent of the person entitled to the other one-third. *Ib.*

Real Estate—Trust for Sale—Discretion to Postpone.]—A testator devised his real estate upon trust, either immediately or at any time after his death as to his trustees should seem most expedient, to sell and to hold the proceeds in trust for his sons W., F., H., and G., if and when they should attain the age of twenty-one years, in equal shares. F. predeceased the testator, and his share therefore lapsed and devolved upon W., as heir-at-law of the testator. H. attained twenty-one but died intestate and unmarried, leaving his mother E. and his surviving brothers W. and G. his next-of-kin. G. attained twenty-one but died, having by his will given all his real and personal estate to W. W. was subsequently found a lunatic by inquisition, and remained of unsound mind until his death, intestate and without next-of-kin or heir-at-law. Letters of administration to his personal estate had been taken out by the Solicitor to the Treasury. The real estate devised by the testator remained unsold at the time of W.'s death, and an action was brought to ascertain the persons entitled thereto. The representatives of the trustees, as the persons upon whom the legal estate had devolved, contended that, as there had been no conversion of the real estate into personalty, the Crown was not entitled through the Solicitor to the Treasury to come in and insist that the real estate should be treated as converted; that there being an absolute discretion to postpone the sale for an indefinite period, that which was a trust had been cut down to a mere power of sale; and that, as there had been a failure of the cestui que trust, the trustees were entitled to retain for their own benefit the property, or the undivided shares thereof, to which W. was entitled at his death:—Held, that the trust for conversion was absolute, and had not been displaced by the discretion to postpone, inasmuch as the several parties interested had not at any time been all competent to agree to a reconversion; that the real estate must still be treated as personal estate; and that the Solicitor to the Treasury, as administrator of the lunatic, did not stand in any different position to any other administrator, and was entitled to the beneficial interest of W. in the real estate. *Heathcote, In re, Gilbert* v. *Aviolet*, 58 L. T. 43. Affirmed, 85 L. T. Journ. 120—C. A.

Where land has been devised on trust to convert, the acts of the cestuis que trustent must be clear and unequivocal, and by all of them, in order to show their election to enjoy the property unconverted. *Vincent* v. *Fane*, 1 W. R. 264.

See also 3, col. 349, post.

g. Donee of Power.

Limited Interest—Power of Appointment.]—A person having a limited interest, such as a power of appointment, cannot elect to appoint in specie that which the donor of the power has

directed to be converted. *Cooper* v. *Martin*, 15 L. T. 268; 15 W. R. 5.

Real Estate—Power of Sale—Power to Reinvest in Real Estates or in Government Securities.]—A will contained a power to sell some real estate, and a power to reinvest in real estates or in government securities, to be settled as real estate. The property was personalty during the whole of the life of the first tenant in tail:—Held, that it went to her personal representative at her death. *Rich* v. *Whitfield*, L. R. 2 Eq. 583; 14 W. R. 907.

See also *Doncaster* v. *Doncaster*, 3 K. & J. 26; 2 Jur. (N.S.) 1066.

3. WHAT ACTS AMOUNT TO ELECTION.

Money to be laid out—Parol Declaration.]—Money directed to be laid out in land, the person entitled to it absolutely may elect to take it in money or land; and slight act done will be evidence of his intention, but parol declaration is not sufficient. *Bradish* v. *Gee*, Ambl. 229; 1 Ken. 73. S. P., *Delgarno* v. *Morgan*, 1 Ken. 128.

—— **Receipt of Money.**]—Where money is covenanted to be laid out in a purchase of land, and to be settled on A. in fee, the heir, and not the executor, of A. shall have it; but if A. himself has received any of this money, this is a good payment, and shall not be repaid by A.'s executor to his heir. Also if A. in this case dies, A.'s heir shall recover the remainder of the money not received by A.; so if A.'s heir is an infant, and the remainder of the money is decreed to be brought into court, it shall be looked on as land. *Chaplin* v. *Horner*, 1 P. W. 483.

Where money devised to be laid out in land comes into the hands of one who would be entitled to dispose of the lands if purchased, the money is his absolute property. *Pulteney* v. *Darlington* (*Earl*), 7 Bro. P. C. 530. Affirming 1 Bro. C. C. 223. And see *Trafford* v. *Boehm*, 3 Atk. 440.

Stock taken by the heir as real estate under a trust to lay it out in land not executed, considered as personal estate in him, under circumstances showing his conception and intention to treat and dispose of it as personal property. *Triquet* v. *Thornton*, 13 Ves. 345.

—— **Fund in Court—Settlement—Annuity—Petition by Tenant in Tail for Payment out.**]—Certain funds were brought into court, which had been directed by a testator to be invested in lands to be settled upon A. in tail, subject to the payment of an annuity. An order had been made upon a petition presented by A., that a sufficient sum to answer the annuity should be set apart, and that the residue of the fund should be paid to him:—Held, upon the death of the annuitant, that A. had elected to take the whole fund as money, thereby barring the entail, and that A.'s executors were entitled to the sum which had been set apart for the annuity. *Dornford* v. *Dornford*, 10 L. J., Ch. 341.

—— **Marriage Articles—Trust for Sale of Land—Absolute Owner.**]—R. B. by articles previous to his marriage, covenanted to lay out 2,000*l.* in the purchase of lands, and to settle the same on himself for life, and, after his decease, to M., his intended wife, for life, and after both their deceases, to trustees to sell, and the money arising from such sale to be divided among the children of the marriage, to sons at twenty-one, daughters at twenty-one or marriage, provided no sale be made till one of the shares shall become payable. The purchase was made accordingly after E. the only surviving child died unmarried, but had attained the age of twenty-one, the absolute proprietor of these estates: E. having taken them as land in her lifetime, and done acts to show she intended they should be considered as real estate, they must be held as such, and go to the heir. *Crabtree* v. *Bramble*, 3 Atk. 680.

—— **Marriage Articles—Disabling Statute.**]—In what case money covenanted by marriage articles to be laid out in lands shall still be considered as money, and as such go to the personal representative of the party entitled to the money, in prejudice of the heir. *Bowes* v. *Shrewsbury*, 5 Bro. P. C. 144.

A papist, by marriage articles, previously to the disabling stat. 11 & 12 Will. 3, covenants to lay out 12,000*l.* in the purchase of land. The money is never laid out, and therefore shall still be considered as money, and go to the personal representative, instead of the heir, though that heir be a protestant. *Ib.*

—— **Dealing with Property.**]—If a person absolutely entitled to the money-land arising from a compulsory conversion have a right to elect to take it as personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeaths personal estate only, and does not devise realty, are not such proof of election as to prevent the fund descending on his death to his heir. *Stewart's Trusts*, *In re*, *Cramer*, *Ex parte*, 1 Sm. & G. 32; 22 L. J., Ch. 369; 16 Jur. 1063; 1 W. R. 17.

By a settlement certain money was directed to be laid out in land, and the income given to the husband for life; remainder subject to charges for the benefit of the wife, to the use of the right heirs of the husband for ever. No land was purchased, but the money was invested partly on mortgage, partly in the funds. In his banker's pass-books the husband had called these funds "trust-money." In a transfer of the mortgage made shortly before his death, he had agreed that the mortgage should not be paid off for five years, and had made the money payable to himself, his executors, administrators, and assigns. He had made private statements of his property, in which he had treated these trust funds in the same way as his own funded property. By his will he devised his hereditaments at P. and elsewhere in one way, and his personal estate in another way:—Held, that he had elected to take these trust funds as money, and that they passed under his will as personal estate. *Harcourt* v. *Seymour*, 2 Sim. (N.S.) 12; 20 L. J., Ch. 606; 15 Jur. 740.

A testator gave his daughter a sum of money, and directed his executors, as soon as convenient after his decease, to purchase an estate, and when she attained twenty-one she was to receive the money if the land was not bought. There was a gift over. The estate was not purchased, and she invested the money in the funds:—Held, on the daughter's death, that the money was impressed with the character of realty, and passed as such. *Simpson* v. *Ashworth*, 6 Beav. 412; 7 Jur. 410.

A sum of money directed to be invested by an executrix "in land or some other securities," for the benefit of one for life, with remainder to his children, "but in failure of these to A. and his heirs for ever," and which had not been invested in land:—Held, to have been originally impressed with the character of real estate; but by the subsequent dealing therewith by the parties beneficially interested, to have acquired the quality of personalty. *Cookson* v. *Reay*, 5 Beav. 22. Affirmed, sub nom. *Cookson* v. *Cookson*, 12 Cl. & F. 121; 9 Jur. 499.

Where money had been impressed by a will with the character of realty, but the parties who together were absolutely entitled to it in whatever shape, executed a deed, appointing a new trustee, and providing for the investment of the money as money, but by a general clause resettling it upon the trusts generally of a deed, which had been made upon the footing of the will, and provided for the investment in land:—Held, that the money had lost the character of realty. *Ib.*

Money directed to be laid out in land considered as real estate under a general disposition, by the will of a person entitled to it absolutely in either shape, of "the money and land," in the absence of intention, the word "money" being answered by another fund, of stock. *Biddulph* v. *Biddulph*, 12 Ves. 161.

Personalty Settlement—Funds Invested in Real Estate.]—The trust funds of a personalty settlement were invested in real estate conveyed to the trustees. The cestui que trust received the rents and repaired the property for seven years after she had become entitled to the absolute control under the settlement:—Held, that this did not make a conversion into real estate. *Parker* v. *Williams*, 15 W. R. 1006.

Real Estate to be Sold.]—Where land has devised on trust to convert, the acts of the cestuis que trustent must be clear and unequivocal, and by all of them, in order to show their election to enjoy the property unconverted. *Vincent* v. *Fane*, 1 W. R. 264.

Where real estate conveyed to trustees on trust to sell, has been used by the devisee of the settlor to all intents and purposes as realty, and is afterwards sold by the trustees, the trust fund, the produce of the sale, is to be taken as real and not as personal estate. *Gardner's Trusts, In re*, 1 Eq. Rep. 57.

—— **Possession of Title Deeds.**]—By a marriage settlement real estates were conveyed to trustees in trust to sell and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely. There was no child of the marriage. The husband survived his wife; and after her death consulted his solicitors upon his rights under the settlement; and they having advised him that he was entitled to the whole beneficial interest in the estates, he got possession of the settlement and of the title deeds, and remained in possession of them, and also of the estates, until his death:—Held, that thereby he declared his election to take the estates as land. *Davies* v. *Ashford*, 15 Sim. 42; 14 L. J., Ch. 473; 9 Jur. 612.

—— **Occupation.**]—Land under devise in trust to be sold, not considered as real estate, the trust not being executed, and two years' occupation of the land being too short to presume an election; but no act done showing intention to alter the character expressed by the uses of the will, an objection to the title of the heir upon that point prevailed. *Kirkman* v. *Miles*, 13 Ves. 338.

—— **Possession.**]—Where real estate is bequeathed in the character of personalty, and is enjoyed unconverted by the legatee, slight circumstances are sufficient to raise a presumption that he has elected to retain it as realty. In the absence of any other circumstances, the fact that a person has, for a great length of time, preserved the property in its actual state, will be sufficient to induce the court to come to this conclusion. *Dixon* v. *Gayfere*, 17 Beav. 423; 23 L. J., Ch. 60.

A. B., being entitled to an undivided share in a real estate impressed with the character of personalty, retained possession for between two and three years, and died without having said or done anything to indicate an intention to reconvert:—Held, that at his death it was personalty. *Ib.*

A real estate was devised to two trustees, to sell and divide the produce between A., B. and C. The trustees being dead, A. entered into possession, and received the rents, for three and a half years, accounting to B. and C. for their shares. A. then died, and at his death the estate remained unsold:—Held, that there had been no reconversion, but that the estate, in equity, retained its character of personalty. *Brown* v. *Brown*, 33 Beav. 399; 10 Jur. (N.S.) 461; 10 L. T. 83.

A. B., who was one of the trustees, paid the debts and legacies, except one annuity, and remained in possession sixteen years and died intestate:—Held (having regard to his acts, and notwithstanding he was both co-trustee and owner), that the property was reconverted into realty, and passed to his heir. *Griesbach* v. *Freemantle*, 17 Beav. 314.

A testator devised land to trustees to sell a portion as soon as conveniently might be after his death; but not until such time as his trustees should judge beneficial for his estate. The testator died in 1841, and the piece of ground had never been sold, and a sum representing the accumulated rents had been paid into court:—Held, that there was no conversion by force of the will, and that if there was there had been sufficient election to take as realty. *Glover* v. *Heelis*, 32 L. T. 534; 23 W. R. 677.

—— **Real Estate in Lease.**]—A testator devised all his real and personal estate (including a freehold estate called Bank Hall) to trustees, to sell and convert the same, and, after payment of debts and legacies, "to pay, divide, and distribute the principal money to be raised from my real and personal estate and effects, to and equally among all my children, share and share alike, when and as they shall attain the age of twenty-one, to whom I give and bequeath the same, it being my desire that each of my children shall receive and be entitled to an equal share of my property, they being all equally near and dear to me." He died in 1794, and left five children; four of them subsequently died, leaving E. the survivor, who also died in 1854. In 1805 a lease of the estate was executed by the five children, who had all attained their majority, to two persons as lessees for a term of six years, at a proper rent. At the expiration of this lease the

lessees continued for a considerable time as occupants, and the rent reserved was divided by and amongst the five children. The Bank Hall estate had never been sold, but the rents and profits had been divided into fifths, and so received by the children until their respective deaths. E., upon the death of the fourth child, entered into possession of the entirety of the rents and profits up to her own death in 1854, and devised the Bank Hall estate to trustees for sale:—Held, that in the events which had happened, the children had elected to take the Bank Hall estate as freehold; that the estate had not been so dealt with as to be converted into personalty, and that the persons beneficially interested under the will of E., the survivor, were entitled to the proceeds of the estate. *Symes* v. *Holmes*, 19 L. T. 83.

A testator, after giving certain legacies, devised a freehold house to A., B. and C., in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to A., B., and C. A., B. and C. paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain during all that time unpaid, without requiring a sale or any formal security on the house:—Held, in a suit by the personal representative of C. against the real and personal representatives of the testator for the administration of his estate, that A., B., and C. had by their conduct elected to take the house as reconverted into real estate; that the assent of the unpaid legatees might be inferred. *Mutlow* v. *Bigg*, 45 L. J., Ch. 282; 1 Ch. D. 385; 34 L. T. 273; 24 W. R. 409—C. A.

A testator by his will gave his real estate and the residue of his personal estate to trustees, on trust to sell his real estate, and to convert and get in his residuary personal estate, and to stand possessed of the moneys arising from both, on trust to invest the same, and to pay the income to his wife during her life or widowhood, and, after her death or second marriage, upon trust to divide the trust funds equally between such of his children as should be living at his death, and the issue of such of them as might be then dead. The testator died in 1869. The wife and two infant children survived him. There was no issue of any deceased child. Both the children died before the wife, unmarried and intestate, the one who died last dying in 1876. The wife did not marry again, and she died in 1885 intestate. The only real estate of the testator was a house, of which he had in 1869 agreed to grant a lease for twenty years, with an option to the tenant to purchase the reversion at any time during the term. At the death of the widow this option had not been exercised, and the house had not been sold by the trustees. After the deaths of the children the widow continued in receipt of the rent of the house.—Held, that, by reason of the tenant's option to purchase the house, the widow's continued receipt of the rent was no evidence of an election by her to take the property as real estate, and that on her death it descended as personalty to her next of kin. *Gordon, In re* (6 Ch. D. 531), distinguished. *Lewis, In re, Foxwell* v. *Lewis*, 55 L. J., Ch. 232; 30 Ch. D. 654; 53 L. T. 387; 34 W. R. 150.

A devise and bequest of freehold and copyhold land and personal estate to A. and B., upon trust as to the land for sale, and as to the personalty to realise the same, and to stand possessed of the proceeds upon trust for M., who was his heir-at-law, absolutely. A. predeceased the testator; B. renounced probate, and died three years afterwards, not having acted as trustee, though he did not disclaim the trusts, and letters of administration with the will annexed were granted to M. From and after the testator's death M., through his agent, received the rent of the land but did not exercise any other act of ownership. No one was admitted tenant of the copyhold. The land was let from year to year, and there was one change of tenancy effected by the agent. On the death of M., who survived the testator nearly nine years, the question arose whether the land was to be treated as real estate:—Held, that on B. renouncing probate, the legal estate devolved on M., and that whether the legal estate was outstanding or not, M. must be taken to have elected to take the land as real estate. *Gordon, In re, Roberts* v. *Gordon*, 46 L. J., Ch. 794; 6 Ch. D. 531.

—— **Real Estate in Lease—Building Scheme—Petition to Parliament.**]—The H. P. estate was vested in H., D. and S., upon trust after the death of a person who died in August, 1863, to sell with all convenient speed. The proceeds of sale belonged as to one moiety to D.'s wife absolutely for her separate use subject to a charge of 500*l.* to a legatee, and as to the other moiety to S. absolutely. The property was well adapted for building purposes, but the bulk of it was subject to an old lease, of which twenty-six years were unexpired. In March, 1864, D. and wife paid off the 500*l.* In 1864 the three trustees let for three years part of the property not comprised in the old lease, and in 1867, and again in 1869, D. and S., who had survived H., granted similar leases for three years. In 1865, S., who was the acting trustee and managed the property, had plans prepared by a surveyor for laying out the property for building. In the same year a bill was brought into parliament for authorising a railway to pass through the estate, and a petition against it was presented on behalf of "the owners and trustees of the H. P. estate," which stated that it was their intention to lay out the estate for building. Mrs. D. died in 1870, in the lifetime of her husband. There was no direct evidence that she had concurred in the leases, the preparation of the plans, or the petition to parliament:—Held, that the parties had elected to take the property as real estate, and that Mrs. D.'s share went to her heir-at-law as realty, and not to her husband as personalty. *Davidson, In re, Martin* v. *Trimmer, Davidson* v. *Trimmer, In re*, 11 Ch. D. 341; 40 L. T. 726—C. A.

—— **Possession—Instructions for Deed of Gift.**]—A testator devised and bequeathed real and personal estate to trustees for his wife for life, and after death, as to one freehold house upon trust for one of his sons for life, as to another freehold house upon trust for his daughter for life, and as to a third freehold house upon trust for another son for life, and after their respective deaths to their issue respectively, and after the respective deaths of any without issue he directed his trustees to sell the house of such child and to pay the proceeds of sale to the survivors or the survivor of his three children, and until sale to pay the rents to the same persons or person, and he gave his residuary real and

personal estate to such of his three children as should survive the widow. One of the sons predeceased the widow, a bachelor. The daughter survived her and died intestate in 1877, and all her property passed to her surviving brother as her sole next of kin. The houses were let to weekly tenants, and the surviving son, since 1877, received all the rents. He died in 1885, and shortly before his death he handed the title-deeds of the houses to a solicitor, directing that a gift of all his property should be made to a niece, but he died before a conveyance could be executed. The question then rose whether the will had effected a conversion of the realty, and, if so, whether the surviving son had elected to take the property as real estate :—Held, that there had been an out-and-out conversion, and that the son must be taken to have elected to take the houses as real estate. *Potter* v. *Dudeney*, 56 L. T. 395.

—— **Reversionary Interest.**]—A testator directed his residuary real and personal estate to be sold, and the proceeds to be paid, after payment of 1,000*l.*, to A., whom he appointed one of his executors. A. raised the 1,000*l.* by sale of the personal estate and a portion only of the real estate, and the remainder he reconverted into land. The residuary real estate consisted in part of a reversion in copyhold estates, which did not fall into possession until many years after the death of A. :—Held, that the reconversion of the freehold into land did not operate as a reconversion of the copyholds, and that they passed to the personal representatives of A. *Meredith* v. *Vick*, 23 Beav. 559 ; 27 L. J., Ch. 162 ; 3 Jur. (N.S.) 1234 ; 5 W. R. 639.

Gift in lieu of Debts—Real Estate—Presumption—Disclaimer.]—Devise of residuary real estate in lieu and discharge of all debts due from testator to devisee. Devisee dies intestate three days after testator :—Held, as between the heir and personal representative of the devisee, that, it not being manifestly for the disadvantage of the devisee to retain the devised estate, the court could not presume a disclaimer by the devisee, and consequently the heir was entitled to the estate, and debts claimed by the administrator as due to the devisee from the testator were discharged. *Harris* v. *Watkins*, 2 K. & J. 473.

But, semble, had it been manifestly for the disadvantage of the devisee to retain the estate upon the terms proposed by the testator, the court might have presumed a disclaimer. *Ib.*

Gift to Charity—Impure Personalty—Presumption of Conversion.]—A., being entitled to moneys charged upon land, but primarily secured by bond and promissory notes, bequeathed all her property to her three daughters, B., C., and D., whom she appointed executrices of her will. B. died in the lifetime of A., and C. died intestate shortly after A.'s death, and D. became sole executrix of A., and alone entitled to the said moneys. The moneys were not called in during the life of D., who, by her will, gave legacies to charities :—Held, that as D. was alone entitled to the property, the court would not assume in favour of the charities a conversion into pure personalty, which she was not bound to make. *Lucas* v. *Jones*, 36 L. J., Ch. 602 ; L. R. 4 Eq. 73 ; 15 W. R. 738.

Partition, Suit for—Decree for Sale—Consent—Married Woman—Sale.]—B., after consenting to a decree for sale in a partition suit, to which she was a party, married. The sale took place, and the purchase money was paid into court. Subsequently B. died intestate, leaving two sisters, her co-heiresses at law. Her husband took out letters of administration :—Held, that B. had elected to have the property converted, and that her husband was entitled, as her administrator, to the money in court. *Fowler* v. *Scott*, 25 L. T. 23 ; 19 W. R. 972.

J. F. W.

CONVEYANCE.

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See also DEED AND BOND—VENDOR AND PURCHASER.

CONVEYANCER.

See BARRISTER.

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See CRIMINAL LAW—JUSTICE OF THE PEACE.

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A. MANOR.

1. What is.

Statute.]—57 & 58 *Vict. c.* 46, *consolidates the Copyhold Acts.*

The Queen as Lady of the Manor.]—A crown lessee of minerals under a crown manor entered a farm within the manor and opened the surface in search of minerals. The occupier of the farm brought an action for the trespass in the Court of Exchequer against the lessee. The crown undertook to defend the action, and afterwards filed an information and bill against the occupier and the copyhold tenant of the farm. The bill alleged that the Queen, in right of her crown, was entitled as lady of the manor to search for and win, and to grant to others the right to search for and win, minerals within the manor, and had granted this right to the lessee; the bill then prayed that those rights might be declared:—Held, that the crown, by virtue of its prerogative was entitled to maintain the bill, and that since the bill would determine all the questions raised in the action, the occupier of the farm must be restrained from proceeding with the action till the hearing of the bill. *Att.-Gen.* v. *Barker*, 41 L. J., Ex. 57; L. R. 7 Ex. 177; 26 L. T. 34; 20 W. R. 509.

The Queen remains lady of the royal manors, notwithstanding 10 Geo. 4, c. 58, whereby powers over crown lands are conferred on the Commissioners of Woods and Forests. *Reg.* v. *Powell*, 4 P. & D. 719; 1 Q. B. 352.

That act, giving commissioners the management of the land revenues of the crown, does not divest the legal estate out of the crown. *Ib.*

Infant Tenant for Life.]—A female infant tenant for life in possession of a manor, but subject to a legal term of 1,000 years vested in trustees for securing annuities, and also subject to a provision for the receipt by the trustees of the rents during the minority, and for the application of a limited sum thereout for her maintenance, is the lady of the manor. *Griggs* v. *Gibson*, 14 W. R. 819.

Grant of Lands of.]—The demesne lands of a manor previously granted in fee do not become reunited to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat. *Delacherois* v. *Delacherois*, 11 H. L. Cas. 62; 4 N. R. 501; 10 Jur. (N.S.) 886; 10 L. T. 884; 13 W. R. 24.

If the demesne lands are treated in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffer's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain. *Ib.*

On re-purchase, by the lord, of the fee-simple, he will hold of the chief lord. *Ib.*

They will, on such re-purchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase. *Ib.*

The grant of a court-baron involves the grant of a manor for it implies the existence of freeholders of the manor, holding under the lord, and owing suit and service to him. *Ib.*

A lessee of a manor assigned all his interest in the manor to trustees, but continued nevertheless to act as lord, and made grants, and one to himself:—Held, that such grant to himself could not be considered a grant by the trustees, and was therefore void. *Christchurch, Oxford (Dean and Chapter)* v. *Buckingham (Duke)*, 17 C. B. (N.S.) 391; 33 L. J., C. P. 322; 10 Jur. (N.S.) 749; 10 L. T. 575; 12 W. R. 986.

The law as to the divisibility of manors, and the consequences of a division, considered. *Cattley* v. *Arnold*, 4 K. & J. 595.

—— **What passes under.**]—Unascertained and undefined advantages will pass under the general words by a grant of the manor, although not in the contemplation of either party at the time. Thus, for instance, the minerals in the lord's waste would pass, although their existence was neither known to nor suspected by any of the parties to the contract; so also the advowson to a living will pass with a manor by general words, though not specifically named in the grant. *Att.-Gen.* v. *Ewelme Hospital*, 17 Beav. 366; 22 L. J., Ch. 846; 1 W. R. 523.

In 1790, an advowson appendant to a manor was sold and assigned for the residue of a term of 500 years, created in the manor and advowson in 1745, and which, except as to the advowson, ceased:—Held, that this did not sever the appendancy, and that the advowson passed by a subsequent release of the manor with general words. *Rooper* v. *Harrison*, 2 K. & J. 86.

Semble, that an office of trust under the crown

cannot be annexed to a manor. *Att.-Gen.* v. *Mathias*, 4 K. & J. 579; 27 L. J., Ch. 761; 4 Jur. (N.S.) 628; 6 W. R. 780.

The Commissioners of Woods and Forests having power, under 57 Geo. 3, c. 97, to make sale of any royalties, honours, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging to the crown, within the ordering and survey of the Exchequer, contracted for the sale of the crown manor of E.. and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments, and appurtenances thereunto belonging": —Held, that this being in effect a contract for sale by the crown, the advowson of E., which was appendant to the manor, did not pass under the contract, and, consequently, that the purchaser was bound to take a conveyance of the manor without the advowson. Semble, that if the contract had been between subject and subject, the advowson would have passed; although, at the time of the contract, it was not known by either party to be appendant to the manor, and, therefore, the sale of it was not in their contemplation. *Att.-Gen.* v. *Sitwell*, 1 Y. & C. 559; 5 L. J., Ex. Eq. 86.

A. B., being possessed of the K. estate and the manor of E., both in the county of M., mortgaged to S. G. the K. estate by particular description and all other the hereditaments, lands, and premises comprised in a previous mortgage of the K. estate, and all other the lands, tenements and hereditaments (if any) in the county of M., whereof or whereto A. B. was seised or entitled to for an estate of inheritance:—Held, that the manor of E. was not comprised in this mortgage under the general words of conveyance. *Rooke* v. *Kensington* (*Lord*), 2 K. & J. 753; 25 L. J., Ch. 795; 2 Jur. (N.S.) 755; 4 W. R. 829.

—— **Waste Lands of.**]—The 51 Geo. 3, c. 115, s. 2, does not empower the lord to grant a portion of the waste land of the manor, which is a village green, freed from the parishioners' customary right to the use of it, as such. *Forbes* v. *Ecclesiastical Commissioners*, 42 L. J., Ch. 97; L. R. 15 Eq. 51; 27 L. T. 511; 21 W. R. 169.

By a grant of a manor with an exception of the wastes, they are thereby severed from the manor though the copyholders continue to have a right of common thereon by immemorial custom. *Revell* v. *Jodrell*, 2 Term Rep. 415; 1 R. R. 506.

Under a conveyance by the lord of the manor of P. of all those messuages, lands, tenements, commons, wastes, woods, underwoods, and the soil of the woods and underwoods of P., without any reservation of manorial rights, the soil of the common of P. passes. *Cator* v. *Croydon Canal Company*, 4 Y. & C. 405.

A grant of a reputed manor will not pass a freehold interest in the wastes, nor in any specific tenement possessed by the grantor. *Doe* d. *Clayton* v. *Williams*, 11 M. & W. 803; 12 L. J., Ex. 429.

The lord of a manor contracted to sell part of the waste, and furnished a statutory declaration that to the best of his information and belief no copyholder or free tenant had exercised any right of common for forty years and upwards, and that he did not know or believe that any copyholder or free tenant existed, and that no quit rents had been paid or services rendered or court baron held for forty, or, as the declarant believed, for sixty years and upwards. The means of knowledge of the declarant were not questioned, and he offered to add to his statutory declaration a statement negativing the existence of any commonable rights over the waste:—Held, that the title could be forced on the purchaser. *Bridges and McRae's Contract*, *In re*, 30 W. R. 539.

The lord is said to be never out of possession; and that whatever is built on the waste is his, even after sixty years' possession by the tenant. *Lloyd* v. *Bartlett*, 6 Vin. 123, pl. 1.

Sed quære, after twenty years' possession, which is a bar to an ejectment. *Ib.*

—— **Demesne Lands.**]—A bishop who had free warren, by prescription, over the demesne and tenemental lands of a manor whereof he was seised jure ecclesiæ, accepted a grant from the crown, to himself and his successors, of free warren over the demesne lands of all his manors in England:—Held, that, if the grant could have the effect of extinguishing the prescription as to the demesne lands, it could not effect it over the other lands of the manor. *Carnarvon* (*Earl*) v. *Villebois*, 13 M. & W. 313; 14 L. J., Ex. 233.

The term "demesne lands" properly signifies lands of a manor which the lord either has or potentially may have in propriis manibus. *Att.-Gen.* v. *Parsons*, 2 C. & J. 279; 2 Tyrw. 223; 1 L. J., Ex. 103.

—— **Fishery.**]—Where a private river runs through a manor, the presumption of law is, that each owner of land within the manor and on the bank of the river has the right of fishing in front of his land; and, if the lord claims a several fishery, he must make out that claim by evidence. *Lamb* v. *Newbiggin*, 1 Car. & K. 549.

From the words of a deed under which the lord claimed, it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor:—Held, this presumption was rebutted by proof, that, before the date of the deed, owners of land within the manor and on the bank of the river had the right of free fishery therein. *Ib.*

Boundary of Manor.]—The sea-shore between high and low water may be part of the adjoining manor; and where, by an ancient grant of the manor, its limits were not defined, modern usage is admissible to shew that such sea-shore was part of the manor. *Beaufort* (*Duke*) v. *Swansea* (*Mayor*), 3 Ex. 413.

Evidence as to Boundaries.]—Dispute between a lord of a manor and a corporation as to the ownership of a piece of foreshore. The court rolls contained entries—(1) Of fines paid to the lord for salvage, for moorage, and for trespasses, in taking wreck and the like, and of sums paid to the lord by the bailiff for wreck sold by him. (2) Presentments as to wreck, porpoises, &c., coming on the soil, with no express mention of receipt of money except (in some cases) by the bailiff. (3) Presentments of wreck the payments in respect of which were partly made to the salvors and partly to the lord. (4) Presentments directing the bailiff to levy certain fines, &c. (5) Similar presentments with no express direction to the bailiff to levy. (6) Presentments of wreck with no particular entries as to value

or entered as matter for future inquiry :—Held, that all the entries except the last could be safely admitted as evidence of the lord's title. *Walton-cum-Trimley (Manor), In re, Tomline, Ex parte*, 28 L. T. 12 ; 21 W. R. 475.

—— **Decision in former Suit.**]—An action of trespass by a former lord against the same corporation, and decided in his favour in 1738 and acquiesced in ever since, considered the strongest possible evidence in his favour. *Ib.*

In an action which turned on a question as to the boundary of two manors a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries. He directed the verdict to be entered for the defendant. In a subsequent action by the defendant against a third party, where also the question substantially was as to the boundary of the same manors, the verdict was received, but the award rejected as evidence of reputation. *Evans* v. *Rees*, 10 A. & E. 151 ; 2 P. & D. 626 ; 9 L. J., M. C. 83.

An ancient presentment by the homage, in the form of a book, set out the boundaries of the manor, and gave in alphabetical order the names of the several parishes within it, and of the tenants resident in each parish, but this part of the presentment contained nothing as to boundaries. Two or three sheets at the concluding part of it, where a parish should have followed in order, had been cut off, but it did not appear under what circumstances. In an action involving a question as to the boundary of the manor and the parish where it was admitted that the manor and the parish were conterminous in the direction of the locus in quo, the presentment was received in evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary. *Ib.*

In an action by a lord for carrying away dollars claimed by him as wreck, two instruments, dated in 1639 and 1657, and purporting to be presentments or answers of a jury, partly consisting of the tenants of the manor, to questions by commissioners of survey appointed by the lord, were put in to prove the boundaries of the manor and also the lord's title to wreck, which was affirmed in particular passages :—Held, that they were only evidence of the boundaries, and could not be admitted as declarations by the tenants of the title of the lord to wreck, that being a matter of private right, derived from the crown, respecting which they could not be taken to have any peculiar knowledge, as they had no concern with it. *Talbot* v. *Lewis*, 5 Tyrw. 1 ; 1 C. M. R. 495 ; 4 L. J., Ex. 9.

—— **Boundary of other Manors.**]—When the boundary between two manors is formed by a ridge of hills which run beyond the manors, and on an issue as to the boundary between one of these manors and a third manor one of the parties wishes to prove that the same ridge is the boundary between the two latter manors, evidence of its being the boundary of the other two is admissible for this purpose, the three manors being contiguous. *Brisco* v. *Lomax*, 3 N. & P. 308 ; 8 A. & E. 198 ; 1 W. W. & H. 235 ; 7 L. J., Q. B. 148 ; 2 Jur. 682.

—— **Boundary of other Enclosure.**]—The defendant was the lord of a manor, the boundary of which was the medium filum aquæ of a river. Between the river and a freehold close of the plaintiff lay a narrow uninclosed strip of land, the ownership of which was the question in dispute. At the trial of an action of trespass the plaintiff offered evidence that the owner of the inclosure adjoining his own was in the undisputed possession of a similar narrow strip of land between his fence and the river, the last-mentioned piece of land being continuous with that claimed by the plaintiff and within the same manor :—Held, that the evidence was properly admitted. *Vaughan* v. *De Wynton*, 17 L. T. 30 ; 15 W. R. 1145.

—— **Adjoining Highway.**]—Upon a question whether a piece of waste land, lying between a highway and the plaintiff's inclosed land, belonged to the plaintiff or to the lord :—Held, that grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself and of other persons, were admissible for the purpose of showing that the locus in quo was part of the waste of the manor, without showing continuity. *Dendy* v. *Simpson*, 18 C. B. 831 ; 2 Jur. (N.S.) 642—Ex. Ch.

—— **Declarations of Deceased Persons.**]—Where a legal manor has once existed, declarations of persons deceased as to its boundary are still admissible, though the manor has ceased to exist otherwise than by reputation. *Doe* d. *Molesworth* v. *Sleeman*, 9 Q. B. 238 ; 15 L. J., Q. B. 338 ; 10 Jur. 568.

Inclosure of Waste.]—Where waste land was, with the consent of a lord, inclosed by a former owner of the plaintiffs' property, and the plaintiffs had dug for minerals thereon, and where a subsequent lord asserted his right to the minerals, and sold them to the defendant, who thereupon entered upon the property and commenced digging for them ; on a bill to restrain the defendant :—Held, that the lord had not succeeded in establishing his claim, and that the plaintiffs were entitled to the minerals. *Ackroyd* v. *Briggs*, 13 L. T. 521 ; 14 W. R. 25.

Evidence of Existence.]—It seems that reputation alone is admissible to prove the existence of a manor, without any proof of the actual exercise of any manorial rights. *Steel* v. *Prickett*, 2 Stark. 463 ; 20 R. R. 717. And see *Curzon* v. *Lomax*, 5 East, 60.

In ejectment by a party claiming to be the devisee of a manor, the facts of the devisor having held a court thirty-five years ago, and the devisee on several occasions since his death, and of appointments of gamekeepers, are primâ facie proof, both that a manor exists, and that the devisee is the lord, without the production of court-rolls, or any documentary evidence of courts having been held. *Doe* d. *Beck* v. *Heakin*, 6 A. & E. 495 ; 2 N. & P. 660.

An allegation in a declaration that one was seised of a manor, and that he and all those whose estates he had in the manor have immemorially appointed a sexton in the parish, is sustained by the proof of his seisin of a quondam manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane* v. *Ireland*, 10 East, 259 ; 10 R. R. 285.

Contents of manor. as it was sixty years ago, is question for jury. *Anon.*, Cary, 24.

Tolls.]—Bill to establish a right to tolls for carts coming into a manor, dismissed, it not appearing that the toll-bars stood within the manor. *Att.-Gen.* v. *Ayre*, Bunb. 68.

Bill for tolls for landing goods in plaintiff's manor, dismissed as proper at law. *Disney* v. *Robertson*, Bunb. 41.

Bill by the lord, claiming a prescriptive right to tolls for goods landed, and praying a discovery of the goods landed; he is not entitled to a discovery till he has established his right at law; aliter, where the title is in equity. *Northleigh* v. *Luscombe*. Amb. 612.

Copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, are evidence of the existence of a manor, and of such property being within it, in an action by the surrenderee, in which his ownership is disputed. *Standen* v. *Chrismas*, 10 Q. B. 135; 16 L. J., Q. B. 265.

2. Validity of Customs.

General Customs.]—General customs may be reduced to certainty by agreement in manor. *Anon.*, Cary, 31.

Fines on Admission.]—There is no general copyhold law that, in manors in which a fine is only payable on the first admittance of a tenant, a purchaser of several distinct copyhold tenements under one disposition—whether a will, or surrender, or otherwise—is entitled as of right to split his admittance, i.e. is entitled to compel the lord to admit him to any one or more of such several tenements, and to take admittance to the others at any subsequent time, as and when he pleases. A special custom in a manor, that a purchaser of several distinct copyhold tenements under one disposition, must take admittance to all at one and the same time, and pay one general fine in respect of all, is good. Such a special custom may be evidenced by a uniform course of practice or usage in the manor for a number of years, although it does not otherwise appear either on the court rolls, or in any custumal or other record of the manor. *Johnstone* v. *Spencer* (*Earl*), 30 Ch. D. 581; 53 L. T. 502; 34 W. R. 10.

To Work Mines without Compensation.]—A custom to work mines under houses without making compensation for any damage occasioned to such houses is bad, as being unreasonable. *Hilton* v. *Granville* (*Earl*), Dav. & M. 614; 5 Q. B. 701; 13 L. J., Q. B. 193.

To Fell Timber.]—A custom for copyhold tenants to fell timber or other trees upon their customary lands, and to retain the same for their own use, without licence from the lord, although such timber may not be felled for necessary repairs, is not unreasonable. *Blewett* v. *Jenkins*, 12 C. B. (N.S.) 16.

Such a custom is not the less admissible in evidence because it also professes to entitle the customary tenants to plough up meadow land and to suffer their houses to decay, which might be a bad custom, if pleaded. *Ib.*

To Make Bricks.]—A custom that the copyholders of inheritance may, without licence from the lord, break the surface, and dig, and get clay without limit, in, upon, and from, and out of their copyhold tenements, for the purpose of making bricks, to be sold by them off the manor, is good in law. *Salisbury* (*Marquis*) v. *Gladstone*, 9 H. L. Cas. 692; 34 L. J., C. P. 222; 8 Jur. (N.S.) 625; 4 L. T. 849; 9 W. R. 930.

And see Common.

Profits à Prendre.]—Sect. 1 of the Prescription Act, which relates to profits à prendre, applies only to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to the case of a right claimed by a copyholder in his own tenement, according to the custom of the manor. *Hanmer* v. *Chance*, 4 De G. J. & S. 626; 34 L. J., Ch. 413; 11 Jur. (N.S.) 397; 12 L. T. 163; 13 W. R. 556.

Grants for Lives—Descent.]—Quære, whether it is a good and reasonable custom, that upon the death of a tenant in possession of lands holden of a manor for lives, the next life in reversion, for which the estate is holden, shall be entitled to enjoy the estate, and if such custom be good and reasonable, whether where a party takes a grant of such lands for the life of himself and his grandnephews, and dies, the grant shall operate as an advancement for the grandnephews, so as to rebut a resulting trust in favour of other parties claiming under the purchaser. *Edwards* v. *Edwards*, 2 Y. & C. 123; 6 L. J., Ex. Eq. 79.

—— **Renewal—Fine Certain.**]—Copyhold property situate in a manor in which copyholds were held for lives only, and were renewable on payment of a fine, to be ascertained and agreed on between the lord and the tenant, was surrendered by L., the surviving life, to the intent that the lord might regrant the same to M., or such other person or persons, and for such life or lives, estate or interest, as should be agreed on between the lord and M. M. was never admitted, but assigned his interest, by way of mortgage, to A. and B., who entered into possession. After the death of L., the lord took possession, whereupon A. and B. filed their bill against him, praying that he might be compelled to grant the copyholds comprised in the surrender to the plaintiffs, or one of them, for their or his lives or life, or to some other persons or person, by the direction of the plaintiffs, for their or his lives or life, or to make such other grant or grants thereof as the plaintiffs were entitled to have made according to the custom of the manor. The lord denied that there was any custom under which a tenant for life had a right to surrender in favour of any other persons to be admitted in his place:—Held, that M. was a legitimate party to the suit, and that although instances were adduced in evidence in which copyhold tenants of the manor had been admitted, in various forms, for one more life or lives, on a fine being paid, yet that the lord could not be compelled to renew the copyholds for a life or lives without remuneration, nor unless the plaintiffs could prove a custom existed within the manor to renew for life or lives on payment of a fine certain. *Walker* v. *Abingdon* (*Earl*), 10 L. J., Ch. 289; 5 Jur. 714.

—— **Grant in Reversion—Trust.**]—Custom of

manor, that if tenant for life of copyhold obtains a grant in reversion in the name of a third person, unless the trust is mentioned on the rolls of the manor. such third person should be beneficially entitled thereto, and not as trustee, held good. *Edwards* v. *Fidel*, 3 Madd. 237.

The right of the equitable owner of a copyhold estate to dispose of his equitable interest by will cannot be controlled by the custom of a manor; a custom inconsistent with the doctrine of resulting trusts, as that a person named by the purchaser of a copyhold estate as the second life according to the custom shall take beneficially, is unreasonable. *Lewis* v. *Lane*, 2 Myl. & K. 449.

—— **Power to dispose of Whole Interest.**]—Where a father and two sons, A. and B., were successive lives in a copyhold, wherein, by custom, person first named might dispose of the whole interest, and upon marriage of A., it was agreed, that father should have power to appoint, during life of A., and widowhood of his intended wife; father having afterwards obtained a new grant for lives of C., a third son, and A. and B., by will made after death of C., in which no mention is made of copyhold, gives residue of his personal estate to B.:—Held, that B. was not thereby entitled to copyhold. *Rumboll* v. *Rumboll*, 2 Eden, 15.

According to the custom of a manor, a grant by copy of court-roll, "to A., B., & C., for their lives and the life of the longest liver of them, successively. according to the custom of the manor," gave the first taker an absolute power of disposing of the estate in his lifetime:—Held, a good custom; and that it was sufficiently proved by showing four instances of surrender and admittance of the person first named, in exclusion of the others. *Phillips* v. *Ball*, 6 C. B. (N.S.) 811; 29 L. J., C. P. 7; 6 Jur. (N.S.) 48; 7 W. R. 580.

—— **Purchaser.**]—A. buys a copyhold estate for his own and two lives in a manor, where the custom was, that whoever purchases in it, the estate shall go in succession; and by his will devises all his real and personal estate to his wife:—Held, that though the legal interest was according to the custom of the manor, yet A. has an equitable interest from being the sole purchaser, and it shall be construed as a trust for him, he having advanced the money. *Smith* v. *Baker*, 1 Atk. 385.

—— **Heir at Law.**]—Heir-at-law of J., who was the last of three lives named in grant of copyhold, brought bill against lord, to be admitted to estate for his own life, and the lives of two other persons whom he should nominate, alleging the custom of manor to be so; defendant denied the custom by answer, and insisted he was not bound to renew; issue was directed as to the obligation to renew, but on appeal order was reversed and bill dismissed. *Grafton* (*Duke*) v. *Horton*, 2 Bro. P. C. 284.

Surrender to Use of Will.]—A custom that copyholds shall not be surrendered to the use of a will is bad. *Pike* v. *White*, 3 Bro. C. C. 286.

Rights of Cestuis que vie.]—A tenant of a manor having been originally admitted to a copyhold estate, to hold the same for the lives of H. D. the elder and H. D. the younger, surrendered the same into the hands of the lord, and took a re-grant of the estate for the lives of his sons, and the life of the longest liver of them successively, according to the custom of the manor, and paid a fine, the grant describing him as sole purchaser. By the custom of the manor, when a copyhold tenement is granted by copy of court-roll to any person to hold the same for the lives of two or more other persons, and the life of the longest liver of such other persons successively, and the grantee dies, during the life or lives of any one or more of such other person or persons, without having devised the tenement, such one or more of such other person or persons so surviving the grantee shall be entitled, by virtue of such grant, to take and hold the tenement successively, as they are named in the grant during his or their life or lives; but if the grantee devises the tenement, the devisee upon his death shall hold the same during the life or lives of such other person or persons so surviving. The grantee devised his copyhold estate to his eldest son, one of the cestuis que vie named in the grant, who, upon his father's death, entered into the possession:—Held, that the custom was good and valid in law, and not being inconsistent with the grant, barred the lord's right of entry. *Doe* d. *Nepean* v. *Goddard*, 2 D. & R. 773; 1 B. & C. 522; 1 L. J. (O.S.) K. B. 179; 25 R. R. 494.

—— **Advancement.**]—A. was admitted tenant of copyhold lands, to hold to him for the lives of his three sons, B., C., and D., and for the life of the longest liver of them successively:—Quære, whether a custom that the cestuis que vie should successively be entitled to admission, notwithstanding a devise by the grantee, would be good. *Jeans* v. *Cooke*, 24 Beav. 513; 27 L. J., Ch. 202; 4 Jur. (N.S.) 57; 6 W. R. 175.

Held, assuming against the validity of such a custom, that the fact of the grantee naming his three sons as cestuis que vie amounted to an advancement in favour of the sons, and that they were entitled successively for life as against his devisees; and leave was given to try at law the validity of the alleged custom. *Ib.*

—— **Personal Representative.**]—A copyhold estate granted for the lives of A., B. and C.; A. dies intestate, his administratrix shall have the estate during the lives of B. and C. *Howe* v. *Howe*, 1 Vern. 415. S. P., *Withers* v. *Withers*, Amb. 152.

A copyhold is granted to three successively, but no custom proved that the first taker had the power of disposing of the whole, nor that the first taker paid the purchase money; this shall not go to the executor of the first taker, but shall go in succession. *Rundle* v. *Rundle*, 2 Vern. 264.

Mortgages.]—Particular customs of a manor as to mortgages. Equity of redemption will follow the custom attaching on the legal estate. Not absolutely determined whether trust estates or equities of redemption in copyhold escheat to the lord. *Fawcett* v. *Lowther*, 2 Ves. 300.

General custom of copyhold; surrenderee to present at next court. *Ib.*

Custom for mortgagee to present at third court not void. *Ib.*

Custom not void for diminishing lord's profit. *Ib.*

Custom for copyholder in fee to waste, good; not for life. *Ib.*

Relief.] — Copyholders have relief against their lord for breach of custom of manor in equity, though at law they have none. *Anon.*, Cary, 3.

The dwellers in a parish or manor cannot acquire any right to a profit à prendre; and if in laying a custom to a profit à prendre, the dwellers are included in the class alleged to have the right, the custom so laid is bad. *Allgood* v. *Gibson*, 34 L. T. 883; 25 W. R. 60.

Bill by one tenant of the manor of A., suggesting a custom for the tenants of that manor to cut turf in the manor of B. Where several persons have the same right and are disturbed, and bills are entertained to void a multiplicity of suits, since one or two determinations will establish the rights of all parties, on the footing of one common interest; but in all such bills all parties, or a determinate number, join in the name of the rest. Here only one brings a bill in the general right, and not in a distinct right. Bill dismissed. *Baker* v. *Rogers*, Select Ca. Ch. 74.

Nomination of Jury.]—An immemorial custom for the steward of a manor to nominate the jury to serve on the court leet at the election of the mayor of a borough, is good in law. *Rex* v. *Jolliffe*, 3 D. & R. 240; 2 B. & C. 54; 1 L. J. (O.S.) K. B. 232; 26 R. R. 264.

Swearing of Jurors.] — A custom to swear the jurors at one court leet to inquire and return their presentments at the next court day, is bad in law. *Davidson* v. *Moscrop*, 2 East, 56; 6 R. R. 373.

A court leet holden on 28th April was adjourned, after the jury had been sworn, till 15th December, which day was given them to make their presentments:—Held, that the adjournment (which was admitted to be according to the custom of the manor) was not unnecessarily unreasonable. *Wilcock* v. *Windsor*, 3 B. & Ad. 43.

Breaking false Measures.] — A custom in a manor for the leet jury to break and destroy measures found by them to be false, is lawful. *Ib.* And see *Sheppard* v. *Hall*, 3 B. & Ad. 433.

3. Evidence of Customs.

Of Similar Customs.]—The customs of one manor cannot be given in evidence to prove the existence of a particular custom in an adjoining manor, though it lies within the same parish and the same leet. *Anglesey* (*Marquis*) v. *Hatherton* (*Lord*), 10 M. & W. 218; 12 L. J., Ex. 57. S. P., *Ely* (*Dean*) v. *Warren*, 2 Atk. 189.

In Face of written Documents.]—Evidence sufficient in itself to establish a custom in a manor will be insufficient to establish such custom in the face of ancient documents made within the time of legal memory, and which negative the existence of any such custom. *Portland* (*Duke*) v. *Hill*, 35 L. J., Ch. 489; L. R. 2 Eq. 765; 12 Jur. (N.S.) 286; 15 W. R. 88.

Presumption.]—The meaning of s. 6 of 2 & 3 Will. 3, c. 71, is, that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years. *Hanmer* v. *Chance*, 4 De G. J. & S. 626; 34 L. J., Ch. 413; 11 Jur. (N.S.) 397; 12 L. T., 163; 13 W. R. 556.

But where there are circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant. *Ib.*

Customary or Prescriptive Rights.] — Customary rights of copyhold tenements differ from prescriptive rights; the former are usages which apply to a number of persons in a certain district or locality, but prescriptive rights are claimed by one or more person or persons as existing in themselves or their ancestors, or as attached to a particular estate. *Ib.*

The law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be rightly drawn. It is the province of a jury to draw these conclusions of fact. *Ib.*

Circumstances under which the court, sitting as a jury, found the existence of a custom in a copyhold manor, authorising the tenants to dig for and get sand, sandstone, gravel, and clay from their respective tenements, and to cart and carry away the same on to other lands, and to use or sell the same, either on or off the manor, without licence from the lord. *Ib.*

Loss by Negligence.]—There must be one rule applicable to ecclesiastical persons as well as to lay when the question is, whether rights belonging to them have or have not been lost by negligence. *Ib.*

Leases without Enjoyment.] — Leases, without proof of enjoyment under them, are admissible to prove a particular custom of a manor. *Clarkson* v. *Woodhouse*, 3 Dougl. 189.

Payment of Toll.]—Certain variations in old entries of accounts as to a manorial customary payment, extending over three centuries, and uniform in amount:—Held, to be no objection to the validity of the claim. *Beaufort* (*Duke*) v. *Smith*, 4 Ex. 450; 19 L. J., Ex. 97.

Heriot.]—To support the proof of a custom for the lord of a manor to take only one heriot from a tenant whatever the number of his holdings might be, a paper purporting to be a copy of an old decree of the Court of Chancery in a suit between a copyholder and the lord, produced by a witness who succeeded his brother as lord of the manor, and who stated that he had found it amongst his brother's papers, is admissible in evidence as against a subsequent lord, evidence having been given of an ineffectual search for the original. *Price* v. *Woodhouse*, 3 Ex. 616; 18 L. J., Ex. 271.

See also Custom and Evidence.

B. Courts.

Statute.]—*Copyhold Act*, 1894, *s.* 82.

Recovery.] — Bill to compel lord to receive petition in nature of writ of false judgment, for reversing common recovery suffered in manor

court, whereby plaintiff's remainder in tail was barred, suggesting several errors. Lord, by answer, insisted that it was the first attempt of the kind, and of dangerous consequence, and therefore would not proceed on the petition, unless compelled by law. Bill dismissed, and dismissal confirmed by Lords. *Smith* v. *St. Paul's (Dean)*, Shower, P. C. 67.

Bill brought by a remainderman in fee of copyhold expectant on an estate tail which was spent, to be relieved against an erroneous common recovery in the lord's court, praying that the lord might be decreed to suffer it. Plaintiff to bring a plaint in the lord's court in nature of a writ of error to reverse this recovery, so that the court would relieve on the merits. The defendant demurred, and the demurrer was allowed. *Ash* v. *Royle*, 1 Vern. 367.

Jurisdiction of equity over judgment in copyhold court. 1 Rol. Abr. 60, 373.

Jurisdiction of manor of Woodstock, overruled. *Wilkins* v. *Gregory*, *Anon.*, Cary, 85.

Court Baron—Jurisdiction.]—A court baron cannot be legally held without two free suitors. *Rumsey* v. *Walton*, 4 Term Rep. 446, n. And see *Holroyd* v. *Breare*, 2 B. & Ald. 473; 21 R. R. 361.

In the record of a judgment of a court baron, it was stated that the court was held "before W. R., steward of the court, and W. U. and G. M. and others, free suitors of the court":—Held, first, that it was not necessary to state that W. was steward of the manor. *Brown* v. *Gale*, 2 C. B. 861; 3 D. & L. 123; 15 L. J., C. P. 187; 10 Jur. 66.

Held, secondly, that the style of the court thus stated was correct. *Ib.*

Held, thirdly, that it was sufficient to state the names of two of the suitors only. *Ib.*

Manor demised, except court baron and perquisites, &c. Tenant bound to make suit there. *Anon.*, Cary. 18.

—— **Abolition and Revival.**]—By 2 & 3 Vict. c. 85, the old court baron of the honour of Pontefract, in the county of York, was to be terminated and a new court substituted. By 9 & 10 Vict. c. 85, and an order in council made under that act, the new court was abolished:—Held, the old court was not revived, and consequently that a replevin obtained out of that court was void. *Hellawell* v. *Eastwood*, 2 Ex. 295; 20 L. J., Ex. 154.

Court Leet—Jurisdiction.]—An amercement at a court leet for a private injury to the lord is illegal, though there be a custom to warrant it. *Wood* v. *Lovatt*, 6 Term Rep. 511.

A custom to swear the jurors at one court leet to inquire and return their presentments at the next court is bad in law. *Davidson* v. *Moscrop*, 2 East, 56; 6 R. R. 373.

Bill for suit of court to a manor, and a fee farm rent or law day silver at plaintiff's court leet, dismissed, as proper at law. *Thornhagh* v. *Hartshorn*, Bunb. 237.

Customary Court.]—A customary court cannot be held out of the manor unless there is a custom to warrant it; and if a council is so held, all that is done at it is void. *Doe* d. *Leach* v. *Whitaker*, 5 B. & Ad. 409; 3 N. & M. 225.

But the nullity of such court only affects such matters as are required to be done at a court. *Ib.*

C. COURT ROLLS.

I. ENTRIES.

Statute.]—*Copyhold Act*, 1894, *ss.* 54, 62—64.

Reform of Entry.]—The court will not reform an entry on the court roll, unless the lord be a party to the suit or consent to such order as the court shall think fit to make; but the lord consenting to such order, the court decreed that a surrender and admission on the court rolls, which gave an interest to the wife of a mortgagor in fraud of the mortgagee, should be reformed. *Elston* v. *Wood*, 2 Myl. & K. 678.

Necessity for.]—A steward indorsing on a surrender the uses of it is sufficient without specifying them on the court rolls. *Carr* v. *Ellison*, 3 Atk. 73.

In ejectment to recover copyholds by the assignee of an insolvent it was not necessary that the conveyance and the assignment from the provisional to the general assignee should be entered on the court rolls. It was sufficient that such conveyance should be entered in the minute book of the steward. The entry on the rolls was only requisite under s. 20 of 7 Geo. 4, c. 57 (Insolvent Debtors' Act), in case of a sale of the property in question. *Doe* d. *Brennan* v. *Glenfield*, 1 Bing. (N.C.) 729; 1 Scott, 699; 4 L. J., C. P. 234.

Effect of]—By an indenture, dated 1598, a farm was demised for 1,000 years, with a covenant by the lessor to convey the fee simple to the lessee within five years if required. The farm was assigned as a leasehold in 1777, since which time it had been three times devised as freehold, and on the court rolls of the manor of which the farm formed part the land was called freehold:—Held, that under the circumstances, it remained leasehold as between the heir and the administrator of an intestate owner. *Pickett* v. *Packham*, L. R. 4 Ch. 190; 16 W. R. 1177.

Constructive Notice.]—The court rolls are not constructive notice of prior incumbrances to purchasers of copyholds. *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377.

2. CUSTODY AND PRODUCTION.

Lord or Steward.]—The lord as of right is entitled to the custody of the court rolls, and the steward holds them only as his agent. Where he was solicitor also of the testator, under whom the parties were entitled, the court made an order for him to deliver them over to the receiver in the cause. *Rawes* v. *Rawes*, 7 Sim. 624; 5 L. J., Ch. 114.

On an application of the guardian ad litem of an infant lord of a manor, the court refused to order the steward to deliver up the court rolls to the receiver in the cause, there being no suggestion of any improper conduct on the part of the steward. *Windham* v. *Giubilei*, 40 L. J., Ch. 505; 24 L. T. 653.

The steward is bound, when called upon, to deliver up the papers of which he has the charge, in a proper condition. *N. W. Ry.* v. *Sharp*, 10 Ex. 451; 24 L. J., Ex. 44.

Inspection.]—In a suit by plaintiffs against the lord, claiming as freeholders a tract of pasture or sheep-walk with the minerals and usual incidents of the ownership in fee-simple of freehold

land, and expressly denying the existence of any rights of ownership in the lord over this sheep-walk, where the defendant by his answer stated that the plaintiffs were tenants of the manor, and as such had exclusive right of pasturage over the sheep-walk, but claimed as lord to be absolutely entitled to the soil of this sheep-walk, subject only to the plaintiffs' right of pasturage :—Held, that the plaintiffs were not entitled to an inspection of the rolls of the manor. *Owen* v. *Wynn*, 9 Ch. D. 29 ; 38 L. T. 623 ; 26 W. R. 944 —C. A.

A plaintiff who claims common appurtenant over the waste of a manor is not necessarily entitled to production of documents relating to the manor, and admitted to be in the possession of the lord, where the defendant denies that they contain anything supporting the claim. *Mint* v. *Morgan*, L. R. 11 Eq. 284 ; 24 L. T. 120 ; 19 W. R. 374.

A plaintiff filed a bill in equity to establish a right of common of vicinage over a common within a manor of which the defendant was lord. By his answer the defendant denied the plaintiff's right :—Held, that he was entitled to production of the records of, and documents relating to, courts baron held within the manor, to the production of accounts and memoranda relating to the digging of gravel and cutting of turf on the common, to have a list of the documents relating to the title of the lord of the manor ; but not to have such documents produced, the defendant stating by affidavit that they related exclusively to his own title as lord of the manor, and did not in any way tend either to establish the rights claimed or to defeat the defence to the suit. *Ib.*

Where an order has been made in a suit for production of documents, the court will not vary such order by providing for the payment of the customary fees, payable to the steward of a manor, on inspection of court rolls. *Hoare* v. *Wilson*, L. R. 4 Eq. 1 ; 16 L. T. 112 ; 15 W. R. 548.

In a suit by the freehold tenants of a manor with respect to right of common and estover, they are entitled to see the court rolls. The lord may not seal up such parts as he swears do not relate to the matters in dispute. *Warrick* v. *Queen's College*, 36 L. J., Ch. 505 ; L. R. 3 Eq. 683.

A lord selling freehold lands of the manor subject to leases for lives granted by copy of court roll must covenant to produce the court rolls up to the date of the conveyance. *Poulett (Earl)* v. *Hood*, L. R. 5 Eq. 115.

Mandamus to Inspect.]—The demand to inspect the rolls of a manor cannot be made by the agent of a person authorised by warrant of attorney to make the demand on behalf of the tenant, although the agent's authority is in writing, so as to obtain a mandamus in case of refusal. *Hutt, Ex parte*, 7 D. P. C. 690 ; 3 Jur. 1105.

And see DISCOVERY.

3. EVIDENCE.

To what Extent.]—Copies of the court roll authenticated by the steward, held admissible, although not the copies delivered to the tenant. *Breeze* v. *Hawker*, 14 Sim. 350.

The court rolls, taken by themselves, are evidence only against the tenants of the manor and the lord. *Att.-Gen.* v. *Hotham (Lord)*, Turn. & R. 217. Affirmed, 3 Russ. 415 ; 24 R. R. 21.

Dispute between a lord and a corporation as to the ownership of a piece of foreshore. The court rolls contained entries—(1) Of fines paid to the lord for salvage, for moorage, and for trespasses, in taking wreck and the like, and of sums paid to the lord by the bailiff for wreck sold by him. (2) Presentments as to wrecks, porpoises, &c., coming on the soil with no express mention of receipt of money except (in some cases) by the bailiff. (3) Presentments of wreck, the payments in respect of which were partly made to the salvors and partly to the lord. (4) Presentments directing the bailiff to levy certain fines, &c. (5) Similar presentments with no express direction to the bailiff to levy. (6) Presentments of wreck with no particular entries as to value or entered as matter for future enquiry :—Held, that all the entries except the last could be safely admitted as evidence of the lord's title. *Tomline, Ex parte, Walton-cum-Trimley (Manor), In re*, 28 L. T. 12 ; 21 W. R. 475.

An action of trespass by a former lord against the same corporation, and decided in his favour in 1738 and acquiesced in ever since, considered the strongest possible evidence in his favour. *Ib.*

In administering the real estate of the heir of an intestate it was discovered that a farm, part of a manor, and supposed to be freehold, had been leased in 1598 to the predecessors in title of the intestate, for a term of 1,000 years, subject to a rent and heriots. The lease contained a covenant by the lord "at all times hereafter and from time to time during the space of five years next ensuing," at the request of the lessee, to convey to him the fee. There was no direct evidence of any such conveyance. The entries in the court rolls recorded the payment of rent and heriots down to the present time, and also uniformly mentioned the farm as freehold. In 1777 the remainder of the term was assigned (for the fifth time since the lease) to L., who, for two years afterwards, devised the farm as freehold, and it subsequently passed as freehold under several devises, until it reached the intestate in the cause :—Held, that the continuance of the rent and heriots rendered the entries in the court rolls more at variance with the theory of the farm being freehold than with that of its being leasehold ; that L. having acknowledged the existence of the term two years before he devised the farm as freehold, the court could not presume that the tenure had been in the interim converted to freehold ; and that the farm must pass to the intestate's personal representatives as leasehold. *Pickett* v. *Packham*, L. R. 4 Ch. 190 ; 16 W. R. 1177.

And see EVIDENCE.

D. STEWARD.

Appointment.]—A lord of the manor being tenant in fee, may grant by deed the stewardship of the manor, for the life of the grantee, and the steward cannot be displaced by the devisee of the lord. *Bartlett* v. *Downes*, 5 D. & R. 526 ; 3 B. & C. 616 ; 1 Car. & P. 522 : 3 L. J. (O.S.) K. B. 90 ; 28 R. R. 436.

Court will not determine in whom is the right to appoint a steward on petition for delivery of deeds, &c., to the appointment of one of the parties. *Mott* v. *Buxton*, 7 Ves. 201.

Liability.]—The steward of a court baron is a judicial officer ; and therefore is not responsible for the acts of the regular bailiffs of the court to

whom process is directed. *Bradley* v. *Carr*, 3 Scott (N.R.) 523 ; 3 Man. & G. 221.

But he is responsible where he directs the process to bailiffs specially nominated by the party who sues it out, taking an indemnity. *Ib.*

A steward of a manor is bound, when called upon, to deliver up the papers, of which he has the charge, in a proper condition. *North-Western Ry.* v. *Sharp*, 10 Ex. 451 ; 24 L. J., Ex. 44.

Displacement by Court.]—The court will not displace one steward without seeing that there is another to perform his functions. *Windham* v. *Giubilei*, 40 L. J., Ch. 505 ; 24 L. T. 653.

Deputy Steward Infant.] — An infant, if capable of performing the duties of the office, may be the deputy steward of a manor, and take a surrender by a married woman. *Edlestone* v. *Collins*, 22 L. J., Ch. 480 ; 17 Jur. 331 ; 1 W. R. 169.

Authority to receive Fines.]—The defendant purchased copyhold land in the plaintiff's manor, and was admitted by C., who had been appointed by the steward of the manor as his deputy, to admit the defendant. C. also acted as the defendant's attorney in completing the purchase. Nine days afterwards the defendant gave C. a cheque on his bankers for 87*l.* 10*s.* 8*d.*, viz. 78*l.* 15*s.* for the lord's fine, 4*l.* 11*s.* 8*d.* steward's fees, 4*l.* 4*s.* C.'s own charges as the defendant's solicitor. This cheque was crossed by the defendant at the request of C. to C.'s bankers. The cheque was duly paid by the defendant's bankers to C.'s bankers, and they retained the money in discharge of a debt due to them by C., who had overdrawn his account. In an action by the lord against the defendant to obtain payment of the fine due :—Held (reversing the judgment of the Common Pleas), that there was no evidence for the jury to support a finding that the payment of the fine to C. was a valid payment to the lord. *Bridges* v. *Garrett*, 39 L. J., C. P. 251 ; L. R. 5 C. P. 451 ; 22 L. T. 448 ; 18 W. R. 815—Ex. Ch.

Fees—Preparing Deeds.]—A steward of a manor sued in the county court a copyhold tenant for solicitor's costs attending the enfranchisement of his tenement. The tenant agreed to abide by the valuation of the surveyor named by the steward, and paid over the consideration and the surveyor's fee in accordance with that valuation. The steward's claim consisted of the costs of the enfranchisement deed, which the tenant had received from the steward :—Held, that this being a voluntary enfranchisement, the Copyhold Acts, 1852 and 1858, did not apply ; therefore the steward was entitled to the charges for work done on the tenant's behalf, and the words "as steward," by which he described himself in the plaint, might be treated as surplusage. *Blaker* v. *Wells*, 28 L. T. 21.

It is a good custom in a manor that the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor. *Rex* v. *Rigge*, 2 B. & Ald. 550 ; 21 R. R. 394. S. P., *Reg.* v. *Bishop's Stoke*, 8 D. P. C. 608 ; 4 Jur. 630.

Amount.]—A fee of 13*s.* 4*d.*, claimed in respect of special custom, would be rank. *Treherne* v. *Gardner*, 5 El. & Bl. 913 ; 25 L. J., Q. B. 201 ; 2 Jur. (N.S.) 394 ; 4 W. R. 281.

Where admittance is claimed on behalf of joint tenants, the steward (in the absence of special custom) is not entitled to higher fees than upon the admittance of a single tenant. *Ib.*

Under 55 Geo. 3, c. 192, s. 2, if copyhold lands are devised, the steward is entitled to fees as in respect of a surrender to the use of the will, though such surrender is no longer necessary, to the same amount as would have been payable for an actual surrender. *Ib.*

Where, by the custom of a manor, surrenders were, before the statute, sometimes made in court, and sometimes out of court, and then presented in court, registered and enrolled, the payment is still to be made, the labour of the steward having been practically the same in each case. *Ib.*

Where a steward refuses to admit except upon payment by the tenant of fines and fees not duly payable (as where the steward insists on payments as for four admittances where payments are due in respect of one only, or of higher fees to himself upon the admittance of joint tenants, than are due in respect of a single tenant), the tenant, if he pays the money under protest, is entitled to recover it back as money had and received. *Ib.*

His right to recover the full excess is not lessened by his having, on one occasion, offered to pay, upon admittance, a sum including part of such excess, the steward not having accepted such offer. *Ib.*

—— **Under Lands Clauses Act.**]—Where a steward was by custom entitled to one fee upon the surrender, and another on the admittance to copyhold lands :—Held, that under the Lands Clauses Act, 8 & 9 Vict. c. 18, s. 95, he was entitled to one fee only on a surrender. *Cooper* v. *Norfolk Ry.*, 6 Railw. Cas. 94 ; 3 Ex. 546 ; 18 L. J., Ex. 176 ; 13 Jur. 195.

—— **Different Tenements.**]—Where a person is admitted to several distinct copyhold tenements, the steward is not entitled, as a matter of general right, to the full fees on each admission separately ; and therefore, where no custom prevails in the manor to that effect, he must stand on his quantum meruit. *Everest* v. *Glyn*, 2 Marshall, 84 ; 6 Taunt. 425 : Holt, N. P. 1 ; 16 R. R. 640.

U., a copyhold tenant, was owner of sixteen tenements, holden by sixteen separate copies of court-roll, and sixteen separate yearly quit-rents. He was admitted to these tenements at five different times, and by five different titles. An act passed, directing commissioners to allot the waste lands among the owners, in proportion to their rights and interests. The act directed that the allotted lands should be held by the allottees under the same tenures, rents, customs, and services as the lands in respect of which they were allotted would have been in case the act had not passed ; and that, where the lands were held under different titles or for different estates, the commissioners should distinguish the lands held for each of such estates and titles, and set out the allotments accordingly. The commissioners allotted to U., in respect of his sixteen copyhold tenements, five pieces of land, amounting to forty-nine acres, but did not distinguish in respect of which of the tenements, or of what particular estates, the five pieces were allotted. U. afterwards surrendered to E. the fifth allotment, and he was duly admitted to the same. Before the act passed, when any person was admitted in severalty to a part of a copyhold tenement, the steward was entitled, upon such admission, to the same amount of fees as if such

person had been admitted to the whole of such tenement. In an action by the steward to recover sixteen fees in respect of the admission to the fifth allotment:—Held, that such allotment must be considered as an allotment of a portion of each of the sixteen former tenements, and that therefore the steward was entitled to recover sixteen fees. *Evans* v. *Upsher*, 16 M. & W. 675; 16 L. J., Ex. 185.

E. TENURE AND INCIDENTS.

1. In General.

Statute.]—*Copyhold Act*, 1894, *s.* 81, *imposes restraints on creation of new copyholds.*

Period of Tenure.]—A copyhold must have been such time out of mind, and cannot be created within the time of legal memory. *Roe* d. *Newman* v. *Newman*, 2 Wils. K. B. 125.

When there is no custom for that purpose, the lord of the manor cannot make a new grant of copyhold. *Rex* v. *Hornchurch*, 2 B. & Ald. 189.

Perfecting—Regularity.]—In order to constitute the grantee of a copyhold a perfect customary tenant, where the grant is made out of court, such grant must be notified at the next customary court, or at such other subsequent court as the custom points out, and must be entered on the rolls of the court. *Doe* d. *Leach* v. *Whitaker*, 5 B. & Ad. 409; 3 N. & M. 225.

But it is sufficient if, having been entered on the court-rolls at a void court as at a good court, it appears on the court-rolls at a subsequent good court, and is not then objected to by the tenants. *Ib.*

It is no objection to a copyhold grant that it is made upon the surrender of a former grantee in remainder, whose admittance had upon such former grant been expressly respited, and of whose admittance at any subsequent time there was no entry in the court-rolls. *Ib.*

Nor is it an objection to the grant of several customary tenements by one copy of court-roll, that several rents are reserved, without specifying which is reserved out of each tenement, it appearing that former entire grants of the same several tenements contained similar entire reservations. *Ib.*

Nor is it an objection that two heriots are expressed to be reserved, where in former grants only one heriot has been reserved. *Ib.*

A customary court cannot be held out of the manor, unless there is a custom to warrant it; and if a court is so held, all that is done at it is void. *Ib.*

But the nullity of such court only affects such matters as are required to be done at a court. *Ib.*

A lord may grant to and admit a copyhold tenant, not only out of court but also out of the manor. *Ib.*

A grant by the lord in person is good, although it purports to be made at a court within the manor, which in fact was held out of the manor. *Ib.*

The steward of a manor may take a surrender out of court. *Ib.*

But a steward cannot admit out of court. *Ib.*

But a voluntary grant of a copyhold, made by the steward at a court held off the manor, is sufficient where such steward is also clothed with a power of attorney, which expressly authorises him to make voluntary grants. *Ib.*

So, although the grant purports to be made by such steward, as steward, and without any reference being made in the grant to the special authority. *Ib.*

Alienation by Lord.]—A lord, having only a temporary estate in his manor, may make grants of copyhold to endure after the determination of his own interest; but such grants must conform strictly to the custom of the manor. *Doe* d. *Rayer* v. *Strickland*, 2 Q. B. 792; 2 G. & D. 278; 11 L. J., Q. B. 305.

An alienation of the fee by a lord of a manor does not affect the rights of a copyhold tenant. *Phillips* v. *Bull*, 6 C. B. (N.S.) 811; 29 L. J., C. P. 7; 6 Jur. (N.S.) 48; 7 W. R. 580.

Therefore, where a lord had granted the inheritance of a portion of the manor to A.:—Held, that it was competent to a copyhold tenant to dispose of his interest to a grantee by an ordinary common-law conveyance; the customary mode of conveyance being rendered impossible by the act of the lord. *Ib.*

Void Grants by Lord.]—A lord of a manor cannot grant copyhold lands to his wife; if he does the grant is void. *Fireman* d. *Symes* v. *Pennant*, 2 Wils. K. B. 254.

Grants of copyhold are ineffectual and void in law, when made by the lord to himself. *Christchurch, Oxford (Dean and Chapter)* v. *Buckingham (Duke)*, 17 C. B. (N.S.) 391; 33 L. J., C. P. 322; 10 Jur. (N.S.) 749; 10 L. T. 575; 12 W. R. 986.

Effect of Devise for Life.]—A., who held lands of a manor, devised them to three trustees and their heirs to the use of B. for life, with remainders over. After A.'s death B. was admitted and enjoyed the lands during his life. He died, having by his will, according to the custom of the manor, nominated his successor. He nominated a stranger. On a bill by the remaindermen under A.'s will, claiming that the power of nominating a successor was vested in B. by virtue of the will, and that therefore it must be exercised by him in reference to the limitations of the will, and not in favour of a stranger:—Held, that B. was customary tenant under the will, and also a trustee for the purposes of the will, and that every right which he had acquired by admission on the court-rolls was, beyond his own life estate, held for the benefit of the remaindermen. *Allen* v. *Bewsey*, 7 Ch. D. 453; 37 L. T. 688—C. A.

Customs.]—There is no general custom for all copyholds. *Everest* v. *Glyn*, 6 Taunt. 425; 2 Marshall, 84; Holt, N. P. 1; 16 R. R. 640.

Occupancy.]—Copyhold estates are liable to special occupancy. *Doe* d. *Lempriere* v. *Martin*, 2 W. Bl. 1148. And see *Zouch* d. *Forse* v. *Forse*, 7 East, 186; 3 Smith, 191.

There cannot be a general occupancy of copyholds. *Doe* d. *Forster* v. *Scott*, 7 D. & R. 190; 4 B. & C. 706; 4 L. J. (O.S.) K. B. 39.

Wastes.]—If there is a custom within a manor for a lord to grant parcels of the waste by copy of court-roll, the premises granted in that mode are well described as copyhold premises, though the date of the grant is modern. *Northwick (Lord)* v. *Stanway*, 6 East, 56; 2 Smith, 225; 3 Bos. & P. 346.

A grant of parcel of the waste of a manor to

hold to B. and his heirs by way of increase to his copyhold, by such services as the copyhold was subject to, for which B. paid a fine of 10s., does not enure as copyhold, there being no custom to warrant such grant, nor as an estate in fee-simple. *R. v. Wilby*, 2 M. & S. 504; 15 R. R. 328.

After a grant of the soil of wastes to trustees for the use of the copyholders of free socage, the lands, when inclosed, will be freehold, and not copyhold. *Revell* v. *Jodrell*, 2 Term Rep. 415; 1 R. R. 503.

There is no general common-law right of tenants of a manor to common appendant on the waste. *Dunraven (Earl)* v. *Llewellyn*, 15 Q. B. 791; 19 L. J., Q. B. 388.

And see COMMON.

Divided Enjoyment.] — One may hold the prima tonsura of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. *Stammers* v. *Dixon*, 7 East, 200; 3 Smith, 261; 8 R. R. 612.

Grant of Reversionary Estate.]—Under a grant by copy of court-roll of a reversionary estate to A. (who had before a life estate in the premises) habendum to him for the lives of B. and C., his grandsons, during the life of either of them longest living, successively, according to the custom, reserving a heriot and 6*s.* rent; A. only takes the legal estate in reversion, and not the cestuis que vie, there being no custom to enable them to take, although they were stated to be admitted tenants in reversion. *Right* v. *Bawden*, 3 East, 260.

Trusts.]—Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir. *Wearer* v. *Maule*, 2 Russ. & M. 97.

But, in the absence of custom, he is not bound to make a surrender by deed burthened with trusts. *Flack* v. *Downing College, Cambridge*, 13 C. B. 945; 1 C. L. R. 692; 22 L. J., C. P. 229; 17 Jur. 697; 1 W. R. 453.

There may be such a custom. *Snook* v. *Mattock*, 5 A. & E. 239.

W., tenant by copy of court-roll for his life, took, according to the custom, a grant from the lord of the reversion to C. and D., his sons, for the term of their lives, in trust for W., as sole purchaser:—Held, that C. and D. were trustees of the reversion for W. *Keats* v. *Hewer*, 10 Jur. (N.S.) 1040; 11 L. T. 290; 13 W. R. 34.

Corporation.]—A corporation cannot hold land by copy of court-roll. *Att.-Gen.* v. *Lewin*, 1 C. P. Cooper, 51; 8 Sim. 366; 6 L. J., Ch. 204; 1 Jur. 234.

Form of Tenure.]—Where lands are held by copy of court-roll, according to the custom of the manor, they are copyhold within 55 Geo. 3, c. 192, although they are not held at the will of the lord. *Doe* d. *Edmunds* v. *Llewellyn*, 2 C. M. & R. 503; 1 Gale, 193; 5 Tyrw. 899; 5 L. J., Ex. 84.

In a manor there are customary tenures of the following nature:—The court of the manor is held twice a year; the steward, having summoned a jury of the freeholders, presides in the court. An applicant for a tenement in the manor goes through the following forms: he is asked by the steward for what purpose he attends there; he says that he seeks to be admitted as tenant of a house, as purchaser, devisee, or as the case may be. The steward inquires of the foreman of the jury if he knows of any objection to the admission of the applicant; should he not do so, the steward, after hearing the whole discussion, decides granting or refusing the application, according to his judgment. If the application is granted, the name of the outgoing tenant is struck out of the roll by the steward, who inserts the name of the applicant in its place. The applicant does not hold by copy of the manor-roll. The applicant takes the oath of fealty and pays to the steward a fee, but no fine is paid to the lord:—Held, that the holder of such a tenure, provided its yearly value amounts to 10*l.*, was entitled to vote as being seised of copyhold or other tenure, within the meaning of 2 Will. 4, c. 45, s. 19. *Garbutt* v. *Trevor*, 15 C. B. (N.S.) 550; 1 H. & R. 69; 33 L. J., C. P. 73; 10 Jur. (N.S.) 131; 9 L. T. 535; 12 W. R. 471.

One who holds in fee land parcel of a manor, which by the custom of the manor is conveyed by ordinary assurance, and without any necessity for a licence from the lord, or any enrolment and admittance, is a freeholder within 8 Hen. 6, c. 7, although at the time of acquiring the estate he acknowledged to holding the land "by free deed, fealty, suit of court," &c. *Passingham* v. *Pitty*, 17 C. B. 299; 25 L. J., C. P. 4; 2 Jur. (N.S.) 837; 4 W. R. 122.

Leases.]—A lessee for years of a copyholder may maintain ejectment, though there is no custom in the manor to lease, and no licence has been obtained from the lord, such lease being good between the parties to it, and void only as against the lord. *Doe* d. *Tresidder* v. *Tresidder*, 1 Q. B. 417; 1 G. & D. 70; 10 L. J., Q. B. 160; 5 Jur. 931.

Presumption as to Boundaries—Occupancy.]—In ejectment between the purchasers of copyhold and leasehold properties adjoining, the question being as to the limits of the garden ground of each, a portion of the garden of one having been thrown into the garden of the other forty years ago by the then common proprietor, and the boundary-line being left doubtful on the plans:—Held, that the fact that the piece in question had actually been occupied with the leasehold property for more than twenty years, was conclusive. *Tear* v. *Taylor*, 1 F. & F. 480.

2. DESCENT OF COPYHOLD.

Effect of Entry.]—A copyhold is devised by A. to B. for life, remainder to C. in fee. B. is admitted, and dies. C. has, before entry, a descendible estate; and, upon the death of C., his customary heir, and not the customary heir of A., is entitled to the copyhold. *Doe* d. *Parker* v. *Thomas*, 3 Man. & G. 815; 4 Scott (N.S.) 449; 11 L. J., C. P. 124.

Equitable Estates.]—According to the custom of the manor of Heathfield, upon the death intestate of a tenant seised of an estate of inheritance, his younger son is his customary heir. *Trash* v. *Wood*, 4 Myl. & Cr. 324; 9 L. J., Ch. 105; 4 Jur. 669.

T., an equitable tenant in tail of copyhold, received the rents during his life, but, having an

equitable estate only, was not admitted tenant of the copyhold, and died, leaving several sons. The custom proved, with respect to the descent of copyholds within the manor, was that upon the death intestate of a tenant, seised of an estate of inheritance, his younger son was his customary heir:—Held, that the youngest son of T., and not the eldest, became entitled, on his father's death, to call for a conveyance of the copyhold, as tenant in tail under the devise. *Ib.*

The descent of an estate tail, or an equitable estate, in copyholds, is governed by the same customs as descents of estates in fee. *Ib.*

C., after desiring that all his just debts, &c., should be in the first place paid, devised to three trustees, and the heirs of the survivor, a copyhold estate, upon trust to pay the rents and profits thereof, in equal moieties, to his two daughters, for their separate use for life; and after the decease of either, upon trust to pay the whole of such rents, &c., to the survivor for life; and after the decease of the survivor, C. devised the estate, in equal moieties, to the heirs of the bodies of his daughters respectively; and in default of issue of either daughter, he gave the entirety of the estate to the heirs of the body of such daughter who should leave such issue: and in default of issue of both daughters, he gave the estate to the right heirs of the surviving daughter. The trustees were appointed executors of the will and they were duly admitted to hold to the uses of the same. Both the testator's daughters died without having ever been married. The estate was of gavelkind tenure. Both the customary co-heirs and the heir-at-law of the surviving daughter claimed the estate. On demurrer by the latter:—Held, that the general charge of debts, coupled with the legal estate devised to the trustees, made the estate of the devisee in remainder an equitable estate; and the demurrer was overruled. *Creaton* v. *Creaton*, 3 Sm. & G. 386; 26 L. J., Ch. 266; 2 Jur. (N.S.) 1223; 5 W. R. 123.

Executory Devise.]—The descent of the interest possessed by a person entitled under an executory devise of customary lands is regulated by the common law and not by the custom. *Mallinson* v. *Siddle*, 39 L. J., Ch. 426; 18 W. R. 569.

A testator devised customary lands of inheritance to his brother, his heirs and assigns, but in case his brother should die without issue, he directed that the whole should be divided amongst his five sisters or their lawful representatives. The brother survived the testator, but died without issue. A person entitled under the gift over to a share in the lands, died intestate in the lifetime of the brother:—Held, that the share of the intestate descended to her common law heirs and not to her customary heir. *Ib.*

Custom of Jus Representationis.]—The custom of a manor was stated to be that all copyhold descended to the youngest son or daughter, brother or sister, uncle or aunt. A tenant died intestate seised of customary lands of the manor, leaving neither son, daughter, brother, sister, uncle, nor aunt; but leaving sons of deceased uncles:—Held, that the youngest son of the youngest uncle was not entitled, and that the heir-at-law was entitled to the lands. *Smart, In re, Smart* v. *Smart*, 18 Ch. D. 165; 30 W. R. 43.

According to the custom of descent in the manor of Taunton Deane, a surviving sister is not entitled to inherit in preference to the son of a deceased brother's son. *Locke* v. *Colman*, 2 Myl. & Cr. 635.

Possessio sororis, in copyhold, effect of. *Anon.*, Cary, 5; Dyer, 291.

Possession of the mother for collateral heir. *Ib.* 6.

R. M., on his marriage, surrendered certain premises within the manor of Taunton to trustees upon trust, after the death of the survivor of the husband and wife, and in default of issue of the marriage that should be living at the death of the survivor, to surrender the premises into the hands of the lord for the use and behoof of the right heirs of the settlor for ever, according to the custom of the manor. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of the widow her mother. It being admitted that the widow was, according to the custom, the heir of the settlor at the time of his death, and that his youngest sister was such heir at the time of the widow's death, it was held the youngest sister was entitled under the ultimate limitation. *Bush* v. *Locke*, 3 Cl. & F. 721; 9 Bligh (N.S.) 1. Affirming, *Locke* v. *Southwood*, 1 Myl. & Cr. 411.

—— **Part Subject to.**]—Devise of copyholds to A. for life, and after his death to his eldest son, and the legal customary heirs of such eldest or only son for ever, provided that if A. leave no son or issue of a son living at his death, devise to the daughters of A. as tenants in common in fee, and if A. leave no son or daughter, or issue of a son or daughter, living at his death, gift over:—Held, that A.'s daughters, during his lifetime, took contingent descendible interests as tenants in common in fee in the devised estate. *Rider* v. *Wood*, 1 K. & J. 644; 3 Eq. Rep. 1064; 24 L. J., Ch. 737.

Held, also, that the admission of A. did not enure for the benefit of his daughters, so as to bring them within the seisin. *Ib.*

Part of the property was copyholds, descendible according to the tenure of borough English among issue and collaterals also:—Held, that on the death of one of the daughters of the tenant for life without issue in his lifetime, her interests in the copyholds descended to her youngest sister then living, and on the subsequent birth of another sister shifted to her. *Ib.*

Another part of the property was copyholds not proved to be descendible according to the tenure of borough English, but by custom the descent was shown to be to the youngest son or daughter or sister of the copyholder last seised:—Held, that, on the death of one of A.'s daughters in his lifetime without issue before she became seised, her interest in these copyholds descended not according to the custom, but to all her sisters as her co-heiresses-at-law. *Ib.*

Evidence as to.]—A. claimed land in a manor as heir in borough English, under these circumstances:—B. was the first purchaser, on whose death the land descended to his two granddaughters as parceners, one of whom dying unmarried, her share went to her sister, who died leaving a son to whom the property descended, and died without issue, and was the person last seised. A. was the youngest son of the youngest brother of the purchaser, and his father, had he

been living, would therefore have been the great-great uncle of the last person seised. In order to prove the custom of borough English in the manor, it was shown that the lands in the manor descended lineally to the youngest son of the person last seised in infinitum, and if no son, to the daughters as parceners. Instances were also proved, that if there were no lineal heirs the youngest brother took, and the youngest son of the youngest brother; and if the youngest brother died without issue the next youngest brother took; and if there were no brothers, then sisters took as parceners; also that the youngest son of an uncle took, and the youngest son of two sisters, who were co-parceners, respectively took:—Held, that this evidence did not warrant the conclusion that there existed in the manor either a customary descent to the youngest nearest male descendant of the person last seised, or a customary descent to entitle A. to recover. *Muggleton* v. *Barnett*, 1 H. & N. 282. Affirmed, 2 H. & N. 653; 27 L. J., Ex. 125; 4 Jur. (N.S.) 139; 6 W. R. 182—Ex. Ch.

The Inheritance Act (3 & 4 Will. 4, c. 106) has not taken away the customary descent in borough English. *Ib.*

A single admittance to copyhold is evidence to prove the custom of the manor for lands to descend to the youngest nephew. *Doe* d. *Mason* v. *Mason*, 3 Wils. K. B. 63.

Meaning of "Descent."]—When the custom of a manor was stated in a presentment of the homage to be that copyholds for the first descent after a surrender descend to the eldest son, and, if no surrender, to the youngest son:—Held, that the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy." *Bickley* v. *Bickley*, 36 L. J., Ch. 817; L. R. 4 Eq. 216.

Where, therefore, the last surrender had been made to B. B, who devised to J. L. B., his heir according to the custom of the manor, and J. L. B. died intestate, having two sons:—Held, that the youngest son of J. L. B. was entitled to succeed him. *Ib.*

Line of, when Broken.]—B. conveyed customary freeholds which he had inherited from his mother, to N. absolutely, and N., after surrender and admittance, executed on the same day a deed of declaration of trusts for such person as B. should by deed or will appoint, and in default for B. and his heirs, this process being necessary according to the custom to give B. the power of devising. B. died intestate:—Held, that the descent had not been broken, and that the heir of the testator ex parte maternâ was entitled. *Nanson* v. *Barnes*, L. R. 7 Eq. 250; 20 L. T. 154; 17 W. R. 429.

One seised in fee of a copyhold of inheritance by descent ex parte maternâ, surrendered the same to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint, remainder in default of appointment to himself in fee; after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who, upon repayment of the principal and interest, surrendered again to the mortgagor:—Held, that the line of descent was thereby broken, and that the estate descended to the paternal heir. *Doe* d. *Harman* v. *Morgan*, 7 Term Rep. 103.

Devise after a tenancy for life of borough English lands for sale, and to divide the moneys amongst all the testators' sons and daughters who might then be living, and to the heir and heirs of them who might be deceased, share and share alike—Held, that, under the gift to the heirs, the common law, and not the heirs in borough English, took. *Polley* v. *Polley*, 31 Beav. 363.

Devolution—Death of Sole Trustee between Conveyancing Act, 1881, and Copyhold Act, 1887.]—The effect of s. 45 of the Copyhold Act, 1887, is to repeal entirely s 30 of the Conveyancing and Law of Property Act, 1881, as regards copyholds, so that, if a sole trustee of copyholds had died between the commencement of the Conveyancing and Law of Property Act and the passing of the Copyhold Act, the legal estate in the copyholds, which by virtue of s. 30, had on his death devolved upon his personal representatives, was on the passing of the Copyhold Act divested from them, and vested in his customary heir or devisee. But the validity of any disposition of the property made by the personal representatives before the passing of the Copyhold Act would be unaffected by that act. *Mills' Trusts, In re*, 57 L. J., Ch. 466; 37 Ch. D. 312; 58 L. T. 620; 36 W. R. 393. Affirmed on other grounds, 40 Ch. D. 14; 60 L. T. 442; 37 W. R. 81—C. A.

See Copyhold Act, 1894, s. 88.

3. Quasi-Tenancy by the Curtesy.

Admittance.]—A copyhold having descended to a wife as heir-at-law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of England, according to the custom of the manor, though the only evidence of such custom on the rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by the operation of law. *Doe* d. *Milner* v. *Brightwen*, 10 East, 583; 10 R. R. 395.

4. Freebench.

Customary Lands.]—By the custom of a manor as settled by 1 Car. 1, the widow of a copyholder is entitled to dower, but of all the customary lands of which her husband was tenant during the coverture, although he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been examined in court, or having joined in the surrender. *Doe* d. *Riddell* v. *Gwinnell*, 1 G. & D. 180; 1 Q. B. 682; 10 L. J., Q. B. 212. S. P., *Riddell* v. *Jenner*, 10 Bing. 29; 3 M. & Sc. 673.

Equitable Interests.]—A wife is not dowable out of the trust of a customary freehold. *Godwin* v. *Winsmore*, 2 Atk. 526.

It is a dying seised of the husband and not a seisin during coverture which entitled the widow to freebench. *Ib.* And see *Chaplin* v. *Chaplin*, P. Wms. 229; overruling *Otway* v. *Hudson*, 2 Vern. 583, 585.

A widow shall not have freebench of a trust estate in a copyhold; the entry of the widow as guardian to the son does not prevent his having such a seisin as to convey a title to his customary heir. *Forder* v. *Wade*, 4 Bro. C. C. 521.

Estate Tail.]—A widow of a tenant in tail of copyholds is entitled to her freebench, though there is no custom as to such freebench, but only as to the freebench of tenants in fee. *Doe* d. *Norfolk* (*Duke*) v. *Sanders*, 3 Dougl. 303.

Purchaser Dying before Admittance.]—The 3 & 4 Will. 4, c. 105, does not apply to freebench. *Smith* v. *Adams*, 5 De G. M. & G. 712; 18 Beav. 499; 24 L. J., Ch. 258; 18 Jur. 968; 2 W. R. 698.

The purchaser of a copyhold held of a manor, the custom of which entitled widows of the copyholders to freebench in one moiety of the lands of which their husbands died seised, took a surrender, but died before admittance:—Held, that his widow was not entitled to freebench at law or in equity. *Ib.*

When not Barred.]—Copyholds surrendered to a purchaser to uses similar to the common uses to bar dower, on which surrender the purchaser was admitted to hold as tenant in fee simple; his devisee is bound by the terms of the admittance, and is not entitled to claim as appointee under the surrender, so as to defeat the widow's right to freebench. *Powdrell* v. *Jones*, 2 Sm. & G. 407; 3 Eq. Rep. 63; 24 L. J., Ch. 123; 18 Jur. 1111; 3 W. R. 32.

The 3 & 4 Will. 4, c. 105, does not extend to copyholds. *Ib.*

A., by a settlement on his marriage with B., in order to make some provision for B. in case she should survive him, settled copyholds upon himself for life, with remainder to B. for life.—Held, that B.'s right to freebench out of other copyholds, of which A. died seised and intestate, was not barred by the settlement. *Willis* v. *Willis*, 34 L. J., Ch. 313; 13 W. R. 533.

A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he shall leave at his death; his widow is not bound by this agreement. *Musgrove* v. *Dashwood*, 2 Vern. 45.

Barred by Alienation.]—If a husband became entitled to copyhold estates by copy of court roll, and granted them out again by copy of court roll, his wife was not entitled to dower of those estates *Sneyd* v. *Sneyd*, 1 Atk. 442.

Copyholder having power to bar the widow's freebench by surrender, any act by him for valuable consideration will bar her equity. *Brown* v. *Raidle*, 3 Ves. 256.

Copyholder contracts for valuable consideration to sell to his son, and dies before actual surrender; the son held entitled to performance, and to compel the widow to surrender freebench. *Hinton* v. *Hinton*, 2 Ves. 631; Amb. 277.

—— **By Surrender by Wife.**]—A surrender by a wife of a copyholder, with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, is effectual to bar her right of freebench, if any such existed by special custom, although, at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises. *Wood* v. *Lamburth*, 1 Ph. 8; 5 Jur. 741.

—— **By Devise without Surrender.**]—Freebench can be barred by a mere devise without surrender to the use of the will. *Lacey* v. *Hill*, *Leney* v. *Hill*, 44 L. J., Ch. 215; L. R. 19 Eq. 346; 32 L. T. 48; 23 W. R. 285.

A testator by his will (made in 1861) devised all his real estate in trust for sale and conversion with a direction to pay an annuity out of the proceeds to his widow during her life. The testator (who had married after the Dower Act came into operation) died entitled to copyholds which he had purchased but which had not been surrendered to the uses of his will:—Held, that the widow was deprived of any right to freebench by virtue of the Wills Act, s. 3. *Ib.*

Husband's Debts.]—A widow's freebench is not subject to her deceased husband's debts. *Spyer* v. *Hyatt*, 20 Beav. 621; 1 Jur. (N.S.) 315; 3 W. R. 294.

5. Mode of Barring Entails.

By Custom—Recovery or Surrender.]—A custom to bar the entails of copyhold land either by recovery suffered, or by surrender in fee to the purchaser or vendee, is good. *Everall* v. *Smalley*, 1 Wils. K. B. 26; 2 Str. 1197.

A recovery suffered to defeat an entail was valid for such purpose, although uses were declared of such discovery which were void. *Doe* d. *Baverstock* v. *Rolfe*, 7. L. J., Q. B. 251.

A custom to bar the entail of a copyhold, by surrender, may subsist, concurrently with a custom to bar by a recovery in the lord's court, though the instances are much less frequent. *Doe* d. *Wightwick* v. *Truby*, 2 W. Bl 944.

Where, therefore, it was left to the jury to say whether the custom was to bar by recovery or surrender, without stating to them that such customs might be concurrent and consistent with one another, the court granted a new trial. *Doe* d. *Wallhead* v. *Ossinghrooke*, 9 Moore, C. P. 68; 2 Bing. 70; 2 L. J. (O.S.) C. P. 105.

A single instance of a surrender in fee by tenant in special tail of a copyhold estate is evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor has not been dead twenty years, and though one instance is proved of a recovery suffered by a tenant in tail to bar the entail. *Roe* d. *Bennett* v. *Jeffery*, 2 M. & S. 92; 14 R. R. 597.

The presumption is that a surrender will bar an estate tail in copyholds until a contrary custom is shown. *Goold* v. *White*, Kay, 683; 2 Eq. Rep. 1100.

Copyholds were sold subject to a condition, that all statements and recitals in any of the title deeds should be considered as satisfactory evidence of the facts stated or recited. The purchaser objected, that in the first surrender on the abstract, which was by A., and J., his wife, it was stated that J. "had then lately been admitted there tenant in tail, according to the custom of that manor," and that there was nothing to show how the estate tail had been barred; and he required evidence that the custom of the manor warranted estates tail. The first surrender was dated in 1801, and was conditional only. In 1815 the same parties made an absolute surrender in fee, under which

the possession had been enjoyed ever since:—Held, that the recital was conclusive evidence, under the conditions of sale, that J. had been admitted tenant in tail, but not that this was according to the custom of the manor for this was not a single fact, but a deduction from a series of facts; but, held, that the recital coupled with the conditional surrender of 1801, the absolute surrender of 1815, and the subsequent possession consistently with that title, was sufficient evidence that the custom of the manor did warrant estates tail. *Ib.*

Where there is no particular method in the lord's court to bar entails, a common surrender is sufficient, though the entail is of a legal estate. *Otway* v. *Hudson*, 2 Vern. 585.

Copyholds may be entailed, and surrenders or plaints in nature of fines and recoveries, may bar the entails as well in court baron as at common law. *Anon.*, Cary. 22.

Two tenants in common of a copyhold estate in tail, agree upon a partition; each surrenders the part allotted to the other:—Held, entail was barred only as to moiety. *Oakley* v. *Smith*, Amb. 368; 1 Eden, 261.

Fine by Married Woman.]—The interest of a married woman in copyhold estates will not pass by a fine. *Life Association of Scotland* v. *Siddall*, 3 De G. F. & J. 58; 7 Jur. (N.S.) 785; 4 L. T. 311; 9 W. R. 541.

By Will.]—A., being tenant in tail of the trust of a copyhold estate, with remainder over, and trustees refusing to surrender the legal estate to him, he brought his bill for that purpose, and, pending that suit, went to the lord's court and offered to surrender, but was refused, not having the legal estate; and thereupon he made his will, and gave the estate to his wife and children:—Held, the estate to go according to the will, the court conceiving the will sufficient to bar the entail of a trust. *Ib.*

Where copyholder, seised of an estate tail, surrenders to use of his will, if entails by custom of manor are not barrable by recovery or fine, but by surrender; in such cases the surrender to the use of his will not only effectuates the will, but operates as a bar to the entail. *Moore* v. *Moore*, Amb. 279.

Entails of copyhold held barred by surrender to use of will, where no custom, by recovery, or surrender, by three judges against Willis, Ch. J., who thought it might be by recovery, without a custom, and therefore not by surrender. *Carr* v. *Singer*, 2 Ves. 603.

Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon his eldest son, who, by will, charged all his real estate with debts and legacies, and devised it to his brother for life, with various remainders; the estates in the copyhold are barred. *Challoner* v. *Murhall*, 2. Ves. 524; 3 R. R. 1. S. P., *Dunn* v. *Green*, 3 P. Wms. 9.

A. devised copyhold lands to John J. for the term of his life, and after his death to "James J., son of John J., and the heirs male of his body, provided always, that in case James J. shall happen to depart this life without leaving issue male of his body lawfully begotten him surviving," then to George J. in fee:—Held, that unless there were a custom to entail, John J. took an estate for life, James J. a fee simple conditional, and George J. a good executory devise. *Hardcastle* v. *Dennison*, 4 L. T. 707.

Held, also, that the evidence adduced in support of the custom to entail did not afford proof of the existence of such a custom within the manor. *Ib.*

Surrender by Joint Tenants.]—S. and J. being joint tenants in tail, remainder, after the death of M., tenant for life in freebench, of descendible copyhold lands, S. and her husband, without the concurrence of M., surrendered their estate to such uses as the husband should by will appoint. S. died in the lifetime of her husband and of J.; the husband died, having by his will appointed the surrendered share to his executors:—Held, that the quasi estate tail of S. was not barred, and that whether the life estate of M. was under the same instrument as that under which S. and J. derived their title, or whether M.'s tenancy was under her paramount title of freebench, her concurrence was necessary in order effectually to bar the estate tail in remainder. *Edwards* v. *Champion*, 3 De G. M. & G. 202; 23 L. J., Ch. 123; 1 W. R. 497.

Held, also, that there was, under the circumstances, no severance of the joint tenancy. *Ib.*

Quære, whether the surrender by a joint tenant to the use of his will would per se effect a severance of the joint tenancy. *Ib.*

Disentailing Deed—Disposition—Entry on Court Rolls.]—A deed intended to operate as a disentailing assurance of copyholds must, in order to be operative, be a disposition and not a mere declaration of trust, and must be entered on the court rolls of the manor within six months of its execution. *Green* v. *Paterson*, 56 L. J., Ch. 181; 32 Ch. D. 95; 54 L. T. 738; 34 W. R. 724—C. A. S. P., *Honeywood* v. *Forster*, 30 Beav. 1; 30 L. J., Ch. 930; 7 Jur. (N.S.) 1264; 4 L. T. 785; 9 W. R. 855.

So in order to bar an equitable estate tail in copyholds by deed, under 3 & 4 Will. 4, c. 74, such deed must be entered on the court rolls within six months after its execution. *Gibbons* v. *Snape*, 1 De G., J. & S. 621; 2 N. R. 563; 33 L. J., Ch. 103; 9 Jur. (N.S.) 1096; 9 L. T. 132; 11 W. R. 1087.

An indorsement by the steward of the manor on a disentailing deed that it was produced before him at his residence is not a sufficient enrolment. *Boyd* v. *Pawle*, 14 L. T. 753; 14 W. R. 1009.

A. being seised, according to the custom of a manor, and admitted on the court roll as tenant in tail, of copyholds, by an indenture of settlement, inrolled under the act, which operated as a disentailing deed, in consideration of natural love and affection, covenanted to surrender the same to a trustee, in trust for the defendant, her grandnephew, for life, with remainders over. A. also covenanted with the trustee for further assurance, "at the costs of the thereby settled estates and property." Afterwards, by her will, she bequeathed all her residuary estate, after payment of her just debts, to the plaintiff, and made the defendant her executor. After her death the defendant, at the instance of the trustee, procured himself to be admitted on the court roll, and surrendered to the trustee, who was thereupon admitted as tenant:—Held, as between the plaintiff and the defendant, that the defendant was entitled to be allowed all expenses properly incurred in the surrender, and in the execution and registration of the deed of surrender, but was not entitled to anything in

respect of the fine payable to the lord upon the admission of the tenant, and which was necessary in order to effectuate the disentail. *Clarke* v. *Twyford*, 5 Jur. (N.S.) 564; 7 W. R. 538.

Effect of Enfranchisement in barring Entail.]—The tenant in tail in possession of copyhold land (held of a manor by the custom of which an entail could be created) devised all the real estate of or to which he should be seised or entitled at the time of his death to two trustees, their heirs and assigns, upon certain trusts declared by the will. After the death of the testator the trustees were, as such devisees, admitted tenants of the copyhold land, to hold the same to them, their heirs and assigns, upon the trusts of the will. The lord afterwards executed an enfranchisement (not under the Copyhold Acts) to the trustees, and they executed a conveyance to the only daughter of the testator (who was his heiress in tail) in fee. Under the trusts of the will the daughter had become solely beneficially entitled to the real estate which passed under the devise to the trustees:—Held, on the authority of *Challoner* v. *Murhall* (2 Ves. 524), and *Dunn* v. *Green* (3 P. Wms. 9), that the effect of the enfranchisement, and the subsequent conveyance by the trustees, was to bar the entail, and make the daughter owner of the land in fee simple. *London School Board, Ex parte, Hart, In re*, 58 L. J., Ch. 752; 41 Ch. D. 547; 60 L. T. 817; 38 W. R. 61.

6. Contingent Remainders.

Estate to Support.]—To support a contingent remainder in a freehold, there must be a tenant to the præcipe; yet not so of a copyhold; for there no præcipe can be brought, being parcel of the manor only and the freehold in the lord. *Lovell* v. *Lovell*, 3 Atk. 12.

The estate of the lord will preserve contingent remainders of copyhold estate. *Stanfield* v. *Habergham*, 10 Ves. 282.

Contingent remainders of copyhold will be preserved against a forfeiture, by the estate of the lord; not where the preceding estates are expired. *Habergham* v. *Vincent*, 2 Ves. 209; 4 Bro. C. C. 353.

Tenant for life of a copyhold, with a contingent remainder to his first son in tail, takes a conveyance of the reversion in fee of the copyhold before the birth of the son; the contingent remainder is not destroyed, the freehold being in the lord. *Mildmay* v. *Hungerford*, 2 Vern. 243.

Freeholds, copyholds, and leaseholds for lives were devised in 1838 to A. for life, with divers contingent remainders over, with an ultimate remainder to the testator's right heirs. There were no trustees to support the contingent remainders. A., who was the heir-at-law of the testator, executed a release, by which he purported to resettle the estates discharged from the contingent limitations created by the testator:—Held, that the contingent remainders in the copyholds were not destroyed, as they were supported by the estate of the lord of the manor. *Pickersgill* v. *Grey*, 30 Beav. 352; 31 L. J., Ch. 394; 8 Jur. (N.S.) 632; 5 L. T. 706; 10 W. R. 207.

7. Extinguishment of Tenure.

Effect of.]—Lord of manor being seised of it in fee, subject to an executory devise over, purchased an estate, partly freehold and partly copyhold of manor, and afterwards, under inclosure act, carried in two claims, one in respect of devised and the other in respect of purchased estate, and obtained two allotments accordingly. He afterwards died, and the executory devise took effect:—Held, that copyhold part of purchased estate being extinguished in manor, passed with it to executory devisee, who was also entitled to so much of allotment obtained in respect of purchased estate as was proportionate to value of copyhold part; and it was referred to the master to apportion allotment accordingly. *King* v. *Moody*, 2 Sim. & S. 579; 4 L. J. (O.S.) Ch. 227; 25 R. R. 267.

Merger.]—Copyhold purchased by the lord, tenant for life of the manor, with remainders over, taking the surrender to him and his heirs, merge, and as parcel are subject to the limitations of the manor; and though under a covenant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs, he could compel a re-grant by the remainderman, no re-grant having been made, the general devisees of the purchaser have no equity. *St. Paul* v. *Dudley and Ward*, 15 Ves. 167; 10 R. R. 57.

If a lord mortgages the manor in fee to A., and afterwards purchases copyholds held of the manor, and takes surrenders of them to himself in fee, they will accrue to the benefit of the mortgagee; and a settlement by the lord of all his estate mortgaged to A. will pass the equity of redemption of such surrendered copyholds. *Doe* d. *Gibbon* v. *Pott*, 2 Dougl. 710.

A., seised in fee of twelve twenty-fourth parts of a manor held by several as tenants in common, purchased lands holden of the manor, which were thereupon surrendered to trustee for him, and afterwards to himself, in fee, and he was admitted tenant of the entirety by the act of all the lords:—Held, that twelve twenty-fourth parts of his copyhold interest in the lands merged in his freehold estate therein as lord of the manor. *Cattley* v. *Arnold*, 4 K. & J. 595.

The lord, where by the custom he has the cut of the woods growing on the lands, grants all the woods and underwoods on the copyhold to the copyholder in fee. This shall not merge in the copyhold. *Faulkner* v. *Faulkner*, 1 Vern. 21.

Entail barred.]—Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon his eldest son, who by will charged all his real estate with debts and legacies, and devised it to his brother for life, with various remainders: the estates in the copyhold are barred. *Challoner* v. *Murhall*, 2 Ves. 524; 3 R. R. 1.

A. is a copyholder in tail, the lord grants the freehold of the copyhold to him in fee; the copyhold, though entailed, is extinct. *Dunn* v. *Green*, 3 P. W. 9.

Copyholder in tail takes a conveyance of the freehold in fee, the copyhold is merged. *Parker* v. *Turner*, 1 Vern. 458.

B. purchases a copyhold for lives of the lord, who makes a lease of the freehold of soil to A., reserving rent, and afterwards levies fine of manor to B., who accepts rent from A. Quære whether B.'s copyhold is gone. *Compton* v. *Brent*, 1 Dyer 30, a. pl. 207.

Suspension of Tenure.]—Where a customary

tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Bingham* v. *Woodgate*, 1 Russ. & M. 32; Tam. 183; 8 L. J. (O.S.) Ch. 46.

Allotments.]—A manor was vested in trustees upon such trusts as E. B., a married woman, should by will appoint; before any will was made, a piece of copyhold land was, under an inclosure act, allotted to the trustees of the settlement as lords of the manor by way of compensation, and two copyhold allotments were made to two other persons in respect of copyhold interests; the trustees bought the two last-mentioned allotments, and held them upon the same trusts as the manor; in 1807, E. B. made her will, devising the manor with its appurtenances to the father of the plaintiff for life with remainder to his first son in tail, with remainder to his second son, the plaintiff, and devising the residue of her property to trustees in trust to sell. E. B. died in 1813, and the copyhold allotment made to the trustees and the two allotments purchased by them were then treated by the trustees of the will as part of the residue, and in 1814 were sold to a person from whom the defendant subsequently purchased. The plaintiff, while an infant, became entitled in 1831, by the deaths of his father and elder brother, to the manor under the devise; he attained twenty-one in 1849, and soon afterwards filed a bill, claiming the three allotments as part of the manor:—Held, that as to each allotment there had been, under the circumstances, an extinguishment of the copyhold in the manor, and that they all passed to the plaintiff under the devise of the manor. *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; 23 L. J., Ch. 571; 18 Jur. 915; 2 W. R. 173.

Tenure Revived.]—The right of a reversioner or remainderman to grant copyhold lands, according to the custom of the manor, is not extinguished by the severance of the demesne lands from the manor by the lord farmer, or other person who has a limited interest in the same, but on the determination of such interest the right to re-grant is again vested in the lord. *Henley (Lord), Ex parte*, 29 Beav. 311; 31 L. J., Ch. 54; 9 W. R. 350.

The letting of such lands by the lord farmer from year to year will create a severance so far as his interest is concerned, and will destroy his right afterwards to grant the same by copy of court roll, according to the custom of the manor. *Ib.*

If at the time of such lettings by the lord farmer the legal estate is not in him, but in his mortgagee, the tenancies are as against the mortgagee mere tenancies at will and do not work severance, so as to deprive him of the right of re-granting the same subsequently, according to the custom of the manor. *Ib.*

F. LORD OF MANOR (RIGHTS OF).

1. ALIENATION.

Leases by Lord.—A manor was appendant to a rectory, and by the custom of the manor the tenements might be granted for lives in possession and in reversion; by one of the customs it was declared that "if any man has taken a reversion, and the lord dies that granted the same, and the reversion being out of possession the next lord may lawfully set again":—Held, that the meaning of the custom was, that where a reversion happens not to have come into possession at the time of the death of the lord granting it, the succeeding lord may treat the reversion as a nullity and lease again, and that such custom was not unreasonable. *Reg.* v. *Venn*, 44 L. J., Q. B. 158; L. R. 10 Q. B. 310; 23 W. R. 909.

Conveyance by Rector—Land Tax Acts.]—A rector and lord of a manor, by one grant, demised for three lives, at one aggregate holding, and at one undivided rent, three ancient tenements, originally held of the manor under distinct grants, and at distinct rents. The rector afterwards disposed of the reversion in fee under the Land Tax Act, 42 Geo. 3, c. 116:—Held, that though the grant for lives might be void unless sanctioned by special custom in the manor, yet the purchaser of the reversion had a good title, the sale being approved of by the land tax commissioners. *Doe* d. *Strickland* v. *Woodward*, 1 Ex. 273; 17 L. J., Ex. 1.

What Passes by Conveyance.]—When a deed executed by the lord purports to convey a copyhold tenement in fee, nothing but the copyhold tenement will pass by the deed, although the parcels contain a description of something which does not form part of the copyhold tenement. *Hext* v. *Gill*, 41 L. J., Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957.

Mortgage.]—The equity of redemption of a mortgage in fee of copyholds is made legal assets by 3 & 4 Will. 4, c. 104. *Burrell, In re, Burrell* v. *Smith*, 39 L. J., Ch. 544; L. R. 9 Eq. 443; 22 L. T. 263.

A custom of a copyhold manor to grant the demesne lands by copy for lives is destroyed by a grant by the owners in fee of a lease from year to year as to such lands, and they will thereby become severed from the manor, and thenceforth cease to be part of the demesne. But such a grant, by a person having a limited interest as by a lord farmer, has that operation only during the continuance of his estate. The creation of a tenancy at will will not effect such a severance, and, therefore, where a lord farmer created a tenancy from year to year, without the concurrence of his mortgagee:—Held, that, as against the mortgagee, the tenant held only at will, and that therefore no severance had thereby been created. *Henley (Lord), Ex parte*, 29 Beav. 311; 31 L. J., Ch. 54; 9 W. R. 350.

Void Grants by Lord.]—Alienations by lord of the fee do not affect the rights of a copyhold tenant. *Phillips* v. *Ball*, 6 C. B. (N.S.) 811; 29 L. J., C. P. 7; 6 Jur. (N.S.) 48; 7 W. R. 580.

A lord cannot grant copyholds to himself or his wife. *Firebrass* d. *Symes* v. *Pennant*, 2 Wils. K. B. 255. S. P., *Christchurch, Oxford* v. *Buckingham (Duke)*, 17 C. B. (N.S.) 391; 33 L. J., C. P. 322; 10 Jur. (N.S.) 749; 10 L. T. 575; 12 W. R. 986.

2. MINES AND MINERALS.

Property in.]—In an ordinary estate of copyhold the property in the trees and minerals is in

the lord, the possession in the copyholder. If a stranger or the copyholder cuts trees or takes minerals, the lord can bring trover; if a stranger or the lord cuts trees or takes minerals, the copyholder can maintain trespass. *Eardley* v. *Granville*, 45 L. J., Ch. 669; 3 Ch. D. 826; 34 L. T. 609; 24 W. R. 528.

When the trees are cut or the minerals taken, the copyholder becomes entitled to the possession of the space where the trees or minerals were, and is entitled to use of it at his will and pleasure. *Ib.*

On the other hand, if a freeholder grants lands excepting mines, he severs his estate vertically, i.e. he grants out his estate in parallel vertical layers, and the grantee only gets the parallel layer granted to him. The freeholder retains the reserved stratum as part of his ownership, and whether or not he takes the minerals out of the stratum such stratum still belongs to him as part of the vertical section of the land. *Ib.*

G. was lessee of manorial mines, with right to work them and enter on the surface of the copyhold; these mines were worked from the deep pits. Between the deep pits and the North Staffordshire Railway lay, first, copyhold of A.; next, freehold of S.; next, freehold of A. G. took a lease of the S. mines, and, ten days after, a lease of part of A.'s freehold for the purpose of completing a railway then in course of construction over A.'s copyhold from the deep pits to the North Staffordshire Railway. This lease provided for the carriage over A.'s freehold by G. of the produce of mines belonging to or occupied by G. or belonging to S. Shortly afterwards G. drove a crut from the S. mines under A.'s copyhold to the deep pits, and so carried the S. minerals to the deep pits, and thence by the railway over A.'s copyhold to the North Staffordshire Railway:—Held, that A.'s successors in title were entitled to an injunction to restrain G. from carrying the S. minerals under or over A.'s copyhold, and that there had been no acquiescence on A.'s part to disentitle them. *Ib.*

In copyhold lands, although the property in mines is in the lord, the possession of them is in the tenant. The latter, therefore, may maintain an action against the owner of an adjoining colliery, for breaking and entering the sub-soil and taking coal therein, although no trespass is committed on the surface. *Lewis* v. *Branthwaite*, 2 B. & Ad. 437; 9 L. J. (O.S.) K. B. 263.

The lord of a manor as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same; and the copyholder may maintain trespass against him for so doing. *Bourne* v. *Taylor*, 10 East, 189; 10 R. R. 267.

A lord may drive carriages along a tramway under copyholds of the manor, for the purpose of working mines within the manor, but not of working mines beyond its limits. *Bowser* v. *Maclean*, 2 De G. F. & J. 415; 30 L. J., Ch. 273; 6 Jur. (N.S.) 1220; 3 L. T. 456; 9 W. R. 112.

A prescription or a custom in a manor to work mines under houses without making compensation for any damage occasioned to such houses is bad, as being unreasonable. *Hilton* v. *Granville* (*Earl*) Dav. & M. 614; 5 Q. B. 701; 13 L. J., Q. B. 193.

—— **In Customary Freeholds.**]—Customary freeholds, held by copy of court roll, but not at the will of the lord, and passing by surrender and admittance, are copyholds by tenure, and the freehold of them is in the lord, and he is entitled to the minerals. *Portland* (*Duke*) v. *Hill*, 35 L. J., Ch. 439; L. R. 2 Eq. 785; 12 Jur. (N.S.) 286; 15 W. R. 38.

Remedies.]—Injunction by a copyholder restraining the lord preparing to open a mine. Distinction as to a mine opened and working. *Grey* v. *Northumberland* (*Duke*), 13 Ves. 236.

Injunction in the case of trespass by the lord digging for coal on the premises of a copyhold tenant, from the nature of the subject and the consequences, such an injunction not to be continued without securing the means of a speedy trial. *S. C.*, 17 Ves. 281.

Lord may bring a bill for an account of ore dug or timber cut by defendant's testator; otherwise of ploughing up meadows or ancient pasture, or such torts as die with the person. *Winchester* v. *Knight*, 1 P. Wms. 406.

Where the lord, who claims against the tenants the mines within the manor, has stood by for a long period and allowed the tenants to work the mines and to expend large sums of money, a court of equity will not give him an injunction or account against the tenants, but will leave him to his legal remedy. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

The plaintiffs stated on their bill that certain lands were copyhold, but did not allege circumstances sufficient to prove that they were so, and that B., the tenant, had never worked mines. B., by answer, said the lands were freehold. Injunction granted to restrain B. from working mines till the hearing. *Greenwich Hospital Commissioners* v. *Blackett*, 12 Jur. 151.

Suit by lord against a tenant of lands within the manor, to restrain the defendant from taking stone from lands in his occupation. The defendant, by his answer, alleged that it was and had been a common practice in the manor to remove the stone which lay immediately under the surface, for the benefit of cultivation. At the hearing, the court made a decree for a perpetual injunction, the defendant declining to try his right to take the stone in an action at law, to be brought against him by the plaintiff. *Cudden* v. *Morley*, 7 Hare, 202.

Where waste land was, with the consent of a lord, inclosed by a former owner of the plaintiff's property, and the plaintiff had dug for minerals thereon, and where a subsequent lord asserted his right to the minerals, and sold them to the defendant, who thereupon entered upon the property and commenced digging for them; on a bill to restrain the defendant:—Held, that the lord had not succeeded in establishing his claim, and that the plaintiff was entitled to the minerals. *Ackroyd* v. *Briggs*, 13 L. T. 521; 14 W. R. 25.

China Clay.]—By a deed executed in 1799, the lord granted copyholds in fee, reserving all mines and minerals within and under the premises, with full liberty of ingress, egress, and regress to and for the grantor, his heirs and assigns, to dig and search for, and to take, use, and work the excepted mines and minerals:—Held, that the grantor was not entitled to get the china clay, inasmuch as it could be got only in a manner utterly destructive of the surface, and as the deed did not clearly reserve to him power to destroy the surface, and did not contain any

provision for making compensation for injury done to the surface. *Hext* v. *Gill*, 41 L. J., Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957.

The lord granted a licence to certain persons to get china clay under the premises comprised in the deed of 1799, and under the adjoining waste land, and the licensees had entered on the premises, but the grantor asserted that they had done so by mistake, and that neither he nor they had any present intention of getting china clay on the premises, though he claimed to be entitled to do so:—Held, that this was such a threat as to empower the court to grant an injunction to restrain the grantor and his licensees from getting china clay from the premises comprised in the deed of grant. *Ib.*

Shingle.]—In an action by the lord for taking shell-fish and shingle on the foreshore of the manor, between high and low-water mark, his title being under a royal grant of the manor, with anchorage and groundage, but with no express mention of the shore:—Held, that this grant afforded of itself a presumption that it included the soil of the shore; and the jury was directed that, upon matters of that nature, they would properly be guided by the opinion of a judge. *Le Strange* v. *Rowe*, 4 F. & F. 1048.

An earlier grant from the crown to a corporation of rights of anchorage, groundage, and ballast over the shore of the locus in quo would not weigh much against positive evidence of the exercise of rights of ownership over the shore by the plaintiff's ancestors, under the grant of the manor. *Ib.*

Evidence of such acts of ownership as licences to take shingle, sand, and seaweed, is receivable to support the presumption of a grant of the soil of the shore. *Ib.*

It is the duty of the crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; and therefore no subject is entitled to destroy a natural barrier against the sea. And if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it. In an action by the owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom, so as to expose the plaintiff's land to the inroads of the sea, although the shingle was removed for sale in a natural and ordinary user of the land. *Att.-Gen.* v. *Tomline*, 49 L. J., Ch. 377; 14 Ch. D. 58; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617.

Loose Stones.]—In an action by a lord of a manor against his copyholder, for removing from the land loose stones, which had been thrown upon it by the shivering of certain neighbouring rocks, there being no evidence to show that the stones, the subject of the action, had come down upon the land during the tenancy of the copyholder:—Held, that they must be taken, primâ facie, to form part of the soil of the copyhold, and that the copyholder could not remove them for his own profit. *Dearden* v. *Evans*, 5 M. & W. 11; 2 H. & H. 7; 8 L. J., Ex. 171; 3 Jur. 703.

Semble, that a copyholder has a right to remove from off his land stones or other matters which by any convulsion of nature are thrown upon it during his tenancy. *Ib.*

A copyholder, or any other tenant, may remove stones from off his land when they impede the necessary progress of agriculture. *Ib.*

Coprolites.]—Coprolites beneath the surface of a copyhold tenement are minerals, and the property in them is in the lord, though in the absence of a special custom he cannot dig for them without the permission of the tenant. *Att.-Gen.* v. *Tomline*, 46 L. J., Ch. 654; 5 Ch. D. 750; 36 L. T. 684; 25 W. R. 802.

The lord of a manor, in which there was no custom authorising him to do so, entered without permission on the land of a copyhold tenant, which was in the occupation of a tenant, and dug for and carried away coprolites. A large trench was dug, which at the time when the copyhold tenant commenced a suit against the lord to restrain the trespass was not filled up, though it was filled up and the surface restored before the suit came to a hearing. The digging was continued after the filing of the bill, and until the coprolites were exhausted:—Held, that, under the circumstances, the copyholder, though only a reversioner, could maintain a suit against the lord for an injunction and damages. *Ib.*

Held, also, that the proper measure of damage was the gross amount produced by the sale of the coprolites, less the expense of the working, and such a sum by way of profit as would have induced a stranger to undertake the working. *Ib.*

As evidence of an alleged custom authorising the lord of a manor, with the consent of the homage, to grant portions of the waste as copyhold, two admittances in pursuance of such grants, made respectively in 1849 and 1857, were produced:—Held, that in the absence of any contradictory evidence the custom was sufficiently proved. *Ib.* But see *S. C.* in C. A., 15 Ch. D. 150; 43 L. T. 486.

And see COMMON, and MINES AND MINERALS.

3. TREES AND TIMBER.

Extent of Rights of Lord and Tenant.]—The lord of a manor has not by law, independently of custom, any such property or interest in the timber growing on the copyhold premises of a tenant as entitles him to enter and cut. *Whitechurch* v. *Holworthy*, 19 Ves. 213; 4 M. & S. 344; 16 R. R. 481.

Generally, if there is no custom for the tenants of a manor to cut timber it belongs to the lord. *Ib.*

A copyholder may by custom have such an interest in the timber that he may himself cut; so he may have a special interest to prevent the lord's cutting, but such a custom ought to be proved by extremely strong evidence. *Ib.*

The lord has no right to enter on a copyhold of inheritance and cut timber for his own use, leaving sufficient for botes and estovers, if there is no custom in the manor. *Ib.*

Where a copyhold estate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the estate. *Mardiner* v. *Elliott*, 2 Term Rep. 746; 1 R. R. 609. And see *Blewett* v. *Jenkins*, 12 C. B. (N.S.) 16.

Where by agreement, dated 1656, between the lord and certain tenants of customary tenements within a manor, the tenants covenanted that they,

their heirs or assigns would not cut down sell or dispose of any wood standing or growing or thereafter to stand or grow without the licence of the lord and the lord covenanted to set out yearly, upon request of the tenants sufficient for the repairing of their houses and other necessary uses in and about the tenements and that in case any of the tenants their heirs or assigns should plant any wood upon the tenements it should be lawful for them to cut down use or dispose of all or any such wood for repairing their houses or for any other necessary uses without disturbance of the lord—Held that a tenant of one of the customary tenements comprised in the agreement was not entitled without the licence of the lord to cut down and sell wood which had been planted on the tenement by another tenant since the agreement and that having so done the lord might maintain trover against her for the wood *Blacklett* v *Lucas*, 2 M & S 494 15 R R 324

Inclosure of Woods]—In a manor where there were certain commonable rights a question was raised whether the owner of the woods was entitled to inclose the coppices and woods from time to time cut down and exclude therefrom all the commonable cattle for seven successive years for the preservation of the wood and underwood—Held that the owner of the woods was not so entitled 22 Ldw 4 c 7 does not apply to woods wherein rights of common exist and 35 Hen 8 c 17 s 8 which provides that the space where the wood is intended to be cut may be inclosed and kept in severalty for seven years only applies to woods in which immemorial rights of common exist and not to rights of common claimed by grant *Dibdin* v *Anglesey* (*Marquis*) 2 C & M 722 4 Tyrw 926, 4 L J Ex 278

Forfeiture for Cutting]—Where a copyholder for life cut trees though none were applied to the repair of the premises till several months after and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair, it is a question for the jury whether they were cut bonâ fide for the purpose of repair and were in course of application for that purpose and there being no evidence that they were to be applied to any other purpose the court refused to set aside a verdict for the defendant *Doe* d *Foley* v *Wilson*, 11 East, 56

Where a copyholder of inheritance having power by custom to cut timber, surrendered to the use of his will and devised to A for life without impeachment of waste with remainders over though there was no instance in fact of a copyholder for life in the manor cutting timber yet the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate, may make a tenant for life dispunishable of waste and at any rate the lord cannot enter upon the copyholder for life's estate as for a forfeiture upon his cutting timber, for the injury if any is to the remainderman of the inheritance *Denn* d *Jodrell* v *Johnson*, 10 East, 267

And see *Eardley* v *Granville* supra

4 HERIOTS

Heriot Service—Heriot Custom—Copyholder and Customary Freeholder.] — Heriot service may attach to copyholds, and is not confined to the customary freeholds of a manor *Weston* v *Bailey* 65 L J Q B 641, [1896] 2 Q B. 234, 75 L T 210 See *S C* in C A infra

Homage — Presentment that Tenement is Heriotable—Evidence]—Presentments by the homage that a heriot is due in respect of a particular tenement are evidence of the fact where the liability to a heriot arises by heriot custom, but not where it arises by heriot service *Ib*

Customary Heriot—Right of Lord to take Heriot outside Manor]—Where upon the death of the tenant of a copyhold tenement a customary heriot of the best beast of the tenant is due to the lord of the manor, the property in the beast vests in the lord upon the death of the tenant and the lord has a right to seize it wherever it be found, whether in or out of the manor and a right of action against any person misappropriating it *Weston* v *Bailey*, 66 L J, Q B 45 [1897] 1 Q B 86 75 L T 470, 45 W R 115—C A Affirming *S C* supra

Statute of Limitations]—To an action for trespass by seizing two horses of the plaintiff the defendant pleaded that they were taken as customary heriots, and the plaintiff replied a discontinuance of taking heriots for more than twenty years and that the right to heriots then, at the time of such discontinuance first accrued to the lord within 3 and 4 Will 4 c 27 — Held on demurrer that inasmuch as the seizure was neither making an entry or distress nor bringing an action to recover rent, within 3 & 4 Will 4, c 27 ss 2, 3 or 34, the title of the defendant to the heriots was not barred by the statute notwithstanding that more than twenty years had elapsed since the last previous seizure of a heriot and that therefore the replication was bad *Zouche* v *Dalbiac*, 44 L J, Ex 109, L R 10 Ex 172, 33 L T 221, 23 W R 964

When Due]—When a copyhold estate in the possession of one owner, paid but one heriot but several heriots if divided among several owners, if it afterwards becomes united in the person of a single owner one heriot only is payable *Garland* v *Jekyll*, 2 Bing 273 9 Moore C P 502 2 L J (o s) C P 227 27 R R 630

It had been before held, that devisees of a copyhold, holding as tenants in common had several estates to which they must be severally admitted, and for which several services were due to the lord and several heriots in the death of each tenant and the multiplication of heriots and fees on admission still continued, notwithstanding the re-union of the same land afterwards in one person, the estates or interests in the land, once divided into severalty continuing several *Attree* v *Scutt*, 6 East, 476, 2 Smith, 449

Where a copyhold tenement holden by heriot custom becomes the property of several as tenants in common the lord is entitled to a heriot from each of them, but if the several portions are re united in one person, one heriot only is payable *Hollaway* v *Berkeley*, 6 B & C 2 9 D & R 83, 5 L J (o s) K B 1, 30 R R 228

Where a plea of justification for taking two horses, as heriots, stated a custom in the manor, that the lord from time immemorial, until the division of a certain tenement into moieties, had

been accustomed to take a heriot upon the death of every tenant dying seised and since the division the lord had taken and been accustomed to take on the death of every tenant dying seised of either of the moieties, a heriot for each moiety this must be taken to be one entire custom and not two distinct customs the one applicable to the tenement before and the other after the division of it and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory *Kingsmill* v *Bull* 9 East, 185

A heriot may be due by custom upon the death of a free tenant holding an estate in fee simple *Damerell* v *Protheroe*, 10 Q B 20, 16 L J Q B 170, 11 Jur 331

Where there are four joint tenants of a copyhold estate and all join in alienation, one heriot only is due, if the custom of the manor shews only that a heriot is due from every tenant on alienation *Padwick* v *Fyndale*, 1 El & Bl 184, 28 L J, Q B 90, 5 Jur (N S), 676 7 W R 53

The lord's claim for compensation upon a valuation or an enfranchisement under 15 & 16 Vict c 51, s 16 is to be estimated accordingly *Ib*

A heriot is not due upon the death of cestui que trust but of him that has the legal estate *Trinity College, Cambridge* v *Browne* 1 Vern 441

A heriot service before the 12 Car 2, when the feudal system was established was this where the tenant held of the lord by service, the instant the tenant died the property of the best beast vested in the lord and he might seize for it, or distrain for it at his election But there, though the tenant died the tenure continued and, therefore it was not unreasonable to say that the lord might distrain for his heriot because the tenure was a continuing tenure in the heir, however it was doubted in *Osborne* v *Steward* (3 Mod 230) whether in the case of a reservation of an heriot it could be distrained for after the expiration of the term and it does not appear how that case was eventually determined *Inchiquin* v *Burnell*, 3 Ridgw 426

A decree for confirming an agreement between lord and his tenants for settling heriot and stinting common revived by bill brought by purchaser who did not come in in privity and confirmed though lord and tenants were tenants for life *Dunn* v *Allen*, 1 Vern 427

Property in, Vesting]—Where a customary heriot of the best beast is due on the death of a tenant to the lord of a manor no property in any specified beast vests in the lord before selection by him of the beast *Abingdon* v *Lapscombe* 1 G & D 230, 1 Q B 776, 10 L J, Q B 330 6 Jur 257

A selection of seven beasts as heriots when the lord is entitled to five only will not be sufficient to vest in the lord the property in any five of them *Ib*

Seizing, in different Rights — Trespass ab initio]—Action for breaking and entering a close, and seizing and taking two horses The defendant pleaded as to breaking and entering the close, and seizing and taking one of the horses, a justification of the seizure of that horse as a heriot due in respect of a customary tenement, whereof the plaintiff's testator died seised The defendant also pleaded as to the breaking and entering the close and seizing and taking the other horse a justification of the seizure of that horse as a heriot due in respect of another customary tenement whereof the plaintiff's testator died seised Separate replications to each of the pleas that the defendant at the same time place and occasion when he took the horse in the introductory part of that plea mentioned also seized and took the other horse under colour and pretence of the heriot custom, and under an assertion and a claim of right to seize and take the same other horse as and for the heriot custom are good inasmuch as the seizure of the other horse rendered the defendant a trespasser ab initio as to the entry, as well as to the seizure *Price* v *Woodhouse* 1 Ex 559 And see *S C* 3 Ex 616 18 L J, Ex 271

—— **Land on Lease**]—By the 7th custom of a manor the lord is to have for a heriot, on every descent, the best quick cattle for every yard and half yard of land By the 17th if any tenant shall let his land and at his decease the lord not answered the best beast for his heriot which did commonly manure the premises, the person to whom the land ought to come shall pay to the lord within six weeks after the death of the tenant 3*l* for every yard of land and 40*s* for every half yard instead of a heriot —Held that where the tenant died after having let his land the lord could not seize the best beast for his heriot and was entitled only to the pecuniary payment in lieu thereof *Croome* v *Grise*, 4 Bing (N C) 145, 5 Scott, 493 3 Hodges, 277

Where freehold tenants of manor made long leases to deprive the lord of his heriots court would not assist the lord, no trust appearing *Wisly* v *Pemberton* 2 Eq Ca Abr 279

Custom as to Compensation]—It seems that a custom for the homage to assess a compensation in lieu of a heriot to be paid by an incoming copyholder on surrender or alienation is not good *Parker* v *Ratcliffe*, 1 Bos & P 282, 4 R R 797

Evidence that the homage has been accustomed to assess a certain sum of money as a heriot upon alienation and that such assessment has always been made with reference to the best chattel of the tenant will not support an avowry for a heriot in kind upon alienation *Ib*

—— **Commuting**]—Where a money payment is due in lieu of heriots and relief by the custom, there must be also a custom of distress and the custom must be alleged positively, and not merely by inference *Basingstoke Corporation* v *Bolton* 1 Drew 270, 22 L J, Ch 30, 17 Jur 57, 1 W R 76

Commissioners of inclosure have no powers, in exchanging freehold land subject to heriots and reliefs to make the allotted lands so subject *S C*, 3 Drew 50

Apportionment]—A copyholder contracted for the sale of his tenement which was subject to a heriot and to quit-rent and fines The heriot was supplied by severance of the copyhold — Held on the construction of the contract, that the vendor was not entitled to have the remaining part of his copyhold discharged from the heriot, and that he could not refuse to execute the conveyance on the ground that the company

had not apportioned the rent and fines, but must proceed himself under the Railway Consolidation Act. *Parker* v. *S. E. Ry.*, 1 W. R. 316.

—— **Pleading.**]—Where a lord justified under a custom to have the best beast on the tenant's death, and the custom proved was that the lord should have the best beast or goods :—Held, a variance. *Adderley* v. *Hart*, 1 Bos. & P. 394, n.; 4 R. R. 800, n.

5. Quit Rents.

Evidence.]—Payment of an unvaried rent for a long series of years to the lord of a manor, is evidence of a title to the rent only, and not to the land in respect of which the rent is paid. *Doe* d. *Whittick* v. *Johnson*, Gow, 173 ; 21 R. R. 826.

The presumption is, that the rent is a quit rent. *Ib.*

And see *Ecclesiastical Commissioners* v. *Parr*, 63 L. J., Q. B. 784 ; [1894] 2 Q. B. 420 ; 71 L. T. 65 ; 42 W. R. 561—C. A.

Mere length of time short of the period fixed by the statute of limitations, and unaccompanied with any circumstances, is not of itself a sufficient ground to presume a release or an extinguishment of a quit rent. *Eldridge* v. *Knott*, Cowp. 214.

Lord of manor of A. brings a bill for rent of 8*s.*, payable out of copyhold held of manor of B. ; and though it appeared by rolls of manor of B. from Hen. 8 to Car. 1, that copyhold was held of manor of B. at rent of 8*s.*, and though it was admitted by plaintiff that copyhold was held of manor of B., and he had no other evidence of his title to rent, but that it had been paid him near twenty years, yet the court decreed him the arrears and growing rent, and denied defendant trial at law. By the rules of the law in cases of encroachment of rent, if tenant makes but one payment of more than is due, he shall never go back from it. *Steward* v. *Bridger*, 2 Vern. 516.

Bill would not lie against several tenants of a manor for quit rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants. *Bouverie* v. *Prentice*, 1 Bro. C. C. 200.

Election.]—Where customary tenants hold under a corn rent, or an annual sum of money in lieu thereof, in the absence of a custom to the contrary the election is with the tenant to pay either in money or in corn. *Blewett* v. *Jenkins*, 12 C. B. (N.S.) 16.

Altering.]—A lord, on a grant of a copyhold tenement, can neither add to nor diminish the ancient rent. *Doe* d. *Rayer* v. *Strickland*, 2 G. & D. 278 ; 2 Q. B. 792 ; 11 L. J., Q. B. 305.

Where a lord, having a life interest only in the manor, granted at a new rent of 2*s.* a portion of an entire tenement, the ancient rent for which entire tenement had been 10*s.* and two hens :—Held, an invalid grant against his successor. *Ib.*

6. Fines.

Right to.]—Custom that general fine is payable on death of lord is good, even where manor has been alienated by lord in lifetime. *Lowther* v. *Raw*, 2 Bro. P. C. 451.

Tenant shall not pay fines on alienation of lord : but on death only, and on alienation, etc., by his own act. *Thwaites Manor, In re*, Cary, 6.

Due only on Admittance.]—The fine due to the lord is to be assessed after the admission. *Grand Junction Canal Co.* v. *Dimes*, 15 Sim. 402 ; 17 L. J., Ch. 206 ; 12 Jur. 886.

Reasonableness.]—Where a fine arbitrary is imposed it is due to the lord of common right, and the tenant must show that it is unreasonable. *Doe* d. *Twining* v. *Muscott*, 12 M. & W. 832 ; 14 L. J., Ex. 185.

A lord of a manor cannot recover a fine not certain, unless it is reasonable, and assessed and demanded. *Hayward* v. *Raw*, 6 H. & N. 308 ; 30 L. J., Ex. 178 ; 4 L. T. 519.

An entry by a steward of a manor in his book of the admission of a surrenderee of copyhold premises is a mere memorandum, and not such an admittance as will entitle the lord to claim a fine. *Ib.*

A single copyholder is not relievable in equity for an excessive fine, because this is determinable at law. But to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine that is excessive. *Cowper* v. *Clerk*, 3 P. Wms. 155.

The rent reserved in a lease of copyhold premises, is not conclusive as to the amount of a fine payable to the lord, for the tenant may show that the actual value of the premises demised is less than the rent reserved ; and the fine must be estimated according to the improved value. *Verulam (Earl)* v. *Howard*, 5 M. & P. 148 ; 7 Bing. 327 ; 9 L. J. (O.S.) C. P. 69.

A tenant for life and several remaindermen in their order were all admitted at the same court, and the fines assessed upon them were calculated on the same principle as those imposed upon joint tenants :—Held, that this was not an unreasonable mode of calculation. *Richardson* v. *Kensit*, 5 Man. & G. 485 ; 6 Scott (N.R.) 419 ; 12 L. J., C. P. 154 ; 7 Jur. 856.

Assessment of.]—The mode of assessing a fine proportionably upon the clear annual value of copyhold lands is to consider such annual value so much as it would yield to the copyholder if he occupied it himself, i.e. if he were to let it and repair it himself ; and therefore the annual charge for repairs should enter into the calculation. *Ib.*

If an assessment of a copyhold fine is entered in the court rolls, as of 100*l.*, but that out of especial favour the lord remitted 40*l.*, and thereby reduced it to 60*l.*, and the lord sued for the fine, and the jury finding the annual value of the premises 30*l.* give a verdict for 60*l.*, the lord cannot retain the verdict for the sum actually due, but must make a new assessment ; the old assessment, notwithstanding the remitter, being in law an assessment as of 100*l.* *Northwick (Lord)* v. *Stanway*, 3 Bos. & P. 346 ; 6 East, 56.

The lord may recover from a copyholder the fine assessed by him on admittance, not exceeding two years' value of the tenement, although there is no entry of the assessment of such fine on the court rolls, but only a demand of such a sum for a fine after the value of the tenement had been found by the homage. *Ib.*

—— **Two Years' Rule**].—The lord can never be entitled to more than two years' intrinsic value of the estate, as a fine upon admission ; therefore, a custom to take 10 per cent. on the purchase-money, be it of ever so long continu-

ance, cannot bind. *Leake* v. *Pigot* (*Lord*), 1 Selw. N. P. 87.

And an action will lie to recover the overplus above two years' value, if it was paid upon compulsion. *Ib.*

—— **Improved Annual Value.**]—A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of the improved annual value for a certain number of years of the tenement to which the admittance relates, and without stating in money the precise amount of the fine. *Fraser* v. *Mason*, 52 L. J., Q. B. 643; 11 Q. B. D. 574; 49 L. T. 761; 32 W. R. 421—C. A.

—— **Double Fine—Sale under Settled Land Act.**]—A copyholder who had been admitted to the copyhold, to him and his heirs, died, leaving a will by which he devised it to trustees upon trust to pay the rents to his widow for life. Shortly after his death the widow sold the property under the powers of the Settled Land Act, 1882. The trustees had not been admitted. The lord claimed to be paid, in addition to the fine payable by a purchaser on admittance, the fine which would have been payable if the trustees had been admitted:—Held (dissentiente Fry, L.J.), that the lord could only claim one fine. *Naylor and Spendla's Contract. In re*, 56 L. J., Ch. 453; 34 Ch. D. 217; 56 L. T. 132; 35 W. R. 219—C. A.

—— **Several Admitted.**]—The fine payable according to the custom of a manor on the admittance of a single tenant in fee was two years' improved value; and where several persons had been admitted they had paid fines assessed two years for the first life, half of that for the second, and half again for the third:—Held, that that was the proper mode of calculating the fine in the present case. *Sheppard* v. *Woodford*, 5 M. & W. 608; 9 L. J., Ex. 90.

A copyhold estate was vested in fourteen trustees, and by a decree of the Court of Chancery, made in a suit to which the lord and the trustees for the time being were parties, it was ordered, that when the number of the trustees should be reduced to five, the lord should, with the approbation of the master in chancery, nominate nine others to be added to the five, to whose use a new surrender should be made, and that the lord should admit them on paying a reasonable fine. The annual value of the estate was 1,000*l.*:—Held, that 5,657*l.* 19*s.* was an unreasonable fine, on the admission of fourteen trustees; and that the proper mode of assessing the fine was to take, for the first life, two years' improved value; for the second life, one half of the sum taken from the first; and for the third life, one half of the sum taken from the second; and so on. *Wilson* v. *Hoare*, 2 B. & Ad. 350; 9 L. J. (O S.) K. B. 253.

A lord claimed double the admitted yearly value on the first life, half of that sum on the second life, half of the last amount of the third, and so on in a descending series:—Held, that a fine calculated on this principle was a reasonable fine. *Wilson* v. *Hoare*, 2 P. & D. 659; 10 A. & E. 236.

Held, in the exchequer chamber, that the principle of assessment laid down in *Wilson* v. *Hoare*, 2 B. & Ad. 350, was inapplicable, and that a deduction should be made on account of the right to take a new fine on the failure of nine lives out of fourteen, instead of absolutely. *Hoare* v. *Wilson*, 10 A. & E. 245, n.

On Licence to Demise.]—On February 8, 1810, a licence was granted by a lord to a copyholder, to demise part of his copyhold premises to A. for seventy-one years, saving all fines to the lord. On April 4, 1810, a second licence was granted to him to demise the remainder of his copyhold, excepting the part previously demised to A. with this condition, that, in consequence of his engagement to improve the premises, it was agreed, that during the seventy-one years the fine on all future admissions should be at the rate of 37*l.* per year for the whole, and so in proportion for any less quantity of land:—Held, that the words "the whole" meant the whole of the residue which had not been demised to A., and that the executors of the copyholder were bound to pay on their admission to the whole of the premises not only the two years' improved value at 37*l.* per annum of the residue of the premises occupied by the copyholder, but also two years' improved value of the premises demised to A. *Curtis* v. *Scales*, 14 M. & W. 447; 14 L. J., Ex. 318.

Unreasonable Custom.]—A custom that the lord, in assessing a fine upon admittance of one not being a copyhold tenant on the court rolls (except a customary heir claiming admittance as such), is not restricted in amount to any number of years' value of the tenement to which such admittance is made is unreasonable and bad. *Douglas* v. *Dysart* (*Earl*), 10 C. B. (N.S.) 688; 6 L. T. 327.

Instruments—Stamps.]—Copyhold land was devised to A. for life, remainder to five persons as tenants in common; A. was admitted. After his death the five, having contracted to sell to B., severally surrendered to the use of B. in fee, which surrender was accepted by the lord:—Held that B, on claiming admittance, must pay five fees, and that the admittance would require five stamps. *Reg.* v. *Eton College*, 8 Q. B. 526; *S. C.*, nom. *Reg.* v. *Evesdon Manor*, 16 L. J., Q. B. 18.

If a copyhold tenant conveys his tenement in several parcels to different parties, and some only of those parcels afterwards devolve upon a single person, such person (in the absence of special custom) is not entitled to be admitted by a single admittance; but the lord may insist upon several admittances (whether in a single instrument or not) in respect of each parcel which has so devolved, and there must be several stamps in respect of each. *Traherne* v. *Gardner*, 5 El. & Bl. 913; 25 L. J., Q. B. 201; 2 Jur. (N.S.) 394; 4 W. R. 281.

Co-parceners.]—Semble, that co-parceners are entitled to be admitted to copyhold tenements as one heir, and upon the payment of one set of fees. *Rex* v. *Bonsall*, 4 D. & R. 825; 3 B. & C. 173; 27 R. R. 319.

Trustees.]—A. devised real estates to three trustees, upon certain trusts, and directed, that, in the event of any of the trustees dying or ceasing to act, others should be appointed, so that there might always be three trustees for carrying the trusts into execution; and he also directed a transfer of the estates upon every such new appointment. In execution of the trusts,

several copyhold estates were purchased, and subsequently, one of the trustees having died, and another having declined to act, the third surrendered the copyhold estates to himself and two new trustees, and the three were duly admitted by the lord:—Held, that, although one of the surrenderees was also surrenderor, this was an admittance of the three to a new estate; and that the fine, being payable in respect of that new estate, was correctly assessed as upon an admission de novo of three tenants as joint tenants of the estate. *Sheppard* v. *Woodford*, 5 M. & W. 608; 9 L. J., Ex. 90.

A devise of a copyhold estate to four as joint tenants:—Held, that any of them was entitled to be admitted as tenant, without the payment of three fines as a condition. *Reg.* v. *Wanstead Manor*, 2 El. & Bl. 924; 23 L. J., Q. B. 67; 18 Jur. 310. And see *Wilson* v. *Hoare*, supra.

Devise of copyholds to three trustees upon trust, to permit A. to occupy the same or receive the rents and profits thereof for his life; and after the death of A., upon trust, to sell the estate, and divide the proceeds amongst the children of A.; and gift of the testator's residuary estate to the trustees upon other trusts, but charged with debts and "the costs and charges of proving and executing" the will:—Held, that the fines payable on the admission of the devisees in trust were not part of the costs and charges of executing the will to be borne by the residuary estate, but that such expenses of admission were a charge upon the copyholds so devised. *Cole* v. *Jealous*, 5 Hare, 31.

Covenant by A. B., a husband, with trustees that he would at his proper costs and charges surrender to the lord, according to the custom, the copyhold hereditaments to which his wife was entitled, to the use of the trustees, to the intent that they might, at the costs and charges of A. B., be admitted tenants upon trust to pay the rents to the wife for her separate use:—Held, that the act of admittance was complete before the fine became payable, and that A. B. was not bound to provide for the fine under the words "costs and charges." *Barrow* v. *Barrow*, 3 W. R. 587.

Disclaimer by Devisee of Trustee.]—A trustee of copyholds devised them and died. The devisee disclaimed. A new trustee was appointed by the court, and a vesting order made in the ordinary form. The lord of the manor refused to admit the trustee without payment of a double fine—one as for the admission of the customary heir, and one for that of the trustee:—Held, that the order was right, and that the lord could not have been served with the petition on which the order was made. *Paterson* v. *Paterson*, 35 Beav. 506; 35 L. J., Ch. 518; L. R. 2 Eq. 31; 12 Jur. (N.S.) 408; 14 L. T. 320; 14 W. R. 601.

Tenant for Life and Remainderman.]—The fines, fees, and expenses of the admission of new trustees to copyholds must be borne by the tenant for life, and those in remainder, in proportion to their respective interests. *Cater* or *Carter* v. *Sebright*, 26 Beav. 374; 28 L. J., Ch. 411; 5 Jur. (N.S.) 259; 7 W. R. 225.

When a testator provides a fund for the payment of fines on admission to copyholds, or renewals of leases, the manner of raising the fines, and the question of contribution between the tenant for life and the remainderman, must depend upon the intention of the testator, to be collected from the whole will. *Playters* v. *Abbott*, 2 Myl. & K. 97; 3 L. J., Ch. 57.

Equitable tenant for life of copyholds under a will, which contained no special provision for the payment of expenses on admission, died without having paid the fines and fees incurred on the admission of a trustee in her lifetime. By her will she bequeathed her personal estate to her daughter for life for her separate use, and after her decease to her children. The daughter and her husband and children took estates in remainder in the copyholds:—Held, that having regard to the frame of the will, under which the tenant for life was entitled, and to the interest which the parties entitled to the copyhold estates took in the personal estate of the tenant for life, one-third of the fees was properly payable out of the corpus of her personal estate, the husband of the daughter consenting to pay the residue. *Bull* v. *Birkbeck*, 2 Y. & C., C. C. 447.

Fines for admission received by the trustees of a manor upon grants of parts of the waste belong to the tenant for life. *Cowley (Earl)* v. *Wellesley*, 35 Beav. 640.

Preliminary fines received on enfranchising copyholds by reason of the admission having taken place before July, 1853, as is mentioned in the 15 & 16 Vict. c. 31, belong to the tenant for life. *Ib.*

Expenses of fencing waste lands of a manor, granted to a trustee for the benefit of the estate, are payable out of corpus. *Ib.*

Where moneys are paid into court by a railway company, in respect of copyholds enfranchised under the Lands Clauses Act, the tenant for life of the manor is not entitled to any portion of such moneys as fines payable to him under the provisions for enfranchisement contained in the Copyhold Acts, 1852 and 1858. *Wilson's Estate, In re*, 3 De G. J. & S. 410; 32 L. J., Ch. 191; 7 L. T. 722; 11 W. R. 294.

—— **Renewal of Copyholds.**]—Property held upon lives was in settlement, and the surviving life being advanced in years, a renewal was obtained under which two new lives were added, the tenant for life advancing the money necessary to pay fines on such renewal. The tenant for life afterwards died in the lifetime of the surviving life:—Held, that as he had obtained no benefit from the renewal, the estate of the tenant for life was not bound to contribute towards the expenses of the renewal, but was entitled to be recouped out of the corpus of the settled property the amount paid for the fines on the renewal. *Harris* v. *Harris*, 11 W. R. 451.

Where a tenant for life of copyholds and leaseholds for lives has renewed the lives, the proportions of the fines and expenses of the renewals payable as between his estate and that of the remainderman entitled to the property, are to be estimated with regard to the actual enjoyment of the property; and compound interest at 4 per cent. per annum with annual rests upon the amount payable by the remainderman will be allowed to the estate of the tenant for life for the period between the renewal and his death; simple interest only after that event, and simple interest from that time till the time of actual enjoyment. *Bradford* v. *Brownjohn*, 38 L. J., Ch. 10; L. R. 3 Ch. 711; 18 L. T. 388; 16 W. R. 1178.

Remaindermen.]—A lord who has been paid a full fine on the admission of a tenant for life has

no right, on the death of the latter, to another full fine from the remainderman for his admission, unless a special custom of the manor justifies the claim. *Reg.* v. *Woodham Walter Manor (Lord)*, 10 B. & S. 439.

The custom must be proved by affirmative evidence; and entries on the court rolls of the admission of a tenant for life and payment of a fine by him, and after his death the admission of the tenant in remainder and payment of a fine by him without mentioning any amount, are not of themselves evidence of the custom, since such entries are consistent with an apportionment of the full fine between the tenant for life and the remainderman. *Ib.*

The same principle applies where the entries mentioned the amount of the fines. *Ib.*

The lord having taken a full fine on the admittance of a tenant for life, is not entitled to another full fine upon the admittance of the remainderman as tenant in fee unless the imposition of such latter fine is authorised by a special custom. *Ely (Dean)* v. *Calderott*, 1 M. & Sc. 633; 8 Bing. 439; 1 L. J., C. P. 131.

A devisee in fee of a copyhold tenement on his admittance paid the lord the full fine due by the custom of the manor; he afterwards made a surrender of the premises to the use of himself and his assigns for life, with divers remainders over; and on being admitted tenant for life of the surrendered premises he paid a fine of 1*s.* to the lord:—Held, that in the absence of a custom within the manor to sanction it, no fine was payable on the admission of the remainderman, the admission of a tenant for life being the admission of the remainderman. *Phippers* v. *Eburn*, 3 Scott, 634; 3 Bing. (N.C.) 250; 2 Hodges, 230; 6 L. J., C. P. 20.

Where a person becomes entitled under a will to copyholds, whether by remainder, originally vested, or by contingent remainder or executory devise which has become vested by the happening of the contingency, he comes in directly under the will, and therefore as between himself and the lord, he is entitled to the benefit of the admittance of the first devisee under the will. *Randfield* v. *Randfield*, 1 Dr. & Sm. 310; 30 L. J., Ch. 18; 3 L. T. 284; 9 W. R. 70.

The admission of a tenant for life to a copyhold is the admission of all in remainder, and the lord may assess the whole fine. *Kensington (Lord)* v. *Mansell*, 13 Ves. 246.

Vendor of Manor.]—A vendor of a manor is entitled to the fines paid for the admission of any new tenants in the room of the tenants described in the particulars of sale who may happen to die after the contract, but before the day fixed for the completion of the purchase, although the fines are not in fact paid till after that day. *Cuddon* v. *Tite*, 1 Giff. 395; 4 Jur. (N.S.) 579; 6 W. R. 606. S. P., *Hardwicke (Earl)* v. *Sandys (Lord)*, 12 M. & W. 761; 13 L. J., Ex. 233.

A manor was sold under the decree of the court as part of the real estate of the testator, and an order was made on the 13th of March that the purchaser should, on or before the 17th of May, pay his purchase money into court, and be let into possession of the profits from Lady-day, several deaths and admissions taking place prior to Lady-day, but the fines due thereon had not been paid or assessed until after that time, no court having been holden; these fines belong to the vendors, and not to the purchaser. *Garrick* v. *Camden (Earl)*, 2 Cox 231; 2 R. R. 37.

Purchasers of Copyholds.]—A copyhold estate of the testator in a cause was sold under a decree of the Court of Chancery. After the sale, and before the surrender, the tenant on the court rolls, who was the surviving trustee, died intestate. There had been no improper delay or neglect on the part of either the trustee or purchasers:—Held, that the fine and fees paid on the admission of the trustee's heir must be paid out of the fund belonging to the cestuis que trust. *Paramore* v. *Greenslade*, 1 Sm. & G. 541; 23 L. J., Ch. 34; 17 Jur. 1064.

A condition of sale that "the purchasers should have proper surrenders, conveyances, and assignments of the premises at their own expense," did not bind them to bear the expense of procuring the concurrence of all proper parties. Where, therefore, it was necessary for the heir of a trustee to be admitted on the court rolls, the fine and fees on that admission were ordered to be paid by the vendors. *Ib.*

The purchaser of a copyhold estate (devised subject to payment of debts, in trust for sale, and sold during the infancy of the heir, under the usual decree) is not entitled to have a portion of the purchase money retained in court, as a provision for defraying the expense of the fine which would become payable on the death of the heir before a conveyance. *Morris* v. *Clarkson*, 3 Swanst. 558; 1 J. & W. 604 n.; 19 R. R. 277.

A railway company having taken copyholds, an order was made for the reinvestment of the purchase money in other copyholds, and for the payment by the company of the costs, charges, and expenses property incurred of and relating to the purchase, and of the application, and consequent thereon:—Held, that under this order the company was not liable to pay the fine on admission. *Eastern Counties Ry., In re, Sawston, Ex parte*, 27 L. J., Ch. 755; 4 Jur. (N.S.) 473; 6 W. R. 492.

Several Tenements.]—One fine cannot be assessed on the admission to several copyhold tenements. *Grant* v. *Astle*, 2 Dougl. 722.

Surrender of Intermediate Estate.]—A surrenderee of a remainder in a copyhold estate having died in the lifetime of the tenant for life:—Held, that on the decease of the tenant for life the heir of such surrenderee was entitled to be admitted on payment of a single fine. *Garland* v. *Alston*, 3 H. & N. 390; 27 L. J., Ex. 438; 4 Jur. (N.S.) 539; 6 W. R. 689.

—— **Custom as to.**]—Where a copyholder in fee, who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over; on which surrender and re-admittance no new fine was paid, and by the custom a remainderman coming into possession on the death of tenant for life must be admitted and pay a fine:—Held, that such a custom is good. *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522; 2 Smith, 116.

Surrender by Heir.]—Where a devisee for life on admittance has paid a full fine as on admittance in fee, and the heir of the devisor has surrendered his reversion, the surrenderee cannot compel the lord to accept and enrol the surrender without payment of the fine payable in respect of the descent upon the heir. *Reg.* v. *Dulling-*

ham (*Manor*), 1 P. & D. 172; 8 A. & E. 858; 1 W. W. & H. 865; 8 L. J., Q. B. 37.

Devise by one not Admitted.]—Where a person entitled to copyhold tenements in fee, who had never been admitted and never sought admission to them, died, having devised all his property to his eldest son and heir:—Held, first, that on the admission of the son the lord was entitled to two fines, one for the tenant's own admission, and the other as if his father had been admitted. *Londesborough* (*Lord*) v. *Foster*, 3 B. & S. 805; 32 L. J., Q. B. 225; 9 Jur. (N.S.) 1173; 8 L. T. 240; 11 W. R. 593.

Held, secondly, that the lord was not estopped from claiming this on the ground that the property was held in trust, and that he had admitted some of the cestuis que trust on payment of the accustomed fines. *Ib.* And see *Right* d. *Taylor* v. *Banks*, 3 B. & Ad. 664; 1 L. J., K. B. 254.

Executory Devisees.]—Where by the custom of a manor it was necessary for a copyhold tenant in remainder to be admitted and pay a fine on becoming entitled in possession, notwithstanding the admission of the tenant for life:—Held, that the same rule ought to be applied to an executory devisee who became entitled on the defeasance of an estate in fee, although no custom applicable to that case was established. *Randfield* v. *Randfield*, 3 De G., F. & J. 766; 31 L. J., Ch. 113; 8 Jur. (N.S.) 161; 5 L. T. 698.

Disclaimer of Trustees.]—Devise of a copyhold to three persons in fee who were also appointed executors of the will. The three proved the will. Two of them, by deed, released their interest and estate in the copyhold to the third, to the intent that such third person might be admitted alone. The lord claimed a treble fine, and had not admitted:—Held, that he was entitled to a single fine only, the deed operating as a disclaimer, and the fact that all three had proved the will not preventing any of them from disclaiming the devise under it. *Wellesley* v. *Withers*, 4 El. & Bl. 750; 24 L. J., Q. B. 134; 1 Jur. (N.S.) 706; 3 C. L. R. 1187.

The Court of Chancery has power under the Trustee Acts of 1850 (13 & 14 Vict. c. 60) s. 32, and 1852 (15 & 16 Vict. c. 55), s. 9, to make an order appointing a trustee in substitution for a deceased trustee of a copyhold tenement, and vesting such tenement in him; and the trustee is entitled to be admitted on payment of one fine only, as claiming under such order and not through the customary heir to whom the estate had descended. *Bristow* v. *Booth*, 39 L. J., C. P. 47; L. R., 5 C. P. 80; 21 L. T. 427; 18 W. R. 138.

A disclaimer by two out of three joint tenants, surrenderees of copyhold lands belonging to a manor, executed before the admittance of the remaining tenant, but after the exercise by all three of various acts of ownership over the estate, is void, and the lord is entitled to a fine as upon the admittance of all. *Bence* v. *Gilpin*, 37 L. J., Ex. 36; L. R. 3 Ex. 76; 17 L. T. 655; 16 W. R. 705.

Surrender — Assignment of Equitable Interest.]—The lord is entitled to a fine in respect only of a transmission of the legal estate in copyholds, and cannot claim a fine in respect of any devolution of the equitable title where the legal estate remains in the person who has been already admitted tenant on the roll. E., as customary heir of M., was in 1848 admitted tenant on the rolls, in respect of copyholds which by M.'s will the trustees thereof were directed to sell. The trustees contracted to sell the copyholds to A., but before completion A. was married to X. In 1849 the copyholds were conveyed to the trustees of A.'s marriage settlement. E. joined in the conveyance and covenanted to surrender to the uses of the settlement, and in pursuance of his covenant surrendered in 1850 to such uses as the trustees of the settlement should appoint. Upon the death of X., A. became absolutely entitled to the copyholds, and by deed of 1853, which recited incorrectly that no surrender had been made by E., the trustees of the settlement granted, bargained, and sold the copyholds to A., and E. joined in this deed and covenanted to surrender to the use of A. The surrender was not acted upon, and by a settlement of 1854 on the second marriage of A. she purported to assign her equitable interest in the copyholds to E., F., and G. on trust for sale. A. died in 1856, leaving E., who had remained tenant on the rolls, her customary heir. E. survived F. and G., leaving executors on whom, under the Conveyancing Act, 1881, s. 30, his estate in the copyholds devolved; and they had been admitted. Three fines were claimed by the lord; 1. In respect of the quasi admittance of A.; 2. In respect of the quasi admittance of E., her customary heir; 3. In respect of the legal estate which devolved upon E.'s executors:—Held, that the deed of 1853 was a mere assignment of the equitable interest in the copyholds to A., and could not be construed as operating by appointment to transfer the legal estate from E. to A.; and accordingly that as the legal estate of E., the tenant on the roll, remained unaffected by the equitable devolutions of title, the only fine payable was in respect of the admittance of the statutory heirs of E.:—Held, also, that a covenant for value to surrender, though binding as between surrenderor and surrenderee, cannot be enforced by the lord, so as to enable him to compel a new admittance and a fine in respect thereof. *Hall* v. *Bromley*, 56 L. J., Ch. 722; 35 Ch. D. 642; 56 L. T. 683; 35 W. R. 659—C. A.

Death pending Proceedings to Enfranchise.]—A copyhold tenant died after proceedings instituted by him for a compulsory enfranchisement under the Copyhold Act, 1858 (21 & 22 Vict. c. 94), and before the confirmation of the award by the commissioners:—Held, that the lord was entitled to have a new tenant on the roll and to a fine on his admittance. *Myers* v. *Hodgson*, 45 L. J., C. P. 603; 1 C. P. D. 609; 34 L. T. 881; 24 W. R. 827.

Held, also, that the proceedings did not abate by the death of the first tenant. *Ib.*

Covenant to Assure.]—A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c., for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham* v. *Sime*, 1 East, 632; 6 R. R. 356.

—— **To Assign.**]—A covenant by a copyholder

with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homage, does not give the lord any right to a fine. *Rex* v. *Hendon*, 2 Term Rep. 484; 1 R. R. 527. And see *Garland* v. *Jekyll*, 2 Bing. 273; 9 Moore, C. P. 502; 3 L. J. (O.S.) C. P. 227; 27 R. R. 630.

Under Lands Clauses Act.]—A lord, entitled by custom to fines on surrender and admittance to copyholds, is not entitled to the payment of any fine upon the execution of a conveyance by a copyholder to a company, under the Lands Clauses Act, 8 Vict. c. 18, s. 95, or upon the enrolment of such conveyance; nor to any compensation for the loss thereof. *Ecclesiastical Commissioners* v. *L. & S.-W. Ry.*, 14 C. B. 743; 2 C. L. R. 1797; 23 L. J., C. P. 177; 18 Jur. 911; 2 W. R. 560.

—— **On Enfranchisement.**]—Where copyhold lands are taken by a railway company, such fines for admittance as would, upon a compulsory enfranchisement under 21 & 22 Vict. c. 94, s. 6, be payable by the tenants requiring enfranchisement, are not claimable by the lord against the company. *Wilson, In re*, 32 L. J., Ch. 191; 7 L. T. 772; 11 W. R. 294.

And see ENFRANCHISEMENT, infra.

On Renewal of Leases.]—A custom to renew copyholds for lives can only be on payment of certain fines. *Wharton* v. *King*, 3 Anst. 659. S. P., *Abergavenny* (*Lord*) v. *Thomas*, 3 Anst. 668, n.; 4 R. R. 833.

Equitable Jurisdiction over.]—A court of equity has no jurisdiction to direct a fine in respect of copyholds to which an infant has become entitled as customary heir of an intestate to be raised by a mortgage of the copyholds. *Harbroe* v. *Combes*, 43 L. J., Ch. 336.

See also ALIENATION, infra.

Right of Steward to Receive.]—*See* STEWARD, infra.

Action for.]—Indebitatus assumpsit lies for copyhold tolls and fines. *Wakefield* v. *Hunt*, 2 Dougl. 727.

7. FORFEITURE.

Seizure Quousque—Pro defectu.]—Although the lord of the manor proceeds in the first instance on his right to enter and seize quousque pro defectu tenentis, if that be answered, he may nevertheless recover on a right of entry and seizure quousque the fine is satisfied. *Doe* d. *Twining* v. *Muscott*, 12 M. & W. 832; 14 L. J., Ex. 185.

The right of entry quousque is not affected by 11 Geo. 4 & 1 Will. 4, c. 65, s. 9. *Ib.*

A lord cannot seize a copyhold estate, as forfeited pro defectu tenentis, without a custom. *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162; 1 R. R. 680.

If one of several co-heirs of a copyholder is a feme covert at the time of the ancestor's death, and the lord seizes the whole estate (in default of the heir's not coming in to be admitted after three proclamations), without first appointing an attorney or a guardian for the feme covert, according to 9 Geo. 1, c. 29, a seizure of the whole estate is irregular, though not known to the lord that one of the heirs is a feme covert. *Ib.*

A forfeiture of a copyhold estate can only be taken advantage of by him who is lord at the time of the forfeiture, except where the act of forfeiture destroys the estate. *Ib.*

If copyholders do not come in to be admitted, after proclamations, on so many court days, the lord may seize their lands. *Clayton* v. *Cookes*, 2 Atk. 449.

If the tenants be infants, the statute 9 Geo. 1, c. 29, s. 1, shows the method how to proceed.

—— **In what Right.**]—A lord may seize copyhold land quousque, in virtue of a right which accrued to the preceding lord, on default of the heir's coming in to be admitted; and that although he is the devisee, and not the heir of the preceding lord; but to entitle the lord to make such seizure, there must be three proclamations made, at three consecutive courts. *Doe* d. *Bover* v. *Truman*, 1 B. & Ad. 736; 9 L. J. (O.S.) K. B. 119.

—— **Implied Admittance—Statute of Limitations.**]—The persons entitled to be tenants of a manor paid quit rents for over twenty years, though they had not been formally admitted. On proof that the money was paid as quit rents and so received by the lord with the knowledge of the death of the preceding tenant, it was held that there had been an admittance in law, by necessary implication, so as to bar the lord's right to seize quousque. *Ecclesiastical Commissioners* v. *Parr*, 63 L. J., Q. B. 784; [1894] 2 Q. B. 420; 9 R. 542; 71 L. T. 65; 42 W. R. 561—C. A.

The right to seize quousque does not accrue until the lord has with due notice or proclamation called upon the tenant to come in and the latter has refused; the Statute of Limitations runs only from such refusal. *Ib.*

And see *Beighton* v. *Beighton*, 64 L. J., Ch. 796; 13 R. 743; 73 L. T. 86; 43 W. R. 685.

The lord is barred by the Statute of Limitations from entering for a forfeiture after twenty years. *Whitton* v. *Peacock*, 3 Myl. & K. 325.

—— **Against Heir—Jus tertii.**]—The heir of copyhold lands not appearing on proclamations, the lord seized quousque; afterwards the heir claimed, and, the lord declining to admit him, on the supposition that another party had obtained title, it was ordered by the court by consent of the heir and lord (no other party appearing), that an ejectment should be brought to try the right, the heir being lessor of the plaintiff, and the lord defendant on the trial. The heir proved title, and the defendant put in a will of the ancestor, devising the lands to the London Annuity Society. No further evidence being given for the defendant:—Held, that the plaintiff was entitled to recover, for that the lord, though he had seized quousque, could not hold against the heir on the mere proof of a devise to parties who had not claimed admittance, and of whom nothing was known. *Doe* d. *Le Keux* v. *Harrison*, 6 Q. B. 631; 14 L. J., Q. B. 77; 9 Jur. 104.

Waste.]—On a mandamus to the lord to admit trustees of a building society, interested as mortgagees, the return setting up a forfeiture for permissive waste, but the tenement having since been rebuilt:—Held, that the question was, whether the lord had a right to seize, and it was left to the jury whether, when the tenant who had mortgaged was admitted, the premises were in such a ruinous state as not to be fairly repair-

able; or whether he had delayed repairing for an unreasonable time. *Reg.* v. *Dare*, 2 F. & F. 355.

A lord may enter for waste committed by a copyholder for life, though there is an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion. *Doe* d. *Foulkes* v. *Clements*, 2 M. & S. 68; 14 R. R. 590.

If in ejectment by a lord against a copyholder, for a forfeiture by waste, the jury find there has been no damage, there is no waste and no forfeiture. *Doe* d. *Grubb* v. *Burlington* (*Earl*), 2 N. & M. 534; 5 B. & Ad. 507; 3 L. J., K. B. 26.

Forfeiture of copyhold for waste during minority. *Litton's Case*, Cary, 6.

Copyholder in fenny lands may be entitled to dig up the lord's soil for turf. *Ely* (*Dean*) v. *Warren*, 2 Atk. 189.

Semble, that the summoning a copyholder known to be in India to attend a court baron in a fortnight is an inequitable act whereon to found a forfeiture by the copyholder. *Andrews* v. *Hulse*. 4 K. & J. 372; 27 L. J., Ch. 655; 4 Jur. (N.S.) 581; 6 W. R. 508.

Relief in Equity.]—The Court of Chancery has a concurrent jurisdiction with courts of law over copyholds. *Ib.*

The jurisdiction can be exercised in favour of a copyholder as against the lord, and is not limited to compelling the lord to do right as between two persons claiming to be copyholders. *Ib.*

The circumstance of the copyhold lands being subject to a demise by the copyholder is such a circumstance as renders it the more proper course to seek relief in equity. *Ib.*

In suits by creditors and legatees a receiver was appointed of the rents and profits of real estate, part of which was copyhold. The death of the last tenant having been duly presented at the court baron of the manor, proclamations were made for the next tenant to come in and be admitted, and no person appearing, the bailiff of the manor was ordered to seize the lands quousque. Declaration in ejectment at the suit of the lord was afterwards served on the terre-tenant; but on the motion of the receiver, the lord was restrained by injunction from prosecuting the action. *Evelyn* v. *Lewis*, 3 Hare, 472.

The court would not, upon an interlocutory application at the suit of a copyhold tenant, in a bill to establish certain customs disputed by the lord, restrain the lord from prosecuting his legal rights against one of such tenants in respect of an alleged forfeiture. *Sefton* (*Lord*) v. *Salisbury* (*Lord*), 7 W. R. 272.

No relief will be given against a voluntary forfeiture of copyhold. *Peachy* v. *Somerset* (*Duke*), 1 Str. 447.

The Court of Equity will not assist a copyholder against a forfeiture which is found such at law, unless in cases where a compensation can be made. *S. C.*, Pre. Ch. 568.

A copyhold is forfeited for not repairing; quære, whether equity will relieve. *Cox* v. *Higford*, 2 Vern. 664.

Mortgagee of a copyhold may pull down ruinous houses, and build better to prevent a forfeiture. *Hardy* v. *Reeves*, 4 Ves. 483.

There are many acts which may be void as against another, and yet a forfeiture as to the person; as a lease made by a copyhold tenant is certainly void as against the lord, and yet is a forfeiture as to himself. *Smith* v. *Packhurst*, 3 Atk. 141.

Plaintiff sold defendant copyhold estate of 16*l.* per annum value (on which was timber of 150*l.* value) for 630*l.*, and covenanted to surrender on or before Michaelmas then next. Defendant paid 10*l.* earnest, entered on premises and cut down timber, stocked land, and acted as owner. On bill for specific performance of covenants, plaintiff proved he gave notice that he would surrender next court day, which does not appear to have been before Michaelmas, and attended accordingly. On defendant's part it was proved that he was disordered in his senses; and though there be proof of timber's value, yet, as no custom is alleged of tenants having power to cut it down, it must be according to common law, by which tenant has no power over it, and therefore a plain imposition. Lord Chancellor was of opinion that it was a great over-value, and that his cutting down timber was a proof of his folly, being a direct forfeiture, but said it is a matter merely at law. If surrender had been made, action would have lain at law. Bill dismissed. *Edwards* v. *Heather*, Select Ca. Ch. 3.

A., having two copyholds, held of the manor of B., cuts timber on one and employs it in repairing the other; after a verdict on an ejectment by the lord for the forfeiture, A. brings in a bill and is relieved, but ordered to pay costs at law and in equity. *Nash* v. *Derby*, 2 Vern. 537. And see *Durham* (*Bishop*) v. *Rippon*, 4 L. J. (O S.) Ch. 32.

Compulsory Sale—Against Infant.]—The 11 Geo. 4 & 1 Will. 4, c. 65, s. 9, enacting that no infant shall forfeit copyhold land for his neglect or refusal to be admitted, does not prevent the lord from seizing quousque. *Dimes* v. *Grand Junction Canal Co.*, 9 Q. B. 469; 5 Railw. Cas. 34; 16 L. J., Q. B. 107; 11 Jur. 429—Ex. Ch. See *S. C.*, in the House of Lords, 3 H. L. Cas. 794; 17 Jur. 73.

A canal company was authorised by statute to purchase land on voluntary or compulsory sale by the persons interested (at prices to be agreed upon or ascertained by commissioners or a jury), and a form of conveyance was prescribed purporting that the party granted all his "right, title and interest to and in the same, and every part thereof, to hold to the company for ever." The company was authorised to enter upon payment of the price or tender, and was made liable to render compensation for damage done by their works, if claimed within six months. A copyholder in fee executed a conveyance in the statutory form to the company, who paid him the price and entered:—Held, that the conveyance passed only such interest as the copyholder could convey without the lord, and that on the copyholder's death, no other person having been admitted, the lord might seize quousque for want of a tenant, and maintain ejectment and an action for mesne profits against the company. *Ib.*

By Conviction for Felony.]—There cannot be a forfeiture of copyhold by a conviction of felony before attainder, unless there is a special custom in the manor to the contrary. *Rex* v. *Willes*, 3 B. & Ald. 510.

Where there is a remainder to the use of one who is convicted of felony and hanged before admittance, the lands were not forfeited to the

lord, but descended to the heir of the surrenderor. *Roe* d. *Jeffreys* v. *Hicks*, 2 Wils. K. B. 13.

A copyholder in fee surrendered to the use of another person, and afterwards, and before the admittance of the surrenderee, was convicted of simple felony: there being a custom in the manor that any tenant of customary tenements, who should commit and be convicted of felony, should forfeit his tenements to the lord:—Held, that the surrenderor, before admittance, was still tenant for the purpose of forfeiture, and that his estate was forfeited to the lord, and the surrenderee not entitled to be admitted. *Rex* v. *Mildmay*, 5 B. & Ad. 254; 2 N. & M. 778.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards securing the copyhold:—Held, that, at the expiration of the two years, the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency, and the estate would not vest in the lord without any act done by him. *Doe* d. *Evans* v. *Evans*, 5 B. & C. 584; 8 D. & R. 399; 4 L. J. (O.S.) K. B. 322.

Estoppel of Tenant.]—A copyholder who has been admitted to a tenement, and done fealty to the lord, is estopped, in an action by the latter for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Doe* d. *Nepean* v. *Budden*, 1 D. & R. 243; 5 B. & Ald. 626; 24 R. R. 504.

Effect on Leases.]—*See* ALIENATION, *infra*.

Forfeiture for Cutting Timber.]—*See cases*, supra, *as to* TIMBER.

8. ESCHEAT.

Crown.]—Copyhold cannot escheat to the crown. *Walker* v. *Denne*, 2 Ves. 169; 2 R. R. 185.

Equitable Estate.]—Before the Intestates Estates Act, 1884 (17 & 48 Vict. c. 71), there could be no escheat of an equitable estate. *Burgess* v. *Wheate*, 1 W. Bl. 123; 1 Eden, 177.

Mortgaged Estate.]—Where a copyhold was surrendered to a mortgagee and his heirs, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir:—Held, that the lord was entitled to it as an escheat. *Att.-Gen.* v. *Leeds*, 2 Myl. & K. 343.

The lord, taking by escheat on the death of a tenant without heirs the fee simple of lands holden of the manor, but subject to a demise by way of mortgage for a term of years, created by the tenant, is entitled in equity, as against the mortgagee, to redeem the term. *Downe* (*Viscount*) v. *Morris*, 3 Hare, 394; 13 L. J., Ch. 337; 8 Jur. 486.

A. B. makes a mortgage in fee, and dies without heirs:—Held, that the equity of redemption does not escheat, but belongs to the mortgagee, subject to the debts. *Beale* v. *Symonds*, 16 Beav. 406; 22 L. J., Ch. 708; 1 W. R. 137.

Debts.]—The lord takes an escheat subject to the payment of debts. *Evans* v. *Brown*, 5 Beav. 114; 11 L. J., Ch. 349; 6 Jur. 380. S. P., *Hughes* v. *Wells*, 9 Hare, 749; 16 Jur. 927.

Devise Subject to Charity.]—Devise of copyhold land in fee, on condition to pay 1,000*l.* to charity. Testator having left no next of kin, nor any customary heir, and gift of charity being void, devisee held entitled to 1,000*l.*, and not the crown or lord of the manor. *Henchman* v. *Att.-Gen.*, 3 Myl. & K. 485. Reversing 2 Sim. & S. 498; 4 L. J. (O.S.) Ch. 155; 25 R. R. 255.

Trust Estate—Customary Heiress of Devisee of Surviving Trustee.]—A testatrix who died in 1851 devised her copyhold property to a trustee in trust to pay the rents and profits to J. King for life, and after her death to certain charitable purposes which were void under the mortmain acts. The testatrix died without heirs. The trustee named in the will refused the trust, and two trustees were appointed by order of the court in 1853, who were admitted upon the court rolls to hold upon the trusts of the will. One trustee died in 1873, and the surviving trustee, who died in 1877, devised his trust estate to two trustees, neither of whom was admitted to the copyholds. The survivor of these trustees made no devise of his trust estates, and died leaving his youngest daughter, Janet Hawkins, his customary heiress according to the custom of the manor. The tenant for life under the will died in 1883:—Held, that Janet Hawkins who claimed by escheat and under a resulting trust was entitled to be admitted as tenant to the copyhold property for her own benefit as against the lord. *Gallard* v. *Hawkins*, 53 L. J., Ch. 834; 27 Ch. D. 298; 51 L. T. 689; 33 W. R. 31.

Where a lord admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them, upon the death of the trustee without an heir. *Weaver* v. *Maule*, 2 Russ. & M. 97.

Felony before 1870.]—Upon felony committed by the surrenderor before admittance of the surrenderee, the copyhold escheats to the lord. *Rex* v. *Mildmay*, 2 N. & M. 778.

So, although the surrender is by way of mortgage. *Ib.*

G. COPYHOLDERS (RIGHTS OF).

1. SURRENDER AND ADMITTANCE.

a. Agreements to Surrender.

Statute.]—*Copyhold Act*, 1894, *ss.* 84, 85, 86.

In General.]—Parol agreement for the sale of copyhold lands, carried into execution. *Borrett* v. *Gomeserra*, Bunb. 94.

The heir of one who had covenanted to surrender copyholds to the use of a settlement on his daughter's marriage, being a lunatic, a surrender cannot be made under the statute 4 Geo. 2, c. 10. *Currie*, *Ex parte*, 1 J. & W. 642.

Injunction to restrain the vendor of copyhold premises, after delivery of possession and receipt of part of the purchase money, from surrendering them to persons other than the purchasers. *Spiller* v. *Spiller*, 3 Swanst. 556; 19 R. R. 276.

Covenant for one's self and heirs to surrender copyhold, heir decreed to surrender it. *Neeve* v. *Keck*, 9 Mod. 106.

Copyholder contracts, for valuable consideration, to sell to his son, and dies before actual surrender; the son held entitled to performance,

and to compel the widow to surrender free bench. *Hinton* v. *Hinton*, 2 Ves. sen. 631; Amb. 277.

A. covenanted on marriage, that, within a month, he would surrender his copyhold to his wife for life, remainder over, and if he neglected, then that he would leave his wife 500*l.* at his death. The husband made no surrender, but died after the month without assets. Decreed the heir to surrender. *Wood* v. *Pesey*, 5 Vin. Abr. 547, pl. 36.

Mother gave bond to son conditioned to surrender copyhold to him, of which she was the heiress:—Held, she became a trustee for son. *Alison's Case*, 9 Mod. 62.

Upon a voluntary covenant to surrender copyholds, and in the meanwhile to stand possessed of them for trustees for the volunteers, though the covenant to surrender per se cannot be enforced, yet a valid trust is constituted for the volunteers. *Steele* v. *Waller*, 28 Beav. 466; 6 Jur. (N.S.) 1004; 3 L. T. 74.

A copyhold was devised to trustees for certain persons, who, after the testatrix's death, sold it, and the purchaser was admitted on the surrender of the customary heir:— Held, that although the purchaser had thus obtained both the legal and equitable title, still, to make a good title, there must be a release from the trustees of their bare right to be admitted. *Ib.*

Bill to have execution of articles for the sale of some copyhold lands to plaintiff, on payment of 538*l.* to defendant R., a guinea being paid in part; and to compel the lord of the manor to admit plaintiff in fee according to the agreement, which was decreed; but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs. *Sayle* v. *Reeves*, Gilb. 188.

Decree of foreclosure, mortgagor to surrender mortgaged premises, which were copyhold, at expense of mortgagee. *Hill* v. *Price*, 9 Dick. 344.

If A., for valuable consideration, undertakes to surrender a copyhold to B., and B., on borrowing money from C., enters into a written agreement with C., that he, B., will surrender the same copyhold to C., by way of mortgage security; A. is not justified in refusing to surrender the copyhold to B., because he, A., has received notice from C. of the agreement between him and B. The surrender by A. to B. does not prejudice, but promotes that agreement. —— v. *Walford*, 4 Russ. 372.

Bond executed on marriage of obligor, conditioned to settle lands, "if he should become seised in possession," affects copyhold as well as freehold. *Prebble* v. *Boghurst*, 1 Swanst. 580.

Covenants for Title.]—A. sold copyholds in fee simple to B., and covenanted to surrender, which he did the next day, and entered into the the usual covenants for title. Shortly afterwards, the copyholds were again sold:—Held, that the covenants for title either ran with the land for the benefit of the second purchaser, or that he was entitled to sue on them in the name of the first. *Riddell* v. *Riddell*, 7 Sim. 529; 5 L. J., Ch. 102.

Quære, whether covenants for the title of copyholds run with the land. *Ib.*

Copyhold lands mortgaged in fee by lease and release as freehold, the customary heir is bound by a covenant by further assurance; but during his infancy the court refused to foreclose, and would go no further than directing the account, and that in default of payment, the plaintiffs should be let into possession, and enjoy till the heir should attain twenty-one, at which time he should surrender, and a day was given to show cause against the decree. *Spencer* v. *Boyes*, 4 Ves. 370.

b. Construction.

Same Construction as at Law.]—The same construction takes place in copyholds as in other law conveyances. *Sutton* v. *Stone*, 2 Atk. 101.

Before admittance, mortgagee may bring bill of foreclosure, and after decree an ejectment for possession of the premises. *Ib.*

The surrender of copyhold must have the same construction with feoffments at law, and other conveyances, and not as a will; and if the limitations of a copyhold are so framed as that by the rules of law they are void, they must take their fate, and no intention can make them good. *Lovell* v. *Lovell*, 3 Atk. 11.

Life Estate.]—Surrender of copyhold to the use of surrenderor for life, remainder to the use of A. for life, remainder to the use of the child or children of A., and for want of such issue, to the use of B. Semble, A. takes an estate for life. *Widdowson* v. *Harrington* (*Earl*), 1 J. & W. 532.

Tenant for life of a copyhold sold his estate, and surrendered it, that the lord might admit A. the purchaser; the copyholder in reversion entered, and recovered at law: A. was relieved in equity. *Anon.*, 2 Free. C. C. 118.

Land surrendered to lord is not vested in him as a trustee. *George* v. ——, Amb. 627.

Effect of surrender, "to the intent, that the lord might regrant it to the surrenderor, or such other person or persons, and for such life or lives, estate or interest, as should be agreed upon between the lord and the surrenderor." *Walker* v. *Abingdon* (*Earl*), 10 L. J., Ch. 289; 5 Jur. 714.

Joint Tenancy.]—A dormant surrender operates as a severance of a joint tenancy, though it is revocable during the lifetime of the surrenderor. *Gale* v. *Gale*, 2 Cox, 136.

A dormant surrender of a copyhold (that is, a surrender to A. on condition to perform the will of the surrenderor) will vest an estate in the dormant surrenderee sufficient to support the contingent remainders of the surrenderor's will without the interposition of trustees for the purpose. *Ib.*

Quære, whether the surrender by a joint tenant to the use of his will would per se effect a severance of the joint tenancy. *Edwards* v. *Champion*, 3 De G. M. & G. 202; 23 L. J., Ch. 123. And see *Lee*, *Ex parte*, 5 L. J. (O.S.) K. B. 290.

Intended Marriage.]—In consideration of a marriage intended to be had betwixt two copyholders, the man surrenders his copyhold to the use of him and his intended wife, and the survivor of them; and the woman, in like manner, surrenders her copyhold to the like uses: the man dies before any marriage had; the woman enters and enjoys for thirty years. Declared a trust, and a resurrender and account of profits decreed. *Hammond* v. *Hicks*, 1 Vern. 434.

Husband and Wife.]—A copyhold was sur-

rendered to the use of husband and wife for their lives, and the life of the longer liver of them, and, from and after the decease of the survivor, to the right heirs of the survivor for ever:—Held, that the husband and wife took a vested estate for their joint lives, as well as for the life of the survivor, with a contingent remainder in fee to such survivor. *Doe* d. *Dormer* v. *Wilson*, 4 B. & Ald. 303; 23 R. R. 275.

A surrender of a copyhold to husband and wife, and the survivor, and after the death of the survivor, to the right heirs of both, vests an immediate fee-simple in the husband and wife by entireties, and the husband cannot alien or devise any part of it, but on his death the whole survives to his wife. *Green* d. *Crew* v. *King*, 2 W. Bl. 1211.

A. purchases copyhold estate, and takes the surrender to himself and his wife and daughter, and their heirs: the husband and wife (as one person) take a moiety by entireties, and the daughter the other moiety: the husband mortgages it and dies: void for the whole, and no relief in equity. *Back* v. *Andrew*, 2 Vern. 120; Pre. Ch. 1.

Surrender to the use of C. T. during life, and after his decease to the use of such one or more of his children as he should appoint, and, in default of appointment, to the use of his son D. T. and the heirs of his body. C. T. appointed to D. T. for life, and after his death to K. T. and E. T. for life, as tenants in common; and after their respective deaths to the use of grandchildren:—Held, that the latter limitation being void as an excess of the power, the estate limited in the surrender to D. T. and the heirs of his body, was a valid remainder in tail, expectant on the estate for life of K. T. and E. T. as tenants in common. *Doe* d. *Nicholson* v. *Welford*, 12 Ad. & E. 61; 9 L. J., Q. B. 334.

Surrender of a copyhold to the use of baron and feme for their lives, and heirs and assigns of the said baron and feme, and for default of such issue to the right heirs of the surrenderors. This is an estate in fee, and not an entail in the baron and feme; otherwise had it been the case of a will. *Idle* v. *Cook*, 1 P. W. 70.

Fee Simple Conditional.]—Copyhold lands, which by custom of manor are incapable of being entailed, are yet capable of such limitations as make them a fee simple conditional. *Pullen* v. *Middleton* (*Lord*), 9 Mod. 483.

Equitable Estate Tail.]—Equitable estate tail in copyhold does not merge by accession of the legal fee. *Mercst* v. *James*, 6 Madd. 118.

Assignee of Reversion.]—The surrenderee of a copyhold is an assignee of a reversion within the statute of 32 H. 8, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease. *Whitton* v. *Peacock*, 3 Myl. & K. 325.

As to construction of a surrender creating a rent. See *Spindler* v. *Wilford*, 2 Vern. 16.

"Or" meaning "And."]—In order to effectuate the intention of the parties, the court will construe the word "or" to mean "and," as well in a surrender of copyhold premises as in a will. *Wright* v. *Kemp*, 3 Term Rep. 470; 1 R. R. 748.

Similar Names.]—John Lealand surrendered a copyhold in his occupation to the use of Joseph Lealand and John Lealand, his son, for their lives and the life of the survivor; remainder to the heirs of the body of the said John Lealand, son of Joseph L.; remainder to the right heirs of the said John Lealand:—Held, that the ultimate remainder was meant for the right heirs of John the surrenderor, as well because John the surrenderee was before described with the addition of the son of Joseph, as of the manifest futility of giving John the surrenderee an estate in tail, and afterwards a fee in succession. Though, if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe* d. *Hucknall* v. *Foster*, 9 East, 405.

A surrender was made in 1816 to the use of John G., of S., and Elizabeth, his wife, for their joint lives and the life of the survivor of them. After the death of the survivor, the property was to be sold, and the proceeds divided among the children or other issue then living of "the said Elizabeth G." and another person. There never was such a person as Elizabeth, the wife of John G., of S., but there was an Elizabeth G., the wife of W. G., of B., a niece of the surrenderor, for whom he had a great regard. The wife of John G., of S., was named Hannah. Upon a conflict of claims between the children of Elizabeth G. and of Hannah G.:—Held, that the surrenderor intended his niece, Elizabeth G., and that her children were entitled to the property. *Garner* v. *Garner*, 3 L. T. 396.

Description.]—A steward is not bound to accept a general surrender of tenements without describing particularly what the tenements are, although the proposed surrender refers to a previous surrender, in which there was a description of the tenements. *Reg.* v. *Bishop's Stoke*, 8 D. P. C. 608; 4 Jur. 630.

A surrender to the lord, in the absence of any custom to the contrary, should contain an accurate and a specific description of the tenements surrendered, as they have been previously described at the time of admission. *Ib.*

A copyholder surrendered his copyhold cottage with a croft adjoining, and a common right, belonging to the same, "all which premises (as the surrenderor described them) were then in his own possession;" and on the same day he devised "all his copyhold cottage and premises then in his own possession." In fact, the croft, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time; yet held, that the whole passed under the description of "all his copyhold cottage and premises;" the words, "then in his own possession," being merely a mistaken description, following the mistake of the surrender, which mentioned the croft with the rest as then being in his possession. *Goodright* d. *Lamb* v. *Pears*, 11 East, 58.

A surrenderee of copyhold premises has a right to have in his admittance a description of the premises corresponding with that in the surrender. *Hayward* v. *Raw*, 6 H. & N. 308; 30 L. J., Ex. 178; 4 L. T. 519.

Admissions on the court-rolls of a manor "pro pasturâ bosci et subbosci," and for "the pasture, wood, and underwood of," &c., are sufficient to pass the land. *Doe* d. *Kinglake* v. *Beviss*, 7 C. B. 456; 18 L. J., C. P. 128.

Ancient admissions of a copyholder and those

under whom he claims the land, by the description of tres acras patri, may be construed only to carry the prima tonsura, if, in fact, they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains, though the copyholder may have paid all the rates and taxes which was in his own wrong. *Stammers* v. *Dixon*, 7 East, 200; 3 Smith, 261; 8 R. R. 612.

A. being tenant of copyhold premises at Clondall, under four several admissions to the use of himself for life and of such person as he should appoint, and in default of appointment, to the use of himself in fee, subject to certain quit-rents, and being seised and possessed of other real estates in Great Britain and Ireland, and of a leasehold estate held under two leases at Blansby, devised his whole real estate in lands in Great Britain or Ireland, to his wife for life, and after her death to be divided between his two nephews and their issue, and in default of such issue, to be divided between the children of his nieces; and by a codicil reciting that he had ordered all his estate in Great Britain and Ireland, after the decease of his nephews without issue, to be divided, he revoked the same; and before that division devised his whole real estate to B. and his heirs male, and devised his two leases with the quit-rents of his lands in Clondall and in Blansby to B. after his wife's decease:—Held, that B., after the wife's death, took a fee in the copyhold premises. *Cuthbert* v. *Lempriere*, 3 M. & S. 139.

Rent "Compounded for."]—Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant: therefore, where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, &c., whatsoever, in the manor which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of 4*l*. 10*s*. 8½*d*., and compounded for":—Held, that the words, "and compounded for," restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words, "being of the yearly rent, &c., of 4*l*. 10*s*. 8½*d*.," which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. *Roe* d. *Conolly* v. *Vernon*, 5 East, 51; 1 Smith, 318.

Surrender to Uses.]—A surrender to uses, reserving a power of revoking them, may be maintained. *Boddington* v. *Abernethy*, 5 B. & C. 776; 8 D. & R. 626; 4 L. J. (O.S.) K. B. 181.

Surrender not Voluntary.]—A. surrenders the reversion in fee of copyhold lands to his son to lessen the fine he must have paid in case it had come to him by descent; after his son's treaty of marriage, the father tells the wife's friends that this copyhold was so settled, in consideration of which, and of some leasehold lands, a marriage was had and 2,000*l*. portion paid: this surrender of the copyhold held not to be voluntary or fraudulent. *Kirk* v. *Clarke*, Pre. Ch. 276.

Voluntary Conveyance.]—An assignment of personal property for a consideration clearly inadequate is fraudulent as against creditors, under the 13th Eliz. But copyholds not being naturally subject to debts, a conveyance of them could not be fraudulent against creditors. *Mathews* v. *Feaver*, 1 Cox, 278; 1 R. R. 39.

Mortgages.]—Copyholds being mortgaged together with freeholds, mortgagee could not, by any act of his, defeat creditors having only the freehold to resort to. Copyhold estate not assets for specialty debts to the Crown. *Aldrich* v. *Cooper*, 8 Ves. 382, 393; 7 R. R. 86.

A mortgagee of a copyhold could not tack a judgment to his mortgage, because no judgment could before 1 & 2 Vict. c. 110 affect that estate. *Cannon* v. *Pack*, 6 Vin. 222, pl. 6; 2 Eq. Ca. Abr. 226, pl. 6.

The equity of redemption of a mortgage in fee of copyholds is made legal assets by 3 & 4 Will. 4, c. 104. *Burrell, In re, Burrell* v. *Smith*, 39 L. J., Ch. 544; L. R. 9 Eq. 443; 22 L. T. 263.

Payment of creditors out of a copyhold forfeited by mortgage. *Anon.*, Cary, 7.

Charge of Debts.]—The Act 1 Will. 4, c. 47, enabling a tenant for life under a will to sell lands for payment of the debts of any testator whose estate "by law shall be liable to the payment of any of his debts" is prospective, and now extends to copyholds, although they were not liable to the payment of debts when the act passed. *Branch* v. *Browne*, 2 De G. & Sm. 299; 17 L. J., Ch. 435; 12 Jur. 768.

Introductory words, referable to all testator's worldly estate, amounting to a charge, copyhold lands are liable as well as freehold. In this case there was also a copyhold which had not been surrendered, this was also declared liable. *Coombes* v. *Gibson*, 1 Bro. C. C. 273. S. P., *Kentish* v. *Kentish*, 3 Bro. C. C. 257.

Where a testator, having both freehold and copyhold estates, charges his real estate with payment of his debts, if he has surrendered the copyhold to the use of his will, the freehold and copyhold shall be applied ratably; but if he has not surrendered the copyhold, it shall not be applied until the freehold is exhausted. *Growcock* v. *Smith*, 2 Cox, 397.

Under a devise, that all testator's debts "should be first paid and satisfied":—Held, that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all. *Godolphin* v. *Penneck*, 2 Ves. sen. 271. S. P., *Ronalds* v. *Feltham*, Turn. & R. 418.

Devise of all the testator's "real" and personal estate, "subject to debts;" affects copyhold lands unsurrendered for the benefit of the creditors, there being no freehold lands; if there had been, it would have been otherwise. *Ithell* v. *Beane*, 1 Ves. sen. 215; 1 Dick, 132.

By a marriage settlement, a freehold estate was settled on husband and wife for their lives, remainder to the first, &c., son in tail, remainder to trustees for 500 years to raise portions for daughters, remainders over; covenant from the husband to settle his copyhold estate, to the same uses. A surrender was made, but no term,

was limited. The freehold estate not being sufficient to raise the daughters' portions; decreed the copyhold estate should be charged, and liable to raise the portions. *Shouldham* v. *Shouldham*, 2 Vern. 321.

Quære, whether copyhold lands are subject to sequestration. *Carmarthen* (*Marquis*) v. *Hawson*, 3 Swanst. 294.

c. Operation.

Barred by Lapse of Time.]—A suit to compel the lord to admit a tenant according to the custom of the manor is a suit to recover land within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 2, 3. *Walters* v. *Webb*, 39 L. J., Ch. 677; L. R. 5 Ch. 531; 18 W. R. 587.

When the lord has seized quousque for non-payment of fines, the right of the tenant to recover the land cannot be deemed to have first accrued at the time when he pays or tenders the fines. *Ib.*

Copyhold lands, of which W.'s ancestor was tenant, were seized by the lord quousque for non-payment of fines:—Held, that after twenty years' discontinuance of possession W. was barred by 3 & 4 Will. 4, c. 27, from bringing a suit to compel the lord to admit him as tenant. *Ib.* S. P., *Rex* v. *Agarsdley*, 5 D. P. C. 19; *Phillips*, *Ex parte*, 1 H. & W. 660.

Legality of Lord's Title.]—The legality of the title of the lord or steward who admits a copyholder is immaterial, provided the admission is in pursuance of a surrender, and not of a voluntary grant from the lord. *Doe* d. *Burgess* v. *Thompson*, 1 N. & P. 215; 5 A. & E. 532; 2 H. & W. 451; 6 L. J., K. B. 57.

Relation back to Surrender.]—The title to copyhold lands relates back from the time of the admittance to the surrender as against all persons but the lord, so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. *Holdfast* d. *Woollams* v. *Clapham*, 4 Burr. 1952; 1 Term Rep. 600; 1 R. R. 309. S. P., *Smith* v. *Adams*, 18 Beav. 499; 23 L. J., Ch. 525; 2 Eq. Rep. 517; 2 W. R. 381. *See* 5 De G., M. & G. 712; 24 L. J., Ch. 258; 18 Jur. 968; 2 W. R. 698.

An admittance of the surrenderee before trial will maintain ejectment brought by him before admittance, upon a demise laid between the time of surrender and admittance. *Doe* d. *Bennington* v. *Hall*, 16 East, 208. And see *King* v. *Turner*, 1 Myl. & K. 456; 2 L. J., Ch. 188.

A devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender, but the legal title remains in the heir of the surrenderor. *Doe* d. *Vernon* v. *Vernon*, 7 East, 8; 3 Smith, 6.

The customary heir of a copyhold tenement cannot maintain trespass without entry, but after entry there is a relation back to the actual title, as against a wrongdoer, and he may maintain an action for trespasses committed prior to his entry. *Barnett* v. *Guildford* (*Earl*), 11 Ex. 19; 24 L. J., Ex. 281; 1 Jur. (N.S.) 1142; 3 W. R. 406.

Admittance on Trusts.]—Where a lord admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir. *Weaver* v. *Maule*, 2 Russ. & M. 97.

Rights of Administrator.]—One who is admitted tenant, upon a claim as an administrator de bonis non to the grantee of a copyhold pur autre vie, having no title in such character, cannot recover in ejectment by virtue of such admission, as upon a new and substantive grant of the lord. *Zouche* d. *Forse* v. *Forse*, 7 East, 186; 3 Smith, 191.

Remaindermen.]—Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe* d. *Blacksell* v. *Tomkins*, 11 East, 185; 10 R. R. 467. And see *Doe* d. *Lushington* v. *Landaff*, 2 Bos. & P. (N.R.) 491; 9 R. R. 682.

A., a copyholder for life, remainder to B., surrendered his own and B.'s estate (over which latter he had no control, and by which he let in B.'s remainder), and took a new copy for the lives of himself, C. and B. successively; and on A.'s death, after twenty years had run against B., B. entered on the possession then vacant:—Held, that as against C., who had no possession and no title, B. might defend his legal title, coupled with possession, in ejectment, however twenty years' adverse possession by A. might have barred B.'s possessory right as against him, or might have disabled B., if he had continued out of possession, from recovering in ejectment. *Doe* d. *Burrough* v. *Reade*, 8 East, 353.

Heir-Apparent.]—If the heir-apparent of a copyholder in fee surrenders in the lifetime of his ancestor, and survives him, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee. *Goodtitle* d. *Faulkner* v. *Morse*, 3 Term Rep. 365; 1 R. R. 719.

To Uses of Will.]—A surrender of copyhold lands to the use of a will only operates on the estate which the surrenderor has at the time of the surrender. *Doe* d. *Ibbot* v. *Cowling*, 6 Term Rep. 63. And see *Prankerd* v. *Prankerd*, 1 Sim. & S. 1.

The effect of the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 3, is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee. *Garland* v. *Mead*, 40 L. J., Q. B. 179; L. R. 6 Q. B. 441; 24 L. T. 421; 19 W. R. 1156.

Where, therefore, a copyholder devised his estate to two trustees, appointing them guardians of his customary heir who was an infant, and the devisee was entered on the court-rolls, and after proclamations the trustees, who had not disclaimed the devise, did not come in to be admitted, but tendered the infant heir for admittance, and the lord refused to admit him on the ground of the devise:—Held, that the lord could not seize quousque for want of a tenant. *Ib.*

A copyholder has a right to surrender to the use of his will, though there is no instance of it upon the records of the manor. *Church* v. *Mundy*, 15 Ves. 403.

A custom in a manor that copyholds shall not be surrendered to the use of a will, is bad. *Pike* v. *White*, 3 Bro. C. C. 286.

A copyholder in fee having surrendered to the use of his will, and afterwards surrendering to new particular uses, with reversion to himself in fee, is in by the old use, and may devise the reversion without any admittance, or fresh surrender to the use of his will. *Thrustout* d. *Gower* v. *Cunningham*, 2 W. Bl. 1046.

Quære, whether, after forty years' possession of a copyhold under a will, a surrender to the use of the will shall not be presumed. *Lyford* v. *Coward*, 1 Vern. 195; 2 Ch. Ca. 150.

—— **Relief against Merger.**]—A tenant who by the custom of a manor had no power of devising his estate, except by creating two long terms therein, which were devisable, granted such terms to A., who was his tenant from year to year, and devised the estate. The Court of King's Bench having decided that the terms had merged in the estate from year to year:—Held, by the Master of the Rolls, on demurrer, that the devisee had no equity against the customary heir, to be relieved against the merger, though effected by mistake. *Woodman* v. *Tilby*, 4 L. J., Ch. 169.

And see 7 Will. 4 & 1 Vict. c. 26, s. 3, repealing 55 Geo. 3, c. 192.

—— **Several Devisees.**]—Where a copyhold surrendered to the use of a will was devised to six persons, of whom one offered to be admitted, but the lord refused to admit him:—Held, that the lord ought to have admitted him, and could not seize quousque. *Roe* d. *Ashton* v. *Hutton*, 2 Wils. K. B. 162.

—— **Want of Surrender Supplied—In Favour of Relations.**]—The want of a surrender of copyhold estate to the use of the will was supplied in favour of a widow, against co-heiresses, daughters of the devisor, married, and infant granddaughters by deceased daughters. The Lord Chancellor was of opinion, that in supplying a surrender the court was to look only to the object, not to the circumstances of the parties, as whether the heir has a provision or not. *Hills* v. *Downton*, 5 Ves. 557.

The want of surrender supplied for a widow against collateral heir, viz., a sister, whether provided for or not. As to a son, quære. *Fielding* v. *Winwood*, 16 Ves. 90.

The want of a surrender supplied, even though the wife had a provision under a settlement. *Smith* v. *Baker*, 1 Atk. 386.

See *Chapman* v. *Gibson*, 3 Bro. C. C. 229; *Church* v. *Mundy*, 12 Ves. 426.

Feme covert (heiress-at-law) and her husband being drawn in to enter into articles for supplying the defect of a surrender of copyholds to the use of a will, whereby they were devised to the plaintiff; the plaintiff not allowed to carry these articles into execution, in respect of the fraud, and against feme covert. *Preston* v. *Wasey*, Pre. Ch. 76.

A surrender supplied for a limited interest (a wife for life), though the devisees over (nephews and nieces) were not entitled to have it supplied for them. *Marston* v. *Gowan*, 3 Bro. C. C. 170.

Testator seised of freehold and copyhold estates in certain counties devised all his lands and hereditaments in those counties to his wife for life, remainder to his first and second sons in tail, remainder to his wife in fee, the court would not supply the want of a surrender, there being freehold estates to answer the words of the devise. *Milbourne* v. *Milbourne*, 1 Cox, 247; 2 Bro. C. C. 64.

A., having made a surrender of copyhold, left it in the hands of tenant, who took it in order to be presented; A. afterwards devised the estate to his children, but the tenant neglected to present the surrender:—Held, that the surrender ought to be made good, and decreed that estate should be enjoyed according to the will. *Lloyd* v. *Burton*, 2 Bro. P. C. 281.

It made no difference in supplying a surrender, that the custom required a surrender to trustees to the uses of the will, or that the only provision was an annuity issuing out of the copyhold itself. *Braddick* v. *Mattock*, 6 Madd. 361.

Where the owner of a freehold and copyhold estate (the latter of which could not be devised, but by conveyance to a trustee, and declaring uses by will), devised to his youngest son all his messuages and tenements, the court would not supply a surrender, or put the heir to election, though the devise was to a younger child. *Hodgson* v. *Merest*, 9 Price, 556.

Surrender not supplied for a child under a devise in general terms, not mentioning copyhold estate, and not executed to pass the freehold. *Sampson* v. *Sampson*, 2 V. & B. 337.

Surrender not supplied for a child against a grandchild unprovided for. Want of surrender supplied in the case of a deed, as well as a will, but upon the same principle as in the case of a will, or the execution of a power, i.e., for and against the same person. *Rogers* v. *Marshall*, 17 Ves. 294.

Surrender supplied for younger children, the heir having a provision under the will or otherwise, without regard to the amount. *Garn* v. *Garn*, 16 Ves. 268. S. P., *Macey* v. *Shurmer*, 1 Atk. 389; *Pike* v. *White*, 3 Bro. C. C. 286; *Hardham* v. *Roberts*, 1 Vern. 132.

Where a testator devised his copyhold, being borough English, to his eldest son, and houses to his youngest son, the houses being soon afterwards burnt, and never having been entered upon by the younger son, the court would not supply the want of a surrender. *Cooper* v. *Cooper*, 2 Vern. 265.

A testator devised all his cottages, messuages, lands, tenements, and hereditaments, whatsoever, to his daughter B., and the heirs of her body, to enter upon at the age of twenty-one. B. married the plaintiff, and upon a bill to have the defect of surrender supplied and transferred, it was held, that the copyhold passed to B. by the general words. *Andrews* v. *Waller*, 6 Vin. Abr. 287, pl. 12.

Equity would supply the want of a surrender as well for an elder son as a younger, in case of gavelkind copyhold, if it appeared to be the intent of the will that the eldest son shall have the copyhold, paying a legacy thereout to the younger son. *Bradley* v. *Bradley*, 2 Vern. 163.

Defective surrender of copyhold could not be supplied for grandchildren. *Perry* v. *Whitehead*, 6 Ves. 544.

Equity would not supply the want of a surrender in behalf of a natural child. *Fursaker* v. *Robinson*, Pre. Ch. 475; Gilb. Eq. Rep. 139. But if it had a legacy from the father, payable at twenty-one, would allow maintenance. *Crickett* v. *Dolby*, 3 Ves. 12.

Testator, by his will, taking notice that he had not surrendered copyhold estates which he devised, but directing his son to convey them, and devising to the son other estates, though the copy-

holds were not devisable by custom, the surrenders were decreed to be made. *Wardell* v. *Wardell*, 3 Bro. C. C. 116.

Quære whether, after forty years' possession of a copyhold under a will, a surrender to the use of the will should not be presumed. *Lyford* v. *Coward*, 1 Vern. 195; 2 Ch. Ca. 150.

Devise in general terms of all the residue, and remainder of real and personal estate, to nephews and nieces, not being for creditors, wife, or children, was not sufficient to raise a case of election, or for supplying the want of surrender of copyhold land, contiguous and intermixed with freehold against the heir. *Judd* v. *Pratt*, 15 Ves. 390.

A testator being entitled in reversion to copyholds and in possession to freeholds by his will in 1804, devised his freehold, leasehold, and copyhold estates, to his wife for life, with remainder to his three younger children. In 1807 he made another will, commencing with the words, "This is the last will and testament," and thereby he gave all his real and personal estates to his wife for life, and after her death, all his "property" and effects to all his children equally, except his eldest son. The testator died in 1807. In 1851 the reversion of the copyholds fell into possession: —Held, that the court would, if necessary, supply a surrender in favour of the objects to whom the first will expressly devised the copyholds. *Freeman* v. *Freeman*, Kay, 479. Affirmed, 23 L. J., Ch. 838; 2 W. R. 658.

Held, also, that, as there was freehold property upon which the general devise in the second will could operate, there was no ground for deciding that it revoked the intended devise of the copyholds by the former will. *Ib.*

Quære, whether, in the absence of a special custom, it was necessary to surrender a reversion or remainder in copyholds to the use of a will. *Ib.*

A will, so called, of copyholds, does not operate strictly as a devise, but rather as a designation of the person to take under the previous surrender; analogous, in some respects, to the appointment of a use under a power created by deed. *Ib.*

A father is a judge of the quantum, and also of the time when his daughter's provision shall take place; and a limitation to a daughter, on failure of issue male of an eldest son or sons, is not too remote, but shall be considered as a provision. *Goring* v. *Nash*, 3 Atk. 191.

A father limited a copyhold estate to a first son in tail, and to a second, third, fourth, and fifth son; but not having surrendered it, the second son brought his bill to have the want of the surrender supplied. The court decreed it to all the sons, in the same order that the father left it; for where it did not introduce a hardship, or leave other children in distress, the court would always decree the provision made for one child to be as extensive as he intended. *Ib.*

Construction of a residuary devise as including under the general words "estate and effects" a copyhold, not surrendered in favour of a younger son, subject to debts, the will reciting that the eldest son was provided for, and no freehold estate. *Pennington* v. *Pennington*, 1 V. & B. 406.

A devise of "all my real estate" would carry copyhold surrendered, and, if no freehold, (for favoured objects) copyhold not surrendered. *Wentworth* v. *Cox*, 6 Madd. 363.

Devise of copyhold estates in general terms, to a child, passed all copyholds surrendered and not surrendered, to the use of the will. *Blunt* v. *Clitherow*, 10 Ves. 589.

Customary heir was bound to elect, claiming copyhold not duly surrendered to use of will. *Ib.*

Copyholds passed under a general devise. *Reeves* v. *Baker*, 18 Beav. 372; 2 Eq. Rep. 476; 23 L. J., Ch. 599; 18 Jur. 588; 2 W. R. 354.

Copyholds held to pass under a will by the words "moneys, property, and effects," aided by the context. *Streatfield* v. *Cooper*, 27 Beav. 338.

Devise of a house as leasehold, which afterwards turned out to be partly leasehold and partly copyhold:—Held, to be a valid gift of the whole of the property. *Bush* v. *Culloway*, 7 W. R. 638.

—— **In Favour of Creditors.**]—Defect in surrender of copyhold to use of will supplied in favour of creditors. *Ithell* v. *Beane*, Dick. 132; 1 Ves. sen. 215.

If copyhold estate was devised for debts. *Holmes* v. *Coghill*, 12 Ves. 216; 8 R. R. 323. S. P., *Kidney* v. *Coussmaker*, 12 Ves. 136.

Surrender supplied for creditors, though there was freehold specifically devised by the same will. *Bixby* v. *Exley*, 2 Bro. C. C. 325; Dick. 698.

Where a man devised his real estate to be sold to pay debts and pecuniary legacies, and subject to his debts and legacies devised his personal estate to his sister, the court would not supply the defect of a surrender of the copyhold to the use of the wife, if the other estates sufficed to pay the debts. *Mallabar* v. *Mallabar*, Forrest, 78. S. P., *Drake* v. *Robinson*, 1 P. Wms. 443.

Equity would supply the want of a surrender of a copyhold when it was devised for the provision for younger children, or in favour of creditors, or a purchaser. *Bradley* v. *Bradley*, 2 Vern. 163.

—— **In favour of Charity.**]—Surrender of a copyhold not supplied to substantiate a devise to a charity, where there were prior limitations to strangers. *Att.-Gen.* v. *Downing*, Amb. 571.

Tenant for Life.] — The admittance of a tenant for life upon a surrender to the use of a will, enures as to the admittance of those in remainder, so as to vest the estate in them. *Smith* v. *Glasscock*, 4 C. B. (N.S.) 357; 27 L. J., C. P. 192; 6 W. R. 487.

Where a testator devised a copyhold to his wife for life, and at her death, equal shares to her six children as tenants in common, and the widow after his death was admitted; and after the death of three of the children, the eldest son got himself admitted after proclamation to the whole estate, as heir, but it appeared that a younger brother was alive, and there was no evidence of the decease of one of the sisters: —Held, that the eldest son could not maintain ejectment for more than four-sixths of the whole estate. *Ib.*

Feme Covert.]—Feme covert cannot, at law, make will of copyhold lands surrendered by her before marriage to the use of her will; nor can she declare the use of the surrender. *George* d. *Thornbury* v. ——, Amb. 627.

Such a surrender becomes void or suspended by marriage. *Ib.*

A custom for feme sole to bar without surrender and private examination is bad. *Ib.*

A feme covert having power, under articles of separation, to dispose of her estate. Quære, whether her surrender of the copyright is good. *Compton* v. *Collinson*, 2 Bro. C. C. 377 ; 1 H. Bl. 334 ; 2 R. R. 786.

If a copyhold is surrendered to such uses as a feme covert shall by will or codicil appoint, a paper, purporting to be a will, though made by her living with her husband, is a good execution. *Driver* d. *Berry* v. *Thompson*, 4 Taunt. 294 ; 13 R. R. 592.

Effect of 55 Geo. 3, c. 192.]—The 55 Geo. 3, c. 192, extended only to supply surrenders in form, but not surrenders in substance : therefore, where a feme covert omitted to surrender to the use of her will :—Held, that the case was not within that statute. *Doe* d. *Nethercote* v. *Bartle*, 1 D. & R. 81 ; 5 B. & Ald. 492.

Since 55 Geo. 3, c. 192, a copyhold estate will pass under a general devise of all the testator's real estate, although there was no previous surrender to the use of his will. *Doe* d. *Clarke*, v. *Ludlam*, 5 M. & P. 48 ; 7 Bing. 275 ; 9 L. J. (o.s.) C. P. 74.

But copyholds which have been surrendered to the use of the will do not pass by a general devise of the real estate, where the will was made before 55 Geo. 3, c. 192. *Doe* d. *Smith* v. *Bird*, 5 B. & Ad. 695 ; 2 N. & M. 679 ; 3 L. J., K. B. 78.

A copyhold was surrendered to the use of A. for life ; remainder to such person or persons, and for such estate or estates as A. should appoint by will, executed in the presence of and attested by three witnesses ; remainder, in default of such appointment, to the use of A. in fee. After 55 Geo. 3, c. 192, A. devised to B. by a will executed in the presence of two witnesses only :—Held, a good devise of the remainder in fee, and that the want of a surrender to the use of this will was aided by the statute. *Doe* d. *Hickman* v. *Hickman*, 1 N. & M. 780 ; 4 B. & Ad. 56 ; 1 L. J., K. B. 238.

Equitable Interest — Devise before the Statute.]—Before 55 Geo. 3, c. 192, general words of devise included a legal estate in copyholds surrendered to the uses of the will by force of the intention shown by the surrender that such general words should include it ; and when the question is of an equitable estate, some intention must be shown that such general words should include it ultra the words themselves. *Torre* v. *Browne*, 5 H. L. Cas. 555 ; 24 L. J., Ch. 757.

d. Mode of Surrender and Admittance.

Statute.]—*Copyhold Act*, 1894, *s.* 84.

By Steward out of the Manor.]—Previously to 4 & 5 Vict. c. 35, an admittance to a copyhold by the steward, as such, out of the manor, was bad ; but it might have been good if made in virtue of a special authority given by the lord, or such admittance might have been validated by the ratification and adoption of the lord, and notification to the homage. *Doe* d. *Gutteridge* v. *Sowerby*, 7 C. B. (N.S.) 599 ; 29 L. J., C. P. 291 ; 6 Jur. (N.S.) 870 ; 2 L. T. 150 ; 8 W. R. 393.

By Lord.]—A grant by the lord in person is good, though it purports to be made at a court within the manor, which is, in fact, out of the manor. *Doe* d. *Leach* v. *Whitaker*, 5 B. & Ad. 409 ; 3 N. & M. 225.

Refusal by Steward out of Court.]—A person claiming to be admitted as heir to a copyhold need not tender himself to be admitted at the lord's court, if the steward, upon application to him out of court, has refused to admit him. *Doe* d. *Burrell* v. *Bellamy*, 2 M. & S. 87 ; 14 R. R. 595.

Married Woman.]—A feme covert who surrenders copyhold lands, ought previously to be examined separately from her husband by the steward of the manor. *Driver* d. *Berry* v. *Thompson*, 4 Taunt. 294 ; 13 R. R. 592.

But by special custom she may be separately examined before two customary tenants. *Ib.*

A feme covert entitled to a copyhold surrendered it, after secret examination by the steward, to the use of her husband with his assent, testified by his immediate admittance :—Held, that this surrender was valid. *Seaman* v. *Maw*, 3 Bing. 378 ; 11 Moore, C. P. 243 ; 4 L. J. (o.s.) C. P. 97.

As to a surrender of copyhold estate by feme covert, with her husband's privity and consent, but without his having actually joined in the act. *Taylor* v. *Philips*, 2 Ves. sen. 23.

Husband and wife surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs ; the husband afterwards released his equity of redemption to the mortgagee ; the mortgagee entered into the possession, and the husband afterwards died :—Held, that the wife was entitled to redeem. *Reeve* v. *Hicks*, 2 Sim. & S. 403 ; 4 L. J. (o.s.) Ch. 85.

A woman seised of copyholds executed a surrender, jointly with her husband, to such uses as her husband should appoint, and in default of appointment, to him in fee, but no admittance was entered. The husband then executed a conveyance of the copyholds to a purchaser, but still there was no admittance. The plaintiff, who claimed under the purchaser, filed a bill to restrain an action of ejectment by the copyhold heir of the wife, and to compel a surrender to complete his title :—Held, that the husband had no power to make perfect the title which he, as a volunteer, took imperfectly, and no person claiming under him could ask that his defective title should be made complete ; and the bill was dismissed. *Sowerby* v. *Gutteridge*, 18 L. J., Ch. 9.

—— **Freebench.**]—A surrender by a wife of a copyholder with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, is effectual to bar her right of freebench, if any such existed by special custom, although, at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises. *Wood* v. *Lambirth*, 1 Ph. 8 ; 5 Jur. 741.

Freebench can be barred by a mere devise without a surrender to the use of the will. *Lacey* v. *Hill*, 44 L. J., Ch. 215 ; L. R. 19 Eq. 346 ; 32 L. T. 48 ; 23 W. R. 285.

—— **Assent of Husband.**]—A custom for a feme covert to surrender her copyhold lands, without the assent of her husband, is bad. *Stevens* d. *Wise* v. *Tyrrell*, 2 Wils. K. B. 1.

A custom in a manor required that the consent of the husband to a surrender by his wife should

be expressed in the surrender and admission: a surrender was made by the wife at a general court, and the husband was present at that court, but in the surrender his consent was not expressed:—Held, that the surrender was inoperative. *Doe* d. *Shelton* v. *Shelton*, 4 N. & M. 857; 3 A. & E. 265; 1 H. & W. 287; 4 L. J., K. B. 167.

Copyhold property may be conveyed by a married woman without the concurrence of her husband, under certain circumstances, notwithstanding the proviso in the 3 & 4 Will. 4, c. 74, s. 77, as to copyholds. *Shirley, Ex parte*, 5 Bing. (N.C.) 226; 7 D. P. C. 258; 3 Jur. 125.

—— **Infant Deputy Steward.**]—A surrender by husband and wife of her copyhold estate, taken out of court by a deputy steward who was under age, and by whom the wife was separately examined, is valid, the infancy of the deputy steward forming no ground of objection. *Eddleston* v. *Collins*, 3 De G., M. & G. 1; 22 L. J., Ch. 480; 17 Jur. 331; 1 W. R. 169.

By Clerk of Castle.]—A castle, being parcel of a manor, a custom of the manor for the clerk of the castle, who was appointed by the lord, to take surrenders of copyholds in the castle concurrently with the stewards of the manor, is a legal custom. *Doe* d. *Stillwell* v. *Mellish*, or *Mellersh*, 1 N. & P. 30; 5 A. & E. 540; 2 H. & W. 341; 6 L. J., K. B. 41.

To Use of Will out of Court.]—A surrender out of court to the use of his will, made by the surrenderee of a copyhold before his admittance, is absolutely void and of no effect, and cannot be made good by his subsequent admittance. *Doe* d. *Tofield* v. *Tofield*, 11 East, 246; 10 R. R. 496.

Surrender to Trusts.]—In the absence of any special custom to that effect, the lord cannot be compelled to take a surrender by deed burdened with trusts. *Flack* v. *Downing College, Cambridge*, 13 C. B. 945; 1 C. L. R. 692; 22 L. J., C. P. 229; 17 Jur. 697; 1 W. R. 453.

There may be an immemorial custom in a manor to surrender lands in trust. *Snook* v. *Mattock*, 5 A. & E. 239; 6 N. & M. 783; 5 L. J., K. B. 206.

Private Act as to Trusts.]—Copyholds were surrendered to the use of a will whereby they were devised to trustees for sixty years, with a proviso for cesser, and subject thereto to B. for life, remainder to his first son in tail. On the death of the testator the trustees were admitted and a fine was paid: the trusts of the term became satisfied. By a private act new trustees therein named were empowered to sell the copyholds, discharged from the limitations of the will, and by any surrender by them made, according to the custom of the manor, and in the same manner as if they were the copyhold tenants, to surrender them to the use of the purchaser in fee. No estate was given to the new trustees by the act; it contained a clause saving the rights of all persons except those interested under the will. The new trustees sold the copyholds, and tendered a surrender to the steward, which was refused, on the grounds that they must first be admitted tenants of the manor, and that the estate tail could only be barred by a surrender, on which, by the custom of the manor, a fine was payable to the lord:—Held, that inasmuch as under 3 & 4 Will. 4, c. 74, s. 50, the tenant for life and remainderman in tail might, by one surrender, bar the entail and convey to a purchaser, and they had already been admitted by the operation of the admittance of the original trustees, the lord was not prejudiced by the private act substituting the new trustees as surrenderors, in lieu of the tenant for life and remainderman in tail, and was therefore bound to accept their surrender. *Reg.* v. *Weedon Beck Manor*, 13 Q. B. 808; 18 L. J., Q. B. 289; 13 Jur. 1121. And see *Dixon* v. *Wilkinson*, 1 W. R. 513.

An act incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands; it authorized persons to "contract for, sell, and convey their lands," gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying, and enacted that all such contracts, agreements, sales, conveyances, and assurances should be valid to all intents, &c. S., a tenant of copyhold land, a portion of which was wanted for the canal, sold it to the company, and executed a conveyance according to the form given by the act. On the death of S., the lord made a proclamation for his heir to come in and be admitted. No one appearing, the lord seized the land quousque. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land (a corporation not being entitled to be admitted). He then interfered to stop the navigation. The canal proprietors filed a bill against him, praying that the customary heir of S., or such other person as the plaintiffs might appoint, might be admitted to the copyholds, the plaintiffs undertaking to pay the fine and fees upon such admission; and further praying for a perpetual injunction. The Vice-Chancellor made a decree, that the customary heir of S. (who had been made a party to the suit) should be admitted tenant, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and an injunction was granted as prayed:—Held, that the decree of the Vice-Chancellor was right. *Dimes* v. *Grand Junction Canal Co.*, 3 H. L. Cas. 794; 17 Jur. 73.

Three Years' Term—Waiver.]—By the written customs of a manor (confirmed by an act), every person to whose use lands are surrendered ought to come within three years after the surrender is presented, and be admitted:—Held, that this custom was only for the benefit of the lord, who might waive it, and grant a valid admittance after the expiration of the three years. *Doe* d. *Warwick* v. *Coombs* or *Combes*, 6 Q. B. 535; 14 L. J., Q. B. 37; 8 Jur. 1166.

Under Power of Attorney — Authority.] — Where copyholds are surrendered by attorney, and the attorney exceeds his power, the admittance is cut down to the limits of the surrender authorised by the power. *Carter* v. *Carter*, 3 K. & J. 617; 27 L. J., Ch. 74.

A power of attorney by husband and wife, severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands, is a nullity. *Graham* v. *Jackson*, 6 Q. B. 811; 14 L. J., Q. B. 129; 9 Jur. 275.

The death of the wife is a revocation of such

a power, and a surrender subsequently made by the attorney is inoperative and void. *Ib.*

Purchaser of copyhold not obliged to accept of surrender by letter of attorney. A custom that it must be in person is not contrary to law. *Mitchel* v. *Neal*, 2 Ves. sen. 679.

Upon sale in court of copyhold, vendor coming for aid is compelled to surrender in person, if it can be done conveniently. *Noel* v. *Weston*, 6 Madd. 50; 22 R. R. 235.

—— **Evidence of.**]—A court-roll, stating that a surrender was by power of attorney, would be secondary evidence of such power of attorney, if the same cannot be found after a sufficient search. *Doe* d. *Counsell* v. *Caperton*, 9 Car. & P. 112.

The steward of a manor proved, that, where a surrender was by a power of attorney, the practice was, to keep the power of attorney within the court-rolls. The power in question, which was for a surrender in 1814, could not be found either with the court-roll or anywhere in the office in which the court-rolls had been kept ever since 1814, both by the present steward and his predecessor, who was steward in 1814:—Held, sufficient to let in secondary evidence. *Ib.*

Implied Admittance.]—Admittance to copyholds may take place by implication, though what is done is done out of court and the tenant's name is not placed on the rolls of the manor. *Ecclesiastical Commissioners* v. *Parr*, 63 L. J., Q. B. 784; [1894] 2 Q. B. 420; 9 R. 542; 71 L. T. 65; 42 W. R. 561—C. A.

e. Necessity of.

After Proclamations.]—If copyholders do not come in to be admitted, after proclamations, on so many court days, the lord may seize their lands. *Clayton* v. *Cookes*, 2 Atk. 449.

Two Proclamations — Failure to be admitted — Presumed Enfranchisement.] — The right of a lord of a manor to seize quousque does not accrue until after three proclamations to the tenant to come in and be admitted, or until after the latter has refused; but such refusal must be deliberate, and not a mere failure to be admitted. Consequently where a tenant came in, but was not admitted through some defect in his title, the right did not accrue to the lord. Until such right accrues the Statute of Limitations does not run against the lord. *Ecclesiastical Commissioners* v. *Parr* ([1894] 2 Q. B. 420), applied and explained. *Beighton* v. *Beighton*, 64 L. J., Ch. 796; 13 R. 743; 73 L. T. 86; 43 W. R. 685.

Remainders.]—Where the reversion in fee of a copyhold, expectant on a life estate, vests by devise in the tenant for life, who has been admitted as tenant for life, the life estate is merged, and another admittance in respect of the estate devised is necessary. *Doe* d. *Winder* v. *Lawes*, 2 N. & P. 195; 7 A. & E. 195; W. W. & D. 484; 7 L. J., Q. B. 97.

The admittance of the particular tenant of a copyhold is an admittance of the remainderman. *Church* v. *Mundy*, 12 Ves. 426.

If tenant for life, remainders over, is admitted, it holds to all remainders without new admission fee. *Barnes* v. *Cooke*, 3 Lev. 308.

If wife tenant for term, dies before expiration, husband continues in without new admission or fine. *Ib.*

A testator devised a copyhold estate, of which he was seised in fee, to his wife for life; and after her decease he directed his executors to sell the estate and divide the proceeds. The widow was admitted for life, and after her decease the executors sold the estate and executed a bargain and sale to the purchaser. The purchaser made his will in 1837, before he had been admitted tenant of the copyhold estate, and devised it to his wife. He was subsequently admitted to the copyhold estate and died:—Held, that the admission of the wife of the first testator enured for the benefit of the purchaser under the executors; that the customary heir of the purchaser took no estate in the copyholds, but that they passed to the wife as devisee. *Seaman* v. *Woods*, 24 Beav. 372; 27 L. J., Ch. 538; 4 Jur. (N.S.) 725.

Where the lord, by copy of court-roll, granted to A. the reversion of certain premises then in his tenure, to have and to hold to B. for his life, immediately after the death of A.:—Held, that B. might, on the death of A., maintain an ejectment, although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance. *Roe* d. *Cosh* v *Loveless*, 2 B. & Ald. 453; 21 R. R. 352.

A., who held lands of a manor, devised them to three trustees and their heirs to the use of B. for life, with remainders over. After A.'s death B. was admitted and enjoyed the lands during his life. He died, having by his will, according to the custom of the manor, nominated his successor, who was a stranger. On a bill by the remaindermen under A.'s will, claiming that the power of nominating a successor was vested in B. by virtue of the will, and that therefore it must be exercised by him in reference to the limitations of the will, and not in favour of a stranger:—Held, that B. was customary tenant under the will, and also a trustee for the purposes of the will, and that every right which he had acquired by admission on the court-rolls was, beyond his own life estate, held for the benefit of the remaindermen. *Allen* v. *Bewsey*, 7 Ch. D. 453; 37 L. T. 688—C. A.

Trustees after Admittance of Remainderman.]—A copyholder in fee devised his estate to trustees for a term of years, and subject to the term, to A. in fee. A., who was an infant, was admitted, and paid a full fine. After his admittance the lord made proclamations, and the trustees refusing to be admitted he seized quousque:—Held, that, as by the form of the admittance A. was admitted in presenti and not merely to the remainder, the lord had both a tenant on the roll and a full fine, and therefore could not force the trustees to come in and be admitted. *Everingham* v. *Ivatt*, 42 L. J., Q. B. 203; L. R. 8 Q. B. 388; 28 L. T. 672; 21 W. R. 952—Ex. Ch.

Settlement—Married Woman—Declaration of Trust by Deed acknowledged — Validity of, against Heir — "Disposition."]—A voluntary declaration of trust of copyholds made by a married woman, the tenant on the rolls, by deed acknowledged, with the concurrence of her husband, is a valid "disposition" in equity of the copyholds under s. 77 of the Fines and Recoveries Act, and the customary heir of the married woman will be bound by the trusts. *Pride* v. *Bubb* (41 L. J., Ch. 105; L. R. 7 Ch. 64) applied. *Carter* v. *Carter*, 65 L. J., Ch. 86;

[1896] 1 Ch. 62; 13 R. 824; 73 L. T. 437; 44 W. R. 73.

Previous Surrender Presumed.]—Semble, after long enjoyment under an admittance to a copyhold, a previous surrender (not entered on the rolls), may be presumed. *Wilson* v. *Allen*, 1 J. & W. 611: 21 R. R. 255. And see *Cookes* v. *Hellier*, 1 Ves. sen. 234.

After forty-five years' possession, a perpetual injunction was granted. *Knight* v. *Adamson*, 2 Free. C. C. 106.

Devisees.]—The devisee of a copyhold estate has no title until admittance, and such a right cannot be forfeited to the lord, but continues in the heirs of the surrenderor. —— d. *Jefferies* v. ——, 1 Ken. 110.

Devise of a copyhold duly surrendered to A. and his heirs in trust for B. and his heirs; upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him, and his bill was dismissed without costs. *Williams* v. *Lonsdale* (*Lord*), 3 Ves. 752.

A surrenderee (for a valuable consideration) of a copyhold tenement, who had never been admitted thereto, devised it to A.:—Held, that A., although admitted, gained no legal title to the premises. *Matthew* v. *Osborne*, 13 C. B. 919; 22 L. J., C. P. 241; 17 Jur. 696; 1 W. R. 151.

Mortgage.]—Till admittance of the surrenderee of a copyhold upon mortgage, the surrenderor continues the legal tenant, and he could not, before 7 Will. 4 & 1 Vict. c. 26, s. 3, devise the equity of redemption, even after the surrender made, without a new surrender to the use of his will; but the legal estate, which, on his death, descended to his heir-at-law, carried the equity of redemption also to the heir in respect of the mortgage. *Doe* d. *Shewen* v. *Wroot*, 5 East, 132; 1 Smith, 363. S. P., *Kenebel* v. *Scrafton*, 8 Ves. 30.

An equity of redemption in copyholds passed by will without surrender. *M'Namara* v. *Jones*, 1 Bro. C. C. 481.

A trust or equity of redemption of a copyhold could not pass by a will, unless attested by three witnesses. *Wagstaffe* v. *Wagstaffe*, 2 P. Wms. 258. *Appleyard* v. *Wood*, Select Ca. Ch. 42.

A mortgagee of copyhold premises, who has not been admitted by the lord of the manor, cannot maintain ejectment against the tenant of the mortgagor, unless the relation of landlord and tenant has been established aliunde. *Rayson* v. *Adcock*, 9 Jur. (N.S.) 800; 7 L. T. 747.

A., being owner of a copyhold, made a conditional surrender of it, in 1826, to W., to secure money lent. In 1832, A. sold the copyhold to G., and made a surrender of it to him absolutely. In 1833, G. was admitted tenant; and, in 1834, W. was also admitted tenant:—Held, that, on ejectment brought by W., he was entitled to recover. *Doe* d. *Wheeler* v. *Gibbons*, 7 Car. & P. 161.

As to the right of the surrenderee under a mortgage deed containing a power of sale to enter for the purposes of such sale without admittance. See *Watson* v. *Waltham*, 2 A. & E. 485; 4 N. & M. 537; 4 L. J., K. B. 98.

Where a surrender is made referring to a deed which states that the surrender was made as a security for money, and provides, that, after twelve months more the surrenderee may sell, and pay himself, such deed and surrender are a mortgage, and the court will compel the lord, upon the death of the surrenderor, to admit his heirs on payment of the fines, according to the custom of the manor. *Weaver* v. *Kinglake*, 9 L. J., (O.S.) Ch. 20.

Copyholder in fee makes a conditional surrender for securing a sum of money at the end of six months. Money not being paid, and mortgagee willing to continue his money, they desire the lord that the old surrender might be taken up, and a new one made for six months longer; but the lord insisted the mortgagee should come in and be admitted, and pay a fine of two years' value. Equity will not relieve against the lord. *Tredway* v *Fotherley*, 2 Vern. 367.

The omission of the assignees of an insolvent debtor to sell or take possession of the copyhold estate of the insolvent, or to cause an entry of the assignment or copy of the appointment of the assignees to be made on the court rolls, or to possess themselves of the copies of court roll for a period of nineteen years after the insolvency, whereby the insolvent is enabled to retain the property and hold himself out as the owner, and mortgage it for value to a person who had no actual knowledge of the insolvency, does not constitute an equitable ground for giving such mortgagee a charge in priority to the title of the assignees. *Cole* v. *Coles*, 6 Hare, 517.

Copyhold mortgaged in fee, by lease and release as freehold, the customary heir is bound by a covenant for further assurance; but during his infancy, the court refused to foreclose, and would go no further than directing the account, and that in default of payment the plaintiffs should be let into possession and hold and enjoy till the heir should attain twenty-one, at which time he should surrender, and a day was given to show cause against the decree. *Spencer* v. *Boyes*, 4 Ves. 370; 4 R. R. 215.

—— **Deposit of Copies of Court Roll.**]—An equitable lien or mortgage may be created of copyholds by the mere deposit of the copy of court roll. *Whitbread* v. *Jordan*, 1 Y. & C. 303; 4 L. J., Ex. Eq. 38.

And see *Lewis* v. *John*, 9 Sim. 366; C. P. Cooper, 8; 7 L. J., Ch. 242; *Warner*, *Ex parte*, 19 Ves. 202.

It is, therefore, not sufficient for the protection of a purchaser or mortgagee of copyholds, that he should search the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title, and copy of his admission to the copyhold premises; and if the latter document is not forthcoming its non-production must be reasonably accounted for. *Ib.*

—— **Costs of Admission.**]—B., tenant in common of copyholds, joins in deposit of deeds on an equitable mortgage, and a foreclosure bill is dismissed as against him. Upon the question of costs of admission:—Held, that a surrender of copyholds stands on the same footing as a conveyance of freeholds, and a decree cannot be varied as to costs of admission. *Pryce* v. *Bury*, 2 Drew. 41; 2 Eq. Rep. 8; 17 Jur. 1173; 2 W. R. 87.

—— **Right to Tack.**]—Since 3 & 4 Will. 4, c. 104, a mortgagee of copyholds may tack a simple contract debt to his mortgage debt, as against the customary heir or devisee, but not as against specialty creditors. *Bolfe* v. *Chester*, 20 Beav. 610; 25 L. J., Ch. 244.

Where copyhold is twice mortgaged, by surrender before the same steward, a third mortgage to the steward, who buys in the first, shall not postpone the second. *Brothers* v. *Bence*, Fitzg. 118.

A. and B. (A. owning one-third of a freehold estate and a copyhold estate, and B. the other two-thirds of the freehold estate) mortgaged the entire freehold estate and the copyhold to C., to secure 6,000*l.* A. subsequently mortgaged his one-third to D. to secure 12,000*l.*; and B., subsequently to that, mortgaged his two-thirds to C. to secure 2,000*l.* C. filed his bill to foreclose:—Held, that he was not entitled to tack his second mortgage; but that upon D. paying off plaintiff's first mortgage, the entire estate should be conveyed to him, which he should hold both for that which he paid plaintiff and his own mortgage for 12,000*l.*, D. thereby being allowed to tack, although C., being plaintiff, was not allowed to tack under precisely similar circumstances. *Thorneycroft* v. *Crockett*, 7 Jur. 712. Affirmed 2 H. L. Cas. 239.

—— **Defective Surrender made Good.**]—A. mortgages copyhold lands to B., but the surrender not being presented within the time limited by the custom became void. Afterwards A. becomes bankrupt. On a bill by B. against the assignees, this defective surrender was made good. *Taylor* v. *Wheeler*, 2 Vern. 565. And see *Finch* v. *Winchelsea*, 1 P. Wms. 280.

Defective surrender for securing a sum of money which was become void by not being presented in due time, made good against subsequent purchasers with notice. *Blenkarne* v. *Jennens*, 2 Bro. P. C. 278. S. P.. *Jennings* v. *Moore*, 2 Vern. 609.

Where, by the custom of a manor, no time is limited for presenting surrenders, an incumbrancer whose security had not been enrolled until long after a subsequent incumbrance, will not be postponed, although the subsequent incumbrancer had no notice of the prior charge. *Horlock* v. *Priestley*, 2 Sim. 73; 29 R. R. 58.

—— **Locke King's Act.**]—The Act 17 & 18 Vict. c. 113, for rendering mortgaged estates primarily liable for payment of the mortgage debt in exoneration of the personal and other estates of the deceased mortgagor applies to copyholds. *Piper* v. *Piper*, 1 J. & H. 91; 29 L. J., Ch. 719; 6 Jur. (N.S.) 1026; 2 L. T. 458; 8 W. R. 543.

Partition.]—A. & B., joint tenants of a copyhold, made partition by parol without the assent of the lord, and afterwards occupied in severalty. A. surrendered to C. by general words; C. was not entitled to be admitted to the parcels occupied by A. in severalty. *Rex* v. *Southwood*, 5 M. & Ry. 414. And see *Lee, Ex parte*, 5 L. J. (O.S.) K. B. 290.

Appointees.]—A. surrenders a copyhold to such uses as B. shall appoint, and in default of it and until appointment, to B. in fee; B. appoints to C. The lord is bound to admit C. without requiring the previous admission of B. *Rex* v. *Oundle* (*Manor*), 3 N. & M. 484; 1 A. & E. 283; 3 L. J., K. B. 117.

Donees of Power of Sale.]—Where by the custom of a manor one of three donees of a power of sale is admitted as tenant until the execution of the power of sale by them, if the lands so given by the power are purchased by the donee so admitted, he cannot call upon the lord to admit his surrender until he has been himself admitted as bargainee of the land. *Reg.* v. *Copthall*, 1 W. R. 306.

Surrender for Sale to Trustees.]—According to the custom of a manor, when a power was given by the will of a copyhold tenant to his executors to sell lands, the lord, after the death of the tenant had been presented, and after three proclamations, might seize the same, until admission of the customary heir or some other person claiming to be admitted; and the heir or such other person might be admitted to hold the same for the purposes declared by and subject to the powers contained in the will; and upon such admission, the lord was entitled to the same fine as upon an admittance to a fee-simple; and when, after such admission, the executors appointed the lands to a purchaser, and the appointment was enrolled, the purchaser was entitled to be admitted, whether before such enrolment the heir or such other person had or had not been admitted:—Held, that although the person admitted to the lands devised before the execution of the power was himself the heir, and had paid the same fine as upon an admittance to a fee-simple, and although the power was afterwards executed in his favour, he must be admitted again, and pay a fine before he could surrender the lands, inasmuch as the execution of the power destroyed the effect of the first admittance, and caused a vacancy on the roll. *Reg.* v. *Corbett*, 1 El. & Bl. 836; 22 L. J., Q. B. 335; 17 Jur. 1024; 1 W. R. 306.

Where a copyholder surrendered to the use of his will, and thereby ordered two persons to sell and apply the money for the purposes of the will: Held, that they might sell without being admitted; and that the lord was bound to admit the vendee, upon the payment of only one fine. *Holder* d. *Sulyard* v. *Preston*, 2 Wils. K. B. 400.

A testator devised copyholds to such uses as A. and B., or the survivor of them, his executors or administrators, should appoint, and subject thereto, to the use of A. and B., their heirs and assigns, upon certain trusts; and he directed his trustees to sell the copyholds as soon as conveniently might be:—Held, that the trustees could make a good title to a purchaser without being admitted. *Glass* v. *Richardson*, 2 De G., M. & G. 658; 22 L. J., Ch. 105; 17 Jur. 926.

A copyholder by will authorised his executor to sell the copyholds and to convey the same to the purchaser:—Held, that the executor had power to sell and to convey to the purchaser, who thereupon was entitled to be admitted, and that it was not necessary that the trustee conveying should be previously admitted. *Reg.* v. *Wilson*, 3 B. & S. 201; 32 L. J., Q. B. 9; 9 Jur. (N.S.) 439; 7 L. T. 326; 11 W. R. 70.

A copyhold was devised to trustees for certain persons, who, after the testatrix's death, sold it, and the purchaser was admitted on the surrender of the customary heir:—Held, that although the purchaser had thus obtained both the legal and equitable title, still, to make a good title, there must be a release from the trustees of their bare right to be admitted. *Steele* v. *Waller*, 28 Beav. 466; 6 Jur. (N.S.) 1004; 3 L. T. 74.

Heir-at-law.]—An heir-at-law may devise a copyhold descending to him, although he has neither been admitted to it nor has paid the lord's fine upon the descent. *Doe* d. *Perry* v.

Wilson, 6 N. & M. 809 ; 5 A. & E. 321. S. P., *King* v. *Turner*, 1 Myl. & K. 456 ; 2 L. J., Ch. 188. And see *Right* d. *Taylor* v. *Banks*, 3 B. & Ad. 664 ; 1 L. J., K. B. 254.

So he may devise his reversion without admittance. *Doe* d. *Winder* v. *Lawes*, 2 N. & P. 195 ; 7 A. & E. 195 ; W. W. & D. 484 ; 7 L. J., Q. B. 97.

A testator, who was seised of a copyhold, died in 1808, leaving T. his heir-at-law and devisee of the fee in reversion. T. died intestate, never having entered or been admitted to the copyhold, nor having dealt with the reversion in any way :—Held, that the heir-at-law might maintain ejectment without admittance. *Doe* d. *Taylor* v. *Crisp*, 1 P. & D. 37 ; 8 A. & E. 779 ; 8 L. J., Q. B. 41.

A mandamus to the steward of a manor, to admit a copyholder claiming by descent, refused, on the ground of descent giving a complete title without admittance. *Rex* v. *Rennet*, 2 Term Rep. 128.

Heir-at-law of J., who was the last of three lives named in grant of copyhold, brought bill against lord to be admitted for his own life, and the lives of two other persons whom he should nominate, alleging the custom of manor to be so ; defendant denied the custom by answer, and insisted he was not bound to renew. Issue was directed as to the obligation to renew, but on appeal, order was reversed, and bill dismissed. *Grafton* (*Duke*) v. *Horton*, 2 Bro. P. C. 284.

In copyholds the lord is a trustee for the heir, and is bound to admit him ; though the lord be the original grantor, yet he is only in virtue of the trust reposed in him by the law. *Mason* v. *Day*, Gilb. Eq. Rep. 77.

—— **Omission of "Heirs."**]—Where copyholds descendible from ancestor to heir, according to the custom, are held for the joint lives of the lord and the tenant for the time being, and the copyholder is admitted to hold to him (not saying "and his heirs") for the joint lives of himself and the lord, according to the custom, the heir of the copyholder cannot maintain ejectment before admittance. *Doe* d. *Dand* v. *Thompson*, 13 Q. B. 670 ; 18 L. J., Q. B. 326.

Stamped Admittance.]—Estates of inheritance were held at the will of the lord, according to the custom of the manor, subject to fines on the death of the lord or tenant, and on alienation, and to other dues. The tenant might alien by customary bargain and sale, with the licence of the lord indorsed. Courts were held twice a year, at which new tenants on death or alienation were bound to appear, and have their names entered on a roll, paying a shilling to the steward. On default made, the lord might seize quousque :—Held, that in cases of alienation, the estates passed by the conveyance licensed by the lord ; and, where the lands descended, the heir became entitled as in case of freehold ; and consequently, that a person taking as heir was not bound, on enrolment, to receive a stamped admittance from the steward. *Doe* d. *Carlisle* (*Earl*) v. *Towns*, 2 B. & Ad. 585 ; 9 L. J. (o.s.) K. B. 278.

Executor of Termor.]—If a copyhold is granted for a term of years, the executor of the termor is obliged to be admitted, and the lord is entitled to a fine upon such admittance. *Bath* (*Earl*) v. *Abney*, 1 Burr. 206 ; 1 Ken. 471 ; Dick. 263.

Disclaimer.]—A copyhold may be disclaimed by parol or by other matters without deed. *Rex* v. *Wilson*, 5 M. & Ry. 140 ; 10 B. & C. 80 ; 8 L. J. (o.s.) K. B. 101.

On a devise of copyhold surrendered to the use of the will, the estate descends upon the heir, subject to the contingency of being divested by the admittance of the devisee. *Ib.*

No disclaimer by the devisee, therefore, is necessary to vest the estate in the heir. *Ib.*

Where several Claimants.]—Where there are two claimants by different titles to a copyhold tenement, the lord must admit both. *Rex* v. *Hexham* (*Manor*), 1 N. & P. 53 ; 5 A. & E. 559 ; 2 H. & W. 397 ; 6 L. J., K. B. 33 ; *Rex* v. *Coggan*, 6 East, 431 ; 2 Smith, 417.

The lord is bound to admit the customary heir of a copyholder in fee, although there is a surrender to the use of the will, and a devise by the surrenderor, there being no claim of admittance on the part of the devisee. *Rex* v. *Wilson*, 5 M. & Ry. 143 ; 10 B. & C. 80 ; 8 L. J. (o.s.) K. B. 101. See *Doe* d. *Perry* v. *Wilson*, 6 N. & M. 809 ; 5 A. & E. 321.

So, although it appears (upon the return to a mandamus) that the non-claim of admittance on the part of the devisee is the result of a contrivance between him and the customary heir, to deprive the lord of the fine which would be payable upon the admittance of the devisee. *Ib.*

Surrender of Chambers in New Inn.]—A surrender of chambers in New Inn, to the treasurer and ancients of the society, made with their assent, to the intent that they might grant the chambers to a purchaser, passes the estate to such purchaser before admission ; admission is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only for the purpose of signifying the assent of the society that a grantee should become a member of the inn. *Doe* d. *Worry* v. *Miller*, 1 Term Rep. 393.

f. Enforcing.

By Mandamus—Parties.]—A mandamus will not be granted commanding the steward of a manor to accept a surrender into the hands of the lord, according to the custom, unless the lord is made a party to the rule. *Reg* v. *Evans*, 1 Q. B. 355, n. *S. C.*, nom. *Reg* v. *Witchford* (*Steward*), 7 D. P. C. 709 ; 8 L. J., Q. B. 251 ; 3 Jur. 533. And see *Anon.* 2 L. J. (o.s.) K. B. 93.

A mandamus to admit to a copyhold tenement must be directed to the lord as well as to the steward ; not to the steward only. *Reg* v. *Powell*, 4 P. & D. 719 ; 1 Q. B. 352. *S. C.*, nom. *Reg* v. *Richmond* (*Steward*), 10 L. J., Q. B. 148 ; 5 Jur. 605.

A mandamus to admit will not issue to the steward of a manor belonging to the crown, though he may have received his appointment from the commissioners of woods and forests under 10 Geo. 4, c. 50, s. 14. *Ib.*

A mandamus to admit must be directed to the lord as well as to the steward, in the case of a crown manor, the management of which only is vested in the commissioners of woods and forests, under the 10 Geo. 4, c. 50, and the profits of which are applied under 1 & 2 Vict. c. 2, to the public service ; and therefore a peremptory writ cannot issue. The remedy in such a case for a refusal to admit is by bill in chancery. *Ib.*

A mandamus lies against a steward for not admitting a devisee, under the pretence that the testator was insane. *Anon.*, Lofft. 390.

Where a bill is brought for surrender of copyhold estate for lives, the lord must be made a party, because when the surrender is made, the estate is in the lord, and he is under no obligation to re-grant it. Contra in case of copyholders of inheritance; there the lord need not be a party. *Anon.*, 6 Vin. Abr. 293. S. P., *Anon.*, 2 Vin. 239, pl. 5.

On bill to compel performance of covenant to surrender to A. in trust, A. must be a party. *Cope* v. *Parry*, 2 J. & W. 538.

No general decree can be made for all copyholders, unless by agreement between lord and copyholders. *Anon.*, Cary, 27.

Claim Barred—Lapse of Time.]—Where it is clear that by 3 & 4 Will. 4, c. 27, a claimant's title to a copyhold is barred by lapse of time, the court will not compel the lord, by mandamus, to admit him. *Rex* v. *Agarsdley*, 5 D. P. C. 19. S. P., *Phillips, Ex parte*, 1 H. & W. 660: *Walters* v. *Webb*, 39 L. J., Ch. 677; L. R. 5 Ch. 531; 18 W. R. 587.

Heirship.]—Where a party claims to be admitted, as heir by the custom, he is entitled to a mandamus directing the lord to admit him. *Reg.* v. *Ham* (*Manor*), 8 L. J., Q. B. 265.

—— **Nature of Return.**]—Where a person, claiming as heir-at-law of a tenant last seised of a copyhold, was refused admission by the lord, and a mandamus issued, but the lord in his return thereto did not deny the heirship, except argumentatively, the court ordered a peremptory mandamus. *Rex* v. *Brewers' Co.*, 4 D. & R. 492; 3 B. & C. 172; 27 R. R. 318.

The court will grant a mandamus to compel the lord to admit a person who claims as heir of a deceased copyholder, if he has made out a primâ facie case of title by descent according to the custom of the manor, even though the lord suggests that the tenement has escheated to himself, for want of an heir. *Reg.* v. *Dendy*, 1 B. C. C. 111; 22 L. J., Q. B. 39.

Mandamus to a lord to admit P. to copyholds alleged to have descended to P. as the heiress-at-law of T., her maternal uncle, who died seised. Return, that the copyholds did not descend to P. as the heiress-at-law of T., and that P. was a stranger in blood to T., and not entitled to the estates whereof T. died seised. Pleas—first, that the copyholds did descend to P. as the heiress-at-law of T.; secondly, that P. was not a stranger in blood to T.; and, thirdly, that P. was on the death of T. entitled to the estates whereof T. died seised:—Held, that the second plea traversed an immaterial allegation in the return, and was therefore bad. *Reg.* v. *Dendy*, 1 El. & Bl. 829; 22 L. J., Q. B. 247; 17 Jur. 970.

The court refused to grant a mandamus to admit a copyholder claiming as heir of his mother, where it did not appear that he was her heir-at-law, or that he was heir-at-law according to the custom of the manor. *Reg.* v. *Caius College, Cambridge University*, 9 Jur. 411.

A mandamus to the steward, to admit a copyholder claiming by descent, refused, on the ground that descent gave a complete title without admittance. *Rex* v. *Rennett*, 2 Term Rep. 128.

—— **Where Devise—Duty of Trustees.**]—A person, having been admitted to copyhold, devised them in fee to two trustees for the benefit of his family, whom he also appointed guardians to his infant son, his customary heir. The trustees proved the will, but did not claim themselves to be admitted, but called upon the lord to admit the infant heir by his guardians. The lord refused on account of the devise. If the two devisees had been admitted, the lord would have been entitled to a double fine instead of a single fine on the admittance of the heir. The court refused a mandamus to compel the lord to admit the heir, on the ground, that it was a matter of discretion, and they would not grant the writ, as the effect of granting it would be to enable the trustees to evade payment of a double fine, and to commit a breach of trust by not acquiring themselves the legal estate. *Reg.* v. *Garland*, 39 L. J., Q. B. 86; L. R. 5 Q. B. 269; 22 L. T. 160; 18 W. R. 429.

Avoiding Fine.]—Where, by the custom of a manor, persons not being previously customary tenants, or not dwelling in the manor, purchasing by surrender customary lands within the manor, were liable to pay a larger fine to the lord than tenants or inhabitants; and a person, not being a tenant or inhabitant, had purchased the equity of redemption in a customary estate, and in order to save the larger fine due in respect thereof, had subsequently become the purchaser of a smaller estate; the court granted a mandamus to the lord and steward to admit him to the latter; and as the return thereto did not allege any fraud in the transaction, the mandamus was made peremptory, although the effect of admittance to the smaller estate would be to defeat the lord's claim to the fine due upon the larger estate first purchased. *Rex* v. *Meer and Forton* (*Manors*), 2 D. & R. 824; 1 L. J. (o.s.) K. B. 184. *S. C.*, nom. *Rex* v. *Boughey*, 1 B. & C. 565; 25 R. R., 516.

A mandamus lies to the lord and steward, to admit one to a copyhold tenement who has a primâ facie legal title, in order to enable him to try his right; though equity has before refused to compel the lord to admit him for want of his shewing an equitable right to the property. But if there is a claim of a previous fine due to the lord in respect of the ancestor from whom the party claims, the rule will only be granted on payment of such fine or fines as shall be due. *Rex* v. *Coggan*, 6 East, 431; 2 Smith, 417; 8 R. R. 509.

A tenant in fee of copyholds devised them to A., B. and C., on certain trusts. A. demanded admittance. The steward refused admittance, except upon payment of a treble fine. The court, without deciding as to the amount of the fine, made absolute a rule for a mandamus commanding his admittance, the lord being bound to admit before payment of fine, and the right to fine accruing only by admittance. *Reg.* v. *Wellesley* (*Lord*), 2 El. & Bl. 924.

Person Appointed to Convey.]—Where a copyhold vested in a married woman was sold under a decree which ordered all proper parties to join, and she stated in writing that she would never surrender, a vesting order was made. *Rowley* v. *Adams*, 14 Beav. 130; 20 L. J., Ch. 436; 15 Jur. 1002.

Form of order appointing a new trustee of a copyhold estate, and appointing a person to complete the assurance of the estate to such new

trustee. *Hey's Will, In re*, 9 Hare, 221 ; 22 L. J., Ch. 248.

The court on a petition to appoint a new trustee under the Trustee Act, 1850, directed copyholds to vest in the trustees appointed by the court, without requiring the consent of the lord. *Fliteroft, In re*, 1 Jur. (N.S.) 418. And see *Boyce, In re*, 4 De G. J. & S. 210.

A., being tenant on the rolls of copyholds held in trust, devised them to B., who disclaimed. The court having made an order, under the Trustee Act, in the absence of the lord of the manor, vesting the copyholds in a new trustee :—Held, that the order was regular in form, and that it did not prejudice the right of the lord. *Paterson* v. *Paterson*, 35 Beav. 506 ; L. R. 2 Eq. 31 ; 35 L. J., Ch. 518 ; 12 Jur. (N.S.) 408 ; 14 L. T. 320 ; 14 W. R. 601.

An infant, customary heir to copyholds which were mortgaged, and which the court had ordered to be sold, was never admitted. The purchaser, the infant, and the mortgagee presented a petition praying that the copyholds might (the lord being satisfied as to his fines and dues in respect of the non-admittance of the infant) be vested in the purchaser. An order as prayed was made, but the registrar having objected to draw it up unless the consent of the lord were obtained :—Held, that such consent was necessary, and that the lord must either appear and consent, or give a certificate to that effect. *Cooper* v. *Jones*, 25 L. J., Ch. 240 ; 2 Jur. (N.S.) 59. And see *Howard, In re*, 3 W. R. 605 ; *Wise, In re*, 5 De G. & Sm. 415.

It is not necessary for the lord to appear in court to consent to a vesting order under the Trustee Act. *Ayles* v. *Cox*, 17 Beav. 584.

After a decree for the sale of an intestate's copyhold estate in lots, but before the sale, the infant heir of the intestate was admitted :—Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase money of the particular lot, and not out of the fund in court generally. *Ib.* And see *Bradley* v. *Muntin*, 16 Beav. 294.

A vendor covenanted to surrender copyholds to the purchaser, and the purchase money was paid. The vendor died before surrender. His customary heir was of unsound mind. The covenant contained no declaration that the vendor and his heirs would until surrender hold the premises in trust for the purchaser :—Held, that a person might be appointed under the Trustee Act, 1850, to convey to the purchaser, without a suit being instituted to have the heir declared a trustee. *Cuming, In re*, L. R. 5 Ch. 72 ; 21 L. T. 739 ; 18 W. R. 157.

A. covenanted to surrender copyholds to the use of B., and until surrender to stand seised of the copyholds "upon trust for, and to surrender same unto B," and then went out of the jurisdiction without making any surrender. Order made under Trustee Act, 1850, for the appointment of a person to surrender to B. *Collingwood's Trusts, In re*, 6 W. R. 536.

The Act 11 Geo. 4 & 1 Will. 4, c. 47, does not enable an infant devisee for life only to made an effectual surrender of copyholds to a purchaser so as to bar the contingent interests under the will of unborn persons. An order under s. 29 of the Trustee Act, 1850, is necessary. *Wood* v. *Beetlestone*, 1 K. & J. 213 ; 2 Eq. Rep. 238.

A mortgagor of copyholds having refused for twenty-eight days to make a surrender in accordance with his covenant, an order was made vesting the legal estate in the mortgagee, subject to the proviso for redemption. *Crowe, In re*, 41 L. J., Ch. 32 ; L. R. 13 Eq. 26.

The court will, by mandamus to the lord, give effect to an order of the Court of Chancery, appointing a person to convey copyholds under s. 20 of the Trustee Act, 1850. *Lane, In re*, 12 W. R. 710.

Where such an order has been made, the court will not look beyond it, but give effect to it according to its terms. *Ib.*

When a party, claiming to be heir-at-law of the last cestui que trust of a copyhold estate, petitioned the Court of Chancery under 11 Geo. 4 & 1 Will. 4, c. 60, who referred it to the Master to ascertain whether there was any heir-at-law of the last trustee, and, on the Master's report, made an order, stating that there was no such heir, and appointed G. to convey or surrender the legal estate to the petitioner, the Court of Queen's Bench refused to interfere by mandamus to compel the lord to accept a surrender from G., as the Court of Chancery had full jurisdiction, and was a fitter tribunal to investigate the matter. *Reg.* v. *Pitt*, 2 P. & D. 385 ; 10 A. & E. 272 ; 8 L. J., Q. B. 277 ; 3 Jur. 1028. Overruled by Trustee Act.

g. Evidence of.

Original Entries.]—A surrender of, and admittance to, a copyhold, may be proved by the original entries on the court-rolls, without shewing a copy stamped. *Doe* d. *Bennington* v. *Hall*, 16 East, 208.

Where a surrender of copyholds is made out of court by deed of surrender, the copy of the court-rolls is still evidence of the surrender, although 48 Geo. 3, c. 149, required that the deed of surrender, or a memorandum thereof, should be stamped, and not the copy of the court-roll, as in all other cases. *Doe* d. *Hawthorn* v. *Mee*, 1 N. & M. 424 ; 4 B. & Ad. 617 ; 2 L. J., K. B. 104.

The provisions of the 55 Geo. 3, c. 184, as to stamping copies of court-rolls, only apply to such copies as are given out by the steward. *Doe* d. *Burrows* v. *Freeman*, 12 M. & W. 844 ; 1 Car. & K. 386 ; 14 L. J., Ex. 142.

The court-rolls, containing a presentment of an admittance upon a surrender out of court, are primary evidence of the surrender as between surrenderor and surrenderee, without producing the original surrender, or inquiring into the sufficiency of the stamp upon it. *Doe* d. *Garrard* v. *Olley*, 12 A. & E. 481 ; 4 P. & D. 275 ; 9 L. J., Q. B. 379.

Draft Entry.]—A draft of the entry on the court-rolls of the surrender and presentment of a copyhold, is good evidence of the surrender and presentment, though it appears that the entry was never made on the rolls. *Doe* d. *Priestly* v. *Calloway*, 6 B. & C. 484 ; 9 D. & R. 518 ; 5 L. J. (O.S.) K. B. 188 ; 30 R. R. 398.

Parol evidence of the holding a manor court, and of the proceedings at it, is admissible. *Ib.*

Regularity of Court.]—In order to prove the admittance to a copyhold tenement, an entry was produced of an admittance which purported to be at a special court baron for the manor Evidence was given that customary tenant

attended the court :—Held, that the admission must be taken to be at a customary court baron, and therefore regular. *Doe* d. *Evans* v. *Walker*, 15 Q. B. 28 ; 19 L. J., Q. B. 293.

Existence of Manor.]—Copies of court-rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, are evidence of the existence of a manor, and of such property being within it, in an action by the surrenderee, in which his ownership is disputed. *Standen* v. *Chrismas*, 10 Q. B. 135 ; 16 L. J., Q. B. 265.

Signature of Deputy Steward.]—Copyhold rolls proved by a deputy steward, not signed by the steward, admitted, and a surrender out of court proved by entry upon such rolls. *Bridger* v. *Huett*, 2 F. & F. 35.

—— **Clerk.**]—In order to prove an admittance made in 1810, a book was produced by the steward, as containing the court-rolls. In this book was an entry, though not in the form of a court-roll, of the admittance of 1810, in the handwriting of the clerk of the then steward. The original draft of the entry in the handwriting of the clerk had been found and compared with the entry in the book, and corresponded, but the draft was not produced :—Held, that the entry in the book was good evidence of the admittance, and that it was not necessary to produce the original draft. *Doe* d. *Gutteridge* v. *Sowerby*, 7 C. B. (N.S.), 599 ; 29 L. J., C. P. 291 ; 6 Jur. (N.S.) 870 ; 2 L. T. 150 ; 8 W. R. 393.

Record.]—A record on the record-book of a manor, of admittance to a copyhold, reciting a surrender of the same copyhold to the use of a will, is admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrender being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll. *Rex* v. *Thruscross*, 1 A. & E. 126 ; 3 N. & M. 284.

Ownership of Waste.]—A series of admissions and surrenders to copyhold property (at one time waste of the manor) going back over 200 years, coupled with slight acts of ownership, is evidence upon which a jury may find a title to such property made out. *Parrott* v. *Watts*, 47 L. J., C. P. 79 ; 37 L. T. 755.

It is no misdirection in such a case to ask the jury whether the plaintiff has not made out his title, without telling them that he was bound to prove a grant from the crown. *Ib.*

To prove the identity of the property claimed with the piece of the waste of the manor mentioned in the deeds of surrender, after the vendor's death, evidence of what he said to the purchaser, when putting him into possession, is admissible. *Ib.*

And see *Att.-Gen.* v. *Tomline*, ante, col. 394 ; and *Reg.* v. *Woodham Walter Manor (Lord)*, ante, col. 405.

Termination of Interest.]—The determination of a copyhold interest may be shown without producing the copy of the court-roll. *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497.

2. LEASE.

By Copyholder—Licence.]—A copyholder demised for one year, and thence from year to year for the term of thirteen years more, if the lord would licence, and so as the same should not be liable to forfeiture :—Held, that the licence of the lord was a condition precedent to the lease of the further term of thirteen years, and the lord having given notice that he would not give such licence, the assignee of the lessor, to whom the premises were surrendered, was entitled to recover in ejectment against the tenant after six months' notice to quit ; although it appeared that such surrenderee was a trustee for the lord (the real purchaser), who had notice of the terms of the demise when he purchased, with an exception in the contract of purchase of all subsisting leases, and afterwards accepted quit-rent from the tenant, the consideration of these latter circumstances belonging to a court of equity. *Doe* d. *Nunn* v. *Luffkin*, 4 East, 221 ; 1 Smith, 90. And see *Luffkin* v. *Nunn*, 1 Bos. & P. (N.R.) 168.

A mandamus will not go to compel the lord to grant a licence to a copyholder to demise his copyhold land on an alleged custom, that the tenant may demise for three years without licence ; and that for licence to demise during a longer term, the lord should have a sum certain for every year of such term. *Reg.* v. *Hale*, 9 A. & E. 339 ; 1 P. & D. 293 ; 8 L. J., Q. B. 83.

Freebench.]—A lease for years by a copyholder, with the licence of the lord, where the widow, by custom, would be entitled to her freebench, if the copyholder died seised, defeats the widow of her freebench. *Salisbury* d. *Cooke* v. *Hurd*, Cowp. 481.

Freebench can be barred by a mere devise without a surrender to the use of the will. *Lacey* v. *Hill*, *Leney* v. *Hill*, 44 L. J., Ch. 215 ; L. R. 19 Eq. 346 ; 32 L. T. 48 ; 23 W. R. 285. And see *Wood* v. *Lambirth*, 1 Ph. 8 ; 5 Jur. 741.

Irregular—Estoppel.]—If a copyholder makes a lease for years, which is not according to the custom of the manor, the lease is good between the lessor and lessee, and all others except the lord. *Doe* d. *Tresidder* v. *Tresidder*, 1 G. & D. 70 ; 1 Q. B. 416 ; 10 L. J., Q. B. 160 ; 5 Jur. 931.

The surrenderee of a copyhold is an assignee of a reversion within the statute of 32 Hen. 8, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease. *Whitton* v. *Peacock*, 3 Myl. & K. 325.

By a private act it was enacted, that certain copyhold property should be vested in trustees upon trust to grant building leases, and every lease was to contain certain specified covenants ; and the trustees were to sell the materials of a house already standing on the premises, and apply the proceeds in payment of the costs and charges attending the obtaining the act and incidental thereto, and the residue of such costs and expenses were to be paid out of the rents of the premises so to be demised, and were to be charged upon the premises :—Held, that the legal estate in the copyholds was vested in the trustees ; that the costs incidental to obtaining the act were a charge upon the corpus of the estate, and the court had power to direct a sale

of the corpus for payment of such costs. *Dixon* v. *Wilkinson*, 22 L. J., Ch. 981; 1 W. R. 513.

An objection as to the validity of the leases was overruled, on the ground that there was no one, who, under the circumstances of the case, could challenge their validity. *Ib.*

Forfeiture.]—A lease by a copyhold tenant for a period longer than that warranted by the custom of the manor is not absolutely void as against a stranger, but is a ground of forfeiture, of which the lord alone may take advantage. *Doe* d. *Robinson* v. *Bousfield*, 6 Q. B. 492; 1 Car. & K 558; 14 L. J., Q. B. 42; 8 Jur. 1121.

Where a lease is made by a copyholder with the licence of the lord, a forfeiture committed by the copyholder does not destroy the term granted by such lease. *Clarke* v. *Arden*, 16 C. B. 227; 3 C. L. R. 781; 24 L. J., C. P. 162; 1 Jur. (N.S.) 710; 3 W. R. 444.

A person who is in receipt of the rent from the occupier is entitled to defend as landlord an ejectment by the lord, and to set up such lease as an answer, notwithstanding the copyholder has committed a forfeiture. *Ib.*

3. Partition.

Statute.]—*Copyhold Act*, 1896, *s.* 87.

In General.]—Previous to 4 & 5 Vict. c. 35, s. 85, a bill in equity would not lie for a partition of copyholds. *Horncastle* v. *Charlesworth*, 11 Sim. 315; 10 L. J., Ch. 35; 4 Jur. 1179. S. P., *Scott* v. *Fawcett*, Dick. 299.

In a suit before the act for a partition of freeholds and copyholds, the court directed the copyholds to be allotted in entirety to one of the parties. *Dillon* v. *Coppin*, 6 Beav. 217, n.; 3 L. J., Ch. 201.

After the act specific performance of an agreement between joint tenants of copyhold estate for partition enforced, and a decree for mutual surrenders. *Bolton* v. *Ward*, 4 Hare, 530; 14 L. J., Ch. 361; 9 Jur. 591.

Independently of the act, the court has no jurisdiction to direct the partition of copyholds, nor of customary freeholds. *Jope* v. *Morshead*, 6 Beav. 213; 12 L. J., Ch. 190.

On a bill for a partition, where there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the court will grant an inquiry, but where there is a material omission in the proof of plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the plaintiff had recovered in ejectment a portion of the estate from the defendant, it not appearing what were the circumstances of that proceeding, or whether the plaintiff's title, as alleged, was therein proved. *Ib.*

The court will not make a decree for a partition of copyholds, without directing a commission. *Bowles* v. *Rump*, 9 W. R. 370.

H. CUSTOMARY FREEHOLDS.

Nature of.]—The customary tenements in the north of England, which are parcels of the respective manors in which they are situate, and descendible, from ancestor to heir, by the hereditary right, called tenant-right, though held of the lord, according to the custom, differ much from copyhold. *Burrell* v. *Dodd*, 3 Bos. & P. 378.

Customary estates, which are peculiar to the north of England, are not freehold, but seem to fall under the same general consideration as copyholds; alienable by bargain and sale, and admittance thereon, and not holden at the will of the lord. *Doe* d. *Reay* v. *Huntington*, 4 East, 270.

The difference between copyholders and customary tenants explained. *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2764.

The freehold of an estate, parcel of a manor, and demisable only by licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, to have to her and her heirs, to hold of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs and services, is in the lord, and not in the tenant, though not holden at the will of the lord. *Doe* d. *Cook* v. *Danvers*, 7 East, 299; 3 Smith, 291.

Where the copies of admission were anciently "to hold of the lord according to the custom of husbandry of the manor," but other copies were to "hold at the will of the lord" also, and all the modern copies were so:—Held, that this land was copyhold, and not customary freehold. *Bourn* v. *Rawlings*, 3 Smith, 405. *S. C.*, nom. *Brown* v. *Rawlings*, 7 East, 509; 8 R. R. 652.

Where, according to the custom of a manor, the customary tenements pass by lease and release and admittance, although no surrender is required, the freehold is in the lord, and not in the tenant. *Thomson* v. *Hardinge*, 1 C. B. 940; 14 L. J., C. P. 268; 9 Jur. 927.

Customary freeholds held by copy of court-roll, but not at the will of the lord, and passing by surrender and admittance, are copyholds by tenure, and the freehold of them is in the lord. *Portland* (*Duke*) v. *Hill*, 35 L. J., Ch. 439; L. R. 2 Eq. 765; 12 Jur. (N.S.) 286; 15 W. R. 38.

The right to coal under customary freeholds is the same as in the case of lands of ordinary copyhold tenure. The onus lies on the tenant of customary freeholds to prove that he has the right by custom to dig for coal under his lands of that tenure. *Ib.*

As to this tenure. See *Warrick* v. *Queen's College*, 40 L. J., Ch. 780; L. R. 6 Ch. 716; 25 L. T. 254; 19 W. R. 1098.

A common recovery suffered in the C. P. would not pass a copyhold, secus, in customary freeholds. *Oliver* v. *Taylor*, 1 Atk. 474.

Purchase by Lord.]—Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. *Bingham* v. *Woodgate*, 1 Russ. & M. 33; Tam. 183; 8 L. J. (O.S.) Ch. 46; 31 R. R. 78.

Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Ib.*

Conveyance by Lord.]—Where a feme sole, after marriage, was admitted tenant of a manor in the north of England, of certain premises to her and her heirs, as of her own tenant right, according to the custom; and afterwards the

lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seignory rights to which they were previously liable; it seems that this conveyance, after his death, did not operate by way of grant of the estate in fee, but as an enfeoffment of the tenant-right estate; and that the wife's estate became a tenancy in fee-simple, and descended upon her heirs; and that those who derived title from them had a right to claim as heirs ex parte materná. *Doe* d. *Newby* v. *Jackson*, 2 D. & R. 514; 1 B. & C. 448.

If the lord conveys a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant, by reason of the statute of quia emptores, must then hold of the superior lord. *Bradshaw* v. *Lawson*, 4 Term Rep. 443.

A copyhold, to which a right of common was annexed, having by the custom of the manor vested in the lord by forfeiture, and been re-granted by him as a copyhold tenement with the appurtenances:—Held, that it having always continued demiseable, whilst in the hands of the lord, it was a customary tenement, and, as such, was still entitled to the right of common. *Badger* v. *Ford*, 3 B. & Ald. 153.

Renewals.]—The conventionary tenants within the assessionable manors of the duchy of Cornwall, have a perpetual indefeasible right, to them and their customary heirs and surrendrees, to renew their estates from seven years to seven years. *Rowe* v. *Brenton*, 3 M. & R. 361; 8 B. & C. 758.

Admission—Succession to.]—If the custom of a manor is that the customary tenements are held to a tenant and his heirs, and when a tenant dies seised, leaving sisters only, go wholly to the eldest sister, in exclusion of the other sisters, or, if such eldest sister dies during the life of such tenant, to her heir in exclusion of her younger sisters; there, if the heir of a tenant who had been admitted and died seised, enters but dies without being admitted, he nevertheless dies seised, and the custom attaches in respect of his sisters. *Doe* d. *Hamilton* v. *Clift*, 4 P. & D. 579; 12 A. & E. 576.

But, if the customary estate is not a customary estate of inheritance, to which the tenant is admitted to hold to him and his heirs, but one to which he is admitted to hold during the joint lives of himself and the lord, with a tenant-right of renewal binding the lord to admit the customary heir of a tenant; there, if the customary heir is not admitted in his lifetime, though he enters, he has no estate, and does not die seised, and the custom does not attach. *Ib.*

—— **Necessary to Pass Estate.**]—In a manor the custom of tenure is tenant right; the freehold of the customary tenements is in the lord. By the custom of the manor, on alienation, the tenant executes a deed of bargain and sale to the alienee, with the licence of the lord indorsed thereon, which licence is matter of course. The tenant afterwards appears in court with the deed, and states to the steward that he surrenders the premises into the hands of the lord, to the use of the alienee. The alienee is then admitted tenant, and the alienation presented by the jury. When husband and wife surrender lands out of court, they appear before the lord, his steward, or deputy, out of court, and execute the deed of bargain and sale; the wife is separately examined, and the surrenderor taken before the lord, his steward, or deputy, with the exception that there is no proclamation. There is no instance of a married woman surrendering lands within the manor by attorney. Surrenders, and also admittances by the custom of the manor, may be made out of court, and they may be made by or to the parties themselves or their attorneys:—Held, that surrender and admittance, as well as the deed of bargain and sale, were necessary to pass the lands; and where the tenant died, after executing the deed, but before surrender, that nothing passed to the alienee. *Graham* v. *Jackson*, 6 Q. B. 811; 14 L. J., Q. B. 129; 9 Jur. 275.

Husband and wife cannot, either jointly or severally, appoint an attorney to alienate the wife's land.

A power of attorney by husband and wife, severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands.—Held, a nullity.

Semble, the death of the wife is at all events a revocation of such a power, and a surrender, subsequently made by the attorney, is inoperative. *Ib.*

—— **Compelling.**]—The 3 & 4 Will. 4, c. 74, s. 53, only applies to equitable estates of tenants in tail of lands held by copy of court-roll; the court, therefore, refused a mandamus to the lord, commanding him to enter on the court-rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not enrol the deed by which they were granted. *Reg.* v. *Ingleton*, 8 D. P. C. 693; 4 Jur. 700.

Enfranchisement of.]—*See* ENFRANCHISEMENT, infra.

I. ENFRANCHISEMENT.

Statute.]—*Copyhold Act*, 1894, *Parts I.-V.*

Who may Enfranchise.]—Power to a tenant for life, lord of a manor, to enfranchise, and for that purpose to convey the freehold to the customary or copyhold tenants, authorises a conveyance of the freehold to one who is equitably entitled, and has been erroneously admitted, without a previous surrender by his trustee. *Wilson* v. *Allen*, 1 J. & W. 611; 21 R. R. 255.

The heir of a copyholder may accept an enfranchisement before admittance. Quære, whether the surrenderee or devisee can before admittance. *Ib.*

The lord enfranchises a copyhold with all common thereto belonging. Though the common be extinct at law yet it subsists in equity. *Styant* v. *Staker*, 2 Vern. 250.

For whose Benefit.]—Enfranchisement of a copyhold by a person having only a particular interest, is for the benefit not only of himself, but of all the persons in remainder. Recovery suffered by one not in possession had no operation. *Wynne* v. *Cookes*, 1 Bro. C. C. 515.

Copyholder in fee takes an enfranchisement of his copyhold in the name of a trustee, and devises the land to his younger son, who sells to A. The heir-at-law of the copyhold recovers in ejectment, and A. brings his bill, and is decreed

to hold and enjoy against the heir. *Dancer* v. *Evett*, *Parker* v. *Turner*, 1 Vern. 392.

Lands in ancient demesne were held according to the custom of the manor, which was, that each tenant should have an estate tail, with reversion to the lord in fee, and that he might, with the lord's licence, by deed alien to any other person in tail, with remainder to the lord in fee. In 1792, T., a tenant according to such custom, executed marriage articles by which 2,000*l.* was to be raised for younger children of the marriage. No conveyance was ever made according to these articles. In 1794 T. procured an enfranchisement from the lord to himself in fee. In 1828, on the marriage of F., the eldest son of T., the same lands were conveyed to trustees, in trust for T. for life, remainder to his wife for life, remainder, upon the ordinary trusts of a marriage settlement, in favour of F. and his wife; and F. covenanted to settle after-acquired property on his wife. T. died in 1844, and his wife in 1850. F. became bankrupt in 1849, having previously mortgaged all his property to secure 2,000*l.* which he had received in 1839, in right of his wife: neither his wife nor the trustees had heard, until after 1854, of the articles of 1792. On a bill by the younger children of the marriage of 1792 to have their 2,000*l.* portions raised according to the articles:—Held, first, that the lands were not within the operation of the Statute De Donis; secondly, that the enfranchisement of 1794 operated as a merger; thirdly, that the wife of F. and her trustees of F.'s settlement were first of all entitled to their charge for 2,000*l.* as purchasers for valuable consideration without notice; and fourthly, that the younger children were entitled to have the benefit of their charge according to the settlement of 1792, in preference to F. and his assignees. Semble, the same result would have been arrived at, even apart from the fact of enfranchisement. *Cresswell* v. *Hawkins*, 3 Jur. (N.S.) 407.

Infant Lord of Manor.]—A female infant tenant for life in possession of a manor, but subject to a legal term of 1,000 years vested in trustees for securing annuities, and also subject to a provision for the receipt by the trustees of the rents during the minority, and for the application of a limited sum thereout for her maintenance:—Held, although the trustees had the usual power of sale that, on notice given by the tenants to apply for enfranchisement, her guardian was the proper person, and not the trustees, to appoint a valuer. *Griggs* v. *Gibson*, *Maynard* v. *Gibson*, 14 W. R. 819.

Compensation, how Determined—Customary Freeholds.]—The lord is entitled, on the enfranchisement of a customary freehold, to compensation in respect of the advantages accruing to the customary freeholder from the removal of restrictions on leasing or other disabilities attending his customary estate. The amount of the compensation is a question of fact for the valuer, and depends upon the extent to which the value of the property is in the particular case increased by the removal of such restrictions. *Lingwood* v. *Gyde*, 36 L. J., C. P. 10; L. R. 2 C. P. 72; 16 L. T. 229; 15 W. R. 311.

——**Present Obstacles to Improvements.**]—In assessing the amount of compensation payable to the lord on a compulsory enfranchisement of a copyhold under 15 & 16 Vict. c. 51, regard is to be had, not only to the capability of the land for future improvements, but also to any present obstacles which may stand in the way of improvements. *Arden* v. *Wilson*, 41 L. J., C. P. 273; L. R. 7 C. P. 535; 26 L. T. 887.

When, therefore, copyholds were the subject of a settlement (by will) which precluded the granting of leases for more than twenty-one years, and a portion of them was at the time of the enfranchisement held by a third person under a lease granted with the licence of the lord, and the other portion could have no frontage to a public road pending such lease:—Held, that, in assessing the compensation payable to the lord, the valuers were not bound by the mode in which the property was then enjoyed, viz., as a private residence, but might take into consideration the capacity of the land for improvement by applying it to building purposes. *Ib.*

Held, that they were also bound to take into consideration the impediments standing in the way of its being presently used as building land. *Ib.*

Statute.]—52 & 53 Vict. c. 30, *transfers to the Board of Agriculture the powers and duties of the Land Commissioners for England.*

Valuation by Umpire—Refusal to Amend—Determination of Value by Commissioners.]—By s. 11 of the Copyhold Act, 1887: "The valuers appointed under the provisions of the Copyhold Acts shall determine the value of the manorial and other rights and incidents, such value to be a gross sum of money, and their decision shall be in such form as the commissioners may prescribe, and they shall in every case deliver the details of the valuation to the commissioners, and if it shall appear to the commissioners that the valuation is imperfect or erroneous, they may remit it for reconsideration or correction; and if the valuers neglect or refuse to amend the same, the commissioners may, after due notice to the lord and to the tenant, and after fully considering all the circumstances brought before them, determine the value of the manorial and other rights and incidents at such a sum as they may deem just and reasonable." On a valuation of manorial rights under the act it appeared to the commissioners that the valuation was erroneous in amount, and they remitted it to the valuer, who refused to amend. The commissioners thereupon proceeded to consider the circumstances with a view to themselves determining the value. On an application for a prohibition to restrain them from proceeding to determine the value except as appeared by the award:—Held, that the commissioners were acting within their jurisdiction in proceeding to determine the value of the rights, as the authority given them by the statute applies where, in their opinion, the valuation is erroneous in amount. *Reg.* v. *Land Commissioners of England*, 58 L. J., Q. B. 313; 23 Q. B. D. 59; 37 W. R. 538; 53 J. P. 773—C. A.

Jurisdiction of Commissioners.]—When a lord, who takes proceedings under the Copyhold Acts to compel a tenant to enfranchise, sets up a special custom entitling him to one-third of the timber, if there is evidence, it is the exclusive province of the copyhold commissioners to determine whether the custom is proved, and the court will not interfere with their decision.

Reynolds v *Woodham Walter Manor*, 41 L J C P 281, L R 7 C P 639, 27 L T 374

The valuers acting under the second part of s 8 of 21 & 22 Vict c 94, are not bound to state in their award what proportion of the rent charge should be deferred, or such particulars as might enable the commissioners to defer payment of the whole rent charge or any part, and though the pecuniary circumstances of the tenant ought not to be taken into account in determining whether there is special hardship under 15 & 16 Vict c 51, s 35 and the commissioners inquire into them, and though the court think, looking to the particular interest of the tenant, that there is hardship, yet the court is not at liberty to interfere with the decision of the commissioners that there is no such hardship *Ib*

Reservation of Lord's Rights]—The lord of a manor, with consent of the homage, granted a portion of the waste to be held by the grantee as copyhold upon condition that no building should thereafter be erected thereon, and reserving to certain copyholders in the grant liberty, in case of the election of any building contrary to the condition, to enter and pull down and remove the same, such reservation in favour of the copyholders being gratuitous and without consideration The estate afterwards vested in B, who was admitted tenant, and gave notice, under 4 & 5 Vict c 35, s 40, 15 & 16 Vict c 51, s 8, and 21 and 22 Vict c 94, s 10 of his desire to enfranchise the same —Held, that the effect of the enfranchisement was to give B an estate in fee simple, disencumbered of the conditions imposed upon the creation of the copyhold, and that the lord was entitled to compensation accordingly *Brabant* v *Wilson*, 6 B & S 979, 35 L J, Q B 49, L R 1 Q B 44, 12 Jur (N S) 24, 13 L T 319, 14 W. R 28

The owner of freeholds and copyholds adjoining each other surrendered the copyholds to a grantee, who covenanted for himself, his heirs and assigns, with the grantor, his heirs and assigns, that the grantor should have full power to mine under his own freeholds without paying compensation for any injury which might be sustained by the copyhold portion and buildings erected thereon, in consequence of the removal of the support Compensation was sought by the assignee of the grantee for damage resulting from the sinking of his land, in consequence of the mines excavated under the land of the assignee of the grantor —Held, that the grantee had no power to disclaim the right to compensation so as to bind the lord without his consent, and that the covenant did not run with the land *Richards* v *Harper*, 4 H & C 55 35 L J, Ex 130 L R 1 Ex 199, 12 Jur (N S) 770, 14 W R 643

The vendor of a copyhold estate enfranchised under 15 & 16 Vict c 51, is not bound to show the lord's title *Kerr* v *Pawson*, 25 Beav 394, 27 L J, Ch 594, 4 Jur (N S) 425, 6 W R 447.

After the passing of 4 & 5 Vict c 35, and 15 & 16 Vict c 51, but before 21 & 22 Vict c 94, an agreement was entered into for the sale of a copyhold estate, together with the timber and all appurtenances to the hereditaments belonging, as soon as the same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise, an enfranchisement was made under the second act, reserving the minerals to the lord —Held, that the contract had reference to the provisions in those acts relative to minerals and that the purchaser must complete, notwithstanding this reservation *Ib*

Where copyholds are taken by a railway company, such fines for admittance as would, upon a compulsory enfranchisement under s 6 of 21 and 22 Vict c 94 be payable by the tenants requiring enfranchisement, are not claimable by the lord against the company *Wilson's Estate, In re*, 3 De G J & S 410, 32 L J, Ch 191, 7 L T 772, 11 W R 295

Where a lump sum was paid as compensation by a company —Held, that no part could be retained in respect of such fines by the tenant for life, but that the whole must be treated as paid on account of the inheritance *Ib*

Where purchase money for copyholds is paid into court, under 5 & 6 Will 4, c 69, including the value of the lord's interest, the words, "expenses attending such purchase" include the costs of the enfranchisement *S C*, 11 W R 712

Forfeitures] — A college demised all lands, quit rents, waifs, and other appurtenances, and all rights and privileges, profits, emoluments, and appurtenances in respect of the game except all courts and perquisites of courts, fines, amerciaments, escheats and all profits growing and arising by virtue of the privileges of the college —Held, that in enfranchising the copyholds that part of the money representing forfeitures belonged to the college, as included in the exception in the lease *Deane, Ex parte*, 17 L T 100

Sale]—A sale under 23 & 24 Vict c 124, of a freehold estate devised upon trusts by a will was allowed for the purpose of enfranchising ecclesiastical leaseholds bequeathed by the will upon similar trusts *Adams, In re*, 20 L T 511, 17 W R 582

—— **Costs**]—Upon a petition for the sale of settled real estate, partly freehold and partly copyhold, the court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale *Adair, In re*, 42 L J, Ch 841, L R 16 Eq 124

Non-Admission of Mortgagee]—It is no sufficient objection to the title of a vendor of an enfranchised copyhold, that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord *Minton* v *Kinwood*, L R 1 Eq 449, 12 Jur (N S) 86, 13 L T 743; 14 W. R. 274

An appointee under a power in a settlement was admitted to the copyholds, and obtained an enfranchisement to himself —Held, that the concurrence of the customary heir of the settlor was a question of conveyance and not of title, for that the heir clearly had no beneficial interest. *S C*, 37 L J, Ch 606, L R 3 Ch 614, 18 L T. 781, 16 W R 991.

Death of Tenant pending Proceedings]—A copyhold tenant died after proceedings instituted by him for a compulsory enfranchisement under the Copyhold Act, 1858 (21 & 22 Vict c. 94), and before the confirmation of the award by the

commissioners —Held, that the lord was entitled to have a new tenant on the roll and to a fine on his admittance *Myers* v *Hodgson*, 45 L J, C P 603 1 C P D 609, 34 L T 881, 24 W R 827

Held, also, that the proceedings did not abate by the death of the first tenant *Ib*

Investment of Purchase money on Enfranchisement]—The Lands Clauses Act, 1845, s 69, authorises the application of purchase-money paid in respect of freeholds taken by a company in the enfranchisement of copyholds settled upon the same trusts *Cheshunt College, In re*, 3 W R 638 And see *Ground's Estate, In re*, 1 W R 32

—— **Service of Petition for Investment**]—Petitions under the Copyhold Acts for investment of moneys paid into court in respect of the enfranchisement of copyholds are not to be served on the copyhold commissioners *Templer* v *Swete*, 22 W R 837

—— **Costs of Appearance of Commissioners**]—Where copyholds had with the consent of the commissioners, been enfranchised under 15 & 16 Vict c 51 and the money had been paid into the bank to an account "Ex parte the Copyhold Commissioners' —Held, that the commissioners were entitled to the costs of appearance on the petition of the lord to have the money invested and the dividends paid to him *Queens College, Cambridge, Ex parte*, 27 L J, Ch 178, 4 Jur (N S) 19, 6 W R 9

Where the consideration money for the enfranchisement of copyholds under the Copyhold Enfranchisement Act was paid into court, and a petition was presented by the lord for the investment of the money —Held, that the commissioners had a right to appear at the hearing of the petition, and that their costs and those of the lord were payable out of the consideration money *Hereford (Bishop), Ex parte*, 5 De G & Sm 265, 21 L J, Ch 608

Estate tail]—As to the effect of enfranchisement in barring an entail, see *London School Board, Ex parte, Hart, In re*, 41 Ch D 547, &c, ante, col 387

Confusion of Boundaries—Enquiry—Liability of Tenant]—A copyhold tenant of a manor is under an obligation to keep the boundaries of his tenement distinct, and if he neglects to do so the court will direct an inquiry for ascertaining the boundaries, and, if that should be impossible, will order land of equal value to be set out in substitution If the tenement is enfranchised the obligation to preserve the boundaries ceases, but the tenant is still liable for default which had happened before the enfranchisement *Searle* v *Cooke* 59 L J, Ch 259, 43 Ch D 519, 62 L T 221—C A

The lord obtained the enfranchisement of a copyhold under the 15 & 16 Vict c 51, reserving a rent charge to himself The boundaries had become confused before the enfranchisement, but the lord did not avail himself of the power given by s 24 of the Act to have the boundaries ascertained The rent-charge having fallen into arrear, the grantee of the rent-charge brought an action to ascertain the boundaries of the land charged with the rent-charge, and, if that could not be done, to have land of equal value set out in substitution —Held, that the lord and those claiming under him did not lose their rights by reason of the lord's omission to have the boundaries ascertained under the act, and that the plaintiff was entitled to the relief prayed the costs of the inquiry being reserved *Leeds (Duke)* v. *Stafford (Earl)*, (4 Ves 180, 4 R R 186) followed *Ib*

Profit a Prendre—Right of Fishing—User]—An owner of land formerly copyhold, but now enfranchised brought an action claiming on behalf of himself and other owners and occupiers of ancient copyhold tenements, and ancient tenements formerly copyhold of the manor, but now enfranchised a right of fishing in a portion of a river which formed one of the boundaries of the manor, and as incident thereto a right of way over the defendant's land which adjoined the river, and was formerly copyhold of the manor In 1845 the lords of the manor enfranchised the defendant's tenements to the intent that the copyhold tenure and all "rights of fishing" might be extinguished The plaintiff's tenements were enfranchised subsequently to 1845 The homage had for many years made a presentment of the right of copyhold tenants of the manor to fish in the river between certain points and there was evidence that from 1823 down to 1885, when the defendant had taken steps to stop the fishing from his land, the copyhold tenants and the owners of enfranchised tenements had fished in the river, and for the purpose of fishing had been accustomed to pass along the banks of the river over the defendant's land The tenants of the manor held upon leases for lives with no right of renewal It was contended that the effect of the enfranchisement deed of 1845 was only to extinguish the right of the lords to fish, and did not extend to their right to grant de novo to the tenants of the manor, or to owners of enfranchised tenements, such rights of fishing as had been previously enjoyed, and were appurtenant to their tenements, and that the intention and meaning of the deed was shown by the user —Held, that the effect of the deed of 1845 was to preclude the lords from granting as against the defendant any right of fishing, and that so far as the user was inconsistent with the deed no legal origin for it could be assumed. *Tilbury* v *Silva*, 45 Ch D 98, 63 L T 141—C A

Lunatic's Estate—Devolution]—The court on sanctioning proceedings for carrying into effect the enfranchisement of a copyhold estate belonging to a lunatic, the rules of descent as to which were different from those as to the descent of freeholds, made a declaration that, in the event of his dying intestate as to the enfranchised property, his heir at law would stand seised thereof in trust for the persons who would have been entitled thereto as his heirs according to the custom of the manor if it had not been enfranchised *Ryder, In re*, 20 Ch D 514, 30 W R 417—C A

Presumption of]—The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown *Roe* d *Johnson* v *Ireland*, 11 East, 283, 10 R R 504.

Where a surrender had been made to churchwardens and their successors in 1636, without naming any rent, but, in 1649, the parliamentary survey charged the churchwardens with

6*d* rent, under the head of freehold rents, and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a freehold rent by the steward of the manor —Held, that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement although the manor had continued out in lease from before 1636 to 1804, and though a tablet of parochial benefactions at least as old as 1636, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it *Ib*

In the absence of evidence adverse to the rights of the lord the court will not presume enfranchisement of land, shown to have been copyhold in 1717 from mere negligence by the lord in exacting the small acknowledgments for which the fines were then commuted *Turner* v *West Bromwich Union*, 3 L T 662, 9 W R 155

—— **Copyhold Land treated as Freehold for long Period—Statute of Limitations**]—Land anciently copyhold was for upwards of 100 years treated as freehold without any claim being made on the part of the lord, and the only intimation that the land was copyhold was in recitals to that effect and a covenant to surrender contained in deeds of recent date to which the lord was neither party nor privy A contract having been entered into for the sale of the land as freehold —Held, that, under the circumstances, an enfranchisement must be presumed, and that the purchaser was therefore not entitled to require the vendors to obtain the enfranchisement of the land *Liddard and Broadley, In re*, 58 L J Ch 785, 42 Ch D 254, 61 L T 322, 37 W R 793

Semble, also, the lord's right of entry was barred by the Statute of Limitations. *Ib.*

Evidence]—An assignment of copyholds by a common law conveyance (without any surrender) recited a grant of the fee by the Bishop of Rochester to the releasor, in which grant the premises were described as "parcel of the manor of the prebend of Wivelscombe' Quære, whether this recital was evidence against the widow of the releasor, who continued in possession from the death of her husband down to the commencement of the ejectment —Held, that, even if it was so, it did not show an enfranchisement, inasmuch as it did not distinctly appear that the bishop was seised of the fee-simple of the manor, or seised otherwise than by right of his prebend *Doe* d *North* v *Webber*, 5 Scott, 189, 3 Hodges, 203

Acknowledgment of Right to production of Documents—Lands Clauses Act]—Copyhold land having been taken by a corporation under the powers of the Lands Clauses Act, and a draft conveyance from the copyholder being in the course of settlement, the corporation applied to the lord, under s 96, for enfranchisement upon certain terms, which were agreed to In settling the draft enfranchisement deed, the corporation claimed to have from the lord and his trustee to uses an acknowledgment of the right of the corporation to production of the documents of title to the manor, and of the court rolls relating to the hereditaments enfranchised, and to delivery of copies thereof, and, also from both, an undertaking for the safe custody of the same —Held, that the corporation were entitled to no more than an acknowledgment by the lord and his trustee of the right of the corporation to the production of the documents of title to the manor, and of the court rolls, so far as they related to the hereditaments enfranchised, and to delivery of copies thereof, and an undertaking by the lord alone for safe custody *Agg-Gardner, In re*, 53 L J, Ch 347, 25 Ch D 600, 49 L T 804, 32 W R 356

Whether the corporation were entitled to so much as the above, quære *Ib*

J ENCROACHMENT.

On Waste by Copyhold Tenant]—An encroachment made by a copyhold tenant upon the waste of the manor becomes, at any rate in a manor in which there is a custom that the lord may grant portions of the waste as copyhold, an accretion to the original holding, and the tenant acquires by adverse possession, under the Statute of Limitations, only a copyhold title to the encroached land. *Att-Gen* v. *Tomline*, 46 L J, Ch. 654, 5 Ch. D. 750, 36 L T. 684, 25 W. R. 802

—— **Mining without Consent**]—A copyhold was surrendered in 1809 to a trustee for the crown for military purposes In 1808 the then lord had granted to M, the governor of an adjoining fort, a licence to inclose part of the waste adjoining the copyhold, and to occupy it at a yearly rent during his life if he so long continued governor, which he ceased to be in 1811. Nothing further was shown as to the title to the land included in the licence, except that at the commencement of this action in 1874 the crown had been in possession of such land as inclosed ground, as well as of the original copyhold, for more than forty years. Since 1811 there had been repeated admittances of trustees for the crown to the original copyhold, in which it was described by metes and bounds not including the close L comprised in the licence In 1874 the lord, without the consent of the crown, granted a licence to get coprolites out of close L at a royalty, and received 222*l* for royalties The crown brought an action for an injunction and damages. Fry, J, held, that close L had become an accretion to the copyhold tenement, and was of copyhold tenure, but the decree only granted an injunction and an inquiry as to damages, without any declaration of the rights of the parties The chief clerk having certified that the damages payable to the crown were 222*l*, and Fry, J, having approved of his finding, the lord appealed on the ground that the damages were excessive The tenant who held close L. under the crown had separately received full compensation for surface damage, and the land had been restored to its original condition — Held, by the Court of Appeal, that, assuming the doctrine that encroachments made by a lessee enure to the benefit of the landlord to be applicable to encroachments by a copyholder, the application of that doctrine was excluded by the facts that the inclosure of close L. having been made by licence from the lord was not an encroachment, and that the subsequent admittances did not treat close L as part of the copyhold tenement. *Att-Gen.* v. *Tomline*, 15 Ch D. 150; 43 L. T. 486—C. A. And see *Seddon* v. *Smith*, 36 L. T. 168.

Whether that doctrine does apply to copyholds, quære *Ib*

—— **Measure of Damages.**]—Whether, if close L had been copyhold, a finding which gave to the copyholder by way of damages the whole sum received by the lord for the coprolites could have been sustained, quære *Ib*

Crown acquiring Freehold under Statute of Limitations]—Held, that the crown had under the Statute of Limitations acquired a freehold title to close L, and that as the coprolites, therefore, belonged to the crown, the damages were not excessive *Ib.*

Presumption as to.]—A tenant encroached on an adjoining waste, part of a manor belonging to her son, a minor. On his attaining his majority, the homage presented that she had encroached She thereupon applied for and obtained from her son, the lord, a grant of the piece of land so encroached on. She never paid any rent for it, nor was any service ever rendered in respect of the grant At the expiration of the tenancy, the landlord took possession, not only of the land demised, but of the piece of th waste encroached on —Held, in ejectment by the lord of the manor, that the ordinary presumption of law, that an encroachment made by a tenant is for the benefit of his landlord, was rebutted, that by the acceptance of the grant from the lord, the encroacher became his tenant, and that the lord therefore was entitled to succeed *Barney* v *Bickmore*, 8 L T 353

Waste — Rent — Presumed Grant allowing Buildings.]—In 1739 articles of agreement were entered into between the lord and freehold tenants of a manor, by the eighth clause of which it was agreed that no other part of the wastes should thereafter be enclosed or built upon, unless by the mutual consent of the lord, and of the greater part in number and value of the freehold tenants, under their hands and seals, and in case of any improvements and enclosures by such consents as aforesaid, it was agreed that the same and all profits and advantages arising therefrom should belong to and be divided between the lord and freehold tenants in the proportions therein mentioned The articles were confirmed by a private act passed in the same year Persons were appointed by the lord and freeholders to receive the rents, and books were kept showing how the rents were received and divided, in accordance with the provisions of the articles An entry appeared in one of these books in 1803, that one R paid a rent of 1*l* 1*s* in respect of premises which were there described as a stable, and it appeared from entries in the books that he continued to do so down to 1808, when the property was mentioned as held by D at a yearly rent of 2*l* 12*s* 6*d* In 1811 D was entered as holding a coal warehouse at the rent of 4*l* 10*s* "now and in future" In 1813 D paid the same rent in respect of a coal and corn warehouse, and that rent was paid by D and his successors in title until just before this action was brought In 1816 D. sold or mortgaged the property for 299*l* to B, who subsequently re conveyed it to him for the same amount In 1829 D conveyed the property by lease and release to K. for 1,000*l*. He mortgaged it to S. by feoffment for 1,000*l*, and subsequently became bankrupt, and the equity of redemption vested in his assignees In 1836 the assignees and S conveyed the property to J S for 1,440*l* In 1838 J S leased the property to R The property was described in the lease as part of the waste of the manor, and it was provided that the lessee was to pay 4*l* 10*s* per annum, and any future rent which might become payable, to the lord and freeholders New buildings were from time to time built on the property The defendant became entitled to the premises under the will of his father J S Questions having arisen as to the title to the property, the defendant claiming to be entitled in fee-simple, the lord and the freeholders brought this action to recover possession of it — Held, that (1) a consent to the enclosure of the property in question, in accordance with clause 8 of the articles, might under the circumstances be fairly assumed, but the result of possession under such consent was that a tenancy from year to year was created, (2) that the feoffment by K to S in 1829 did not tortiously pass the fee to S, (3) that there was no evidence that the tenants were under any misapprehension as to title, or had built under misapprehension, or that the lord or freeholders were aware of any such misapprehension of titles, and therefore the defendant was not entitled to equitable relief *Weller* v *Stone*, 54 L J, Ch 497, 53 L T 361, 33 W R 421—C A

—— **Necessary Parties — Mining Lease — Lessor**]—In an action by a copyholder to restrain the working of coal under his land by A, who claimed to be entitled to do the acts complained of by virtue of a lease from B, the lord of the manor, B, was by amendment added as a defendant, on the allegation that he claimed the right by himself and his lessees to work the coal, that he justified the acts of A, and that he had received and claimed to be entitled to receive from A rents and royalties in respect of such wrongful working On summons by B under Rules of Supreme Court, 1883, Ord XXV r 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, and that the action might be dismissed as against him —Held, that the lessor had been properly added as a defendant *Shafto* v *Bolckow, Vaughan and Co.*, 56 L J, Ch 735, 34 Ch D 725, 56 L T. 608, 35 W R 562

And see COMMON

W A G W

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1. *Engravings and Prints*, 534.
2. *Pictures and Photographs*, 538.

E. International Copyright, 546.

A. BOOKS.

1. Rights at Common Law.

Extent of.]—The property of an author in an unpublished work exists independently of the statute. *Southey* v. *Sherwood*, 2 Mer. 435. S. P., *Tonson* v. *Collins*, 1 W. Bl. 301.

Authors have not, by common law, the sole and exclusive copyright in themselves, or their assigns, in perpetuity, after having printed and published their compositions. *Miller* v. *Taylor*, 4 Burr. 2303.

Copyright does not exist at common law; it is the creature of statute. *Jefferys* v. *Boosey* (*in error*), 4 H. L. Cas. 815; 3 C. L. R. 625; 24 L. J., Ex. 81; 1 Jur. (N.S.) 615.

An Englishman, though resident abroad, will have copyright in a work of his own first published in this country. *Ib.*

Copyright in works of literature and art, after they are published, exists by statute only; and there is no co-existing common-law protection during the statutable period. *Reade* v. *Conquest*, 9 C. B. (N.S.) 755; 30 L. J., C. P. 209; 7 Jur. (N.S.) 265; 3 L. T. 888; 9 W. R. 434.

2. Rights by Statute.

a. Subject Matter.

i. *Unpublished Works.*

Right to Withhold.]—The right and property of an author or a composer of any work, whether of literature, art or science, in such work, unpublished and kept for his private use or pleasure, entitle the owner to withhold the same altogether, or so far as he may please, from the knowledge of others; and the court of chancery will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work. *Millar (Prince)* v. *Strange*, 1 Mac. & G. 25; 1 H. & T. 1; 18 L. J., Ch. 120; 13 Jur. 109.

MSS.]—An injunction was granted to restrain the printing of an unpublished MS. which had been, by the representative of the author, given to a person under whom the defendant claimed, but not with the intention that he should publish it. *Queensberry* (*Duke*) v. *Shebbeare*, 2 Eden, 329.

Semble, unless there is a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. *Cox* v. *Cox*, 11 Hare, 118.

The statute 8 Anne, c. 19, did not impose upon authors as a condition precedent to their deriving any benefit under it, that the composition should be first printed; and therefore, an author did not lose his copyright by selling his work in manuscript before it was printed. *White* v. *Geroch*, 2 B. & Ald. 298; 1 Chit. 24; 22 R. R. 786.

Information supplied to Subscribers only.]—The plaintiffs, under an agreement with the committee of the Stock Exchange, were allowed to collect information as to the prices of stocks and shares:—Held, that they had a right of property at common law in the information so collected. *Exchange Telegraph Co.* v. *Gregory*, 65 L. J., Q. B. 262; [1896] 1 Q. B. 147; 74 L. T. 83; 60 J. P. 52—C. A.

A company carrying on the business of supplying information of the results of race meetings to subscribers upon the terms of a contract, regulating the use to be made of the information so supplied, has a right of property in such information, and is entitled to restrain by injunction a third party from publishing it if obtained from a subscriber with knowledge of the contract and contrary to its terms. *Exchange Telegraph Co.* v. *Gregory* (supra), followed. *Exchange Telegraph Co.* v. *Central News*, 66 L. J., Ch. 672; [1897] 2 Ch. 48; 76 L. T. 591; 45 W. R. 595.

ii. *Letters.*

Right withheld.]—The sending of a letter bearing the character of a literary composition does not give the person to whom it is transmitted the right to publish it for his own benefit; otherwise, if published to vindicate his character

from false imputations cast upon him by the writer. *Perceval (Lord)* v. *Phipps*, 2 Ves. & B. 19; 13 R. R. 1.

Injunction granted on application of the executor to restrain defendant from publishing letters, the property of the testator. *Granard* v. *Dunkin*, 1 Ball & B. 207; 12 R. R. 18.

Defendant moved (on putting in answer) to dissolve an injunction obtained against his selling a book of "Letters from Pope, Swift, and others." Lord Chancellor said, collection of letters, as well as other books, is within intention of Statute 8 Anne; but receiver of letter has at most but a joint property with writer, and possession does not give him licence to publish it. Injunction was continued as to letters written by Mr. Pope, but not as to those written to him. Lord Chancellor also said, that reprinting a book in England which was originally pirated and printed in Ireland will not be suffered, being a mere evasion of the Act. *Pope* v. *Curl*, 2 Atk. 342.

Letters written by the plaintiff to the defendant, having been returned by him, with a declaration that he did not consider himself entitled to retain them, the publication of copies taken before the return, without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character. The jurisdiction to restrain the publication of letters is founded on a right of property in the writer. *Gee* v. *Pritchard*, 2 Swans. 402; 19 R. R. 87.

The receiver of a letter has a sufficient property in the paper upon which it is written to entitle him to maintain an action of detinue for it against the sender, into whose hands it had come as a bailee. *Oliver* v. *Oliver*, 11 C. B. (N.S.) 139; 31 L. J., C. P. 4; 8 Jur. (N.S.) 512; 5 L. T. 287; 10 W. R. 18.

An injunction was granted to restrain the executor of the person to whom private letters were written, from publishing them without leave of the executors of the person who wrote them. *Thompson* v. *Stanhope*, Ambler, 737.

Solicitor of Company.]—When the solicitor of a company writes a letter, apparently on the behalf of the company, he has no such property in the letter as to entitle him to prevent its publication, although it was written in his private capacity. *Howard* v. *Gunn*, 32 Beav. 462.

iii. *Newspapers.*

Registration.]—A newspaper is within the Copyright Act (5 & 6 Vict. c. 45), and requires registration under that act in order to give the proprietor the copyright in its contents and so enable him to sue in respect of a piracy. *Cox* v. *Land and Water Journal Co.*, infra, not followed. *Walter* v. *Howe*, 50 L. J., Ch. 621; 17 Ch. D. 708; 44 L. T. 727; 29 W. R. 776.

A newspaper not being within the Copyright Act (5 & 6 Vict. c. 45), requires no registration under that act; but the proprietor of a newspaper has, without registration, such a property in all its contents as will entitle him to sue in respect of a piracy. *Cox* v. *Land and Water Journal Co.*, 39 L. J., Ch. 152; L. R. 9 Eq. 324; 21 L. T. 548; 18 W. R. 206.

Where the proprietor of a newspaper sought to restrain the piracy of "a list of hounds," the court was of opinion that, although the piracy might be established, the list was liable to such frequent changes, and a correct list was so easily obtained, that it was not a case for an interlocutory injunction. *Ib.*

Name of—Assignment.]—A suit was instituted between B. & H. as to the proprietorship of a newspaper, in which it was ultimately decided that they were entitled in equal moieties. During the progress of the suit B. assigned his share in the newspaper, and the right of publication, and in the profits, to W. The assignment contained a recital of the proceedings in the suit, and a power of sale. Afterwards B. mortgaged the same share to his partner H. to secure sums due to him in respect of that share. W. registered his assignment at Stationers' Hall, and subsequently sold the mortgaged share to the plaintiff under his power of sale. Both W. and the plaintiff permitted the newspaper to be carried on by B. and H. jointly. On a bill filed by the plaintiff for a declaration that he was entitled to a moiety of the newspaper:—Held, first, that there is nothing analogous to copyright in the name of a newspaper, and therefore the registration of the assignment at Stationers' Hall was futile; but that the proprietor has a right to prevent any other person from adopting the name, and that this right is a chattel capable of assignment. *Kelly* v. *Hutton*, 37 L. J., Ch. 917; L. R. 3 Ch. 703; 19 L. T. 228; 16 W. R. 1182.

Held, secondly, that as W. and the plaintiff knew of the suit between B. and H., and also permitted them to carry on the newspaper as partners, the plaintiff could only take B.'s share subject to the equities subsisting between the partners. *Ib.*

Prospective Series.]—That protection given by common and statute law which is called copyright is only in respect of some already published or some composed and not yet published literary production, and therefore there can be no copyright in the prospective series of a newspaper. Copyright may attach upon each successive publication; but that which has no present existence as a publication cannot be the subject of this species of property. *Platt* v. *Walter*, 17 L. T. 157.

It is open to doubt whether the 5 & 6 Vict. c. 45, s. 18, relating to copyright in "encyclopædias, reviews, magazines, periodical works, or works published in a series of books or parts," extends to newspapers, notwithstanding the interpretation clause. But, even if it does, that section applies only to what has been already composed, merely giving the copyright of it to the proprietor of the periodical who has employed the writer of the part, essay, or article. *Ib.*

Articles composed at joint Expense of Proprietors of several Newspapers.]—The three several proprietors of three several periodicals jointly employed a person to compile for them lists of registered bills of sale and deeds of arrangement, on the terms that the copyright was to belong to the three proprietors. The three periodicals were registered under the Copyright Act. The compiling these lists required skill, and involved a good deal of labour and expense. The defendant association copied and circulated among their own members so much of these lists as related to their own neighbourhood, which was a very small part of the whole. The three proprietors sued to restrain this proceeding:—Held, that the statute 5 & 6 Vict. c. 45, s. 18, was not to be construed as confining the copy-

right of a proprietor of a newspaper to articles composed on the terms that the copyright should belong to and be paid for by him alone, that each of the three proprietors had an interest in the copyright of the lists, that having registered his periodical he had a right to sue to restrain infringement, and that the defendant association could not escape on the ground that it had only copied a small portion of the lists. *Trade Auxiliary Co.* v. *Middlesborough Tradesmen's Protection Association*, 58 L. J., Ch. 293; 40 Ch. D. 425; 60 L. T. 681; 37 W. R. 337—C. A.

iv. *Magazines.*

Property in Articles.]—By the effect of 5 & 6 Vict. c. 45, s. 18, the proprietor of a periodical is precluded from republishing, without the consent of the author, articles written by the latter for and published in such periodical in any other form than as reprints of the entire numbers of the periodical in which the articles appeared. *Smith* v. *Johnson*, 4 Giff. 632: 33 L. J., Ch. 137; 9 Jur. (N.S.) 1223; 9 L. T. 437; 12 W. R. 122.

A republication in supplemental numbers of a selection of various tales previously published in a periodical is a separate publication within the section. *Ib.*

The right of an author of an article in a periodical, under 5 & 6 Vict. c. 45, s. 18, to prevent a separate publication, is not copyright within the meaning of s. 24, and it is no objection to a motion for an injunction in such a case that the author has not entered his work at Stationers' Hall. *Mayhew* or *Murray* v. *Maxwell*, 1 Johns. & H. 312; 3 L. T. 466; 8 W. R. 118.

The republication of the Christmas number of a periodical under a different title, form, and price, is a separate publication of an article contained in such number, which the author is entitled to restrain. *Ib.*

A copyright may exist in only a small portion of a serial story. *Low* v. *Ward*, 37 L. J., Ch. 841; L. R. 6 Eq. 415; 16 W. R. 1114.

A proprietor of an encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish an article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes. *Hereford (Bishop)* v. *Griffin*, 16 Sim. 190; 17 L. J., Ch. 210; 12 Jur. 255.

—— **When Vesting.**]—Under 5 & 6 Vict. c. 45, s. 18, actual payment for an article written for a periodical work is a condition precedent to the vesting of the copyright, in the article, in the proprietor of the work; a contract for payment is not sufficient. *Richardson* v. *Gilbert*, 1 Sim. (N.S.) 336; 20 L. J., Ch. 553; 15 Jur. 389.

To enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show, not merely that the author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor. *Walter* v. *Howe*, 50 L. J., Ch. 621; 17 Ch. D. 708; 44 L. T. 727; 29 W. R. 776.

—— **Implied Agreement as to.**]—By 5 & 6 Vict. c. 45, s. 18, when a proprietor of any periodical work shall employ any person to compose any article, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor:—Held, that these terms need not be expressed, but may be implied. *Sweet* v. *Benning*, 16 C. B. 459; 24 L. J., C. P. 175; 1 Jur. (N.S.) 543; 3 W. R. 519.

Where an author is employed by the proprietor of a periodical to write for it articles on certain terms as to price, but without any mention of the copyright, it is to be inferred that the copyright is to belong to such proprietor.

Position of Editor.]—The name of the editor appearing upon the title-page forms no part of the title; and a court of equity refused to restrain, by injunction, the proprietors of a journal from omitting the publication of the editor's name on the title-page, although the agreement between the proprietors and editor provided that the title of the journal should not be altered without mutual consent. *Crookes* v. *Petter*, 6 Jur. (N.S.) 1131; 3 L. T. 225.

Without determining the extent to which the owners of the copyright in a journal are justified in interfering with the editor in his editorial capacity, where the remuneration of the editor depends on the success of the journal, a court of equity refused to restrain the proprietors from altering articles proposed to be inserted by the editor, or inserting others contrary to his wish, it being the province of a jury to determine the amount of damage, if any, which the editor sustained by reason of the conduct of the proprietors. *Ib.*

Where publishers of a magazine employ and pay an editor, and the editor employs and pays persons for writing articles in the magazine,—Semble, the copyright in such articles is not vested in the publishers under 5 & 6 Vict. c. 45, s. 18. *Brown* v. *Cooke*, 16 L. J., Ch. 140; 11 Jur. 77.

Registration of.]—A periodical or magazine must be registered. *Henderson* v. *Maxwell*, 46 L. J., Ch. 59; 4 Ch. D. 163, 25 W. R. 66. And see *Maxwell* v. *Hogg*, 36 L. J., Ch. 433; L. R. 2 Ch. 307; 16 L. T. 130; 15 W. R. 467.

A periodical or magazine is a book within the meaning of s. 24 of 5 & 6 Vict. c. 45, and its proprietor, if he has, pursuant to s. 19, registered the first number at Stationers Hall, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under s. 18, although neither the serial nor the first number containing it has been separately registered. *S. C.*, 46 L. J., Ch. 59; 4 Ch. D. 163; 25 W. R. 66.

Registration under the Copyright Act, 5 & 6 Vict., c. 45, ss. 18 & 19, of the first number of a periodical protects articles contained in subsequent numbers. *Ib.*

Registration of First Number of Series—"Separately Published."]—An author who has sold to the proprietor of a periodical the right to publish a story in his paper in serial form, and who has agreed not to publish his work elsewhere until the series is completed, is not a "person employed to compose a part of any encyclopædia, review, magazine," &c., under s. 88 of the Copyright Act, 1842, and need not, in order to secure his copyright, republish his work

"in a separate form" under the last proviso of that section. *Johnson* v. *Newnes*, 63 L. J., Ch. 786; [1894] 3 Ch. 663; 8 R. 500; 71 L. T. 230.

Every part of a published volume which is separate and distinguishable from the other parts and distinguished in the volume itself is a "division or part of a volume separately published" within the meaning of s. 2 of the Copyright Act, 1842. *Ib.*

The registration of the first number of a work published in serial parts is a sufficient registration of each of the succeeding parts. *Ib.*

v. *Compilations and Translations.*

Subject of Copyright.]—A work, partly of compilations and selections from works on the subject, and partly original matter, may be the subject of copyright; and where part is clearly pirated, the court will grant an immediate injunction, although the entire amount of the pirated parts are unascertained. *Lewis* v. *Fullarton*, 2 Beav. 6; 8 L. J. Ch. 291; 3 Jur. 669.

Copyright may be either in respect of the matter or the arrangement, but no property can be acquired in any article copied from a prior work.

The person who forms the plan of the work to be composed by the labours of various persons, who employs different writers to contribute to it, and who pays them for their contributions, is the author and proprietor of such a work within the statute of Anne. *Barfield* v. *Nicholson*, 2 Sim. & S. 1; 2 L. J. (o.s.) Ch. 90.

Arrangement of questions and answers, however simple in themselves, and on subjects however common, may be the subject of copyright. *Jarrold* v. *Houlston*, 3 Kay & J. 708; 3 Jur. (N.S.) 1051.

—— **Mere Corrections.**]—Where a person simply makes corrections in and additions to a work in which he had originally no interest, he acquires a copyright in them, and may bring an action if they are pirated. *Carey* v. *Longman*, 1 East, 358; 3 Esp. 273; 6 R. R. 285.

—— **Directory of Traders—Headings—Advertisements.**]—The headings of a trade directory under which trade advertisements are classified are the subject of copyright. Semble, that the collocation and arrangement of the advertisements generally was, though each single advertisement was not, the subject of copyright. The "terms" referred to in s. 18 of the Copyright Act, 1842, upon which the copyright shall belong to the proprietor, need not be in writing or express, but might be implied from the general nature of the employment and of the business. *Sweet* v. *Benning* (16 C. B. 459) approved. *Lamb* v. *Evans*, 62 L. J., Ch. 404; [1893] 1 Ch. 218; 2 R. 189; 68 L. T. 131; 41 W. R. 405—C. A.

—— **Translation.**]—There may be a copyright in a translation, whether produced by personal application and expense, or by gift. *Wyatt* v. *Barnard*, 3 Ves. & B. 77; 13 R. R. 141.

Extent of Originality.]—If any person by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is sufficient to constitute an original work, of which the copyright will be protected. *Jarrold* v. *Houlston*, 3 Kay & J. 708; 3 Jur. (N.S.) 1051.

But another person may originate another work in the same general form, provided he does so from his own resources, and makes the work he so originates a work of his own by his own labour and industry bestowed upon it. *Ib.*

If, instead of searching into the common sources and obtaining your subject matter thence, you avail yourself of the labours of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use. *Ib.*

Falsely to deny that you have copied or taken any idea or language from another work is a strong indication of an animus furandi. *Ib.*

A person may have copyright in tables calculated by himself, even though the very same tables should have been published long before his appeared. *Bailey* v. *Taylor*, 3 L. J. (o.s.) Ch. 66.

Quære, whether an injunction will be granted to protect a copyright in tables founded on the author's personal calculation of them, when they are of such a nature that the same calculation could be made within a short time by any other person. *Ib.*

An injunction will not be granted, where, according to the case made by the plaintiff, there has been long acquiescence under the injury against which he at length seeks protection. *Ib.*

—— **Railway and Coach Guide—Appropriation of Independent Labour—Portion only infringed.**]—The mere publication in a particular order of time-tables which are to be found in the publications of the various railway companies, is not sufficient to give rise to a claim to copyright. The right may, however, exist in a compilation of information as to coach routes, ferries, and steamers published in the form of an abstract for the use of a particular locality. *Leslie* v. *Young*, [1894] A. C. 335; 6 R. 211—H. L. (Sc.)

Although it is not to be disputed that there may be copyright in a compilation or abstract involving independent labour, yet when copyright is claimed in such a work as a compilation of railway time-tables the burden of proof is on the compiler to show clearly that there has been a substantial appropriation of his independent labour before any proceeding on the ground of copyright can be justified. *Ib.*

If a book depends for its value upon a particular portion, that portion may be treated as an independent work for the purpose of copyright. *Ib.*

vi. *Catalogues and Advertisements.*

Catalogues.]—There is copyright in a catalogue, unless it is a mere dry list of names. *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J., Ch. 771; 9 L. T. 199; 11 W. R. 934.

It is no defence to say that the pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it. *Ib.*

Where a party sets up a case that his work is

a fair compilation from a number of others, and not a mere copy from any one, it is of the highest importance that he should produce his original manuscript. *Ib.*

—— **Illustrated.**]—The plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture which were duly registered under the Copyright Acts as a book. The illustrations were engraved from original drawings made by artists employed by the plaintiffs, but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale but was used by the plaintiffs as an advertisment. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the plaintiffs' book:—Held, that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book. Overruling *Cobbett* v. *Woodward*, infra *Maple* v. *Junior Army and Navy Stores*, 52 L. J., Ch. 67; 21 Ch. D. 369; 47 L. T. 589; 31 W. R. 70—C. A.

There is no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one may sell. *Cobbett* v. *Woodward*, 41 L. J., Ch. 656; L. R. 14 Eq. 407; 27 L. T. 27; 20 W. R. 963.

When an upholsterer, who had published an illustrated furnishing guide with engravings of the articles of furniture which he sold, and descriptive remarks thereon, filed a bill to restrain another upholsterer from publishing, for the purposes of his own trade, a similar work in which many of the engravings and portions of the letterpress of the first work were alleged to be copied:—Held, that he could not be restrained by injunction from so copying the illustrations or such part of his work as was not original but merely descriptive of his stock, or of common articles of furniture; but that, the latter's work being a flagrant imitation of the former's, he could be allowed no costs. *Ib.*

A tradesman who employs another for remuneration to compile a book of designs for him is himself entitled to copyright in the book. A book in the nature of an advertising catalogue may be the subject of copyright. *Grace* v. *Newman*, 44 L. J., Ch. 298; L. R. 19 Eq. 623; 23 W. R. 517.

A cemetery stonemason employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letterpress:—Held, that he had copyright in the book, and was entitled to an injunction to restrain the publication of designs copied from it. *Ib.*

vii. *Maps, Lectures and Other Matter.*

Maps.]—A bird's-eye view of a seat of war is a book within 5 & 6 Vict. c. 45, s. 2, and must be registered. *Stannard* v. *Lee*, 40 L. J., Ch. 489; L. R. 6 Ch. 346; 19 W. R. 615.

C. published a book of roads of Great Britain, comprising Patterson's book (to the copyright of which he was not entitled), with improvements and additions obtained by actual survey and otherwise; an injunction to restrain a publication of an edition of Patterson, comprising C.'s improvements and additions, was refused in equity. *Carey* v. *Fadin*, 5 Ves. 24.

There is no copyright in a general subject, though from its nature the consequence may be close resemblance and considerable interference, as in the case of maps and road-books. *Wilkins* v. *Aikin*, 17 Ves. 427; 11 R. R. 118.

—— **Chart or Plan—Sleeve Chart.**]—A sleeve chart, which consists of a piece of cardboard in the shape of a sleeve with certain curved lines and figures printed upon it, is not the subject of copyright under 5 & 6 Vict. c. 45. *Hollinrake* v. *Truswell*, 63 L. J., Ch. 719; [1894] 3 Ch. 420; 7 R. 568; 71 L. T. 419—C. A.

Lectures.]—Before 5 & 6 Will. 4, c. 65, s. 1, an injunction would be granted against third persons publishing lectures orally delivered, who had procured the means of publishing those lectures from parties who had attended the oral delivery of them. *Abernethy* v. *Hutchinson*, 1 H. & T. 28; 3 L. J. (o.s.) Ch. 209.

Where the court is called upon to restrain a publication, on the ground that it is a piracy of a composition which has been substantially reduced into writing, it is the duty of the court to see that the plaintiff produces his written composition. *Ib.*

N., an author and a lecturer upon various scientific subjects, delivered from memory, though it was in manuscript, a lecture at the Working Men's College upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. P., the author of a system of shorthand writing, and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture, and took notes, nearly verbatim, in shorthand, of it, and afterwards published the lecture in his monthly periodical, "The Phonographic Lecturer." On motion for an injunction to restrain the publication:—Held, that where a lecture of this kind is delivered to an audience limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other; and injunction accordingly. *Abernethy* v. *Hutchinson* (1 H. & T. 28) discussed. *Nicols* v. *Pitman*, 53 L. J., Ch. 552; 26 Ch. D. 374; 50 L. T. 254; 32 W. R. 631; 48 J. P. 549.

A professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle any one to republish them without the permission of the author. *Caird* v. *Sime*, 57 L. J., P. C. 2; 12 App. Cas. 326; 57 L. T. 634; 36 W. R 199—H. L. (Sc.).

The appellant, a professor of a Scottish university, delivered lectures in his class-room as part of his ordinary course to students of the university, who were admitted on payment of the prescribed fees:—Held (Lord FitzGerald dissenting), that such delivery of the lectures was not equivalent to a communication of them to the public at large, and that the appellant was entitled to restrain other persons from publishing them without his consent. *Ib.*

Report of Engineer.]—An engineer made a report upon a mining property and handed it to a member of a syndicate for bringing out a company. It was agreed that the report should be printed and shown to the syndicate. If the company was formed, and the report published in the prospectus, the engineer was to receive 1,000*l.*, but if the company was not formed, the report was to be returned to him. The proposed company was abandoned. The defendant company took up the property, and having obtained a printed copy of the report, made use of it in the prospectus issued by them:—Held, that the property in the report belonged to the engineer, and that he was entitled to an injunction to restrain the defendants from publishing it. *Kenrick* v. *Danube Collieries Co.*, 39 W. R. 473.

Specifications.]—There is no copyright in the specifications of patents. *Wyatt* v. *Barnard*, 3 Ves. & B. 77; 13 R. R. 141. But see *Newton* v. *Cowie*, 12 Moore, 457; 4 Bing. 234; 29 R. R. 541; 5 L. J. (o.s.) C. P. 159.

Voyage of Discovery under Crown.]—A voyage of discovery having been executed, and a narrative of it prepared under the orders of the crown, the narrative is the property of the crown; but on a bill in equity by a publisher, authorised by the secretary of the Board of Admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved. *Nicol* v. *Stockdale*, 3 Swans. 687.

Calendars.]—Though copyright cannot, as such, subsist in an East India calendar, as a general subject, any more than in a map, chart or series of chronology, it may in the individual work; and where it can be traced that another work upon the same subject is not an original compilation, but a mere copy with colourable variations, it will be protected by injunction. *Matthewson* v. *Stockdale*, 12 Ves. 270.

An injunction was granted against pirating a court calendar, the individual work creating a copyright, though the general subject was common. *Longman* v. *Winchester*, 16 Ves. 269.

Album.]—An album for holding photographs, with pictorial borders containing views of castles, with short descriptions attached, is not a "book" within 5 & 6 Vict. c. 45, s. 1, so as to be capable of obtaining copyright for the contents. *Schove* v. *Schmincke*, 55 L. J., Ch. 892; 33 Ch. D. 546; 55 L. T. 212; 34 W. R. 700.

Barometer's Face.]—The face of a barometer, displaying special letterpress, held not to be capable of registration under the Copyright Act, 1842, as not being within s. 2, "a book separately published." *Davis* v. *Comitti*, 54 L. J., Ch. 419; 52 L. T. 539.

Reprints.]—A person may, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, create a new copyright, which will be protected from piracy; and it is a piratical use of such copyright work to borrow therefrom any considerable number of the illustrations. *Black* v. *Murray*, 9 Scotch Sessions Cases, 3rd series, 341.

Right to Republish.]—The proprietor of a copyright does not lose his right of republication, although the book may have been out of print and obsolete, and of little or no value, for any number of years. *Weldon* v. *Dicks*, 48 L. J., Ch. 201; 10 Ch. D. 247; 39 L. T. 467; 27 W. R. 639.

Before 8 Anne, c. 19.]—An author whose works had been published more than twenty-eight years before the passing of 8 Anne, c. 19, was not entitled to the copyright for life. *Brooke* v. *Clarke*, 1 B. & Ald. 396.

Songs.]—*See* MUSICAL COMPOSITIONS, infra.

Plays.] — *See* DRAMATIC COMPOSITIONS, infra.

b. Registration.

i. *In general.*

Before Publication.]—No copyright can be acquired by registration at Stationers' Hall until publication of the work registered. *Maxwell* v. *Hogg*, 36 L. J., Ch. 433; L. R. 2 Ch. 307; 16 L. T. 130; 15 W. R. 467.

The mere declaration of an intention, however public, to publish a magazine or any manufactured article bearing a particular name or mark, notwithstanding that such declaration is accompanied by expenditure in connection with the intended article, cannot create a right to the exclusive use of such name or mark as a trade mark. *Ib.*

H., in 1863, registered an intended new magazine to be called *Belgravia*. In 1866, such magazine not having appeared, M., in ignorance of what H. had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September as about to appear in October. H., knowing of this, made hasty preparations for bringing out his own magazine before that of M. could appear, and in the meantime accepted an order from M. for advertising M.'s magazine on the covers of his own publications, and the first day on which he informed M. that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of H.'s magazine appeared. M.'s magazine appeared in October:—Held, that M.'s advertisements and expenditure did not give him any exclusive right to the use of the name *Belgravia*, and that he could not restrain H. from publishing a magazine under the same name, the first number of which appeared before M. had published his. *Ib.*

Held, also, that H.'s registering the title of an intended publication could not give him a copyright in that name, and that he had not acquired any right to restrain M. from using the name, as being H.'s trade mark. *Ib.*

The proprietor of a book or periodical has no copyright therein under 5 & 6 Vict. c. 45, if it is not actually published at the date of its registration at Stationers' Hall. *Henderson* v. *Maxwell*, 46 L. J., Ch. 891; 5 Ch. D. 892; 25 W. R. 455.

Therefore, where the proprietor of a periodical had registered its first number at Stationers' Hall before publication, although he had then entered on the register the date of its intended publication, which was the actual date:—Held,

that having regard to ss. 13 and 18, and to the form of requiring entry of proprietorship in the schedule to the act, he was not entitled to copyright in the periodical nor to an injunction to restrain its alleged infringement. *Ib.*

No copyright is acquired by the registration of a book before its actual publication. *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. (N.S.) 540; 12 L. T. 540; 13 W. R. 804.

After Infringement.]—The registration of a copyright under the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 24, is not necessary to the existence of the copyright, but is only necessary to perfect the right to sue; and the registration need not have been entered before the alleged infringement. *Goubaud* v. *Wallace*, 36 L. T. 704; 25 W. R. 604.

Issue of Writ on the same day as Registration.]—The issue of a writ in an action for the infringement of a copyright on the same day, but subsequently to the registration of such copyright under the Copyright Act, 1842, sufficiently complies with s. 24 of that statute, so as to enable the person making the registration to sue in respect of the infringement. *Warne* v. *Lawrence*, 54 L. T. 371; 34 W. R. 452.

Registration under Act of 1842, only.]—The proprietor of a newspaper registered as a serial publication under the Copyright Act, 1842, can sue in respect of his copyright in matter published in his paper; though neither the name of the proprietor nor the title of the paper is registered under the Newspaper Libel and Registration Act, 1881. *Cate* v. *Devon and Exeter Constitutional Newspaper Co.*, 58 L. J., Ch. 288; 40 Ch. D. 500; 60 L. T. 672; 37 W. R. 487.

Magazine, First Number of—What must be Registered.]—Registration of a weekly periodical before any part of it had been published is not a good registration; but the subsequent registration of the first number of the tale was a good registration to enable the proprietor to sue in respect of infringement of copyright in the title of the tale, supposing such copyright to exist. *Dicks* v. *Yates*, 50 L. J., Ch. 809; 18 Ch. D. 76; 44 L. T. 660—C. A.

A periodical or magazine is a book within the meaning of s. 24 of 5 & 6 Vict. c. 45, and its proprietor, if he has, pursuant to s. 19, registered the first number at Stationers' Hall, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under s. 18, although neither the serial nor the first number containing it has been separately registered. *Henderson* v. *Maxwell*, 46 L. J., Ch. 59; 4 Ch. D. 163; 25 W. R. 66.

When unnecessary [Parts Registered.]—An infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited; and where that music having been made the subject of two "arrangements," one without the voice, another for the voice and piano, those arrangements having been published, the infringer has used them for his own production. In such a case the question of what was intended to be registered will be considered with reference to all the parts of the register, and if certain portions of the forms of registry are, in the particular case, unnecessary and unmeaning, the introduction of them will not affect those portions of the register which are correct. *Fairlie* v. *Boosey*, 48 L. J., Ch. 697; 4 App. Cas. 711; 41 L. T. 73; 28 W. R. 4.

Description of Author.]—The author and proprietor of copyright in a song, in the entry at Stationers' Hall, describing his place of abode as 65, Oxford Street, he being in America at the time of the publication, and having no place of abode in England, but 65, Oxford Street, being the address of his publishers, is a sufficient description. *Lover* v. *Davidson*, 1 C. B. (N.S.) 182.

Rectification of Register — Person "Aggrieved."]—Under 5 & 6 Vict. c. 45. s. 14, which gives power to make an order to vary an entry in the register of copyright under that act upon the application of any person who "shall deem himself aggrieved by any" such "entry," the court made an order varying an entry in a register of copyright upon the application of the person who had caused the entry to be made. *Poulton, Ex parte*, 53 L. J., Q. B. 320; 32 W. R. 648.

Expunging Entry—Persons "Aggrieved."]—Upon an application under 5 & 6 Vict. c. 45, s. 14, to expunge entries in the register at Stationers' Hall, representing A. to be the proprietor of the liberty of performing certain songs published before the act, it appeared that the applicants, who were music-publishers, claimed under a general grant of the copyright in the songs made by the composer after the act, and that A. claimed under a subsequent grant by the composer which purported to convey separately the right of performing them. A., under colour of this grant, had threatened to take proceedings against persons performing the songs without his consent:—Held, that the application to expunge the entries must be granted; for the applicants were "aggrieved" by the existence of the entries, which were calculated to prejudicially affect their literary copyright in the songs by diminishing the number of copies sold. *Hutchins & Romer, Ex parte*, 48 L. J., Q. B. 29; 4 Q. B. D. 90; 39 L. T. 396; 27 W. R. 261. See *S. C.* in C. A., 48 L. J., Q. B. 505; 4 Q. B. D. 483; 41 L. T. 144; 27 W. R. 857—C. A.

By 5 & 6 Vict. c. 45, s. 14, and 25 & 26 Vict. c. 68, s. 5, "if any person shall deem himself aggrieved" by any entry in the register, he may apply to one of the superior courts for an order that such entry may be expunged or varied. W. being charged under the acts, on the complaint of G., with the infringement of his copyright in a picture, a certified copy of the entry in the register of the assignment to G. was given in evidence to prove G.'s title. W. having been convicted, applied to the court to expunge the entry, on the ground that G. had not a good title to the copyright; W. did not set up any title in himself:—Held, that W. was not a person aggrieved within the meaning of the statutes. *Graves, In re*, L. R. 4 Q. B. 715; 20 L. T. 877; 17 W. R. 1018.

Entry for Purposes of Action.]—Before the 5 & 6 Vict. c. 45, a plaintiff instituted proceed-

ings in equity for an alleged infringement of his copyright, and an issue had been directed, whereupon he caused the entry to be made, and commenced an action:—Held, that the defendant was entitled to have the entry expunged; but the court discharged the rule for that purpose, on the plaintiff undertaking not to use the entry as evidence at the trial. *Chappell* v. *Purday*, 1 D. & L. 458; 12 M. & W. 303; 13 L. J., Ex. 7.

Semble, that the court has no power to restore an entry when once it has been struck out. *Ib.*

Upon a rule nisi to expunge three entries made in the registry on the ground that they would be primâ facie evidence in an action against the defendant for publishing the pieces of music mentioned in them, alleged to be the copyright of the plaintiff, the court (the plaintiff refusing to consent not to use the entries on the trial) declined to expunge the entries, but directed an issue whether there was a copyright in the music, and whether the plaintiff was the proprietor of the copyright, on the trial of which the entries should not be used; and ordered that the rule should be enlarged until the trial of the issue. *Davidson, Ex parte*, 2 El. & Bl. 577; 18 Jur. 57.

The court will not exercise its power to expunge an entry of proprietorship of copyright in the registry, unless it is clearly and unequivocally shewn that it is false, or vary it, unless satisfied by affidavit that in so doing the court would make a true entry; repudiating the power exercised by the Court of Queen's Bench in the above case. *Davidson, Ex parte*, 18 C. B. 297; 25 L. J., C. P. 237; 2 Jur. (N.S.) 1024; 4 W. R. 593.

A., the author of a song, wishing to preserve his copyright therein in America as well as in England, caused his agents simultaneously to register it in New York and London. In the entry in the registry, the name of the London agent was inserted by mistake as the proprietor of the copyright. A., when he discovered this, procured such entry to be altered under a judge's order, by inserting his own name as proprietor in lieu of that of his agent, and he afterwards brought an action for piracy against B., who had published the song in this country before the entry had been altered. B. claimed no title in himself to the copyright, but relied on such prior publication, and also on an alleged publication in America anterior to that stated in the original registration. The court refused, on the application of B., to expunge or vary such altered entry in the registry, because it did not clearly appear that there had been a prior publication in America, or that the entry was untrue. *Ib.*

An entry having been improperly made on the registry the court granted a rule to vary or expunge it. *Bastow, Ex parte*, 14 C. B. 631.

ii. *Name of Publisher.*

Whose Name must be Registered.]—H. agreed with T. to edit a translation of a foreign work, and compose a biographical sketch of the author, and give notes of his own. It was intended that T. should have the sole right of multiplying copies of the work, and the work was published before 5 & 6 Vict. c. 45. There was no assignment of the copyright from H. to T. After T.'s death, his widow, with H.'s knowledge and assent, registered the copyright in her own name under 5 & 6 Vict. c. 45:—Held, that the copyright was in T.'s widow and not in H. *Hazlitt* v. *Templeman*, 13 L. T. 593.

After H.'s assent to T.'s widow registering the copyright in her own name, she paid to him money, and he received from her books on the publication of a fresh edition on the same terms as stipulated in the agreement between H. and her husband in his lifetime. H., on three occasions, claimed remuneration on those terms, and she did not repudiate all liability, but disputed the quantum merely:—Held, evidence from which the jury might infer an agreement by the widow to remunerate H. on the same scale as in the agreement with her husband in consideration of his assenting to her registering the copyright in her own name. *Ib.*

In registering the copyright of a book at Stationers' Hall, it is sufficient to enter the first publisher, under the trade name of the firm, and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor. *Weldon* v. *Dicks*, 48 L. J., Ch. 201; 10 Ch. D. 247; 39 L. T. 467; 27 W. R. 639.

Registration of a copyright is bad, if the name entered as that of "the publisher" is not that of the first publisher. *Weldon* v. *Dicks* (10 Ch. D. 247) followed. *Coote* v. *Judd*, 23 Ch. D. 727; 48 L. T. 205; 31 W. R. 423.

In an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence. *Ib.*

To entitle any one but the author of a literary work to register it at Stationers' Hall, there must be an absolute assignment of the copyright. *Bastow, Ex parte*, 14 C. B. 631.

Where copyright belongs to A. it cannot be properly registered in the name of his nominee or agent unless the property is actually vested in such person as trustee for A. The conjunction in such a case of the unregistered proprietor as co-plaintiff with the improperly registered nominee or agent will not render an action for infringement sustainable. *London Printing and Publishing Alliance* v. *Cox* (60 L. J., Ch. 707; [1891] 3 Ch. 291) discussed and followed. *Petty* v. *Taylor*, 66 L. J., Ch. 209; [1897] 1 Ch. 465; 75 L. T. 545; 45 W. R. 299.

—— **Before 5 & 6 Vict. c. 45.**]—An author, whose work was pirated before the expiration of 28 years (under 54 Geo. 3, c. 156) from the first publication of it, might maintain an action for damages against the offending party, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. *Beckford* v. *Hood*, 7 Term Rep. 620; 4 R. R. 527. See also *Fairlie* v. *Boosey*, *ante*, col. 471.

iii. *Date of Publication.*

Rule—What Entry Sufficient.]—In registering a copyright in the registry-book of the Stationers' Company in pursuance of 5 & 6 Vict. c. 45, s. 13, it is not sufficient to enter the month in which the first publication takes place; but the day of first publication must be stated. *Mathieson* v. *Harrod*, 38 L. J., Ch. 139; L. R. 7 Eq. 270; 19 L. T. 639; 17 W. R. 99.

To entitle the proprietor of a book or periodical

to maintain an action for infringement of copyright, it is necessary that the entry on the register at Stationers' Hall, under s. 13 of the Copyright Act, 1842, should not only state the precise title of the work, but also the "time of first publication." It is not sufficient to enter the month and the year only; but the actual day of the month must be given, in order that it may be known when the term of forty-two years "from the first publication," allowed by s. 3 of that statute as the period of copyright, commenced and will terminate. To entitle the proprietor of a book or periodical to maintain an action for infringement of copyright in respect of articles, reports, or other contributions supplied to him by persons employed and paid by him for that purpose, he must, under s. 18 of the Act, prove that he has actually paid for such articles, reports, or other contributions. *Collingridge* v. *Emmott*, 57 L. T. 864.

Errors.]—If the date of the first publication is erroneously stated in the registration, the registration is of no effect, and no suit can be brought to restrain the infringement of the copyright. *Page* v. *Wisden*, 20 L. T. 435; 17 W. R. 483.

Where in registering the proprietorship of a copyright, either the date of the first publication or the name of the publisher, is incorrectly entered, a subsequent assignment by entry in the book of registry is invalid. *Low* v. *Routledge*, 33 L. J., Ch. 717; L. R. 1 Ch. 42; 10 Jur. (N.S.) 922; 10 L. T. 838; 12 W. R. 1069.

In an action to restrain an infringement of copyright the statement of defence alleged undue registration, and that the registration was void by reason of the wrong date of publication having been given:—Held, that the invalidity of the registration pleaded was confined to invalidity by reason of a wrong date, and did not extend to a misstatement of the name of the publisher. *Collotts* v. *Goode*, 47 L. J., Ch. 370.

—— **False Registration.**]—A court of equity will afford no relief against an alleged piracy of the title of a magazine where the proprietor has made a false registration as to the date of its publication. *Maxwell* v. *Hogg*, *Hogg* v. *Maxwell*, 12 Jur. (N.S.) 916; 15 L. T. 204; 15 W. R. 84. Affirmed, 36 L. J., Ch. 433; L. R. 2 Ch. 307; 16 L. T. 130; 15 W. R. 467.

When a proposed magazine with a particular title has been registered, and, no number of the magazine having yet been published, the entry of date of publication is filled in with the date at which the registration is effected; and no number of the magazine is, in fact, published till some time after the date of registration, the registration is wholly ineffective, and a court of equity will not grant an injunction against another person who publishes a magazine with the same title, whether he commences publishing before or after the party who seeks the injunction. *Ib.*

Application of Rule.]—Offenbach composed, in Paris, the music of an opera called "Vert-Vert." S., by his permission, made two "arrangements" of the music, one for the piano without, the other for the piano with, the voice. The opera was produced at the Opera Comique, in Paris, on the 10th of March, 1869, but was never, as a whole, printed. The two arrangements were printed in a book published in Paris at 10, Rue de la Chaussée d'Antin, on the 28th of March, 1869. B. became the assignee of the music of the opera, and also of the arrangements. He sought to register them in England. He filled up the statutory forms required for that purpose. One column of those forms had, in the lower portion, the heading, "Time and place of first representation," and the words, "Théâtre Impérial de l'Opera Comique, Paris, France, 10th March, 1867," but the upper portion of the same column had the words, "Time and place of first publication," under which were the figures and words, "28th March, 1869. 10, Rue de la Chaussée d'Antin, Paris, France." The form relating to the assignment of the music of the opera was correct in the first two columns, but in the third, under the heading, "Assignee of copyright," were, first of all, the name and residence of B., and then the words, "as assignee of the copyright in the music of the said book, and also of the right of publicly performing such music." The written but unpublished music of the opera was not deposited at Stationers' Hall; the "book" containing the pianoforte arrangements was deposited there. F. produced a dramatic representation, calling it "Vert-Vert, music by Offenbach," the music being taken from the arrangements, but the words were supplied by English writers:—Held, that there had been a sufficient registration of the music of the opera, and that the registration was not affected by the reference to the "book" of the arrangements, and that F. had been guilty of an infringement of B.'s rights. *Fairlie* v. *Boosey*, 48 L. J., Ch. 697; 4 App. Cas. 711.

Evidence.]—A., being in New York, and wishing to publish a song there and in London simultaneously, entered into an agreement for an assignment of the American copyright to a publisher in New York:—Held, that a receipt for the purchase-money was no evidence of the assignment; and also that the date on the title-page (as required by the American law) was not conclusive evidence of the time of publication in New York. *Lover* v. *Davidson*, 1 C. B. (N.S.) 182.

Reprint with Additions—Patent Alleged.]—Where the date of the first publication of an illustrated catalogue, being a reprint with additions of catalogues duly registered in 1880 and 1882, was given on registration as the 22nd June, 1885:—Held, that it was a correct statement as to the first publication of the new pages, and that the description in the catalogue of the articles as "patent," subsequent to the expiration of the patent, on the 31st July, 1885, did not take away the plaintiff's copyright in the part of the catalogue which was correctly stated, and that the plaintiff was entitled to an injunction to prevent any further publication of books by the defendant, so far as they contained an infringement of the copyright of the plaintiff in his illustrated catalogue of Aug. 1880, or in the additions made to that catalogue in the edition of 1885. *Hayward* v. *Lely*, 56 L. T. 418.

Non-registration of First Edition — Registration of Subsequent Edition — Reprint of Former Edition.]—The plaintiff in an action for infringement of copyright in a book, the first edition of which was published in November, 1881, had not, before commencing such action, registered at Stationers' Hall either the first or a second edition which he had subsequently published; but he had registered a third edition which was in fact a reprint of the first edition.

describing it in the entry as a third edition, and giving the time of the first publication as the 22nd of April, 1885, which was the date at which the third edition was published :—Held, that the plaintiff had not truly stated the time of the first publication of his book within the meaning of s. 13 of the Copyright Act, 1842, and consequently had not caused entry to be made of his book pursuant to the act, and was precluded by s. 24 from maintaining and action for infringement of copyright until he had made due and correct entry pursuant to s. 13. *Thomas* v. *Turner*, 56 L. J., Ch. 56; 33 Ch. D. 292; 55 L. T. 534; 35 W. R. 177—C. A.

c. Agreements between Authors and Publishers.

Personal Nature of.]—If an author undertakes to compose a book, and dies before completing it, his executors are discharged from the contract; for the undertaking is merely personal in its nature, and by the intervention of the author's death has become impossible to be performed. *Marshall* v. *Broadhurst*, 1 Tyr. 349; 1 C. & J. 403; 9 L. J. (O.S.) Ex. 105.

So, if the author becomes a bankrupt, his assignees have no power to compel him to finish or complete the work. *Gibson* v. *Carruthers*, 8 M. & W. 343; 11 L. J., Ex. 138.

Not to bring out New Edition—Whether Implied.]—An authoress entered into a verbal agreement with a publisher that he should publish a work at his own expense, and pay her a royalty on the copies sold. The work was accordingly published, but, before all the copies were sold, she arranged with another publisher to bring out a second edition of the work :—Held, that no agreement could be implied on the part of the authoress not to bring out another edition until all the first edition was sold, and that a suit against her and the second publisher to restrain such publication could not be sustained. *Warne* v. *Routledge*, 43 L. J., Ch. 604; L. R. 18 Eq. 497; 30 L. T. 857; 22 W. R. 750.

Semble, that a wife, entitled to the copyright of a work for her separate use, may enter into such contract with a publisher for its publication as to bind herself during a definite period not to grant a licence to publish the work to any other person, and such a contract would be enforceable against a licensee with notice. *Ib.*

Right to bring out Rival Work.]—The plaintiff purchased the copyright of and the right to use the name of the defendant in the publication of a work called "Becton's Christmas Annual," and the defendant agreed to give his whole time to the service of the plaintiff, and not to engage in any other business :—Held, that the defendant must be restrained from advertising a rival work. *Ward* v. *Beeton*, L. R. 19 Eq. 207; 23 W. R. 533.

Licence to Publish, or Sale.]—R., an author, agreed with B., a publisher, that he should publish, at his own expense and risk, a work named W., and after deducting from the produce of the sale all expenses and certain allowances, the profits remaining of every edition that should be printed were to be divided equally between them; the books to be accounted for at trade price, unless it was thought advisable to dispose of any at a lower price, which was to be left to the discretion of B. :—Held, first, that this was a licence to publish, and not a parting with the copyright. *Reade* v. *Bentley*, 3 Kay & J. 271; 27 L. J., Ch. 254; 4 Jur. (N.S.) 82; 6 W. R. 240. And see 4 Kay & J. 656.

Held, secondly, that B. could at any time put an end to the agreement by refusing to publish any more. *Ib.*

Held, thirdly, that the form, type, price, time, number, &c., of every edition were left to the sole judgment and discretion of B. *Ib.*

—— **"Edition."**]—Held, fourthly, that "edition," meant every quantity of books put forth to the bookselling trade and to the world at one time by B.; and that when the advertisements, the printing, and other well-known expenses and acts by a publisher bringing out such quantity of copies in the ordinary way are closed, that constitutes the completion of the edition, whether the copies are taken from fixed or movable plates or types, and whether the types or plates are broken up or not, and whether all the copies taken are given forth and advertised for sale, or retained and stored in the warehouse of the publisher. *Ib.*

—— **Right to Determine.**]—Held, fifthly, that on the completion of any edition, R. had a right to put an end to the agreement between himself and B., by notice given to B. before any expense had been incurred towards another edition. *Ib.*

Agreement for Sale of Edition—Interference by Author in Sale.]—S. entered into a contract with the author of a work, which had already passed through nine editions, to purchase from him and to sell to the public at a fixed price, a tenth edition, consisting of 2,500 copies :—Held, that he had obtained a right in the copyright of the work until he should have sold off the tenth edition; that, during such time he had bound himself to sell the book at the fixed price, and the author would be bound not to interfere in the sale. *Sweet* v. *Cater*, 11 Sim. 572; 5 Jur. 38.

Held, also, after examination by the court of the two books, that there had been such an abstraction of matter from S.'s work as exceeded the limits of fair quotation; and that, though the pirated passages might be contained in the prior editions, in which the author had the entire copyright, yet that being also incorporated in the tenth edition, S. was entitled to an injunction. *Ib.*

—— **For Limited Period—Subsequent Sale.**]—An author contracted with a printer and publisher for the copyright and sole right of sale for four years, from 15th March, 1854, of a book written by the author. The publisher printed three editions of the work previously to the expiration of the four years in March, 1858, but had printed none since :—Held, that an injunction would not lie to restrain the publisher from selling his unsold stock of copies. *Howitt* v. *Hall*, 6 L. T. 348; 10 W. R. 381.

Warranty of Copyright.] — The defendant having been applied to by the plaintiff for permission to publish a work, wrote to him as follows :—"You formerly made me an offer of 50*l.* for the exclusive right of publishing for ten years Captain M.'s work, 'Monsieur Violet,' which offer I accepted, and wrote you to that effect. I possess but few of the copyrights of the earlier portions of Captain M.'s works, and they are many of them published in a cheap edition. I will let you know, in a few days

those of the works that belong to me that I feel disposed to offer to you; in the meantime I shall be glad to know if you received my last letter accepting your offer for 'Monsieur Violet,' and, if not, whether you still hold the same proposal." The sum of 50*l.* was afterwards paid for which the defendant gave a receipt to the plaintiff, expressed to be "for permission to publish Captain M.'s work, 'Monsieur Violet,' so long as the copyright may endure, that right to be exclusively his own for ten years":—Held, this amounted to an express warranty by the defendant that he had the title to the copyright in question. *Sims* or *Simms* v. *Marryat*, 17 Q. B. 281; 20 L. J., Q. B. 454.

Prior to this transaction, Captain M., by an instrument in writing, not sealed or attested so as to pass the legal copyright, agreed to assign the copyright in "Monsieur Violet" to B. for 300*l.*, with a stipulation that a deed of assignment of the copyright should be executed. The money was duly paid by B.:—Held, that the effect of this was to vest the equitable copyright in B., who would be entitled to a decree in equity for a specific performance of the contract. *Ib.*

False Representation as to Authorship.]—An author may maintain an action for an injury to his reputation against a publisher of an inaccurate edition of his work, falsely purporting to be executed by him, though the publisher is the owner of the copyright. *Archbold* v. *Sweet*, 1 M. & Rob. 62; 5 Car. & P. 219.

Breach of Agreement not to Undersell.]—A., having printed a work, sold 300 copies to B., a bookseller, at 40*s.* a copy, binding himself not to sell to others, in quires, under 48*s.*, and in single copies under 50*s.* a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B., "I do not expect you to sell under 48*s.* and 50*s.*, but do as you like." When B. had sold a part of the 300 copies, he went into partnership with C., and transferred all his stock at the cost price. He also sold some copies at 45*s.* and 46*s.* A., in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by B., persuaded D., who had purchased the principal part, to consent to give them back, if it would satisfy B. D. had an interview with B., and told him this. D. said that he understood the arrangement was a settlement of the difference, and that B. went away from the interview perfectly satisfied:—Held, in an action by B. against A. for a breach of the agreement, that neither the underselling by B., nor the transfer of the stock to the partnership, were grounds of a non-suit; but that the arrangement with D. was an answer to the action, if the jury thought that it made an end of the dispute between the parties:—Held, also, that, on the question of damage, it might be considered whether B.'s own underselling had or had not contributed to affect the price of the work in the market. *Benning* v. *Dove*, 5 Car. & P. 427.

Lien of Bookseller.]—Semble, where an author agrees with a bookseller to publish his work, and to allow him interest for the money he should advance, and also a share of the profits, the bookseller has a lien on the copyright for his disbursements. *Brook* v. *Wentworth*, 3 Anst. 881.

Assignment of Agreement.] — Publishers agreed with an author to print, reprint, and publish a work by him at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent edition on the same terms. After the publication of the first edition, the firm of the publishers was changed, and the interest of the old firm in the work was in another publisher, with the author's concurrence, the agreement being held to be of a personal nature on both sides, and the benefit of it not assignable by either party without the other's consent. *Stevens* v. *Benning*, 6 De G., M. & G. 223; 3 Eq. Rep. 457; 24 L. J., Ch. 153; 1 Jur. (N.S.) 74; 3 W. R. 149.

The joint authors of a book (one of whom composed the letterpress, and the other sketched the drawings from which the illustrations were engraved) entered into a verbal agreement with a firm of publishers, by which the firm were to engrave the illustrations and to print and publish the book. If the publication resulted in a loss the firm were to bear the whole of it; if there was a profit, they were to pay half of it to the authors. The profits were to be ascertained after deducting the cost of the engraving, printing, and publication, but without allowing any sum to the authors for the illustrations and letterpress. The book was published, and the publication resulted in a profit:—Held, that the agreement was merely personal to the individuals then composing the publishers' firm, and that the benefit of it could not, without the consent of the authors, be assigned by the publishers' firm to a firm which had succeeded to their business, but which contained none of the partners of the original firm. The successors of the original firm were accordingly restrained from publishing the book. *Hole* v. *Bradbury*, 48 L. J., Ch. 673; 12 Ch. D. 886; 41 L. T. 153, 250; 28 W. R. 39.

Discontinuance — Quantum Meruit.] — An author engaging to write a treatise for a periodical publication which is afterwards, and after his work is commenced, abandoned, is entitled to a quantum meruit, without tendering or delivering the treatise. *Planché* v. *Colburn*, 1 M. & Scott, 51; 8 Bing. 14; 5 Car. & P. 58.

A. agreed to supply B. with a manuscript of a work, to be printed by the latter, the profits of which were to be equally divided between them:—Held, that B. might maintain an action against A. for refusing to supply manuscript after part of the work had been printed. *Gale* v. *Leckie*, 2 Stark. 107; 19 R. R. 692.

Second Agreement Superseding.] — On the 28th of May, 1831, A. agreed with B. for twelve months for the performance of various literary works to be thereafter indited by A., A. to receive from B. for the same, six guineas a week, and not to be at liberty during the twelve months to engage in any publication similar to The Court Journal, mentioned in the agreement. By agreement between the same parties, dated 14th October, 1831, A. agreed to take on himself the various duties of editing the publication called The Court Journal, recited to be the entire property of B., and to devote all his time and attention to the same, except the hours he had already engaged on Saturdays and

Mondays, to superintend a paper named. B. was to pay A. 10*l.* a week:—Held, that the first agreement was superseded by the second, so that A. could not recover on the first after the second came into operation. *Patmore* v. *Colburn*, 4 Tyr. 840; 1 C. M. & R. 65; 3 L. J., Ex. 314.

Advertising Discontinuance.]—D., being one of the proprietors and the editor of a weekly periodical, called "Household Words," was not, on a dissolution of the partnership, justified in advertising that the publication would be discontinued; for the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets; but he might advertise the discontinuance of the publication as regarded himself. *Bradbury* v. *Dickens*, 27 Beav. 53; 28 L. J., Ch. 667.

Agreement to Report.]—The court of chancery cannot specifically perform an agreement, whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual, for a stipulated remuneration, nor interfere by an injunction to restrain the party from permitting the reports written by him to be published by another person; the remedy, if any, is at law. *Clarke* v. *Price*, 2 Wils. C. C. 157; 18 R. R. 159.

—— **To Supply part of Book.**]—Where the plaintiff had contracted to correct and complete, from materials to be furnished by the defendant, a book which the defendant expressed his intention to write, and agreed also to supply the legal information connected with the subject, for which the plaintiff was to be paid a certain remuneration according to the number of pages the work might contain, the court refused an injunction to restrain the defendant from printing, publishing, or selling the legal part of the work (which the plaintiff had contributed) with any material alteration or omission: and also refused an injunction to restrain the defendant from printing, publishing, or selling the work until he had paid the plaintiff the sum agreed upon for his assistance and contribution; for such payment may be enforced at law, and the title to it is not a ground for the interposition of a court of equity. *Cox* v. *Cox*, 11 Hare, 118; 1 Eq. R. 94; 1 W. R. 345.

Yearly Engagement.]—S., a proprietor of a weekly newspaper, by a letter to F., an author, agreed that he should write two tales, extending over one year, at 10*l.* per week for each number, to contain about the same quantity as was sent under a former similar engagement, and to receive the first number on the 22nd April, 1855, and to continue to receive one number weekly during one year, conditionally that he should not write for any other newspaper published at less than 6*d.* He accepted the engagement, received 20*l.* as a deposit, and wrote regularly for some weeks; then went to Paris, sent an abrupt conclusion of a current tale in a small quantity of manuscript, refused to proceed with his engagement with S. and entered into another engagement with C. S. thereupon stopped his payments to F., and employed another author to conclude the half-finished tale:—Held, first, that the engagement was a yearly engagement, and could not be terminated by F. as a weekly engagement. *Stiff* v. *Cassell*, 2 Jur. (N.S.) 348.

Held, secondly, that the condition as to F. not engaging elsewhere was valid. *Ib.*

Implied Agreement as to Copyright.] — By 5 & 6 Vict. c. 45, s. 18, when the proprietor of any periodical work shall employ any person to compose any article, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor:—Held, that these terms need not be expressed, but may be implied. *Sweet* v. *Benning*, 16 C. B. 459; 24 L. J., C. P. 175; 1 Jur. (N.S.) 543; 3 W. R. 519.

Where an author is employed by a proprietor of a periodical work for its articles on certain terms as to remuneration, but without any mention of the copyright, it is to be inferred that the copyright is to belong to such proprietor. *Ib.*

Semble, unless there is a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. *Cox* v. *Cox*, 11 Hare, 118; 1 Eq. R. 94; 1 W. R. 345.

Restraint of Trade.]—An agreement by a publisher not to publish in future a magazine of a particular description is analogous to an agreement by a tradesman not to deal in a particular article, and is not void as a too general restraint on trade. *Ainsworth* v. *Bentley*, 14 W. R. 630.

If one undertakes to furnish a new history of a country, this is not performed by his furnishing a book, which is a translation of an entire previously existing history, with his own continuations, and some additions. *Paton* v. *Duncan*, 3 Car. & P. 336.

Account.]—Semble, a bill will lie for an account by an author against his publisher, where the publisher refuses altogether to render any account; but where a publisher renders an account, and brings an action for the balance due to him, then, in the absence of fraud or misstatement, the court will not allow a suit for an account to be instituted, but will leave the matter to be determined at law. *Barry* v. *Stevens*, 31 Beav. 258; 31 L. J., Ch. 785; 9 Jur. (N.S.) 143; 6 L. T. 568; 10 W. R. 822.

Contrary Obligations.]—Upon an action by several for piracy of copyright, it appeared that the defendant had published the work in question, pursuant to the conditions of a cognovit given by him to one of the plaintiffs and P. in an action for not performing an agreement to write the work in question:—Held, a sufficient defence. *Sweet* v. *Archbold*, 10 Bing. 133; 3 M. & Scott, 299; 2 L. J., C. P. 204.

—— **Restraining Publication of Book in Mutilated Form.**]—The plaintiff, an author, moved to restrain the defendant, a publisher, from publishing or selling a certain book otherwise than in the form in which it was prepared by the author, or from representing that the plaintiff was the author of the book published by the defendant. The book was originally published in its complete form in 1886. In 1892 the publisher issued an edition of the book, omitting the preface, table of contents, introduction, bibliographical notice, and index. The ground of the motion was that the publication of the

book in a mutilated form caused an injury to the plaintiff's reputation as an author:—Held, that the plaintiff's remedy in law was libel. *Lee* v. *Gibbings*, 67 L. T. 263.

Bankrupt Publisher—Property in Copyright.]—A mere question of title between an author and a bankrupt publisher, as to which of them is owner of a portion of a copyright, cannot be decided in a bankruptcy matter; but, semble, where an author allowed the publisher to advertise himself as the owner of the copyright, though it had never been assigned in writing to him, it should be dealt with as the publisher's property in bankruptcy. *Curry, In re*, 12 Ir. Eq. R. 382.

d. Assignment.

Form.]—An assignment of a copyright must be in writing. *Leyland* v. *Stewart*, 46 L. J., Ch. 103; 4 Ch. D. 419; 25 W. R. 225.

The court will interfere by injunction to protect the copyright of the assignee of the author (the reporter of legal decisions), though it appears that, at the time of the alleged piracy, there was not an assignment in writing, and the assignee had a merely equitable title, and that some of the cases were ex relatione; and it will disregard a permission from the author to infringe the copyright, given after he had parted with his equitable title for valuable consideration, and it had appeared upon the title-page of his work that it was printed for the equitable assignee of the copyright. *Hodges* v. *Welsh*, 2 Ir. Eq. R. 266.

Where in registering the proprietorship of a copyright, pursuant to the 5 & 6 Vict. c. 45, either the date of the first publication or the name of the publisher is incorrectly entered, a subsequent assignment by entry in the book of registry is invalid. *Low* v. *Routledge*, 33 L. J., Ch. 717; 10 Jur. (N.S.) 922; 10 L. T. 838; 12 W. R. 1069.

Where the assignees, by entry of a copyright, the proprietorship of which was thus incorrectly entered, filed a bill to restrain infringement of the copyright, a demurrer thereto was allowed, on the ground that the assignees had no title. *Ib.*

Where a copyright has been assigned by the registered proprietor, otherwise than in the method provided by s. 13 of the Copyright Act, 1842—namely, by an entry of such assignment in the Registry Book of the Stationers' Company—the assignee must, before he can, as proprietor, maintain an action for infringement, be registered under s. 24. "Proprietor" in s. 24 includes not merely the original proprietor, but all persons who have taken by assignment otherwise than under s. 13. Dictum of Cockburn, C. J., in *Wood* v. *Boosey* (36 L. J., Q. B. 103, at p. 110; L. R. 2 Q. B. 340, at pp. 351, 352) not followed. *Liverpool General Brokers Association* v. *Commercial Press Telegram Bureaux*, 66 L. J., Q. B. 405; [1897] 2 Q. B. 1; 76 L. T. 292.

A. agreeing with B. "to let B. have" a particular drama in discharge of 10*l.* owing by A. to B. is a complete assignment to B. of A.'s whole property in the drama. *Lacy* v. *Toole*, 15 L. T. 512.

C., the composer of ten songs, assigned the copyright in them in 1843, by deed, to D. & M. The interest of D. & M. vested in H. & R. In 1878 C. purported to assign to A. the sole liberty of performing or singing, &c., the musical compositions. A. thereupon registered himself as the sole proprietor of the liberty of performing the compositions:—Held, upon motion by H. & R., that the entry must be expunged, for the second grant was invalid. *Hutchins and Romer, Ex parte*, 48 L. J., Q. B. 29, 505; 4 Q. B. D. 483; 41 L. T. 144; 27 W. R. 857—C. A.

An author assigned to trustees, subject to a life interest in himself in the present and any new editions, the copyright of certain books, and the copies then on hand, upon trust to permit his son to manage and conduct the printing, publishing, and disposing of the said printed and manuscript books, and the copies thereof:—Held, that the copies printed after the date of the deed, in the lifetime of the father, passed by the assignment. *Rippon* v. *Norton*, 2 Beav. 63.

Term of Duration.]—A committee of seven persons on behalf of a religious body compiled a hymn-book, which was registered under 54 Geo. 3, c. 156, as the property of the compilers, but was published by and sold for the benefit of the religious body. No minute of consent having been registered under 5 & 6 Vict. c. 45:—Held, that the term of the copyright had not been extended under that act, but ceased on the death of the last survivor of the seven compilers. *Marzials* v. *Gibbons*, 43 L. J., Ch. 774; L. R. 9 Ch. 185; 30 L. T. 666; 22 W. R. 637.

—— **Resulting Right.**]—Where an author who had sold his copyright, by living more than fourteen years obtained the resulting right for fourteen years more, under 8 Anne, c. 19:—Held, to belong to his assignee, and not to himself. *Carnan* v. *Bowles*, 2 Bro. C. C. 80; 1 Cox, 283.

An author having given a work to a publisher, who, by the sale of it, reimbursed his expenses and made considerable profit, cannot, at the end of the first fourteen years, restrain him by injunction from continuing the publication. *Rundell* v. *Murray*, Jacob, 311; 23 R. R. 75.

Copies previously Printed.]—In the absence of a special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession. *Taylor* v. *Pillow*, L. R. 7 Eq. 418.

Under 8 Anne, c. 19, s. 1.]—To entitle a party to maintain an action as assignee for an infringement of the copyright in a song, under 8 Anne, c. 19, s. 1, there must have been an assignment of the copyright by an instrument in writing, attested by two witnesses. *Davidson* v. *Bohn*, 6 C. B. 456; 18 L. J., C. P. 15; 12 Jur. 922. S. P., *Power* v. *Walker*, 3 M. & S. 7; 4 Camp. 8; 15 R. R. 378.

No assignment of copyright under 8 Anne, c. 19, the benefit of which was claimed by the assignee, although from a foreigner, could be good in this country, unless it was attested by two witnesses. *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; 3 C. L. R. 625; 24 L. J., Ex. 81; 1 Jur. (N.S.) 615.

There cannot be a partial assignment of copyright. *Ib.*

A foreign author cannot, by assigning his copyright according to the law of his country, give the assignee a copyright which will be recognised in England so as to entitle the purchaser of it here to the right of exclusive publication. *Ib.*

(Overruling *Boosey* v. *Davidson*, 13 Q. B. 257; 18 L. J., Q. B. 174; 13 Jur. 678; *Cocks* v. *Purday*, 5 C. B. 860; 17 L. J., C. P. 273; 12 Jur. 677; and *Boosey* v. *Jefferys*, 6 Ex. 580; 20 L. J., Ex. 354; 15 Jur. 540—Ex. Ch.)

Injunction obtained by the assignee of an author, after the expiration of the two terms of years allowed by the statute of Anne, dissolved; the common law right of the author being so extremely doubtful. *Osborne* v. *Donaldson*, 2 Eden, 327.

Executory Agreement.]—A. wrote words to an old air, and got his friend D. to compose an accompaniment, and A. agreed in writing with D. to execute a proper assignment of the whole work to him or any person whom he might name. A. accordingly executed a deed of assignment to D. and C. The defendant published a copy of the whole work:—Held, that the agreement to assign was executory, and did not operate as an assignment, so as to render the subsequent deed of assignment inoperative. *Leader* v. *Purday*, 7 C. B. 4; 18 L. J., C. P. 97; 12 Jur. 1091.

Attestation.]—If a primâ facie title to the copyright in a book is rebutted, the right may be supported without the production of a formal assignment attested by two witnesses under 5 & 6 Vict. c. 45. *Kyle* v. *Jefferys*, 3 Macq. H. L. 611.

A receipt in writing for the price of the copyright operates as an effectual assignment. *Ib.*

An assignment of copyright made after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, need not be attested. *Cumberland* v. *Copeland*, 1 H. & C. 194; 31 L. J., Ex. 353; 9 Jur. (N.S.) 253; 7 L. T. 334; 10 W. R. 581—Ex. Ch.

The 54 Geo. 3, c. 156, repealed, by s. 4, the 8 Anne, c. 19, s. 1, in this particular. *Ib.*

Pleading.]—Action for the copyright of a play. Plea, non assumpsit:—Held, that it could not be objected that the assignment was not in writing, but that it ought to have been specially pleaded. *Barnett* v. *Glossop*, 1 Scott, 621; 1 Bing. (N.C.) 633; 1 Hodges, 94; 4 L. J., C. P. 174.

Acquiescence.]—In an action for pirating a work, evidence that the plaintiff acquiesced in the publication six years ago is no proof of an assignment of the copyright. *Latour* v. *Bland*, 2 Stark. 382. S. P., *Hogg* v. *Scott*, 43 L. J., Ch. 705; L. R. 18 Eq. 444; 31 L. T. 73, 163; 22 W. R. 640; and *Weldon* v. *Dicks*, 48 L. J., Ch. 201; 10 Ch. D. 247; 39 L. T. 467; 27 W. R. 639.

e. Infringement.

i. *Title.*

Hackneyed Phrase—Registration of Part of a Book.]—The plaintiff published in numbers, in a weekly periodical called "Every Week," a tale intituled "Splendid Misery; or, East End and West End," by C. A. Hazlewood. The defendant subsequently commenced issuing in weekly parts, in a newspaper published by him, a tale by Miss Braddon, intituled "Splendid Misery." The plaintiff was registered as the proprietor of "Every Week" before the publication of it began, and after the tale had been completed he had himself registered as the proprietor of "Splendid Misery; or, East End and West End," giving the date of publication of the number of "Every Week" which contained the first number of the tale as the date of the publication of the tale. He then commenced an action to restrain the defendant from continuing his publication of Miss Braddon's tale under the title of "Splendid Misery," and moved for an injunction. Before the motion was made the defendant had altered the title of Miss Braddon's tale, and the motion was ordered to stand over till the trial, the defendant undertaking not to alter the new title in the meantime. The tale was finished under the new title before the trial. It was proved that a novel which once had a large circulation had been published in 1801 under the title of "Splendid Misery," and that second-hand copies could still be met with:—Held, that though the registration of "Every Week" being made before any part of that periodical was published was not a good registration, the subsequent registration of the first number of the tale was a good registration to enable him to sue in respect of infringement of copyright in the title of the tale, supposing such copyright to exist. *Dicks* v. *Yates*, 50 L. J., Ch. 809; 18 Ch. D. 76; 44 L. T. 660—C. A.

Semble, that, as a general rule, there cannot be any copyright in the title of a book. *Weldon* v. *Dicks* (10 Ch. D. 247), infra, considered. *Ib.*

But held, that the plaintiff had no copyright in the title "Splendid Misery," for that copyright can only exist in something original, and the mere adopting as a title a hackneyed phrase, which moreover had been used as the title of a novel many years before, and which for anything that appeared might have been copied from that novel, could not give any copyright in that title. *Ib.*

Held, therefore, that the plaintiff had no title to sue for infringement of copyright, and that as it was clear that the public could not be misled into purchasing the defendant's tale under the belief that it was the same as that of the plaintiff, so that there was no ground for the interference of the court on the principles applicable to trade-marks, the action ought to be dismissed with costs. *Ib.*

—— **"Reason Why."**]—A. published a work called "Why and Because," treating of the scientific explanations of various common phenomena of life. B. afterwards published a work on similar subjects, called "The Reason Why," of which A. complained that the name and the plan were suggested by his own work, and the arrangement and phraseology in many instances taken bodily from his work:—Held, first, that there was no such similarity or colourable imitation in the title as to support A.'s claim for an injunction. *Jarrold* v. *Houlston*, 3 Kay & J. 708; 3 Jur. (N.S.) 1051.

Held, secondly, that the method of communicating information by question and answer being of unknown antiquity, A. could not claim any originality in the plan of his work. *Ib.*

Held, thirdly, that many of the questions in A.'s book, being the simplest forms in which the questions could be asked, were not the subject of copyright, and could not be the privilege of A. *Ib.*

—— **"Birthday Text Book."**]—The publisher of a work which he claimed to have originated, called "The Birthday Scripture Text Book," consisting of a printed diary interleaved, with a

blank space opposite each day with a text of Scripture appended, and which was designed as a record of the birthdays of friends:—Held, entitled to an injunction to restrain the defendants from publishing and selling a work subsequent to the plaintiff's, called "The Children's Birthday Text Book," on the ground that it was an infringement of the plaintiff's copyright in the title of his work, as well as a colourable imitation of the same. *Mack* v. *Petter*, 41 L. J., Ch. 781; L. R. 14 Eq. 431; 20 W. R. 964.

Position of Name of Author.]—The plaintiffs were the proprietors of a musical work called "Hemy's Royal Modern Tutor for the Pianoforte," but had no exclusive right to the use of the word "Hemy." The defendants, who were proprietors of a musical work called "Jousse's Royal Standard Pianoforte Tutor," brought out a new edition of their work, and employed Hemy to revise and re-edit it, and called it "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," and made the word "Hemy" the most prominent word on the title-page:—Held, that the defendants had so used the word "Hemy" on the title-page of their work as to lead the public to believe that in purchasing the defendants' work they were purchasing the plaintiffs' work, and an injunction was granted accordingly. *Metzler* v. *Wood*, 47 L. J., Ch. 625; 8 Ch. D. 606; 38 L. T. 544; 26 W. R. 577—C. A.

Difference between Works.]—Copyright in the "title" of a book, as being a material portion of a work, will be protected, although another book published under a similar title may be totally different in form and contents. *Weldon* v. *Dicks*, 48 L. J., Ch. 201; 10 Ch. D. 247; 39 L. T. 467; 27 W. R. 639.

Title Similar, but not Misleading.]—The proprietors of a long-established weekly comic periodical called "Punch" moved to restrain the publication of "Punch and Judy," a rival periodical of like character and of the same size as, and somewhat similar appearance to "Punch," but with a different illustration on the cover, and sold at a lower price. Another well-known comic periodical was published weekly under the name of "Judy":—Held, that the adoption of the title, "Punch and Judy," was no infringement of the plaintiff's right to use, and property in, the name "Punch"; and that the general public was not likely to be misled into purchasing the defendant's publication by mistake for that of the plaintiffs; and the motion for an injunction was refused. *Bradbury* v. *Beeton*, 39 L. J., Ch. 57; 21 L. T. 323; 18 W. R. 33.

Title, "Post-office" Directory.]—The plaintiff was the registered proprietor under the Copyright Act of a directory entitled "The Post-office Directory of the West Riding of Yorkshire," which included the town of Bradford; and since 1852 had published directories for various other country districts, which were all entitled "Post-office" directories. The defendants being about to publish a directory for the town of Bradford, entitled "The Bradford Post-office Directory," but which bore no similarity to the work of the plaintiff in price or appearance, the plaintiff claimed to restrain the defendants from using the word "post-office" as part of the title of their directory:—Held, that the plaintiff had no right to the exclusive use of the word "post-office" as part of the title of a directory for Bradford, either under the Copyright Act, or regarding the use of the word as a property in the nature of a trade-mark, and the action was dismissed. *Kelly* v. *Byles*, 48 L. J., Ch. 569; 40 L. T. 623. Affirmed, 49 L. J., Ch. 181; 13 Ch. D. 682; 28 W. R. 585—C. A.

Fraud, whether Necessary.]—A fraudulent intention in infringing copyright is not necessary to entitle the proprietor of the copyright to relief in equity if his right of property has been invaded. *Clement* v. *Maddick*, 1 Giff. 98; 5 Jur. (N.S.) 592.

The registered proprietors of "Bell's Life in London and Sporting Chronicle," published weekly, at the price of 5*d*., filed a bill in equity against the proprietors and publishers of a newspaper, called "The Penny Bell's Life and Sporting News," which was published at the price of 1*d*. The evidence showed, that from the similarity of the two names mistakes had occurred, and were likely to occur, on the part of the public, and that inquiries had been made at the office of "Bell's Life in London" for the "Penny Bell's Life." The court granted an injunction to restrain the proprietors of the latter publication from the use of the words "Bell's Life" in the title of their newspaper. *Ib.*

In 1857, A., being proprietor of a weekly publication, the "London Journal," the price of which was 1*d*., assigned his copyright and interest therein to B. for value, and entered into a covenant with B. not to publish, either alone or in partnership with any other person, any weekly periodical of a nature similar to the "London Journal." In 1859, A. issued an advertisement, announcing the publication by him of a daily newspaper, to be called the "Daily London Journal," and to be sold at 1*d*. B. thereupon filed a bill in equity against A. for an injunction to restrain A. from publishing the "Daily London Journal"; and Wood, V.-C., made an order for an injunction. Upon appeal, Knight Bruce, L. J. (dissentiente Turner, L. J.), confirmed the order for an injunction, upon B. undertaking to abide by any order the court might make as to damages, and to bring an action against A. within one week. *Ingram* v. *Stiff*, 5 Jur. (N.S.) 947.

—— **In First Publisher.**]—To an action for infringing the copyright in a work entitled "Evening Devotions; or, the Worship of God in Spirit and in Truth, for every Day in the Year, from the German of Sturm:" a plea that Sturm was a well-known writer on religious subjects, and that the plaintiff procured H. to write the book in question, as a translation from a work in the German, by Sturm, whereas no such work existed, and, with a view to defraud the public, and obtain a profit to himself, published a title-page and preface to the work, falsely representing it to be the genuine production of Sturm:—Held, that the plea disclosed a transaction, on the part of the plaintiff, in the nature of crimen falsi; that he had no copyright in the work; and that the plea afforded a good defence to the action. *Wright* v. *Tallis*, 1 C. B. 893; 14 L. J., C. P. 283; 9 Jur. 946.

Continuations of Works.]—An injunction was granted to restrain the publication of a magazine as a continuation of the plaintiff's magazine, in

numbers, and as to communications from correspondents received by the defendant while publishing for the plaintiff, not preventing the publication of an original work of the same nature, and under a similar title. *Hogg* v. *Kirby*, 8 Ves. 215; 7 R. R. 30.

The plaintiff became by purchase, in February, 1856, proprietor of a weekly newspaper called "The Britannia," which he subsequently incorporated with another weekly newspaper called "The John Bull," and issued the publication under the title of "The John Bull and Britannia." The plaintiff had not registered his name at the Stamp-office as the proprietor of either newspaper. On the 12th April a notice was inserted in "The Britannia" to the effect that that paper would be united with "The John Bull." On the 19th April the defendant, who had been the printer and publisher of "The Britannia," issued a publication called the "True Britannia," in imitation and as a continuation of "The Britannia." The bill was filed against the defendant as the proprietor of the new newspaper to restrain him from publishing it. The defendant, in his affidavit, said that A. B. was the registered proprietor of the "True Britannia," and that he was the printer and publisher only. On motion for an injunction, the court ordered the defendant to be restrained from printing and publishing, &c., the "True Britannia," or any other newspaper, as a continuation of "The Britannia." *Prowett* v. *Mortimer*, 2 Jur. (N.S.) 414; 4 W. R. 519.

Newspaper.]—There is nothing analogous to copyright in the name of a newspaper, but the proprietor has a right to prevent any other person from adopting the name, and this is a chattel capable of assignment. *Kelly* v. *Hutton*, 37 L. J., Ch. 917; L. R. 3 Ch. 703; 19 L. T. 228; 16 W. R. 1182.

The mere declaration of an intention, however public, to publish a magazine or any manufactured article bearing a particular name or mark, notwithstanding that such declaration is accompanied by expenditure in connection with the intended article, cannot create a right to the exclusive use of such name or mark as a trademark. *Maxwell* v. *Hogg*, 36 L. J., Ch. 433; L. R. 2 Ch. 307; 16 L. T. 130; 15 W. R. 467.

H., in 1863, registered an intended new magazine to be called "Belgravia." In 1866, such magazine not having appeared, M., in ignorance of what H. had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September, as about to appear in October. H., knowing of this, made hasty preparations for bringing out his own magazine before that of M. could appear, and in the meantime accepted an order from M. for advertising M.'s magazine on the covers of his own publications, and the first day on which he informed M. that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of H.'s magazine appeared. M.'s magazine appeared in October:—Held, that M.'s advertisements and expenditure did not give him any exclusive right to the use of the name "Belgravia," and that he could not restrain H. from publishing a magazine under the same name, the first number of which appeared before M. had published his. *Ib.*

And see *Platt* v. *Walter*, 17 L. T. 157, ante, col. 462.

ii. *Subject Matter.*

Unpublished Work.]—The right and property of an author or composer of any work, whether of literature, art, or science, in such work unpublished and kept for his private use or pleasure, entitles the owner to withhold the same altogether, or so far as he may please, from the knowledge of others, and the court will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work. *Prince Albert* v. *Strange*, 1 Macn. & G. 25; 1 H. & Tw. 1; 18 L. J. Ch. 120; 13 Jur. 101.

Transcript.]—If any part of a work complained of is a transcript of another work, or with only colourable additions and variations, and prepared without any real independent literary labour, such portion of the work complained of is piratical. *Jarrold* v. *Heywood*, 18 W. R. 279.

But it is impossible to establish a charge of piracy where it is necessary to track mere passages and lines through hundreds of pages, or where the authors of a work challenged as piratical have honestly applied their labours to various sources of information. *Ib.*

The author of a published work cannot prohibit a subsequent writer from making use of the authorities quoted by him, even if it is proved that the latter was put on the track of these authorities by reading the earlier work; but the subsequent writer must, bonâ fide, go to the common sources, and not copy the quotations or passages from the earlier work. But the taking of a single quotation without verification, and of a single argument founded on facts stated in the earlier book, are not sufficient grounds for granting an injunction. *Pike* v. *Nicholas*, 39 L. J., Ch. 435; L. R. 5 Ch. 251; 18 W. R. 321.

Translation Re-translated.]—If a foreigner translates an English work, and then an Englishman re-translates that foreign work into English, that would be an infringement of the original copyright. *Murray* v. *Bogue*, 1 Drew. 353; 22 L. J., Ch. 457; 17 Jur. 219; 1 W. R. 109.

Grounds on which fairness or unfairness in the use of a previous work is to be determined. *Ib.*

Theories.]—Plagiarism does not necessarily amount to an invasion of copyright, and the author of a published book has no monopoly in the theories and speculations, or even in the results of observations therein stated; but no one, whether with or without acknowledgment, is to be permitted to take a material and substantial portion of the published work of another author for the purpose of making or improving a rival publication. *Pike* v. *Nicholas*, 38 L. J., Ch. 529; 20 L. T. 906; 17 W. R. 842.

Compilations.]—The compiler of a dictionary, or a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colourably made. *Spiers* v. *Brown*, 6 W. R. 352.

An action will lie if parts of a book of chronology are servilely imitated, though other parts of the book are different. *Trusler* v. *Murray*, 1 East, 363, n.; 6 R. R. 289, n.

But not for publishing sea charts on an improved and more useful principle, with material corrections, though many of the lines are copied from old charts. *Sayre* v. *Moore*, 1 East, 361, n.; 6 R. R. 288, n.

An abstract published in an annual register or a magazine is not piracy, especially if the author himself has published extracts in a periodical paper. *Dodsley* v. *Kinnersley*, Amb. 403.

A fair abridgment is no infringement of copyright. *Anon.*, Lofft. 775. S. P., *Bell* v. *Walker*, 1 Bro. C. C. 451; *Gyles* v. *Wilcox*, 2 Atk. 143.

Where two authors, A. and B., treat of the same subject, each being merely a compiler from various other original works, it is a fair use of A.'s work if B. examines it for the purpose of seeing what works, unprotected by copyright, were referred to by A., and B. may then himself refer to such unprotected work, and take from it whatever may be suggested by A.'s book. *Jarrold* v. *Houlston*, 3 Kay & J. 708; 3 Jur. (N.S.) 1051.

It is also a legitimate use of A.'s work if B., after having by his own labour brought his own work into shape, refers to A.'s work to supply omissions. *Ib.*

But it is a piratical use of A.'s work if B. takes the matter therein borrowed from authorities open to all the world, in order to save his own labour and expense of consulting the original work. *Ib.*

Mode in which the court exercises jurisdiction where one work of compilation, such as an encyclopædia, copies matter from a preceding work of the same description. *Mawman* v. *Tegg*, 2 Russ. 385; 26 R. R. 112.

The compiler of a directory or a guide-book containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results. *Kelly* v. *Morris*, 35 L. J., Ch. 423; L. R. 1 Eq. 697; 14 L. T. 222; 14 W. R. 496.

The plaintiff published a book of the roads of Great Britain, comprising Patterson's book, to the copyright of which the plaintiff was not entitled, with improvements and additions obtained by actual survey and otherwise. An injunction to restrain a publication of an edition of Patterson, comprising the plaintiff's improvements and additions, was refused. *Cary* v. *Faden*, 5 Ves. 24.

Selections—Bulk of Work.]—S. published a work containing an original essay on modern English poetry, biographical sketches of forty-three modern poets, and selections from their poems, amongst which were six short poems and parts of longer poems, the copyright whereof belonged to C. The selections constituted altogether the bulk of S.'s work, but were alleged to have been introduced into it for the purpose of illustrating the essay. A court of equity restrained the publication of S.'s work as being an infringement of C.'s copyright. *Campbell* v. *Scott*, 11 Sim. 31; 11 L. J., Ch. 166; 6 Jur. 186.

Injunction till hearing to restrain the publication of Milton's poems with Dr. Newton's notes, notwithstanding a small addition of original commentary. *Tonson* v. *Walker*, 3 Swans. 672.

Injunction granted and continued against the defendant, restraining the sale of a sheet almanack, containing matter pirated from a distinct part of a directory published by the plaintiff, affording information with respect to the Post Office compiled from public documents, the matter pirated forming an exceedingly small portion of the plaintiff's work, but bearing a great proportion to the other matter in the defendant's work. *Kelly* v. *Hooper*, 1 Y. & Coll. C. C. 197; 4 Jur. 2.

Extent of Quotations.]—The question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of that work which he has quoted or introduced in his own book. *Bramwell* v. *Halcomb*, 3 Mylne & C. 737.

When a person obtains information of the nature afforded by statistical tables, directories, road-books, and publishes the same, another person has no right to transfer into his work a considerable portion of the information so published, although it may form but a small part of such work. *Scott* v. *Stamford*, 36 L. J., Ch. 729; L. R. 3 Eq. 718; 16 L. T. 51; 15 W. R. 757.

The result, in such cases, is the true test of the act, and full acknowledgment of the original, and the absence of any dishonest intention will not excuse the appropriator where the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work. *Ib.*

A work may be a piracy from another, though the passages copied are stated to be quotations, and are not so extensive as to render the piratical work a substitute for the original work. *Bohn* v. *Bogue*, 10 Jur. 420.

But it is otherwise, if so much is copied as to form a substitute for the original work. *Roworth* v. *Wilkes*, 1 Camp. 94; 10 R. R. 642.

The proprietors of a periodical professing to be an analytical digest of equity, common law and other cases, copying verbatim the head or marginal notes of cases from the reports, the copyright of which was in another person, without his consent, are guilty of a piracy. Maule, J., dissentiente. *Sweet* v. *Benning*, 16 C. B. 459; 24 L. J., C. P. 175; 1 Jur. (N.S.) 543; 3 W. R. 519.

A count for pirating generally, is not supported by evidence that there are in the original work particular errors and mistakes, with which the pirated edition corresponds verbatim. *Cary* v. *Kearsley*, 4 Esp. 168; 6 R. R. 846.

But such evidence would support a count for transcribing particular matter, without consent. *Ib.*

It is lawful to incorporate part of the works of a contemporary writer in a new work, provided it is not a pretext for stealing the original copyright. *Ib.*

—— **Mere Verifying.**]—A rival publisher is not less liable to an injunction for piracy because he makes inquiries on his own behalf to ascertain the correctness of what he copies. *Morris* v. *Ashbee*, L. R. 7 Eq. 34; 19 L. T. 550.

Slips.]—Although the compiler of a new direc-

tory is not justified in using slips cut from one previously published for the purpose of deriving information from them for his own work; yet he may use such slips for the purpose of directing him to the parties from whom such information is to be obtained. *Morris* v. *Wright*, L. R. 5 Ch. 279; 22 L. T. 78; 18 W. R. 327.

In a trades directory, persons who chose to pay for the privilege got their names printed in capital letters, with additional descriptions of their trade or business, called "extra lines:"—Held, that such payment had not the effect of making the information common property, so as to enable the compiler of a rival directory to reprint it from slips cut from the first, even where the persons whose names were so printed had been applied to to verify the information contained in the first directory, and had not only authorized but had actually paid for the insertion of their names in the second, with the distinctive features of capital letters and extra lines. *Morris* v. *Ashbee*, supra.

Purpose—Copies not for Sale.]—It is no defence to say that a pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it. *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J., Ch. 771; 9 L. T. 199; 11 W. R. 934.

Where a party sets up a case that his work is a fair compilation from a number of others, and not a mere copy from any one, it is of the highest importance that he should produce his original manuscript. *Ib.*

An action will lie for multiplying copies of a work, in which there is a subsisting copyright, without the consent of the proprietor, although the copies are not printed, and are made for gratuitous distribution, and not for sale or hire. *Novello* v. *Sudlow*, 12 C. B. 177; 21 L. J., C. P. 169; 16 Jur. 689. S. P., *Maple* v. *Junior Army and Navy Stores*, 21 Ch. D. 369; 31 W. R. 70—C. A., ante, col. 467.

Editions.]—The first edition of a work of compilation was published before 5 & 6 Vict. c. 45; several editions of it were published after that act, and not registered:—Held, that as to so much of the matter contained in the original edition as was contained in the subsequent ones, the owner might sue, although those subsequent editions were not registered; but as to the new matter, the subsequent editions were books which ought to be registered, and the owner could not sue for an infringement on that point. *Murray* v. *Bogue*, 1 Drew. 353; 22 L. J., Ch. 457; 17 Jur. 219; 1 W. R. 109.

In a suit by a publisher for piracy of a new edition of a work it was held that, notwithstanding some of the passages alleged to have been pirated were contained in the prior editions, as well as in the new edition of the work, the plaintiff was entitled to rely upon them in aid of his title to the relief prayed. *Sweet* v. *Cater*, 11 Sim. 572; 5 Jur. 68.

Joint Copyright in Three Publications.]—An injunction was granted to three plaintiffs, the proprietors of three several serial publications registered under the Copyright Act, to restrain the infringement of their joint copyright in matter printed in all three publications, though the pirated matter was copied not from either of the three publications but from a reproduction of the same matter issued in another form by the authority of one of the plaintiffs without further registration under the Copyright Act. *Cate* v. *Devon and Exeter Constitutional Newspaper Co.*, 58 L. J., Ch. 288; 40 Ch. D. 500; 60 L. T. 672; 37 W. R. 487.

Rival Publications—Partner of Covenantor—Assignee without Notice.]—If A. sells a work to B., and covenants not to do anything which may be detrimental to the sale or circulation of that work, and if afterwards A., and a partner, publish a rival work on the same subject, the partner will be restrained as well as A.

If A., having entered into such a covenant with B., sells the materials of a rival work to C., who concludes his agreement, and pays his money without any notice of the covenant, an injunction, on the ground of that covenant, cannot be maintained against C. *Barfield* v. *Nicholson*, 2 Sim. & S. 1; 2 L. J. (O.S.) Ch. 90; 25 R. R. 144.

Law Reports.]—Reports of legal decisions are to be considered (as to copyright) as any other literary work. *Hodges* v. *Welsh*. 2 Ir. Eq. R. 266.

Quære, whether certain cases in the law reports may be reprinted at length in a treatise on the particular subject to which they relate. *Ib.*

But it is piracy to collect together, and reprint from the reports of legal decisions, all the cases upon a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions and notes. *Ib.*

Injunction against a colourable abridgment of the Term Reports among other law reports till answer or further order upon certificate of the bill filed. *Butterworth* v. *Robinson*, 5 Ves. 709.

Quære, whether it is not piracy to print at full length cases contained in the law reports, although with the addition of notes, however voluminous. *Saunders* v. *Smith*, 3 Myl. & C. 711; 7 L. J., Ch. 227; 2 Jur. 491, 536.

Law Digest.]—A proprietor of a periodical professing to be an analytical digest of equity, common law and other cases, copying verbatim the head or marginal notes of cases from reports, the copyright of which was in another person, without his consent, is a piracy (Maule, J., dissentiente). *Sweet* v. *Benning*, 16 C. B. 459; 24 L. J., C. P. 175; 1 Jur. (N.S.) 543; 3 W. R. 519.

Telegraphic Code for use of Agents compiled from Book of Words.]—The plaintiff published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation. The book was registered under the Copyright Act, 5 & 6 Vict. c. 45. The defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraphic code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation:—Held, that the defendants had infringed the copyright of the plaintiff, and that a perpetual injunction must be granted. *Ager* v. *Peninsular and Oriental Steam Navigation Co.*, 53 L. J., Ch. 589; 26 Ch. D. 637; 50 L. T. 477; 33 W. R. 116.

Newspaper — Alleged Custom of Trade to Copy.]—The plaintiffs, the proprietors of the "Times," a newspaper duly registered under the Copyright Act, 1842, published on the morning of the 13th of April (among other matter) three articles which had been composed by foreign correspondents, and paid for by the plaintiffs on the terms that the copyright therein should belong to the plaintiffs. Two of the articles were signed "Our Correspondent," and the third was signed "Dalziel." The defendants. the proprietor and publisher of the "St. James's Gazette," published in their paper, about half-past twelve on the same day, a verbatim copy of these three articles, except that the words at the end, "Our Correspondent" and "Dalziel," were left out, and that, in one instance, half a dozen lines were added from some other source :—Held, that the plaintiffs had a legal right to sue to restrain the infringement of their copyright; and that the defendants could not escape on the ground that they had copied only a small part of the plaintiff's newspaper, or justify what they had done on the ground of an alleged universal practice of journalists to copy such articles from each other, without asking the permission of the proprietor of the paper copied from. *Walter* v. *Steinkopff*, 61 L. J., Ch. 521; [1892] 3 Ch. 489; 67 L. T. 184; 40 W. R. 599.

When S. had published in a provincial newspaper, of which he was proprietor, whole articles taken verbatim from a magazine, alleging in justification the custom of the trade :—Held, that the proprietor of the magazine was entitled to an injunction against S., but inasmuch as he had acted with bona fides, the court did not give either party his costs of the motion. *Maxwell* v. *Somerton*, 30 L. T. 11; 22 W. R. 313.

—— **Sporting Paper — Publication of "Selections" — "Headings."**]—C., the registered proprietor under the Copyright Act, 1842, of a weekly sporting paper, which he published on Monday in each week, in which appeared, under the heading "One-Horse Selections," the names of the days on which racing was to take place in that week, and opposite the name of each day was the name of the horse which in C.'s opinion was likely to win the race on that day for which it was entered. P., the proprietor of another sporting paper published on each day that racing took place, had systematically reproduced C.'s "selections" by inserting under a heading "One-Horse Final—'Specials'" C.'s name, and opposite C.'s name the name of the horse C. had selected :—Held, that P. had merely published to the world the fact that C. thought a particular horse would win a particular race; that P. had, under the circumstances, a right to do this, and that he had not infringed C.'s copyright. *Chilton* v. *Progress Printing Co.*, 71 L. T. 664; 43 W. R. 136.

Perforated Picture casting a Shadow.]—The plaintiff claimed to be the proprietor of a subsisting copyright in a certain "book" with a picture or design entitled "The Christograph," which was duly registered. The so-called book was an envelope, with the title printed thereon, containing a piece of cardboard, perforated in such a way that the shadow cast by it on a wall, or otherwise, roughly imitated a well-known picture. The envelope contained also some descriptive lines, which were not claimed to be original. The plaintiff complained that the defendants were selling a similarly perforated card, accompanied by the same lines, and enclosed in an envelope bearing as a title "The Bibliroscope, or Shadowgraph," whereby the sale of the plaintiff's article had been diminished. The defendants denied the alleged copyright, and also that the plaintiff was the first inventor of the design :—Held, that the design was not original, and was not capable of being protected by the statute; that the title only was registered, and was the plaintiff's property. As, however, that had not been adopted by the defendants, the plaintiff's case wholly failed. *Cable* v. *Marks*, 52 L. J., Ch. 107; 47 L. T. 432; 31 W. R. 221.

Cartoons.]—The plaintiffs were the proprietors of the copyright of Punch, which contains cartoons and other engravings illustrative of the events of the day, and the careers of eminent persons : and caricatures of the events in the history and the adventures of Napoleon III. The defendant published a book entitled "Napoleon III., from the Popular Caricatures of the last Thirty Years," and amongst a great variety of other caricatures taken from other publications there were nine taken from Punch, with the original headings and references, but much reduced in size. Not more than one such engraving was taken from any one number of Punch, and these engravings had appeared in Punch, at intervals extending over several years. The engravings themselves had not been registered :—Held, that this was an infringement of the publishers' copyright in their publication of Punch. *Bradbury* v. *Hotten*, 42 L. J., Ex. 28; L. R. 8 Ex. 1; 27 L. T. 450; 21 W. R. 126.

Sketches.]—H., a bookseller and publisher. purchased at a sale some books, the property of T., deceased, and containing several caricatures and sketches executed by T. He purchased at the same time some separate drawings by T., and afterwards bought some more of T.'s drawings and of his books containing sketches. These books and sketches came into the possession of C. and W., who succeeded H. in his business. C. and W. published a book which contained the sketches and caricatures, as well as numerous extracts from T.'s published novels, in order to show that T. had in fact written his own biography in these novels. The copyright in the novels, and in all T.'s published and unpublished sketches, had been assigned to S. :—Held, that he had no copyright in the sketches and caricatures, but that, inasmuch as the book appeared to contain an undue amount of extracts, he was entitled to an interlocutory injunction to restrain its sale, on giving the usual undertaking as to damages. *Smith* v. *Chatto*, 31 L. T. 775; 23 W. R. 290.

And see cases, post, col. 538.

Musical Compositions.]—*See* infra, col. 512.

f. Remedies. Action and Injunction.

i. *Principles.*

a. In General.

Common-Law Remedy.]—The 5 & 6 Vict. c. 45, s. 15, which gives a remedy for piracy in certain cases, does not exclude the common-law remedy in other cases in which that statute has given a right. *Novello* v. *Sudlow*, 12 C. B. 177; 21 L. J., C. P. 169; 16 Jur. 689.

Court of Equity—Jurisdiction.]—The court will interfere to protect copyright from piracy at the suit of plaintiffs, who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete. Mode in which the court exercises jurisdiction, where one work of compilation, such as an encyclopædia, copies matter from a preceding work of the same description. *Mawman* v. *Tegg*, 2 Russ. 385 ; 26 R. R. 112. See also *Chappel* v. *Purday*, 4 Y. & Coll. 485 ; 10 L. J. (N.S.) Ex. Eq. 50.

Selling Knowingly—Ignorance of Nature of Imported Copies.]—The registered proprietors of an English copyright magazine brought an action against the agents in England of an American firm of publishers for an injunction to restrain them from selling or importing for sale in this country a magazine published by the American firm, and containing matter pirated from the plaintiffs' copyright. The defendants, by their statement of defence, stated that they had determined not to sell the copies complained of in consequence of a notice received by the plaintiffs shortly before the commencement of the action, and before the defendants themselves had had the opportunity of inspecting such copies : —Held, that the 17th section of the Copyright Act, 1842, mentions two offences, that of "to import for sale" and that of to "sell knowingly" unauthorised publications, and therefore that ignorance of the nature of the imported copies could not be a defence where the offence charged was "importing for sale," but only where the offence charged was "selling knowingly." *Cooper* v. *Whittingham*, 49 L. J., Ch. 752 ; 15 Ch. D. 501 ; 43 L. T. 16 ; 28 W. R. 720.

—— **Injunction and Notice.**]—An owner of an English copyright is entitled to an ex parte injunction against the agents of a foreign firm in respect of the offence of "importing for sale" piracies, but if it is intended to take proceedings in respect of "selling knowingly," the better course is to give the importers notice of their importations. Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the court has no discretion to refuse him costs. Where a statute creates a new offence, and imposes a penalty, the ancillary remedy by injunction may still be claimed. *Ib.*

—— **Knowledge.**]—In an action for an infringement of copyright, by merely publishing a work printed or caused to be printed by others, knowledge of the copyright so infringed must be proved. *Leader* v. *Strange*, 2 Car. & K. 1010.

An author having sold the copyright of a work published under his own name, covenanted with the purchaser not to publish any other work to prejudice the sale of it. Semble, that another publisher, who has no notice of this covenant, will be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject but under a different title, and though there is no piracy of the first work. *Barfield* v. *Nicholson*, 2 Sim. & S. 1 ; 25 R. R. 144.

Rival Works.]—Where there are two rival works, a court of equity will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work. *Seeley* v. *Fisher*, 11 Sim. 581.

A bill in equity stated, that one of the plaintiffs had composed a book, and that all the plaintiffs had caused the book to be printed and published for their joint benefit, and the book had been duly registered by the plaintiffs, as proprietors of the copyright thereof, at Stationers' Hall ; and the copyright had ever since remained in them for their joint benefit. The bill also alleged that the defendant had published a book, in which numerous passages were copied from the plaintiffs' book ; and it prayed an injunction to restrain the sale of the defendant's book :—Held, that the plaintiffs had a joint right to sue. *Stevens* v. *Wildy*, 19 L. J., Ch. 190.

Held, also, upon comparison of the two books, that in the defendant's book there had been such copying from the plaintiffs' book as would entitle them to the injunction. *Ib.*

See also INFRINGEMENT, supra, col. 485, &c.

Plagiarism.]—The question of minuteness in value of the original matter extracted from a work for purposes of criticism, will have great weight with the court, in influencing its decision on the application for an injunction. *Bell* v. *Whitehead*, 8 L. J., Ch. 141 ; 3 Jur. 68.

It appeared to the satisfaction of the court that B. had taken the phraseology and arrangement of many questions and answers from A.'s book although B. swore that he had not done so. This rendered it impossible for the court to obtain from B. (as in *Mawman* v. *Tegg*, 2 Russ. 385) any information as to the quantum ; and the court, therefore, having been satisfied that in certain chapters of B.'s work this improper use had been made of A.'s book, restrained the publication of such chapters only, but not of the entire work ; A. to bring an action forthwith, and B. to keep an account in the meantime. *Jarrold* v. *Houlston*, 3 Kay & J. 708 ; 3 Jur. (N.S.) 1051.

The defendant was a vendor of a literary work published in weekly numbers, and in one of the numbers of this was contained the commencement of a work of fiction, which, with the exception of a few colourable alterations, was in all respects similar to a prior work, of which the plaintiff was the author and publisher. On a bill by the plaintiff, praying that the defendant might be restrained from publishing, selling, or otherwise disposing of the number containing the commencement of such work of fiction, or any continuation or other part thereof, and from copying or imitating, in the whole or in part, the plaintiff's book, the court granted an injunction as prayed, except as to the words "or imitating," but directed the plaintiff to bring an action within ten days against the defendant for the invasion of his alleged copyright. *Dickens* v. *Lee*, 8 Jur. 183.

If an injunction has been granted against a work, which is proposed to be published in successive numbers, on the ground of piracy in the published numbers, the injunction will not be modified, so as to permit the publication of the future numbers, while the question of piracy, as to the others, remains undetermined. *Barfield* v. *Nicholson*, 2 Sim. & S. 1 ; 2 L. J. (O.S.) Ch. 90 ; 25 R. R. 144.

Works Contrary to Morality and Religion.]—

The author or a publisher of a work of a libellous or of an immoral tendency can have no legal property in it. *Stockdale* v. *Onwhyn*, 7 D. & R. 625; 5 B. & C. 173; 2 Car. & P. 163; 4 L. J. (O.S.) K. B. 122; 29 R. R. 207.

No action can be maintained for pirating a work which professes to be the amours of a courtezan, and it is no answer to the objection that the party is also a wrong-doer in publishing them, and that he therefore ought not to set up their immorality. *Ib.*

An injunction to restrain the infringement of the copyright in a work, as to which it appeared doubtful whether in did not tend to impugn the doctrine of the scriptures, was refused by a court of equity. *Lawrence* v. *Smith*, Jacob, 471; 23 R. R. 125.

The court of chancery will not interfere by injunction, upon the author's application, to restrain the publication of a work which is of such a nature as that an action could not be maintained upon it for damages. *Southey* v. *Sherwood*, 2 Mer. 435.

The court will not act either by granting an injunction or account, even upon submission in answer upon a publication of such nature that an action could not be maintained. *Walcot* v. *Walker*, 7 Ves. 1.

Committal for Breach of Injunction.]—The court will hesitate to commit a defendant alleged to have committed a breach of an interim injunction, when it sees that he has endeavoured to set himself right in respect to the original charge against him of infringing the plaintiff's copyright. *Cornish* v. *Upton*, 4 L. T. 862.

b. Account of Profits.

Principles upon which the court gives an account of the profits of the unlawful work in the case of piracy. *Colburn* v. *Simms*, 2 Hare, 543: 12 L. J., Ch. 388; 7 Jur. 1140.

A plaintiff who complains of a piracy of his work has no remedy in equity, unless he establish a title to an injunction, and then the account will follow. *Baily* v. *Taylor*, 1 Russ. & M. 73; Taml. 295; 8 L. J. (O.S.) Ch. 49.

As to the copies of a piratical edition which may have been sold, the registered owner is not entitled in equity to the gross produce of the sale thereof, but only to the profits which the party may have made by the sale thereof. *Delf* v. *Delamotte*, 3 Kay & J. 581; 3 Jur. (N.S.) 933.

To recover the pirated copies, he must proceed at law. *Ib.*

c. Damages.

Reference as to—When ordered.]—When the infringement complained of consists in copying a collection of facts which are easily obtained, the court will not grant an interlocutory injunction, which would be useless, but will wait till the hearing, and then, if necessary, direct a reference as to damages. *Cox* v. *Land and Water Co.*, 21 L. T. 548; 18 W. R. 206.

How Assessed.]—Where a plaintiff claiming a copyright in a work of a foreigner obtained an injunction, on giving an undertaking to abide by any order the court might make respecting damages, and the law was, pending the suit, finally settled against the existence of such a copyright:—Held, that the defendant was entitled to have the damages sustained by him in consequence of the injunction assessed either by the chief clerk of the judge in Chancery, or by a jury, and paid, and that a mere dismissal of the plaintiff's bill with costs was not a sufficiently accurate assessment and award of damages. *Novello* v. *James*, 5 De G. M. & G. 876; 24 L. J., Ch. 111; 1 Jur. (N.S.) 217; 3 W. R. 127.

Damages in case of literary piracy are to be estimated as follows:—the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies. *Pike* v. *Nicholas*, 38 L. J., Ch. 529; L. R. 5 Ch. 260, n.; 20 L. T. 906; 17 W. R. 842.

The registered proprietor of the copyright in a book, to whom a special action on the case against an infringer is given by section 15 of the Copyright Act, 1842, is also entitled to bring an action against him under section 23 in detinue for the copies of the book retained, and also in trover for damages arising from the wrongful conversion. The measure of damages will be the total amount realised by the sale of the books. *Muddock* v. *Blackwood*, 67 L. J., Ch. 6; [1898] 1 Ch. 58; 77 L. T. 493.

Inducing Breach of Contract — Special Damage.]—The plaintiffs entered into contracts with their own subscribers which contained a stipulation that the information supplied to them by the plaintiffs should not be sold or communicated to non-subscribers:—Held, that in order to support an action against the defendant for inducing one of the plaintiffs' subscribers to break his contract by communicating the information to him, it was not necessary to prove specific damage, but that it was enough to show that the act complained of was of such a nature that damage to the plaintiffs ought to be inferred. *Exchange Telegraph Co.* v. *Gregory*, ante, col. 460.

d. Destruction, &c., of Copies.

Destruction.]—Where a party obtains possession by purchase of impressions of etchings, the plates of which are the property of another, knowing that the vendor has obtained such impressions through a breach of trust, a court of equity will interfere by injunction, and, without giving him the right to try the question of property at law, will order the impressions to be delivered up; and the material on which the impressions are taken being substantially worthless, except for that in which the possessor had no property, viz. the impressions, the court will order their destruction. *Albert* (*Prince*) v. *Strange*, 2 De G. & S. 652; 13 Jur. 507. See *S. C.*, 1 Mac. & G. 25; 18 L. J., Ch. 120; 13 Jur. 109.

Forfeiture of Copies.] — Books piratically printed before registration of the proprietor of the copyright become his property after registration. *Hole* v. *Bradbury* (infra) not followed. *Isaacs* v. *Fiddemann*, 49 L. J., Ch. 412; 42 L. T. 395.

Upon motion by defendants to vary a decree as to the delivery up of unsold copies:—Held, that the plaintiffs not having been the registered proprietors of the copyright at the time the copies were printed were not entitled to have them delivered up under the 23rd section of the Copyright Act; but that the court had power under its general jurisdiction to order delivery up for destruction of all articles created in violation of the plaintiff's rights. The decree was therefore

varied to this extent — that if profits had been made, then (with the assent of the defendants) the copies were to be delivered up to the plaintiffs; but if no profits, then the copies to be delivered up for destruction. *Hole* v. *Bradbury*, 48 L. J., Ch. 673; 12 Ch. D. 886.

—— **Without Compensation.**]—The registered owner of a copyright in a work is entitled to have all the unsold copies of a piratical edition delivered up to him for his own use, without making any compensation for the cost of production or publication. *Delf* v. *Delamotte*, 3 Kay & J. 581; 3 Jur. (N.S.) 933.

But as to the copies of such piratical edition which may have been sold, he is not entitled in equity to the gross produce of the sale thereof, but only to the profits which the party may have made by the sale thereof. *Ib.*

To recover the pirated copies, he must proceed at law. *Ib.*

Under 54 Geo. 3, c. 156.]—A proprietor of a book, whose copyright has been invaded by the printing of a similar work, and who is entitled to an injunction to restrain the printing and sale of the unlawful work, was not, under 54 Geo. 3, c. 156, s. 4, entitled to an order for the delivery up of the illegal copies, if the book, the copyright of which had been infringed, was not composed, and entered according to the statutes, at the time the illegal copies were printed. *Colburn* v. *Simms*, 2 Hare, 543; 12 L. J., Ch. 388; 7 Jur. 1104.

Semble, there is no common law right in the author or proprietor of a book which is pirated to the delivery up of the copies of the illegal work, and therefore, if such relief is given in equity, it must be under the provisions of the statute for the protection of literary property. *Ib.*

Quære whether the copies of the illegal work would in any case be ordered to be delivered up in a suit to which the person at whose expense and on whose account they had been printed was not a party. *Ib.*

Quære, whether a court of equity is a court of record within the meaning of the statutes 41 Geo. 3, c. 10, s. 1, or 54 Geo. 3, c. 156, s. 4. *Ib.*

e. Delay and Acquiescence.

Delay with Knowledge.]—Mere delay in taking proceedings after knowledge of a piracy is not in itself such acquiescence as will deprive a plaintiff of his right to an injunction at the hearing. *Hogg* v. *Scott*, 43 L. J., Ch. 705; L. R. 18 Eq. 444; 31 L. T. 73, 163; 22 W. R. 640. S. P., *Weldon* v. *Dicks*, 48 L. J., Ch. 201; 10 Ch. D. 247; 39 L. T. 467; 27 W. R. 639; and *Latour* v. *Bland*, 2 Stark. 382.

Injunction to restrain the piracy of a publication, to which the plaintiffs would have been otherwise entitled, refused on the ground of delay in making the application. *Lewis* v. *Chapman*, 3 Beav. 133.

Constructive knowledge imputed to the plaintiffs, by the court, of an infringement of their copyright by the defendants. *Ib.*

While Law Doubtful.]—The copyright of a work of an alien was sold to a British subject, who published it in this country in 1844. The copyright was infringed in 1849, but the state of the law then rendered it very doubtful whether the copyright was protected, and the purchaser merely protested against the infringement; but, in 1851, within a reasonable time after the decision of a case in the Exchequer Chamber had established the general question of copyright in an alien, he filed his bill and moved to restrain the publication of the pirated work:—Held, that there had been no such delay as to disentitle him to an injunction. *Buxton* v. *James*, 5 De G. & Sm. 80; 16 Jur. 15.

Acquiescence in Transcribing—Action against other Parties.]—If the owner of the copyright has, for some time past, acquiesced in different individuals transcribing cases from his works, the court will not interpose in his favour, by injunction against other parties who have subsequently transcribed the cases from the same work, until the owner of the copyright has established his legal right. *Saunders* v. *Smith*, 3 Myl. & C. 711; 7 L. J., Ch. 227; 2 Jur. 491, 536.

Original Intention Relinquished—Publication by Assignee.]—Injunction refused to restrain publication of a work which had been left for twenty-three years by the author in the hands of a bookseller, to whom it was originally sent, with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the defendants, who published it without the consent or privity of the author. *Southey* v. *Sherwood*, 2 Mer. 435.

ii. *Practice.*

a. Parties.

Joint Proprietors—Right of all to Sue.]—The bill stated, that one of the plaintiffs had composed a book, and that all the plaintiffs had caused the book to be printed and published for their joint benefit, and the said book had been duly registered by the plaintiffs, as proprietors of the copyright thereof, at Stationers' Hall, and the copyright had ever since remained in the plaintiffs for their joint benefit. The bill also alleged, that the defendants had published a book in which numerous passages were copied from the plaintiffs' book, and it prayed an injunction to restrain the sale of the defendants' book:—Held, upon motion for the injunction, that under the Copyright Act, 5 & 6 Vict. c. 45, the plaintiffs had a joint right to sue; held, also, upon comparison of the two books, that in the defendants' book there had been such copying from the plaintiffs' book as would entitle them to the injunction. *Stevens* v. *Wildy*, 19 L. J., Ch. 190.

Registered Owners—Tenants in Common—Right of One to Sue.]—Although the registered owners of a copyright take as tenants in common, and not as joint tenants—*Powell* v. *Head* (12 Ch. D. 686)—yet any one or more of them may maintain an action against a stranger for an infringement of the entire copyright. *Lauri* v. *Renad*, post, col. 549—Per Kekewich, J.

A party having, at the suit of A. and B., submitted to an injunction restraining him from publishing certain etchings, the work of A. and B. respectively, cannot object to an injunction, granted on the application of A., restraining the publication of a catalogue or description of the etchings, on the ground that it is too extensive, as not clearly identifying which of such etchings belong exclusively to A.

Prince Albert v. *Strange*, 1 Mac. & G. 25; 1 H. & Tw. 1; 18 L. J., Ch. 120; 13 Jur. 109.

Injunction against Printer wrongly Sued as Proprietor.]—The plaintiff became by purchase, in February, 1856, proprietor of a weekly newspaper called "The Britannia," which he subsequently incorporated with another weekly newspaper called "The John Bull," and issued the publication under the title of "The John Bull and Britannia." The plaintiff had not registered his name at the stamp-office as the proprietor of either newspaper. On the 12th April a notice was inserted in "The Britannia" to the effect that that paper would be united with "The John Bull" On the 19th April the defendant, who had been the printer and publisher of "The Britannia," issued a publication called the "True Britannia," in imitation and as a continuation of "The Britannia." The bill was filed against the defendant as the proprietor of the new newspaper to restrain him from publishing it. The defendant, in his affidavit, said that A. B. was the registered proprietor of the "True Britannia," and that he was the printer and publisher only. On motion for an injunction, the court ordered the defendant to be restrained from printing and publishing, &c., the "True Britannia," or any other newspaper as a continuation of "The Britannia." *Prowett* v. *Mortimer*, 2 Jur. (N.S.) 414; 4 W. R. 519.

Separate Bill against each Bookseller.]—The proprietor of a copyright must file separate bills against each bookseller taking copies of a spurious edition for sale. *Dilly* v. *Doig*, 2 Ves. J. 486.

b. Pleading.

Admissions.]—The court has jurisdiction to direct admissions in an action brought by the direction of the court. *Dickens* v. *Lee*, 8 Jur. 183.

In a suit by a publisher for piracy of a new edition of a work, it was held that, notwithstanding some of the passages alleged to have been pirated were contained in the prior editions, as well as in the new edition of the work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed. The injunction having been granted on the plaintiff undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit, at the trial, that the plaintiff was the legal proprietor of the pirated work. *Sweet* v. *Cater*, 11 Sim. 572; 5 Jur. 68.

What must be Pleaded.]—Where a party seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated, although he does not claim copyright in all the passages which are the same in both works. *Sweet* v. *Maugham*, 11 Sim. 51; 9 L. J., Ch. 323; 4 Jur. 479. And see *id.* 456.

In a bill to restrain the infringement of a design for ornamenting lace, registered under 5 & 6 Vict. c. 100, compliance with the act is sufficiently pleaded by alleging that the design and proprietorship have been duly registered; and a bill containing those allegations is not open to a demurrer for not alleging in detail that the plaintiff has complied with the various requirements of the act; and if a defendant insists that a plaintiff has lost his copyright by non-compliance in respect of matters subsequently to registration, he must raise the defence by plea or answer. *Sarazin* v. *Hamel*, 32 L. J., Ch. 378; 9 Jur. (N.S.) 192; 7 L. T. 660; 11 W. R. 326.

In an action for damages for an alleged infringement of copyright in a song, the defendant, by his statement of defence, alleged that the song had not been registered at Stationers' Hall until the 9th of December, 1876, and added, "the defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register":—Held, that under this pleading the defendant was only entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated. *Collette* v. *Goode*, 47 L. J., Ch. 370; 7 Ch. D. 842; 38 L. T. 504.

Held, also, that leave to amend the statement of defence, so as to raise the latter point, ought not to be given, even though by the plaintiff's own evidence at the trial it for the first time appeared that the name of the publisher had been untruly entered in the register. *Ib.*

The proprietor of copyright in a book need not, in an action for its infringement, aver that the defendant published the plaintiff's book. The declaration states a good cause of action if it avers that the defendant published parts of the plaintiff's book. *Rooney* v. *Kelley*, 14 Ir. C. L. R. 158.

Such a cause of action is not answered by a plea in confession and avoidance, to the effect that the book of the plaintiff and the books of the defendant were composed by one and the same author, from common sources of information; and that no part of the defendant's books, or either of them, was copied or colourably altered from the book of the plaintiff. *Ib.*

The plaintiffs did not in their statement of claim expressly ask that the registration of the defendants as owners of the copyright might be expunged:—Held, that an order to expunge that registration could not be made at the trial, but that the plaintiffs must make a summary application for that purpose under s. 14 of the act. *Hole* v. *Bradbury*, 48 L. J., Ch. 673; 12 Ch. D. 886; 41 L. T. 153, 250; 28 W. R. 39.

See this case referred to in *Isaacs* v. *Fiddemann*, 49 L. J., Ch. 412; 42 L. T. 395.

What may be Pleaded.]—To an action for the infringement of a copyright in a work, the defendant was allowed to plead that the plaintiff was not the proprietor of the copyright at the time of committing the grievance, and also that he was not the proprietor of the copyright when the books were printed. *Chappell* v. *Purday*, 1 D. & L. 458; 12 M. & W. 303; 13 L. J., Ex. 7.

—— **As to Printer's Name.**]—A count stated that the plaintiff was the proprietor of the copyright in a certain book, and that the defendant, without his consent in writing, printed for sale copies of the work. And another count charged the defendant with "having in his possession for sale and selling" copies of the work so unlawfully, and without the plaintiff's consent, printed. He pleaded that the book was printed and published without the name and place of abode of the printer upon the first or last leaves thereof,

in violation of the 2 & 3 Vict. c. 12, s. 2 :—Held, no defence to either count. *Chappell* v. *Davidson*, 18 C. B. 194 ; 25 L. J., C. P. 225 ; 2 Jur. (N.S.) 544 ; 4 W. R. 559.

—— **Joinder of Causes of Action.**]—In an action for an infringement of copyright, the court refused to allow a count founded upon a common-law right to be joined with counts on the 5 & 6 Vict. c. 45, upon the same cause of action. *Boosey* v. *Tolkien*, 5 C. B. 476 ; 5 D. & L. 547 ; 17 L. J., C. P. 137.

Plaintiff Entitled to an Answer.]—A plaintiff in a suit to restrain breach of a copyright and for an account is entitled to an answer, not only with a view to the account, but also for the purposes of establishing his title, if the action directed by the injunction should, by mutual arrangement not have been tried. *Kelly* v. *Hooper*, 1 Y. & Coll. C. C. 197.

c. Notice of Objections.

Want of Title—At Trial.]—The plaintiffs in the action were the author of the letterpress and the daughter of the other joint author, who was dead. The statement of claim alleged that her father had by his will appointed her mother his sole executrix and universal legatee, and that, she having since died, the daughter had administered to her estate. But it was not alleged that the mother had assented to the bequest made to her by the father. The plaintiffs had registered themselves at Stationers' Hall as joint owners of the copyright of the book, and the defendants (the successors of the original firm of publishers) had afterwards registered themselves as the owners. At the trial the defendants objected that the daughter did not represent her father's estate. The objection had not been taken in the statement of defence, and no notice in writing of it had been given to the plaintiffs under s. 16 of the Copyright Act :—Held, that the objection could not be relied on at the trial. *Hole* v. *Bradbury*, 48 L. J., Ch. 673 ; 12 Ch. D. 886.

In an action by A. for the infringement of copyright in a musical composition, consisting of an air which was old and not the subject of copyright, of words which were written by B., and of an accompaniment which was composed by C. at the request and for the benefit of B. :—Held, that it was not competent to the defendant, under a notice of objections, stating merely that A. was not the owner of the copyright, and that there was no subsisting copyright in the work, to object at the trial that there had been no assignment by C., even though the point arose upon the evidence adduced on the part of the plaintiff. *Leader* v. *Purday*, 7 C. B. 4 ; 6 D. & L. 408 ; 18 L. J., C. P. 97 ; 12 Jur. 1091.

As to Publication.]—Notice of objections required by the statute is sufficiently complied with by alleging a definite publication of the disputed work at some particular place, by some definite party, either before or simultaneously with, the publication by the plaintiff, or with a publication in another place. *Boosey* v. *Purday*, 10 Jur. 1038.

In an action for the infringement of the copyright of a book, the defendant pleaded several pleas, denying that the plaintiff was the proprietor of the copyright ; that there was any copyright subsisting ; that the books were first published in England, and that the copies complained of were unlawfully printed :—Held, on an application by the plaintiff to have the notice of objections delivered with the pleas amended, that the alleged first publication having taken place abroad, and so far back as 1831, it was sufficient for the defendant to state the year of the first publication, and that it was not necessary that he should specify the day or month ; but that he was bound to state the name of the party whom he alleged to be the proprietor or first publisher, the title of the work, the place where and the time when the first publication took place. *Boosey* v. *Davidson*, 4 D. & L. 147.

Held, also, that he was not entitled to object that some person whose name was to the defendant unknown, and not the plaintiff, was the proprietor of the copyright ; nor that the plaintiff was not himself the author ; nor that the work was not first printed or published in the British dominions ; nor that the plaintiff ever acquired any title, by assignment or otherwise, to the copyright ; nor that there was no valid assignment ; nor that there is no copyright in a work first published out of the British dominions under such circumstances as the books in question were published. But that he might object that A., if anyone, and not the plaintiff, was the proprietor ; and that at the time of committing the grievances no copyright in the work was subsisting. *Ib.* See also *Coote* v. *Judd*, 23 Ch. D. 727 ; 48 L. T. 405 ; 31 W. R. 423.

Objections to Registration—Sufficiency of Notice—Terms.]—A plaintiff in an action to restrain the infringement of his copyright in a catalogue put in evidence the entry of his copyright on the registry before the writ in the action was issued. On the plaintiff being cross-examined as to the validity of the registration, the objection was taken that the defendant had not raised in his pleadings any objection to the registration. In answer to that the defendant said that he had suggested the objection to registration in an affidavit filed before the date of the statement of claim on a motion for an interim injunction. On trial of the action :—Held, that the affidavit was not a sufficient notice of the objection, nor a compliance with s. 16 of the Copyright Act, 1842, but that the case was one where the court would allow the defendant to raise the objection by amendment on terms. The terms were, that the defendant was not to raise any objection to the plaintiff proving the registration made since the action was brought, or raise any objection on the ground that such registration was not made before action. *Hayward* v. *Lely*, 56 L. T. 418.

—— **Non-delivery within the Time prescribed.**]—In an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence. *Coote* v. *Judd*, supra.

d. Issues, when Directed.

Principles.]—In cases of contested copyright, the court is disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of

the legal title, and it will give great weight to the consideration of the questions, which side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the action. *M'Neill* v. *Williams*. 11 Jur. 344.

The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter which is the subject of the alleged piracy forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years. *Bailey* v. *Taylor*, 1 Russ. & M. 73; Taml. 295; 8 L. J. (O.S.) Ch. 49.

Where Fraud or Breach of Trust.]—When the court is satisfied that a piratical imitation has been made by the defendant, the plaintiff will not be put to the terms of bringing an action to try his title at law, although the defendant cannot take any steps to bring the fact to an issue before a jury. *Chappell* v. *Sheard*, 2 Kay & J. 117; 1 Jur. (N.S.) 996; 3 W. R. 646.

In a case of alleged fraudulent imitation of a musical publication (independently of copyright), where the court did not consider the fraud clearly made out:—Held, that an injunction ought only to be continued on the terms of the plaintiff undertaking to bring an action, and to be answerable in damages. *Chappell* v. *Davidson*, 8 De G. M. & G. 1.

Where a workman intrusted with copper-plates for the purpose of taking impressions for the plaintiff of etchings made by the latter, and not intended for publication, took impressions for himself, in violation of the trust, and sold the impressions to the defendant, who published a catalogue of them, accompanied by remarks of his own:—Held, that the plaintiff was entitled at the hearing to a perpetual injunction to restrain the publication of the catalogue, and to a decree ordering the impressions to be destroyed; and that the defendant was not entitled to a preliminary trial of his title at law. *Prince Albert* v. *Strange*, 2 De G. & Sm. 652. And see *S. C.* 1 Macn. & G. 25; 1 H. & Tw. 1; 18 L. J., Ch. 120; 13 Jur. 109.

Upon a previous interlocutory application for an injunction, the evidence only made out a case of suspicion that a breach of confidence had been committed. On the defendant putting in his answer, denying notice of any such breach of confidence, but not fully or satisfactorily accounting for his possession of the etchings, and moving to dissolve the injunction:—Held, that there was sufficient ground for suspicion that there were equitable as well as legal grounds for interference, to make it right to continue the injunction to the hearing (on proper undertakings), without putting the plaintiff to establish a title at law. *Ib.*

Semble, that independently of the breach of trust, the legal right of the plaintiff to preserve the privacy of his unpublished works was so clearly infringed by the publication of the catalogue, as to entitle him to have it protected by injunction, without obtaining the decision of a court of law in its favour; and that the distribution of a few copies of the etchings to private friends did not prejudice this right. *Ib.*

Where Agreement to be Construed.]—Injunction against infringement of copyright, depending on effect of agreement, refused till recovery in action. *Walcot* v. *Walker*, 7 Ves. 1.

Where Acquiescence.]—Injunction refused to restrain alleged infringement of copyright before trial at law, where the conduct of the plaintiffs had been such as, in the opinion of the court, was calculated to induce the defendants to believe that the course taken by them would not be objected to by the plaintiffs. *Saunders* v. *Smith*, 3 Myl. & C. 711; 7 L. J., Ch. 227; 2 Jur. 491, 536.

In Patentees' Action.]—Motion by the King's patentees for an injunction to stop the sale of English bibles printed beyond sea, denied till the validity of the patent had been tried at law. *Anon.*, 1 Vern. 120. S. P., *Grierson* v. *Jackson*, 1 Ridgew. L. & S. 304.

e. Evidence and Comparison of Copies.

Evidence of Piracy.]—Where some only of the parts of the work of the defendant alleged to be piratical were produced in evidence, but they were such as to justify the presumption that the general character of the work was piratical, the court made an injunction restraining the defendant "from printing, etc., any copy of his work containing any articles copied, or taken, or colourably altered from the work of the plaintiff." *Lewis* v. *Fullarton*, 2 Beav. 6; 8 L. J., Ch. 291; 3 Jur. 669.

If A., instead of searching into the common sources, and obtaining his subject matter thence, avails himself of the labour of his predecessor, adopts his arrangement and questions, or adopts them with a colourable variation, it is an illegitimate use.

Falsely to deny that he has copied or taken any idea or language from another work is a strong indication of an animus furandi. *Jarrold* v. *Houlston*, 3 Kay & J. 708; 3 Jur. (N.S.) 1051.

Evidence of Publication.]—In an action for infringing the copyright in an opera, in order to prove a prior publication, a statement by a witness that he had seen in print, in Milan, many parts of the opera before the 10th June, 1831, is inadmissible, without accounting for the non-production of the printed copies. *Boosey* v. *Davidson*, 13 Q. B. 257; 18 L. J., Q. B. 174; 13 Jur. 678.

A statement by a witness of his having heard, before the 10th of June, 1831, persons in society sing parts of the opera at a piano, with printed music before them, is no evidence that the music in the printed papers was the same as that of the opera in question. *Ib.*

Interrogatories.]—In an action for infringement of copyright in a book, the court will permit interrogatories, as to the sale of the book for a certain period before and after the date of the alleged infringement, to be administered to the plaintiff for the purpose of ascertaining the amount of damage sustained, and enabling the defendant to pay a sufficient sum into court to meet it. *Wright* v. *Goodlake*, 3 H. & C. 540; 34 L. J., Ex. 82; 12 Jur. (N.S.) 14; 13 L. T. 120; 13 W. R. 349.

Inspection.]—The court will grant an inspection of the work alleged to be pirated in an action of copyright, upon an affidavit that the defendant had no recollection of having sold copies thereof, but is desirous of refreshing his memory in order to be able to state positively if

he has ever done so. *Graves* v. *Mercer*, 16 W. R. 790.

Discovery.]—A plaintiff has a right to a full and particular discovery as to the original sources from which the defendant alleges himself to have drawn his work. *Kelly* v. *Wyman*, 17 W. R. 399.

In a suit to restrain a piracy of a literary work, after interrogatories filed, the defendants, before answer, offered an injunction, and to pay costs; they then moved to stay proceedings:—Held, that their motion was premature, and that the plaintiff was entitled to discovery. *Stevens* v. *Brett*, 10 L. T. 231.

Comparison of Copies and Originals.]—On a motion for injunction, reference to master to see if two books were the same. *Jeffery* v. *Bowles*, Dick. 429.

A work alleged to be a piracy referred to the master. —— v. *Leadbetter*, 4 Ves. 681.

As to comparison of books in case of infringement, see *Gyles* v. *Wilcox*, 2 Atk. 143.

The court is averse to the practice of its time being occupied by applications for injunctions, to restrain infringements of copyright, in which it is difficult, if not impossible, to take an account of the loss complained of. *Bell* v. *Whitehead* 8 L. J., Ch. 141; 3 Jur. 68.

Notwithstanding *Bell* v. *Whitehead* (3 Jur. 68), if the court is led to the conclusion that there has been a piracy, it will not grudge any labour that may be requisite in order to ascertain how far the injunction should extend. *Jarrold* v. *Houlston*, 3 Kay & J. 708; 3 Jur. (N.S.) 1051.

Form of injunction where certain distinct parts of a work are unobjectionable, and other certain piracies. *Ib.*

The court will itself compare and decide upon alleged piracies by inspection, where that can be easily and safely done. *Sheriff* v. *Coates*, 1 Russ. & M. 159.

f. Costs.

Principles as to.]—Where an action is brought to enforce a legal right, such an action to restrain the infringement of a very small part of the plaintiff's copyright, the court will not, as a matter of course, order the defendant to pay the costs of the action. *Cooper* v. *Whittingham* (15 Ch. D. 501) and *Upmann* v. *Forester* (24 Ch. D. 231) observed on. *Walter* v. *Steinkopff*, 61 L. J., Ch. 521; [1892] 3 Ch. 489; 67 L. T. 184; 40 W. R. 599.

Although copyright may be claimed in part only of a work, the whole of which is registered, the part in which copyright is claimed should be distinguished in the bill, otherwise the costs unnecessarily incurred must be borne by the plaintiff. *Page* v. *Wisden*, 20 L. T. 435; 17 W. R. 483.

"Full Costs."]—Where an action for alleged infringement of copyright is dismissed with "full costs," according to 5 & 6 Vict. c. 45, s. 26, the costs are to be taxed in the ordinary way as between party and party. The Act 5 & 6 Vict. c. 97, s. 2, which enacts that where by any public Act it is provided that "either double or treble costs or any other than the usual costs between party and party" shall or may be recovered, the party theretofore entitled to such double, treble or other costs shall, instead thereof, receive such full and reasonable indemnity as to costs as shall be taxed by the proper officer, does not apply, inasmuch as "full costs" are not costs other than the usual costs as between party and party. *Avery* v. *Wood*, [1891] 3 Ch. 115; 65 L. T. 122; 39 W. R. 577—C. A.

And see *Reeve* v. *Gibson*, post, col. 528.

Plaintiff Entitled to Costs of Establishing his Title.]—In a suit to restrain the piracy of a literary work, a plaintiff who, in opposition to the defendant's denial of his title, obtains an injunction, is entitled to an answer from the defendant for the purpose of having his title admitted (in case, by arrangement between the parties, the title is not established at law), and also of having an account from the defendant of the profits made by the sale of the spurious work. The plaintiff therefore, under such circumstances, is entitled to the costs of the suit, including the answer as between party and party; and if, by the refusal of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit as between party and party, although, at the hearing, he may waive the account; and the plaintiff's equity in this respect will not be affected by his having offered to waive his right to an answer with a view to obtain terms more beneficial to himself than the court would, under any circumstances, accord to him; as, for instance, with a view to receive costs as between solicitor and client. *Kelly* v. *Hooper*, 1 Y. & Coll. C. C. 197.

No Costs given—Bona fides of Unsuccessful Defendant.]—When S. had published in a provincial newspaper, of which he was proprietor, whole articles taken verbatim from a magazine, alleging in justification the custom of the trade:—Held, that the proprietor of the magazine was entitled to an injunction against S., but inasmuch as he had acted with bona fides, the court did not give either party his costs of the motion. *Maxwell* v. *Somerton*, 30 L. T. 11; 22 W. R. 313.

—— **Mala fides of Successful Defendant.**]—When an upholsterer, who had published an illustrated furnishing guide with engravings of the articles of furniture which he sold, and descriptive remarks thereon, filed a bill to restrain another upholsterer from publishing, for the purposes of his own trade, a similar work in which many of the engravings and portions of the letterpress of the first work were alleged to be copied:—Held, that he could not be restrained by injunction from so copying the illustrations or such part of his work as was not original but merely descriptive of his stock, or of common articles of furniture; but that, the latter's work being a flagrant imitation of the former's, he could be allowed no costs. *Cobbett* v. *Woodward*, 41 L. J., Ch. 656; L. R. 14 Eq. 407; 27 L. T. 27; 20 W. R. 963.

—— **Of Unnecessary Proceedings.**]—When, in a suit for the infringement of copyright, the chief clerk's certificate, made in pursuance of the decree, was, on the application of the plaintiff, referred back to the chief clerk, and subsequently confirmed, the court refused to make any order as to the costs of the summons and subsequent reference. *Kelly* v. *Hodge*, 29 L. T. 387.

g. Other Matters.

Penalties.]—Two penalties might be incurred on the same day, on 12 Geo. 2, c. 36, for selling books originally written and published here, and afterwards reprinted in any other country, and imported into this, if the acts of sale were distinct. *Brooke* v. *Millikin*, 3 Term Rep. 509.

Property in Blocks.]—The drawings on the blocks from which illustrations of a book were engraved were sketched by the author of the drawings himself:—Held, that, having regard to the terms of the agreement, the blocks themselves were not the property of either the plaintiffs or the defendants, but that the defendants must deliver them up to the plaintiffs. *Hole* v. *Bradbury*, 48 L. J., Ch. 673; 12 Ch. D. 886; 41 L. T. 250; 28 W. R. 39.

Delivery to Public Libraries.]—A single part of a work published at uncertain intervals, of which thirty copies only were printed, twenty-six of which were subscribed for, the principal costs of publication being defrayed by funds devised for that purpose, was not a periodical publication, or book, which need be entered at Stationers' Hall; nor was it demandable by the public libraries under 54 Geo. 3, c. 156. *British Museum* v. *Payne*, 2 Y. & J. 166; 1 M. & P. 415; 4 Bing. 549; 29 R. R. 617.

The 8 Anne, c. 19, s. 5, made it necessary for a printer of a book, composed after the passing of the act, and published for the first time after the composition, which book was printed and published with the consent of the proprietor of the copyright, to deliver a copy upon the best paper to the warehouse-keeper of the Company of Stationers, for the use of the library of the University of Cambridge, notwithstanding the title to the copy of such book, and the consent of the proprietor to the publication, was not entered in the registry book of the company. *Cambridge University* v. *Bryer*, 16 East, 317.

The object of 5 & 6 Vict. c. 45, s. 6, was to obtain for the British Museum a copy of every book published anywhere under British rule, whether there should be copyright in the book or not. *Routledge* v. *Low*, 37 L. J., Ch. 454; L. R. 3 H. L. 100; 18 L. T. 874; 16 W. R. 1081.

Patent Presses.]—Upon a bill in equity by the king's printer to restrain the defendant from the publication of certain acts of parliament, to which the patentees for printing law books were also defendants, the court refused to interfere between the contending patents, and therefore only restrained the defendant from printing at any other than a patent press. *Buskett* v. *Cunningham*, 2 Eden, 1173.

Upon the answer to a bill by the universities of Oxford and Cambridge, of the king's printer not joining but being made defendant, an injunction restraining the sale in England of bibles, prayer-books, etc., printed by the king's printer in Scotland, was continued to the hearing. *Oxford and Cambridge Universities* v. *Richardson*, 6 Ves. 689.

Question of title in king's printer in Ireland to print Irish statutes, not proper for a court of equity. *Grierson* v. *Eyre*, 9 Ves. 341.

How far the university of Oxford's privilege of printing bibles, &c., extends. *Hill* v. *Oxford University*, 1 Vern. 275.

Motion by the king's patentees for an injunction to stop the sale of English bibles printed beyond the sea denied till the validity of the patent had been tried at law. *Anon.*, 1 Vern. 120.

The stat. of 8 Anne, c. 19, does not extend to the Universities, Eton, Westminster, or Winchester. *Donaldson* v. *Beckett*, 2 Bro. P. C. 129.

A patentee claiming an exclusive right of printing bibles must establish his right at law before he can have an injunction in equity. *Grierson* v. *Jackson*, 1 Ridgew. L. & S. 304.

B. MUSICAL AND DRAMATIC COPYRIGHT.

1. Musical Compositions.

a. Subject Matter.

Before 5 & 6 Vict. c. 45.]—The Act 5 & 6 Vict. c. 45 (which by s. 20 incorporates 3 & 4 Will. 4, c. 15, and extends its provisions to musical compositions), confers an exclusive right to the performance of musical compositions published within ten years before the passing of the act. *Hutchins & Romer, Ex parte*, 48 L. J., Q. B. 505; 4 Q. B. D. 483; 41 L. T. 144; 27 W. R. 857—C. A.

A musical composition was a work within 8 Anne, c. 19. *Bach* v. *Longman*, Cowp. 623. S. P., 1 Chit. 26; *Platt* v. *Button*, 19 Ves. 447; Coop. C. C. 303.

Though published on a single sheet of paper. *Clementi* v. *Goulding*, 11 East, 244; 2 Camp. 25. S. P., *Storace* v. *Longman*, and *Hime* or *Hine* v. *Dale*, 11 East, 244, n.; 2 Camp. 27, n.

Nature of Right.]—The copyright in musical compositions is more extensively protected than the copyright in dramatic pieces. *Russell* v. *Smith*, 15 Sim. 181; 15 L. J., Ch. 340.

Re-arrangements.]—A person who writes words to an old air, and procures an accompaniment and publishes them together, is entitled to the copyright in the whole work. *Leader* v. *Purday*, 7 C. B. 4; 18 L. J., C. P. 97; 12 Jur. 1091.

One who adapts words of his own to an old air, adding thereto a prelude and an accompaniment, also his own, acquires a copyright in the combination, and may, in an action for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition *Lover* v. *Davidson*, 1 C. B. (N.S.) 182.

Score for Piano.]—The pianoforte score of an already existing opera, whether arranged by the composer himself or by another person, is the subject of copyright within 5 & 6 Vict. c. 45, and 7 & 8 Vict. c. 12. *Wood* v. *Boosey*, 9 B. & S. 175; 37 L. J., Q. B. 84; L. R. 3 Q. B. 223; 18 L. T. 105; 16 W. R. 485—Ex. Ch.

In registering the pianoforte score of an opera pursuant to 7 & 8 Vict. c. 12, s. 6, it is not correct to insert as the author of it the name of the composer of the opera. *Ib.*

Made Abroad.]—An alien resident abroad composed three musical pieces in a foreign country, and sold the copyright in this country to a British subject, who published the work in

London. The work was on the same day published in Prussia. On motion in a suit instituted by the purchaser of the copyright against a person who had, without leave, published the three musical compositions in this country:—Held, that the publication was within the 5 & 6 Vict. c. 45; and the court granted an injunction, restraining the unauthorised publication. *Buxton* v. *James*, 5 De G. & S. 80; 16 Jur. 15.

Title.]—In a declaration for pirating a book, an allegation that the plaintiff was the author of a book, being a musical composition called A., is well supported by showing him to be the author of a musical composition of that name, comprised in, and occupying only one page of a work with a different title, which contained several other musical compositions. *White* v. *Geroch*, 2 B. & Ald. 298; 1 Chit. 24; 22 R. R. 786.

See also cases, post, col. 517, &c.

b. Assignment.

Must be in Writing.]—An assignment of a copyright under 5 & 6 Vict. c. 45, must be in writing. *Layland* v. *Stewart*, 46 L. J., Ch. 103; 4 Ch. D. 419; 25 W. R. 225.

Therefore, where the author of a song agreed verbally with S. to part with his copyright, and subsequently by instrument in writing assigned it to L., who entered the song at Stationers' Hall:—Held, that the title of L. must prevail, and that he could sustain an action to restrain S. from infringing his copyright. *Ib.*

Assignment by Foreigner.] — The English assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright. *D'Almaine* v. *Boosey*, 1 Y. & C. 288; 4 L. J., Ex. Eq. 21.

Semble, that a foreigner who resides and publishes in England, is within the like protection. *Ib.*

—— **After Publication Abroad.**]—In 1830, a foreigner resident in Paris made a legal assignment of his copyright in an opera to L., resident in England, and L., in the same year, sold his interest to C., without executing any written memorandum. C. died in 1834, and in 1836 C.'s executrix obtained a legal assignment. In the meantime, copies of the full score had been imported into England, and sold in London by several tradesmen. In 1841 P. published and sold the overture of the opera in London:—Held, that C.'s executrix could not maintain an injunction against P. for piracy. *Chappell* v. *Purday*, 4 Y. & C. 485.

Quære, whether, after a foreigner has published his work in a foreign country, he can at common law assign his copyright, limited to Great Britain, to a British subject, so as to give the assignee the benefit of the statutes relating to copyright. *Ib.*

Liberty to Perform.]—Within ten years before the passing of 5 & 6 Vict. c. 45, C. set to music two songs, and in 1843, after the passing of that statute, he by deed assigned to D. and M. his copyright in the two musical compositions, together with all property and benefit therein. The interest of D. and M. in the musical compositions afterwards vested in H. and R. In 1878 C. purported to assign to A. the sole liberty of performing or singing, or causing or permitting to be performed or sung, the musical compositions. A. thereupon caused entries to be made in the register at Stationers' Hall, representing him to be the sole proprietor of the liberty of performing the musical compositions:—Held, upon motion by H. and R., that the entries must be expunged; for C., by the deed made in 1843, had granted the sole liberty of performing the musical compositions to D. and M., and therefore could not, in 1878, grant it to A. *Hutchins and Romer, Ex parte*, 48 L. J., Q. B. 505; 4 Q. B. D. 483; 41 L. T. 144; 27 W. R. 857.

W. was engaged as musical director at a theatre on the terms that he was to find all the music and engage the performers, and provide the musical instruments, pay for the printed music, and for the paper on which the original music (if he provided any such) was written. He did, under the direction of M., his employer, compose certain original music for a stage play. After the termination of his employment, H., by the licence of M., performed the stage play, together with the music, without the permission of W.; whereupon, W. brought an action against H. for so using the music without his permission:—Held, that H., as a licensee of M., was entitled to use the music. *Wallenstein* v. *Herbert*, 16 L. T. 453; 15 W. R. 838.

2. Dramatic Compositions.

a. Subject Matter, &c.

Before 3 & 4 Will. 4, c. 15.]—Before the statute, a proprietor of the copyright of a tragedy, which had been printed and published for sale, could not maintain an action against the manager of a theatre for publicly acting and representing such tragedy in an unabridged form for profit. *Murray* v. *Elliston*, 1 D. & R. 299; 5 B. & Ald. 657; 24 R. R. 519.

An injunction, however, had been granted in chancery to restrain the publication in a magazine of a farce occasionally suffered by the author to be acted, but never printed or published. *Macklin* v. *Richardson*, Amb. 694.

Before 5 & 6 Vict. c. 45, s 20.]—Before this statute, the assignee of the copyright of a dramatic work, printed and published within ten years of the passing of 3 & 4 Will. 4, c. 15, and not the author, who had assigned such copyright, was entitled to the sole right of representing the piece or causing it to be represented. *Cumberland* v. *Planché*, 3 N. & M. 537; 1 A. & E. 580; 3 L. J., K. B. 194.

So, where the work was printed and published subsequently to the act, and no reservation of the right to the exclusive representation was expressly made by the author. *Ib.*

Printing and Publishing—Acting.]—The publication in this country of a dramatic piece, or musical composition, as a book before it has been publicly represented or performed, does not deprive the author of such dramatic piece, or musical composition, or his assignee, of the exclusive right of representing or performing it. *Chappell* v. *Boosey*, 51 L. J., Ch. 625; 21 Ch. D. 232; 46 L. T. 854; 30 W. R. 733.

First represented Abroad.]—The author of a dramatic work which has been first represented in a foreign country is not entitled to any exclusive right of representation in this country, the representation of a dramatic work being a

publication of it within 7 Vict. c. 12, s. 19. *Boucicault* v. *Chatterton*, 46 L. J., Ch. 305; 5 Ch. D. 267; 35 L. T. 745; 25 W. R. 287—C. A.

Contrà in United States.]—Every author, before publication, has a common law right of property in his productions. *Palmer* v. *Dewitt*, 23 L. T. 823—Supreme Court, New York.

A public representation of a dramatic piece at a theatre is not such a publication as to deprive the author or his assignee of such right of property. *Ib.*

Where, therefore, a comedy was performed at a theatre in England, but not otherwise published, and the defendant obtained the words and arrangements from persons who saw it performed in London, and printed and published it in America, on an action being brought by the author's assignee to restrain the publication and sale:—Held, that the action was maintainable, as it is not open to a spectator, on witnessing the public performance of a play, to commit it to memory and then publish it to the world. *Ib.*

Any surreptitious procuring of the literary property of another, no matter how obtained, if unauthorised and without the knowledge or consent of the owner, and before publication by him, is an invasion of his proprietary rights, if made use of to his injury. *Ib.*

In Person Employed to Write.]—One who employs another to write a play for him, and even suggests the subject, does not thereby become the proprietor of the copyright. *Lery* v. *Rutley*, 40 L. J., C. P. 244; L. R. 6 C. P. 523; 24 L. T. 621; 19 W. R. 976.

A person who employs another to adapt a foreign dramatic piece for representation upon the English stage, and who has no other share in the design or execution of the work than that of suggesting the subject, is not the author of such adaptation within the meaning of the 3 & 4 Will. 4, c. 15; and therefore, when such employment is by parol, the employer has not the right of representing it without an assignment in writing from the author. *Shepherd* v. *Conquest*, 17 C. B. 427; 25 L. J., C. P. 127; 2 Jur. (N.S.) 236; 4 W. R. 283.

If a manager of a theatre, having designed to bring out an old play, with new scenery, dresses, and musical accompaniments, hires A. to compose the requisite music, who does so, and is paid for it, the sole right to the representation or performance of such musical compositions, as part of the whole, becomes thereby vested in the former, without assignment or the consent in writing of A., the terms of the contract between them being, that the compositions should become part of the entire dramatic piece, and that the manager should have the sole liberty of representing and performing the compositions with the dramatic piece. *Hatton* v. *Kean*, 7 C. B., (N.S.) 268; 29 L. J., C. P. 20; 6 Jur. (N.S.) 226; 1 L. T. 10; 8 W. R. 7.

Joint Authorship, what Constitutes.] — In order to constitute a joint authorship of a dramatic piece or other literary work, it must be the result of a preconcerted joint design. *Lery* v. *Rutley*, supra.

Mere alterations, additions, or improvements by another person, whether with or without the sanction of the author, will not entitle such other person to claim to be a joint author of the work. *Ib.*

A lessee of a theatre employed W. to write a play for him, suggesting the subject, and W. having completed it, the lessee and some members of his company introduced various alterations in the incidents and in the dialogue, to make the play more attractive, and one of them wrote an additional scene:—Held, that these circumstances did not make the lessee joint author of the play with W. *Ib.*

The play being finished, a sum of 4*l.* 15*s.* was paid to W. on account, and he signed a receipt drawn up by the lessee's attorney, as follows: "Received of Mr. L. the sum of 4*l.* 15*s.* [on] account of 15 guineas for my share, title and interest as co-author with him in the drama entitled, &c.; balance of 15 guineas to be paid on assigning my share to him." The balance was never paid, nor was any assignment executed by W.:—Held, no evidence that the lessee was either a joint author or an assignee of the author. *Ib.*

The adaptor of a play who introduces into his version material alterations is an "author of a dramatic piece" within the Dramatic Copyright Act, 1833. The author of such a dramatic piece, having assigned the provincial rights therein, cannot, without the concurrence of his assignee, maintain an action against an infringer of those rights. *Tree* v. *Bowkett*, 74 L. T. 77.

Song or Dramatic Entertainment.]—C. was the proprietor, by assignment with the author, with the right of singing it when and where he pleased, of the words of a comic song, called "Come to Peckham Rye," which he sang, to a well-known air, for profit, at public music-halls, dressed in character, and accompanying his singing with gesture and expression. He had never registered the song, or printed it, nor, otherwise than by singing it as before mentioned, had he ever published it. B., unknown to and without C.'s consent, printed and published, in a penny book or sheet of songs, a song called "Down at Peckham Rye," the words of which closely resembled and imitated the words of C.'s song:—Held, that C.'s song was not a book within 5 & 6 Vict. c. 45, s. 2, but came within the definition of a dramatic piece, as a "musical or dramatic entertainment," in the same section, and consequently did not require registration under s. 24, which applied to books only. *Clark* v. *Bishop*, 25 L. T. 908.

Introduction to Pantomime.]—An introduction to a pantomime—that is, the only written part of the entertainment, is within the protection of the statute. *Lee* v. *Simpson*, 3 C. B. 871; 4 D. & L. 666; 16 L. J., C. P. 105; 11 Jur. 127.

Dramatising Novel.] — *See cases*, post, col. 522.

b. Assignment.

In Writing.]—Injunction granted to restrain the performance of a comedy, the copyright of which had been sold by the author, and had been afterwards assigned by writing to the plaintiffs, although it did not appear whether the original assignment was in writing. *Morris* v. *Kelly*, 1 Jac. & W. 481; 21 R. R. 216.

Effect of.]—A. agreeing with B., to "let B. have" a particular drama in discharge of 10*l.* owing by A. to B., is a complete assignment to

B. of A.'s whole property in the drama. *Lacy* v. *Toole*, 15 L. T. 512.

A deed, subsequently to 5 & 6 Vict. c. 45, assigning all the right, title, and interest in a dramatic piece, both copyright and acting right, does not require registration under that act, in order to entitle the assignee to the exclusive right of representation, and to all the other rights and remedies conferred by 3 & 4 Will. 4, c. 15, on the author of a dramatic piece and his assignee. *Lacy* v. *Rhys*, 4 B. & S. 873; 33 L. J., Q. B. 157; 10 Jur. (N.S.) 612; 9 L. T. 607; 12 W. R. 309.

The 5 & 6 Vict. c. 45, s. 22, applies only where a copyright only is assigned, and not the exclusive right of representation. *Ib.*

It is competent to an assignee of the sole right of representing a dramatic piece, to sue for penalties under 3 & 4 Will. 4, c. 15, s. 2, notwithstanding the assignment is not by deed, or registered under 5 & 6 Vict. c. 45. *Marsh* v. *Conquest*, 17 C. B. (N.S.) 418; 33 L. J., C. P. 319; 10 Jur. (N.S.) 989; 10 L. T. 717; 12 W. R. 1006.

The assignment of the copyright of a book consisting of or containing a dramatic piece does not, in the absence of an expressed intention that it should be so, pass the right of representing or performing it. That may be the subject of a subsequent assignment to a third person. *Ib.*

Licence by one Part Owner.]—The part owner of a dramatic entertainment cannot grant a licence for its representation without the consent of all the other owners. Accordingly, where the registered owner of the undivided moiety of the copyright of an opera had alone granted a licence for its representation, on an action by the other owners of the other moiety to recover the penalty under 3 & 4 Will. 4, c. 15, s. 2:—Held, that, having regard to that act and the act 5 & 6 Vict. c. 45, the licence was illegally granted, and that the defendant was liable to pay to the plaintiffs one-half of the penalty of 40*s.* for each representation. *Powell* v. *Head*, 48 L. J., Ch. 731; 12 Ch. D. 686; 41 L. T. 70.

3. Infringement.

a. What is.

Piece Represented, but Not Published.]—Injunction to restrain the publishing in a magazine a farce occasionally suffered by the author to be acted, but never printed or published. *Macklin* v. *Richardson*, Ambl. 694.

An infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited; and where that music having been made the subject of two "arrangements," one without the voice, another for the voice and piano, those arrangements having been published, the infringer had used them for his own production. In such a case the question of what was intended to be registered will be considered with reference to all the parts of the register, and if certain portions of the forms of registry are, in the particular case, unnecessary and unmeaning, the introduction of them will not affect those portions of the register which are correct. *Fairlie* v. *Boosey*, 48 L. J., Ch. 697; 4 App. Cas. 711.

Offenbach composed, in Paris, the music of an opera called "Vert-Vert." S., by his permission, made two "arrangements" of the music, one for the piano without, the other for the piano with, the voice. The opera was produced at the Opera Comique, in Paris, on the 10th of March, 1869, but was never, as a whole, printed. The two arrangements were printed in a book published in Paris at 10, Rue de la Chaussée d'Antin, on the 28th of March, 1869. B. became the assignee of the music of the opera, and also of the "arrangements." He sought to register them in England. He filled up the statutory forms required for that purpose. One column of those forms had, in the lower portion, the heading, "Time and place of first representation," and the words, "Théâtre Impérial de l'Opera Comique, Paris, France, 10th March, 1867," but the upper portion of the same column had the words, "Time and place of first publication," under which were the figures and words, "28th March, 1869. 10, Rue de la Chaussée d'Antin, Paris, France." The form relating to the assignment of the music of the opera was correct in the first two columns, but in the third, under the heading, "Assignee of copyright," were, first of all, the name and residence of B., and then the words, "as assignee of the copyright in the music of the said book, and also of the right of publicly performing such music." The written but unpublished music of the opera was not deposited at Stationers' Hall; the "book" containing the pianoforte arrangements was deposited there. F. produced a dramatic representation, calling it "Vert-Vert, music by Offenbach," the music being taken from the "arrangements," but the words were supplied by English writers:—Held, that there had been a sufficient registration of the music of the opera, and that the registration was not affected by the reference to the "book" of the arrangements, and that F. had been guilty of an infringement of B.'s rights. *Ib.*

—— **Published, but not Represented.**]—The publication in this country of a dramatic piece, or musical composition, as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece, or musical composition, or his assignee, of the exclusive right of representing or performing it. *Chappell* v. *Boosey*, 51 L. J., Ch. 625; 21 Ch. D. 232; 46 L. T. 851; 30 W. R. 733.

Substantial Part.]—To support an action for infringement of dramatic copyright under 3 & 4 Will. 4, c. 15, s. 2, it must be proved that the defendant had taken a substantial and material part of the plaintiff's production. *Chatterton* v. *Cave*, 47 L. J., C. P. 545; 3 App. Cas. 483; 38 L. T. 397; 26 W. R. 498.

A. had produced a drama on the tale as written, and the play as acted, of "The Wandering Jew," the authorship of M. Eugène Sue, but had introduced two scenic representations into his production not to be found in the French original; and B. afterwards produced a drama on the same subject, in which these two scenic representations were also introduced; an arbitrator had found "that two scenes or points had been taken direct from the drama of the plaintiff, but that the drama of the defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the plaintiff," and had directed the verdict to be entered for the defendant:—Held, that the finding was conclusive. *Ib.*

The words in the statute, "production or any part thereof," must receive a reasonable construction, and are to be treated as implying some part that is substantial and material. *Ib.*

At the trial the cause had been withdrawn from the jury and submitted to the decision of the judge. On a motion that the verdict should be entered for the plaintiffs, or a new trial granted, on the ground that the representation by the defendant of part of the plaintiff's play had been found as a fact, the judge (who was a member of the court where the case was pending) explained to his brethren on the bench what was the meaning he intended to convey by the finding:—Held, that it was competent for him to do so. *Ib.*

It is a question of fact, and not of law, whether there has been a representation of a part of a dramatic entertainment. *Planché* v. *Braham*, 8 Car. & P. 68; 5 Scott, 242; 4 Bing. (N.C.) 17; 3 Hodges, 288; 7 L. J., C. P. 25; 1 Jur. 823.

Where the jury found that the singing the words of a song taken from an opera written by the plaintiff amounted to such a representation, the court refused to disturb the verdict. *Ib.*

In Work of Criticism.]—The defendant having, in two numbers of a periodical work of theatrical criticism, inserted detached extracts, to the extent of six or seven pages, from a farce the property of the plaintiffs, containing forty pages, interspersed with criticisms, a bill for a perpetual injunction, and an account of the profits of the number, which amounted not to 3*l.*, was dismissed, with costs. *Whittingham* v. *Wooler*, 2 Swans. 428.

Under Different Form.]—To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy. *D'Almaine* v. *Boosey*, 1 Y. & C. 289.

Description on Title-Page—Fraud on Public—Song.]—Certain music publishers having adapted original words to an old American air, which was rearranged for them, gave to the song so composed the name of "Minnie," and procured it to be sung by Madame Anna Thillon, a popular singer, at M. Julien's concerts in London; and when it had by that means become a favourite song, they published it with a title-page containing a picture of the singer who had brought the song into notice, and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby at Julien's Concerts, written by George Linley":—Held, that the publishers had by these means obtained a right of property in that name and description of their song, which a court of equity would restrain any person from infringing. *Chappell* v. *Sheard*, 2 Kay & J. 117; 1 Jur. (N.S.) 996; 3 W. R. 646.

Another music publisher subsequently published the same melody with different words, and upon the title-page they placed a similar portrait of Madame Anna Thillon, with the words "Minnie Dale, sung at Julien's Concerts (and always encored) by Madame Anna Thillon; the music composed by H. S. Thompson;" this song having never, in truth, been sung by Madame Anna Thillon, at Julien's concerts:—Held, that this was a palpable attempt to induce the public to believe that the song so published was the same as that of the first publishers; and an injunction was granted to restrain this or any other similar infringement of their right to the name and description of their song. *Ib.*

There are four indicia in the title of a song, the imitation of which by another party may be restrained by injunction, viz., the name of the song, the name of the singer, of the composer, and of the publisher. *Ib.*

There cannot be a copyright claimed for a part of a book and disclaimed for another part, as in a patent; and the plaintiffs were entitled to protection, although they had simply registered their song, without mentioning that they claimed no copyright in the tune. *Ib.*

The statement in the title-page, "written by L.," when the music was not, although the words were composed by L., is not such a misrepresentation as to disentitle the plaintiffs to protection. *Ib.*

C. having published a song, on the title-page of which was a portrait of Madame Anna Thillon, and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby at Julien's Concerts, written by George Linley," and this song having become very popular, D. subsequently published another song, consisting of different words to the same air (in which there was no copyright), with a title-page on which was a different portrait of Madame Anna Thillon, copied from an American publication, and the words "Minnie, dear Minnie. Madame Anna Thillon":—Held, that this was an obvious attempt to pass off D.'s publication for that of C., which had obtained the public favour; and this attempt was restrained by an interlocutory injunction, without imposing upon the parties the necessity of trying the right at law. *Chappell* v. *Davidson*, 2 Kay & J. 123.

Held, also, that the words "Written by George Linley," who was chiefly known as a musical composer, on the title-page of the plaintiffs' song, did not so clearly manifest an intention to mislead the public into the belief that the music was composed by him as to deprive the plaintiffs of their right to the injunction. *Ib.*

Nor did the entry at Stationers' Hall of the music as well as the words of the song, although the plaintiffs might have entered only those parts of the publication to which they had an exclusive right. *Ib.*

The defendant could not escape his liability by cautioning his shopmen to explain to purchasers that his song was not the same as the plaintiffs', because he could not secure that retail dealers purchasing from him would give the same information to their customers. *Ib.*

—— **Hemy's Pianoforte Tutor.**]—The plaintiffs were the proprietors of an elementary musical work, called "Hemy's Royal Modern Tutor for the Pianoforte." The defendant, who had purchased the plates of an old pianoforte tutor, called "Jousse's Royal Standard Pianoforte Tutor," employed Mr. Hemy, the editor of the plaintiff's work, to re-edit it, and called the new edition, "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the name "Hemy" being at the head of the title-page, and in characters much more conspicuous than the word "Jousse's":—Held, that the plaintiffs were entitled to an injunction, on the ground that the title-page of the defendant's work was a fraudulent imitation of that of the plaintiff, and calculated to deceive the public. *Metzler* v. *Wood*, 47 L. J., Ch. 625; 8 Ch. D. 606; 38 L. T. 544; 26 W. R. 577.

Gratuitous Distribution.]—The publication of a piece of music, not for sale or hire, but by the gratuitous distribution of lithographed copies amongst the members of a musical society, is a

publication for which a party is liable as for an invasion of the property of the proprietor therein, independently of 5 & 6 Vict. c. 45, s. 15. *Novello* v. *Ludlow*, 12 C. B. 177; 21 L. J., C. P. 169; 16 Jur. 689.

Author—Original Play—Sole Liberty of Representation.]—By 3 & 4 Will. 4, c. 15, s. 1, the author, or his assignee, of any play, composed and not printed or published by the author thereof or his assignee, shall have as his own property the sole liberty of representing such play at any place of dramatic entertainment whatsoever in any part of the United Kingdom, and shall be deemed and taken to be the proprietor thereof.—In an action for the infringement of the plaintiffs' sole liberty of representing a play of which they were the joint authors, it was proved that the plaintiffs commenced to write the play in the autumn of 1889, and, having finished it in March, 1892, it was publicly performed at a theatre on June 30. 1892; that the defendants wrote a play in many respects similar to the plaintiffs' play, and that the defendants' play was written and completely finished between the end of 1889 and the early part of 1890, and was publicly performed at a theatre on July 4. 1892. The defendants' play was, as between the parties to the action, in every respect an original play, and in no way copied from or suggested by the plaintiffs, and there was no direct evidence that both plays came from a common source:—Held, that, assuming the two plays to be substantially alike either wholly or in material parts, the plaintiffs were not entitled to maintain their action, because the defendants, having written and finished their play before the plaintiffs had written and finished theirs, were entitled to the sole liberty of representation thereof under 3 & 4 Will. 4, c. 15, s. 1, and, their right having vested, there was nothing in any subsequent legislation to deprive them of it. *Reichardt* v. *Sapte*, [1893] 2 Q. B. 308.

Necessary Consent of Author.]—By 3 & 4 Will. 4, c. 15. s. 2, a penalty is imposed on any one who shall represent any dramatic piece without the consent in writing of the author or other proprietor first had and obtained:—Held, that this consent need not be in the handwriting of, or signed by, the author or other proprietor, and that the statute is satisfied if it is in writing, though given only by the agent of the author. *Morton* v. *Copeland*, 16 C. B. 517; 24 L. J., C. P. 169; 1 Jur. (N.S.) 979; 3 W. R. 593.

In an action by a dramatic author for a penalty under the statute, it appeared that he was a member of a society of dramatic authors, the secretary of which had given the defendant a consent in writing to play dramas belonging to the authors forming such society, upon his punctual transmission of the monthly bills, and payment of the prices for the performance of such dramas. The society published a prospectus, showing the terms on which permission might be obtained from the secretary for the performance of pieces, the property of its members, and that supplementary lists would be annually published of the plays of its members which should from time to time be added to the stock of the society:—Held, that such consent exempted the defendant from any penalty under the act for the performance of dramas of the plaintiff which had been composed by him subsequently to such consent, and belonged to the stock of the society, although the same had not been published by the society in any supplementary list, and although the defendant had not complied with the terms of transmitting monthly bills and paying the prices for such performances. *Ib.*

But a licence cannot be granted by one part owner of a dramatic entertainment without the consent of the other owners. *Powell* v. *Head*, 48 L. J., Ch. 731; 12 Ch. D. 686; 41 L. T. 70.

Absence of Consent in Writing.]—By 3 & 4 Will. 4. c. 15, ss. 1 and 2, it is in substance provided that the author of any dramatic piece or entertainment, or the assignee of such author, shall have, as his own property, the sole liberty of representing such production, or causing it to be represented, at any place of dramatic entertainment during certain periods mentioned in the act, and shall be deemed the sole proprietor thereof, and that, if any person shall, during the continuance of such sole liberty as aforesaid, "contrary to the intent of this act, or right of the author or his assignee," represent such production, or cause it to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, every such offender shall be liable for each and every such representation (among other alternatives) to the payment of an amount not less than 40*s.* to the author or other proprietor. By 5 & 6 Vict. c. 45, ss. 20 and 21, the above provisions are extended to musical compositions, and it is provided that the sole liberty of representing dramatic pieces and musical compositions shall endure and be the property of the author and his assigns for the term in the act provided for the duration of copyright in books.—The plaintiff was employed by the defendant, the proprietor of a music-hall, as the conductor of the orchestra, at a weekly salary, and had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts from the defendant in respect of such compositions. The plaintiff composed the music for a Christmas ballet, to be performed at the defendant's music-hall, but while the piece was running he threw up his engagement as conductor, and took away the musical score and band-parts necessary for the performance of the music. It was subsequently arranged orally between the plaintiff and the defendant that the plaintiff should give up the score and band-parts to the defendant in consideration of a payment of 20*l.* by the defendant. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent, musical composition, and that the plaintiff had not sold his rights therein to the defendant:—Held, that, in the absence of any assignment or consent to the representation of the composition in writing given by the plaintiff, the performances were contrary to the right of the author, and the action was maintainable. *Shepherd* v. *Conquest* (17 C. B. 427) followed. *Eaton* v. *Lake*, 57 L. J., Q. B. 227; 20 Q. B. D. 378; 59 L. T. 100; 36 W. R. 277—C. A.

Dramatising Novel.]—Any person may dramatise a published novel, even though the author of the novel has dramatised his own work. *Tyole* v. *Yorke*, 43 L. J., Q. B. 170; L. R. 9 Q. B. 523 30 L. T. 729; 22 W. R. 694.

H. wrote and published a novel which he afterwards dramatised. He assigned the drama to the plaintiff, but it was never printed, published, or represented upon the stage. G., in ignorance of H.'s drama, also dramatised the novel in a different form, and assigned his drama to the defendant, who represented it on the stage:—Held, that, H. having published his novel, anyone might dramatise it, and, although the two dramas were founded upon the novel written by him, the representation upon the stage of the drama written by G. was not a representation of the drama written by H.; and that the plaintiff could, therefore, not recover penalties from the defendant under 3 & 4 Will. 4, c. 15, ss. 1 and 2. *Ib.*

A. published a play, and afterwards published a novel founded upon it, into which he introduced many scenes and passages from the play. B. afterwards published a play, compiled from A.'s novel, without (as was alleged) any knowledge of A.'s play. B.'s play contained scenes and passages substantially identical with scenes and passages which were common to both A.'s play and novel:—Held, that even if B.'s play was a fair adaptation of the novel, and not an infringement of the copyright therein, it was an infringement of the copyright in A.'s play. *Reade* v. *Lacy*, 1 Johns. & H. 524; 30 L. J., Ch. 655; 7 Jur. (N.S.) 463; 4 L. T. 354; 9 W. R. 531.

An author of a drama called "Gold," which had been printed and represented on the stage, published a novel founded upon it, called "It is never too late to Mend," to which novel he transferred some of the scenes from the drama. The defendant caused another drama to be constructed from the novel, which he called "Never too late to Mend," taking many of the scenes from the novel which had been imported into the novel from the original drama, and produced it at his theatre:—Held, that this was an infringement of the plaintiff's copyright in his drama. *Reade* v. *Conquest*, 11 C. B. (N.S.) 479; 31 L. J., C. P. 153; 8 Jur. (N.S.) 764; 5 L. T. 677; 10 W. R. 271. *And see* 9 C. B. (N.S.) 755; 30 L. J., C. P. 209; 7 Jur. (N.S.) 265; 3 L. T. 888; 9 W. R. 434.

It is no infringement of copyright to represent a play dramatised from a novel written by another author; but it is an infringement to print and publish a play so constructed. *Tinsley* v. *Lacy*, 1 H. & M. 747; 2 N. R. 438; 32 L. J., Ch. 535; 11 W. R. 876.

—— **Novel published before Drama.**]—An action was brought by the executors of A. to restrain the defendant from representing a certain drama in infringement of the plaintiffs' stage copyright. A. had first published a novel and afterwards had published a dramatised version of his own novel. The defendant's drama was dramatised directly from the novel, after the publication of the dramatised version by A., but not with the help of it:—Held, that A. having published the novel before the drama, any person had a right to dramatise the novel and represent the drama; and that therefore the action failed. *Schlesinger* v. *Bedford*, 63 L. T. 762.

—— **Drama published before Novel.**]—An action was brought by the executors of A. to restrain the defendant from representing a certain drama in infringement of the plaintiffs' stage copyright. A. had first published a drama and afterwards a novel founded on it. The defendant's drama was dramatised directly from the novel, and not with the help of A.'s drama:—Held, that A. having published the drama before the novel, no person had a right to infringe the stage copyright in the drama, even though the passages complained of were taken from the novel and not from the drama of the author, and, therefore, that the plaintiffs were entitled to a perpetual injunction. *Schlesinger* v. *Turner*, 63 L. T. 764.

—— **Multiplying Copies.**]—The defendant dramatised the novel, "Little Lord Fauntleroy," and caused his play to be performed on the stage. The infringement of copyright complained of was that, for the purpose of producing the play, the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in MS. or by the aid of a typewriter. Very considerable passages in the play were extracted almost verbatim from the novel. The defendant claimed the right to make more copies if it should be necessary to enable him to give further representations of the play in London and elsewhere:—Held, that what had been done by the defendant constituted an infringement of the plaintiff's copyright, and that they were entitled to an injunction to restrain the defendant from printing or otherwise multiplying copies of this play containing any passages from the plaintiff's book:—Held, also, that all passages from the plaintiff's book in the four copies must be cancelled. *Warne* v. *Seebohm*, 57 L. J., Ch. 689; 39 Ch. D. 73; 58 L. T. 928; 36 W. R. 686.

Place of Dramatic Entertainment.]—The 3 & 4 Will. 4, c. 15, s. 1, gives the author of a dramatic piece not printed or published the sole liberty of representing it at any place of dramatic entertainment; and s. 2 enacts, that if any person shall, during the continuance of such sole liberty, without the consent of the author, represent such piece at any place of dramatic entertainment, "every such offender" shall be liable for each and every such representation to the payment of not less than 40*s.* or to the full amount of the benefit arising from such representation or the loss sustained therefrom, whichever shall be the greater damages. The 5 & 6 Vict. c. 45, by s. 20, enacts that the 3 & 4 Will. 4, c. 15, shall apply to musical compositions, and that the sole liberty of representing any dramatic piece or musical composition shall be the property of the author and his assigns for the term then mentioned; and by s. 21 enacts that the person who shall have such sole liberty of representing such dramatic piece or musical composition, "shall have and enjoy the remedies given and provided by 3 & 4 Will. 4, c. 15, as if the same were re-enacted" in that act:—Held, that the person whose right under s. 20 of 5 & 6 Vict. c. 45, to such sole liberty of representing a musical composition, has been infringed, is entitled to recover the penalty of 40*s.* given by s. 2 of 3 & 4 Will. 4, c. 15, although such musical composition has not been represented at a place of dramatic entertainment. *Wall* v. *Taylor*, 52 L. J., Q. B. 558; 11 Q. B. D. 102; 31 W. R. 712—C. A. Affirming 51 L. J., Q. B. 547; 9 Q. B. D. 727; 47 L. T. 47; 30 W. R. 948; 46 J. P. 679.

An amateur dramatic club gave a performance of a copyright play at a hospital for the entertainment of the inmates. Admission was free; the governors of the hospital paid for the seats

and costumes; tickets were given to members of the dramatic club to distribute among their friends, and some reporters for the theatrical newspapers attended:—Held, that the performance was not a performance in a "place of dramatic entertainment" within 3 & 4 Will. 4, c. 15, or 5 & 6 Vict. c. 45, s. 20, and that the performers were not liable to pay penalties to the owners of the copyright. *Duck* v. *Bates*, 53 L. J., Q. B. 338; 13 Q. B. D. 843; 50 L. T. 778; 32 W. R. 813; 48 J. P. 501—C. A.

A. was the composer of a musical composition of a representative character, called "The Ship on Fire;" B. sang it at a vocal entertainment, announced by bills, with the price of tickets of admission, and giving a programme of the two parts of the performance. The performance was at Crosby Hall, which was licensed for musical entertainments, and was prepared with seats for the audience, and a stage for the performer; and B., without scenes or appropriate dresses, accompanied his singing with a piano, and gave considerable expression to the matters described:—Held, first, that "The Ship on Fire" was a dramatic piece within 5 & 6 Vict. c. 45, s. 20. *Russell* v. *Smith*, 12 Q. B. 217; 17 L. J., Q. B. 225; 12 Jur. 723.

Held, secondly, that Crosby Hall was, on the occasion of the performance, a place of dramatic entertainment, within 3 & 4 Will. 4, c. 15, s. 1, and 5 & 6 Vict. c. 45. *Ib.*

Held, thirdly, that it was not necessary that A.'s right should be registered under 5 & 6 Vict. c. 45, s. 24. *Ib.*

Letting Rooms for.]—No one can be considered as an offender against the provisions of the 3 & 4 Will. 4, c. 15, so as to be liable to an action at the suit of the author or a proprietor, unless he, by himself or his agent, actually takes part in the representation, which is a violation of the copyright. *Russell* v. *Briant*, 8 C. B. 836; 19 L. J., C. P. 33; 14 Jur. 201.

Therefore, one who merely lets a room to the offender is not liable, even though he supplies the benches and lights, or sells a ticket of admission, himself deriving no other profit than that arising from the letting of the room. *Ib.*

Letting Theatre.]—A proprietor of a theatre let it for one night for the benefit of one of his performers, who was to pay him 30*l.* for the use of it for that night, together with the services of the corps dramatique, band, lights and accessories. The performer who so had the use of the theatre represented therein a dramatic piece the sole right of representing which had been assigned to the plaintiff:—Held, that the proprietor of the theatre caused the piece to be represented, and consequently was guilty of an infringement of the plaintiff's right, and liable to the penalty imposed by 3 & 4 Will. 4, c. 15, s. 2. *Marsh* v. *Conquest*, 17 C. B. (N.S.) 418; 33 L. J., C. P. 319; 10 Jur. (N.S.) 989; 10 L. T. 717; 12 W. R. 1006.

The licensed proprietor of a theatre entered into an arrangement with D., whereby he had the use of the theatre for dramatic entertainments. D. provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. The proprietor of the theatre on his part paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by the servants of the proprietor, who retained one-half of the gross receipts as his remuneration for the use of the theatre, and handed the other half to D. Among the pieces represented were two which L. had the sole liberty of representing, as assignee of the author, under 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45:—Held, that no action under those statutes was maintainable by L. against the proprietor of the theatre, as the facts did not show that those pieces had been represented by him, or that there was a partnership between D. and him so as to render him liable for the representation of them by D. *Lyon* v. *Knowles*, 3 B. & S. 556; 32 L. J., Q. B. 71; 9 Jur. (N.S.) 774; 7 L. T. 670; 11 W. R. 266. Affirmed on appeal, 5 B. & S. 751; 10 L. T. 876; 12 W. R. 1083—Ex. Ch.

b. Remedies.

Injunction—Action at Law.]—Copyright in music not asserted against violations by several persons for fifteen years, not protected by injunction until established at law. *Platt* v. *Button*, 19 Ves. 447.

An interim injunction having been granted, the defendant, instead of submitting, insisted on his right to continue the publication of his song:—Held, that he must pay the costs of a motion against him to continue the injunction, although it appeared that no application had been made to him by the plaintiffs previously to the filing of the bill.

Another part of the plaintiff's case being, that the defendant had printed two bars of music which had been added by the plaintiffs to the original air, the court refused to extend the injunction to restrain such piracy until the fact had been established by a trial at law. *Chappell* v. *Davidson*, 2 Kay & J. 123.

Right of Author after Assignment.]—The author of a drama entered into the following agreement with R. & E.:—"Received of Messrs. R. & E. the sum of 75*l.* in part payment of 150*l.* for the London right of a piece to be called 'Ticket of Leave,' the residue to be paid at 2*l.* per night, after the first twenty-five nights of the representation of the same." In an action against the defendant for representing the piece without licence, the judge at the trial having held that the term "London right" meant the whole of the author's right of representation in London, and that the licence was to R. & E. and their assigns:—Held, that he could bring no action for penalties under 3 & 4 Will. 4, c. 15, in respect of representations in London, except as trustee for R. & E. or their assigns. *Taylor* v. *Neville*, 47 L. J., Q. B. 254; 38 L. T. 50; 26 W. R. 255—C. A.

—— **Of Administrator.**]—After 5 & 6 Vict. c. 45, the administrator of the author of a dramatic piece first acted in 1843, by deed, dated the 14th of April, 1859, in consideration of 100*l.*, assigned to the plaintiff the copyright and acting right in all dramatic pieces written by the author; no entry of the assignment to the plaintiff had been made in the registry book in pursuance of 5 & 6 Vict. c. 45, s. 22. The letters of administration were not stamped until March, 1863:—

Held, first, that the administrator might maintain an action for penalties under 3 & 4 Will. 4, c. 15, against the defendant for representing the piece without his licence within twenty-eight years of its publication, the period for which the sole liberty of representation is given by that statute, although the deed was not registered under 5 & 6 Vict. c. 45, s. 22. *Lacy* v. *Rhys*, 4 B. & S. 873; 33 L. J., Q. B. 157; 10 Jur. (N.S.) 612; 9 L. T. 607; 12 W. R. 309.

Held, also, that the defendant could not object to the admissibility of the letters of administration in evidence, on the ground that they had not been stamped within six months after the discovery of the mistake in omitting to get them stamped, and the penalty had not been paid, in pursuance of 55 Geo. 3, c. 184, s. 43. *Ib.*

Pleading.]—A count stated that a song, of which the plaintiff was the proprietor, had been sung by an eminent singer at public concerts, and had acquired great popularity, and became in great demand; that he published it with a likeness of the singer on the outside leaf, and that the defendant, after such publication, deceitfully and fraudulently, and without his consent, caused to be printed another song, the music, melody and words whereof closely resembled the music, melody and words of the plaintiff's song, and with an outside leaf bearing the likeness of the same singer, and similar words to those of the plaintiff's song, with the fraudulent intention of representing and inducing a belief that it was the song of the plaintiff, and deceitfully and fraudulently, and without his consent, offered for sale and sold great numbers, under the false colour and pretence that it was the song so published by the plaintiff, whereby he was injured in the sale of his song. A second count was substantially the same, but limited to the piratical use of the title-page and devices on the outside leaf of the plaintiff's song. A third count stated that the plaintiff was the proprietor of the copyright in a certain book, and that the defendant, without his consent in writing, wrongfully and injuriously printed for sale divers copies of the work, whereby his profits were lessened. A fourth count charged the defendant with having in his possession for sale, and selling, copies of the work so unlawfully, and without the consent of the plaintiff, printed. He pleaded to these counts, that the song was printed and published without the name and place of abode of the printer upon the first or last leaves thereof, in violation of the 2 & 3 Vict. c. 12:—Held, that the plea disclosed no defence as to the charges contained in the third and fourth counts; and semble, that it could not be taken distributively. *Chappell* v. *Davidson*, 18 C. B. 194; 25 L. J., C. P. 225; 2 Jur. (N.S.) 544; 4 W. R. 559.

—— **Description of Offence.**]—In an action upon the 3 & 4 Will. 4, c. 15, s. 2, for penalties for the representation of a dramatic piece at a place of dramatic entertainment, without the author's consent, it is sufficient to describe the offence in the words of the act. *Lee* v. *Simpson*, 3 C. B. 871; 4 D. & L. 666; 16 L. J., C. P. 105; 11 Jur. 127.

To constitute the offence, it is not necessary to show, nor need the declaration aver, that the defendant knowingly invaded the right. *Ib.*

—— **Of Right.**]—Declaration upon s. 20 of 5 & 6 Vict. c. 45, that the plaintiff had the sole liberty of representing and performing a musical composition; yet the defendant, without the consent of the plaintiff, at a place of dramatic entertainment, wrongfully represented and performed the musical composition. Upon motion in arrest of judgment, on the ground that the right of the plaintiff was stated too largely:—Held, that it was sufficient, inasmuch as it followed the words of the statute. *Russell* v. *Smith*, 12 Q. B. 217; 17 L. J., Q. B. 225; 12 Jur. 723.

Costs.]—The provisions of the Judicature Act and Order LXV. r. 1, do not apply to costs which are specially given by statute to a particular individual as a matter of right, and therefore in an action brought to recover penalties for infringement of dramatic copyright under 3 & 4 Will. 4, c. 15, s. 2, a successful plaintiff is entitled, as a matter of right, to the full and reasonable indemnity as to costs, substituted by 5 & 6 Vict. c. 97, s. 2, for the double costs given by 3 & 4 Will. 4, c. 15, s. 2. *Hasker* v. *Wood* (54 L. J., Q. B. 419) followed. *Reeve* v. *Gibson*, 60 L. J., Q. B. 451; [1891] 1 Q. B. 652; 39 W. R. 420—C. A. Affirming 64 L. T. 141.

C. DESIGNS.

1. Subject Matter.

Statutes.] — Distinction between the 5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 65. The first applies to new designs for the ornamentation of articles, the second to new designs of articles of utility. *Windover* v. *Smith*, 32 Beav. 200; 1 N. R. 349; 32 L. J., Ch. 561; 9 Jur. (N.S.) 397; 7 L. T. 776; 11 W. R. 323.

Quære, whether the nine months' copyright given by the 5 & 6 Vict. c. 100, s. 4, in designs ornamenting manufactures, dates from the publication of the manufacture, or from the publication of the design. *Dalglish* v. *Jarvie*, 2 Mac. & G. 231; 2 H. & Tw. 437; 20 L. J. Ch. 475; 14 Jur. 945.

New and Original Design.]—The portrait of a well-known public character, copied from a photograph and applied as a design upon earthenware, is not a new and original design within the meaning of the Copyright of Designs Act. *Adams* v. *Clementson*, 12 Ch. D. 714; 27 W. R. 379.

Perforated Picture Casting a Shadow.]—The plaintiff claimed to be the proprietor of a subsisting copyright in a certain "book" with a picture or design entitled "The Christograph," which was duly registered. The so-called book was an envelope, with the title printed thereon, containing a piece of cardboard, perforated in such a way that the shadow cast by it on a wall, or otherwise, roughly imitated a well-known picture. The envelope contained also some descriptive lines, which were not claimed to be original. The plaintiff complained that the defendants were selling a similarly perforated card, accompanied by the same lines, and enclosed in an envelope bearing as a title "The Biblioscope, or Shadowgraph," whereby the sale of the plaintiff's article had been diminished. The defendants denied the alleged copyright, and also that the plaintiff was the first inventor of the design:—Held, that the design was not original, and was not capable of being protected by the

statute; that the title only was registered, and was the plaintiff's property. As, however, that had not been adopted by the defendants, the plaintiff's case wholly failed. *Cable* v. *Marks*, 52 L. J., Ch. 107; 47 L. T. 432; 31 W. R. 221.

Combinations.]—A new combination of old patterns may be a new and an original design, so as to be susceptible of registration under 5 & 6 Vict. c. 100. *Harrison* v. *Taylor*, 4 H. & N. 815; 29 L. J., Ex. 3; 5 Jur. (N.S.) 1219—Ex. Ch.

The question is solely for the jury. *Ib.*

There is little or no analogy between a patent and a design. *Ib.*

A. registered, under 5 & 6 Vict. c. 100, a design for ornamenting woven fabrics. The design was applied to a fabric woven in cells, called "The Honeycomb Pattern," and it consisted of a combination of the large and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground. The large honeycomb was not new, but they had never been used in combination before A. registered his design. Other fabrics had been woven with a similar combination of a large and small pattern:—Held, that the design was a new and an original design within 5 & 6 Vict. c. 100. *Ib.*

A new combination of several old and known designs may constitute a new design, capable of being protected under 5 & 6 Vict. c. 100; but such combination must, in order to be so protected, constitute one design, and not a multiplicity of designs. *Norton* v. *Nicholls*, 1 E. & E. 761; 28 L. J., Q. B. 225; 5 Jur. (N.S.) 1203; 7 W. R. 420.

An article of manufacture to which a new design is applied (whether such design is single or the result of a new combination of old and known designs) is not itself a design within the meaning of the statute, and cannot be protected by registration. *Ib.* See *Holdsworth* v. *M'Crea*, post, col. 531.

A combination of known things may produce a new and original design. The defendant was convicted before a magistrate under 5 & 6 Vict. c. 100, for having, after notice from the proprietor of a new and original design for a regulation button, and without his consent, sold a button, which was a fraudulent imitation of it. On a case stated it appeared that the original design consisted of the royal arms surrounded by a garter, the garter bearing the inscription, "The Royal Mail Steam Packet Company":—Held, that as a new and original combination might be the result of applying two old and known designs to the ornamenting of a button, the conviction must be affirmed. *Reg.* v. *Firmin*, 3 H. & N. 304, n.; 15 J. P. 570.

—— **How Made.**] — Four old designs were respectively applied to three ribbons, and to a button; and the three ribbons were then united by the button, so as to form a badge. The badge was registered under 5 & 6 Vict. c. 100:—Held, that this union did not amount to a new design within the statute. *Mulloney* v. *Stevens*, 10 L. T. 190.

Useful Purpose.]—The 6 & 7 Vict. c. 65, applies only to new designs having reference to some purpose of utility; and in order to obtain the benefit of the act, the purpose must be specified in the description supplied for registration. *Windover* v. *Smith*, 32 Beav. 200: 32 L. J., Ch. 561; 9 Jur. (N. S.) 397; 7 L. T. 776; 11 W. R. 323; 1 N. R. 349.

A coachmaker caused to be registered a design for a dog-cart, specifying as the purpose of utility, that higher front wheels could be used or closer coupling effected. The designs consisted of parts 1, 2, 3, 4, of which 1, 2 and 3 had nothing to do with front wheels or closer coupling, and No. 4 was not new:—Held, that no exclusive privilege was gained by the registration. *Ib.*

Mode of User.]—D. registered a design under 6 & 7 Vict. c. 65, for ventilation by opening a hinged pane of window by means of a screw; and it was stated that the parts of the design which were not new or original were all the parts, if taken per se, and apart from the purposes thereof, and that what was claimed as new was the general configuration and combination of the parts. The utility of the design was, in fact, not produced by the shape of any of the parts, but only by the mode of putting them together:—"Held, not a proper subject of registration, the statute not applying to designs which have reference to a purpose of utility through the combination of parts, independently of their shape and configuration. And the court quashed a conviction for pirating such design for want of jurisdiction. *Reg.* v. *Bessell*, 16 Q. B. 810; 20 L. J., M. C. 177; 15 Jur. 773. See *Bessell* v. *Wilson*, 1 E. & B. 489.

Bricks.]—A newly-invented brick, the utility of which consisted in its being so shaped, that when several bricks were laid together in building, a series of apertures were left in the wall, by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under 6 and 7 Vict. c. 65. *Rogers* v. *Driver*, 16 Q. B. 102; 20 L. J., Q. B. 31.

Labels.]—The protection granted by 6 & 7 Vict. c. 65, to any new or original design for any article of manufacture, having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, is not clearly applicable to the design of a protector label, which consisted in making in the label an eyelet-hole, and lining it with a ring of a metallic substance, through which a string attached to the packages passed. *Margetson* v. *Wright*, 2 De G. & S. 420.

Calico—Date of Publishing.]—In an action on 34 Geo. 3, c. 23, for pirating a pattern for printing calico, the omission of an averment in the declaration, "that the day of first publishing the pattern was printed at each end of the piece of calico" (which, together with the name of the proprietor, is required by that statute, the monopoly being limited for three months from the first day of publishing the pattern), was aided by verdict; it being stated in the declaration that the defendant pirated the pattern within the term of three months from the day of the first publishing thereof, and while the plaintiff was entitled to have the sole right of printing the same. *Macmurdo* v. *Smith*, 7 Term Rep. 518.

2. REGISTRATION.

Statutes.]—Quære, whether in the condition of copyright, mentioned in s. 4 of the Designs Copyright Act (5 & 6 Vict. c. 100), that the design

has, before publication been registered, the term "publication" is limited to publication after the design has been embodied and introduced into some fabric. *Dalglish* v. *Jarvie*, 2 Mac. & G. 231; 2 Hall & Tw. 437; 20 L. J., Ch. 475; 14 Jur. 945.

Marks.]—The provisions of the 6 & 7 Vict. c. 65, are to be construed strictly. *Pierce* v. *Worth*, 18 L. T. 710.

Therefore, where a plaintiff who had filed a bill to restrain the sale of certain articles of improved furniture, was shown to have sold similar articles without having the word "registered" and the date of registration notified on such articles, his bill was dismissed with costs. *Ib.*

The proprietors of a registered design for ornamenting paper-hangings, sold as patterns small pieces containing the whole design, which were not marked with the letters "Rd.," nor had they the letter corresponding with the date of the registration, as directed by 5 & 6 Vict. c. 100, s. 4. Paper-hangings were sold in lengths of twelve yards; and it was a general practice in the trade to send out patterns stamped with the marks of registration:—Held, that the pattern was an article of manufacture within s. 4. *Heywood* v. *Potter*, 1 E. & B. 439; 22 L. J., Q. B. 133; 17 Jur. 528; 1 W. R. 127.

A proprietor of a design duly registered under 5 & 6 Vict. c. 100, and 24 & 25 Vict. c. 73, whether he is a British subject or a foreigner, forfeits the benefit of the acts unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions. *Sarazin* v. *Hamel*, 32 Beav. 151; 32 L. J., Ch. 378; 9 Jur. (N.S.) 192; 7 L. T. 660; 11 W. R. 326.

Article in two Parts—Mark on one Part only.]—A butter-dish consisting of a dish and a cover is one "article of manufacture" within the Copyright (Designs) Act, 1842, and it is a sufficient compliance with the act to stamp the registration mark upon the dish alone, though the cover was separate from, and not in any way attached to the dish, and though the entire design was upon the cover. *Fielding* v. *Hawley*, 48 L. T. 639; 47 J. P. 582.

Semble, if during the process of manufacture of the article part of the registration mark thereon becomes illegible, the proprietor of the registered design is not thereby deprived of the protection of the statute. *Ib.*

Mode of Description — Combination.]—The same nicety is not required in registering patterns or designs as in describing inventions sought to be protected under the patent laws. *Holdsworth* v. *M'Crea*, 36 L. J., Q. B. 297; L. R. 2 H. L. 380; 16 W. R. 226.

The provisions of the 5 & 6 Vict. c. 100, and 21 & 22 Vict. c. 73, are complied with by a person who leaves with the registrar copies of his design, though without any written description specifying precisely what is the extent of his claim. *Ib.*

If what he claims as his design consists, according to the pattern, of different parts, any one of which might be deemed a design, his registration of the whole pattern amounts to a claim of the combination, and not of any of the parts thus combined, any one of which, therefore, taken separately, is not protected by the registration. *Ib.*

A. registered as a design, within class 12, s. 3, of 5 & 6 Vict. c. 100, a pattern of a woven fabric. He gave no written description of his claim. The design consisted of six pointed stars on an albert chain, arranged in a particular manner, and shaded; and he claimed, in his particulars in the action, "the particular collocation of the shaded and bordered stars upon the ornamented chain surface, as shown in the registered pattern, thus forming together the ornamentation of the woven fabric":—Held, that the design in respect of the combination had been duly registered, and that the pattern, as a combination, was protected. *Ib.*

Registration with particular Thing.]—Semble, that where a man chooses to register his design with a particular thing, he cannot afterwards be heard to say that he claims the design as distinguished from the thing. *Barron* v. *Lomas*, 28 W. R. 973.

Delivery to Registrar.]—The provisions of the 5 & 6 Vict. c. 100, s. 15 relative to furnishing the registrar of designs with copies, drawings, or prints of the design to be registered, prior to obtaining registration, held to be complied with by furnishing him with a specimen of the article to which the design was applied. *Norton* v. *Nichols*, 4 Kay & J. 475; 6 W. R. 764.

It is not a sufficient registration of a design applied to the manufacture of an article comprised in class 8 of s. 3 of 5 & 6 Vict. c. 100, to leave with the registrar the article so manufactured, with an intimation that it is to be applied to class 8. *Norton* v. *Nichols*, 1 E. & E. 761; 28 L. J., Q. B. 225; 5 Jur. (N.S.) 1023; 7 W. R. 420.

A statement, in a notice, that if the parties to whom the notice is given either apply the design to an article of manufacture, or sell or expose for sale an article of manufacture with the design applied to it, the proprietor will sue them, is not a sufficient statement that he has not given his consent to the application of his design to the manufactured article. *Ib.*

By Importer from Abroad.]—A person registered, under 5 & 6 Vict. c. 100, a design consisting of a double card basket, formed of a combination of two baskets, admitted to be separately old in design. He was not the designer, but had contracted to purchase the articles in Germany, and imported them to England:—Held, that the articles were not new or original within the meaning of the act, and that the importer, not being the designer, and not having purchased the design for value, was not entitled to the protection of the statute. *Lazarus* v. *Charles*, 42 L. J., Ch. 507; L. R. 16 Eq. 117.

3. Assignment.

In Writing.]—A partial assignment of, or licence to use, a design under 5 & 6 Vict. c. 100, s. 6, must be in writing, and can only be made by a registered proprietor. *Jewitt* v. *Eckhardt*, 8 Ch. D. 404; 26 W. R. 415.

By a verbal contract made in July, 1877, C., an American manufacturer, purported to sell to the plaintiff the exclusive right to sell in England an article newly designed and then about to be manufactured, and also to obtain

such protection for the same as he could do under English law, it being stipulated that the plaintiff should obtain the article exclusively from C.: by the same contract C. agreed to sell to the plaintiff the first twenty cases of the article for the price agreed upon, which was to cover both the right and the goods. In September, 1877, the cases were delivered in England to the plaintiff, who paid the money due under the contract. Meanwhile, in August, 1877, the plaintiff had obtained registration of the design under 5 & 6 Vict. c. 100, and the copyright therein was granted to him for the term of three years. In an action to restrain the alleged infringement by the defendant of the plaintiff's copyright:—Held, that the plaintiff had not acquired under the contract the right to apply the design to a manufactured article, so as to entitle him to register it in his own name under the act. *Ib.*

Held, also, that the plaintiff's right (if any) to protection could not have accrued till the completion of the purchase. *Ib.*

4. Infringement.

Fraudulent Imitation—What is.]—The plaintiffs registered and sold a design in braid, applied to a boy's jacket The defendants sold jackets with a design in braid applied to them, which jackets were substantially of the same shape as the plaintiffs'. The designer of the defendants' ornamental jackets had previously seen the plaintiffs' article:—Held, that the defendants had made a "fraudulent imitation" of the plaintiffs' design within the meaning of 5 & 6 Vict. c. 100, s. 7. *Barron* v. *Lomas*, 28 W. R. 973.

A fair imitation of a design is not prohibited by s. 7; but under the words "any such design, or any fraudulent imitation thereof," there may be a case where, although there are slight variations, the "design" itself has been applied. "Fraudulent imitation" is equivalent to conscious imitation—where, that is, a man having the design before him, knowingly imitates, and that imitation is not sufficiently original to be protected as a fair imitation. *Ib.*

A. registered as a design a pattern consisting of a combination of distinct designs. B. slightly altered the combination, but not so as to affect the general appearance of the pattern:—Held, that this was an infringement of the copyright in the pattern. *M'Crea* v. *Holdsworth*, L. R. 6 Ch. 418; 23 L. T. 444; 19 W. R. 36.

And see *Holdsworth* v. *M'Crea*, L. R. 2 H. L. 380, ante col. 531.

When a sample of a pattern has been registered under 21 & 22 Vict. c. 70. s. 5, the design will not be infringed by an article produced upon the same principle, if different in style. *Thom* v. *Syddall*, 26 L. T. 15; 20 W. R. 291.

An action will lie for falsely representing a pattern under 6 & 7 Vict. c. 65, s. 7, whereby the party is damnified. *Barley* v. *Walford*, 9 Q. B. 197; 15 L. J., Q. B. 369. See *Rodgers* v. *Nowell*, 5 C. B. 109.

Sale and Manufacture.]—Under 5 & 6 Vict. c. 100, the design protected by the act is entitled to an injunction, restraining not merely the sale but the manufacture of any article to which the design is applied during the period of the protection. *M'Crae* v. *Holdsworth*, 2 De G. & S. 496; 12 Jur. 820.

Injunction—Equitable Jurisdiction.]—Equitable jurisdiction upon the 34 Geo. 3, c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property, which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established. In this case the evidence as to title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account. The court will, itself, compare and decide upon alleged piracies by inspection where that can be easily and safely done. *Sheriff* v. *Coates*, 1 Russ. & M. 159.

Defendants' Right to Trial at Law—Effect of Delay.]—In a suit to restrain an alleged infringement of a copyright in a design registered under the 5 & 6 Vict. c. 100, the defendant does not lose his right to require the plaintiff to establish his title in an action at law, although he delays doing so until the hearing of the cause, and has previously moved to dissolve upon a ground which cannot be maintained. *Ib.*

But the defendant ordered to pay the costs of motion to dissolve, that motion being useless, whatever might be the result of the cause. *Norton* v. *Nichols*, 4 Kay & J. 475; 6 W. R. 764.

Publication no Waiver.]—An inventor of new designs, publishing and selling them in a book, registered under 5 & 6 Vict. c. 100, and containing a notice that persons wishing to manufacture them for the purpose of sale must have the inventor's permission, does not amount to a licence to sell articles to which the designs have been applied. *Branchardiere* v. *Elvery*, 4 Ex. 380; 18 L. J., Ex. 381.

The book does not require to be stamped with the letters mentioned in s. 4. *Ib.*

Pleading.]—A plea that the plaintiff was not before or at the time of registration, the inventor or proprietor of the design mentioned in the declaration to have been registered under 6 & 7 Vict. c. 65, does not put in issue the question whether the design was the subject of a certificate of registration under that act. *Millengen* v. *Picken*, 1 C. B. 799; 14 L. J., C. P. 254; 9 Jur. 714.

D. Engravings, Pictures, Photographs, &c.

1. Engravings and Prints.

Statute.]—The Act 8 Geo. 2, c. 13, is not confined to works of invention only, but means the designing or engraving anything that is already in nature. *Blackwell* v. *Harper*, 2 Atk. 93.

A print published of any building, house, or garden, falls within this act. *Ib.*

The property in the print vests absolutely in the engraver, though the day of publication is not mentioned in it. *Ib.*

Inscription of Name and Date.]—In order to sustain an action for pirating prints the proprietor's name, and the date of the publication, must appear on the original print, pursuant to 8 Geo. 2, c. 13; but it is not necessary that the designation of proprietor should be added to the name. *Newton* v. *Cowie*, 12 Moore, 457; 4 Bing. 234; 5 L. J. (o.s.) C. P. 159; 29 R. R. 541.

No action can be maintained for pirating a

print, where the date of the first publication has not been engraved on the plate, according to 8 Geo. 2, c. 13, s. 1; the performance of the direction precedent to the right of property vesting in the proprietor. *Brooks* v. *Cock*, 4 N. & M. 652; 3 A. & E. 138; 1 H. & W. 129; 4 L. J., K. B. 144.

The assignee of a print may maintain an action on 17 Geo. 3, c. 57, against any person who pirates it. *Thompson* v. *Symonds*, 5 Term Rep. 41; 2 R. R. 526.

In such an action, it is not necessary to produce the plate itself in evidence; one of the prints taken from the original plate is good evidence. *Ib.*

The date must always appear on the print. *Ib.*

In order to avail himself, by his plea, of the provisions of the 8 Geo. 2, c. 13, s 1, and 17 Geo. 3, c. 57, prohibiting persons from engraving any print, without the consent of the proprietor first had in writing, it is necessary for a defendant to aver that the date and name of the proprietor were truly engraven on each plate, and printed on every such print, according to the provisions of that statute. *Colnaghi* v. *Ward*, 12 L. J., Q. B. 1; 6 Jur. 969. And see *Graves* v. *Ashford*, infra.

Illustrated Catalogue—Book of Engravings.]—The plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture, which was duly registered under the Copyright Acts as a book. The illustrations were engraved from original drawings made by artists employed by the plaintiffs, but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the plaintiffs as an advertisement. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the plaintiffs' book.—Held, that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book. *Maple* v. *Junior Army and Navy Stores*, 52 L. J., Ch. 67; 21 Ch. D. 369; 47 L. T. 589; 31 W. R. 70—C. A.

A collection of prints published together in a volume is a book within the meaning of the Copyright Acts, and the proper subject of copyright, though it contains no such letterpress as could be the subject of copyright, and it makes no difference that the book is not published for sale but only used as an advertisement. *Cobbett* v. *Woodward* (L. R. 14 Eq. 407) overruled. *Ib.*

B. published a book containing letterpress, illustrated by wood engravings, printed on the same paper at the same time. A. published a similar book, with different letterpress, but containing pirated copies of the wood engravings. B., upon motion for an injunction, proved that he had complied with the requisitions of the 5 & 6 Vict. c. 45, but he had not complied with the 8 Geo. 2, c. 13, by printing the date of publication and the name of the proprietor on each copy:—Held, that the 5 & 6 Vict. c. 45, extended to the wood engravings equally with the letterpress, and the court granted an injunction. *Bogue* v. *Houlston*, 5 De G. & S. 267; 21 L. J., Ch. 470; 16 Jur. 372.

Illustrations to Book.]—Copyright in a book of which A. is the proprietor registered under the Copyright Act, 1842, will not protect drawings the art copyright of which is not vested in him, though such drawings furnish the illustrations of the book. *Grace* v. *Newman* (44 L. J., Ch. 298; L. R. 19 Eq. 623) distinguished. *Petty* v. *Taylor*, 66 L. J., Ch. 209 [1897] 1 Ch. 465; 75 L. T. 545; 45 W. R. 299.

Under the Fine Arts Copyright Act, 1862, no agreement in writing is required to be made or entered on the register in order to vest the copyright in the person "for or on whose behalf" a drawing is made. *Ib.*

Infringement of.]—It is no piracy of one engraving, to make another from the original picture. *Berenger* v. *Wheble*, 2 Stark. 548.

Diorama of.]—A. made a copy of a print invented by B. in colours, and of large dimensions, and exhibited it as a diorama. A court of equity refused to restrain the exhibition until the right had been established by law. *Martin* v. *Wright*, 6 Sim. 297.

Photographing—Registration.] — Copying a print by the process of photography is within 17 Geo. 3, c. 57, and the proprietor of such print, who has a copyright therein by 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, can therefore maintain an action, under 17 Geo. 3, c. 57, against anyone who publishes such photographic copy contrary to that statute. *Graves* v. *Ashford*, 36 L. J., C. P. 139; L. R. 2 C. P. 410; 16 L. T. 98; 15 W. R. 498—Ex. Ch.

It is sufficient compliance with 8 Geo. 2, c. 13, as to printing the name of the proprietor on each print, for the name of the proprietor to be on the publication line of the print, without an express statement there that he is such proprietor. *Ib.*

Where the statement on the print was, "Published by Henry Graves & Company, May 1, 1861, Printsellers to the Queen, 6, Pall Mall," and it was proved that Henry Graves was, in fact, the sole proprietor:—Held, that the name of the proprietor was sufficiently shown to satisfy 8 Geo. 2, c. 13. *Ib.*

The piracy of a picture or an engraving by the process of photography, or by any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied, is within 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57. *Gambart* v. *Ball*, 14 C. B. (N.S.) 306; 32 L. J., C. P. 166; 9 Jur. (N.S.) 1059; 8 L. T. 426; 11 W. R. 699.

Wool Pattern taken from Engraving.]—D., the proprietor of a periodical, published with his Christmas number a pattern for wool-work, consisting of the figures in Millais' picture, "The Huguenot," with a different background. The pattern appeared not to have been taken from the original picture, but to have been made by help of a fine engraving published in 1857. The pattern, as usual in patterns of this kind, was a mosaic built up of small coloured squares. B., who was the owner of the copyright in the engraving, but was not owner of the picture, issued a circular: "We give you notice that if you sell, &c. any copy of our subject 'The Huguenot' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made." D. thereupon brought an action against B. for damages, and an injunction in respect of the alleged slander of his title. B., by counterclaim, claimed an injunction against the sale of the pattern, and penalties in respect of the infringement of his

copyright:—Held, by Bacon, V.-C., that the pattern was an infringement of B.'s copyright, and that he was entitled to the statutory penalty of 5*s.* for every copy sold by D. But held, on appeal, that a pattern of this description was not a copy of the engraving within the meaning of 7 Geo. 3, c. 38, and 17 Geo. 3. c. 57, as it did not copy or imitate anything which constituted the work of the engraver; and that the counter-claim ought, therefore, to have been dismissed. *Dicks* v. *Brooks*, 49 L. J., Ch. 812; 15 Ch. D. 22; 43 L. T. 71; 29 W. R. 87—C. A.

Held, also, that, as the circular might reasonably be understood to allege as a matter of fact that B. had such a right to the design, as distinguished from the engraving of "The Huguenot," as to make any reproduction of it in any form an infringement of his right, D. could have maintained his action if any appreciable injury to his trade from the circular had been proved. *Ib.* See also *Lucas* v. *Cooke*, post, col. 540.

Prints from Lawful Plate.]—A. being employed by B. to engrave plates from drawings belonging to B., took off from the plates so engraved by him a number of proof impressions, which he retained for his own use. A. afterwards became bankrupt, and the proofs of which he had so possessed himself were advertised by his assignees for sale:—Held, that neither he was nor were his assignees liable to an action for having disposed of pirated prints without the consent of the proprietor, inasmuch as the 17 Geo. 3, c. 57, applied to impressions of engravings pirated from other engravings, and not prints taken from a lawful plate. *Murray* v. *Heath*, 1 B. & Ad. 804; 9 L. J. (O.S.) K. B. 111.

Property in Blocks.]—The drawings on the blocks from which illustrations of a book were engraved were sketched by the author of the drawings himself:—Held, that having regard to the terms of the agreement, the blocks themselves were not the property of either the authors (one of whom sketched the drawings) nor of the publishing firm, but that the successors of the latter were not entitled to hold them against, but must deliver them up to, the former. *Hole* v. *Bradbury*, 48 L. J., Ch. 673; 12 Ch. D. 886; 41 L. T. 250; 28 W. R. 39.

Question for Jury.]—In an action for pirating an engraving, brought under 17 Geo. 3, c. 57, which gives a right of action against any one who shall copy any print in the whole or in part, by varying, adding to, or diminishing from, the main design, the judge directed the jury to consider whether the defendant's engraving was substantially a copy of the plaintiff's:—Held, that this direction was correct. *Moore* v. *Clarke*, 9 M. & W. 622; 6 Jur. 648.

Who Liable.]—The mere seller or publisher of a pirated copy of a print, is liable to an action under 17 Geo. 3, c. 57, although not an exact copy of the original, and though the seller did not know it to be a copy. *West* v. *Francis*, 1 D. & R. 400; 5 B. & Ald. 737; 24 R. R. 541.

A person having a copyright in a print or an engraving may maintain an action against a person for selling pirated copies of it, though such person has no knowledge that the prints are piracies. *Gambart* v. *Sumner*, 5 H. & N. 5; 29 L. J., Ex. 98; 5 Jur. (N.S.) 1109; 8 W. R. 27.

Limitation of Action.]—The limitation of three months to any action on suit brought under 8 Geo. 2, c. 13, does not apply to the action for damages given by 17 Geo. 3, c. 57. *Graves* v. *Mercer*, 16 W. R. 790.

2. Pictures and Photographs.

Common Law Right—Publication.]—At common law, a painter has, before publication of his picture, a right to prevent any person from copying it. *Turner* v. *Robinson*, 10 Ir. Ch. R. 121. Affirmed on appeal, 10 Ir. Ch. R. 510.

The owner of the picture who has purchased it from the painter has the same right. *Ib.*

But after publication, that right is lost. *Ib.*

The sale of a picture is not a publication of it. *Ib.*

The publication of a wood engraving in a magazine, with an article describing the picture, is not a publication of the picture itself. *Ib.*

The exhibition of a picture at a public exhibition or gallery, where copying it would not be permitted, is not a publication of the picture, nor is the exhibition of the picture for the purpose of obtaining subscribers to an engraving of it. *Ib.*

One employing a painter to draw a drawing is not entitled to the protection of stat. 8 Geo. 2, c. 13. *Jefferys* v. *Baldwin*, Ambl. 164.

What Drawings may be the subject of—Absence of Artistic Merit.]—The plaintiffs were a firm of printers. J., a member of the firm, conceived the idea of printing and publishing cards bearing a representation of a hand holding a pencil in the act of completing a cross within a square, with a view to such cards being used at parliamentary and other elections for the guidance and instruction of illiterate voters in the marking of their ballot papers. J., being unable to draw, employed an artist in the service of the firm to make, under his directions, a drawing of the representation above described. The plaintiffs registered the drawing under the Copyright (Works of Art) Act, 1862, and in the memorandum stated J. to be the author of the drawing. Subsequently the defendants published similar cards with a hand holding a pencil in the act of completing a cross in a particular square of a voting paper. The hand on the defendants' cards was in a slightly different position, but the idea was taken from the plaintiffs' cards. Neither the plaintiffs nor the defendants' drawings were of any artistic merit:—Held, that an action for infringement of copyright could not be maintained, on the grounds: 1. That the plaintiffs' drawing was so far not the subject of copyright that it was not entitled to protection against an imitation which was not an exact reproduction. 2. That J. was not the author of the drawing, and that the registration was consequently void. *Kenrick* v. *Lawrence*, 25 Q. B. D. 99; 38 W. R. 779.

Landscapes.]—A party may be the designer and inventor of a plan within the 7 Geo. 3, c. 38, although he may not himself be able to execute it; and a bird's-eye view of a locality is a landscape within that act, and as such does not require to be registered at Stationers' Hall under 5 & 6 Vict. c. 45. *Stannard* v. *Harrison*, 24 L. T. 570; 19 W. R. 811.

A bird's-eye view of a seat of war is a book within 5 & 6 Vict. c. 45, s. 2, and no copyright

can be acquired in it unless it is registered at Stationers' Hall under the protection of that act. *Stannard* v. *Lee*, 40 L. J., Ch. 489; L. R. 6 Ch. 346; 24 L. T. 459; 19 W. R. 615.

"Book"—"Sheet of Letter-Press"—Painted Card.]—A motion was made by the plaintiffs to restrain the infringement of their copyright in a certain picture or publication which consisted of a gloved hand painted on a card cut to the exact size, and showing the back and palm of the hand. The card opened book-wise, and on the inside was represented on the palm of the hand the lines of life of palmistry, and on the back of the hand some verses. The picture had been painted and the verses written by different persons. It was registered in February, 1891, under the Copyright Acts, 1842 (books) and 1862 (works of art). The defendants had issued a similar card with advertisements of their goods printed on it:—Held, that the defendants' card was a copy of the plaintiffs'; that the plaintiffs' work was well registered under the Act of 1842 as a "sheet of letterpress," and under the Act of 1862 as a painting; and that the certificates of registration were prima facie proof that the plaintiffs were proprietors, and, that the plaintiffs were entitled to an interim injunction. *Hildesheimer* v. *Dunn*, 64 L. T. 452.

Photographing similar Groups.]—A, the painter of a picture, sold it to B., who, for a valuable consideration, agreed to sell to C. the sole right to make and publish an engraving of the picture, and to exhibit it for short periods at any of the principal towns either in Great Britain or Ireland, in order that C. might obtain subscribers, and otherwise derive a full advantage in the publication and sale of the engraving. The picture having been exhibited for that purpose, D. arranged in his own studio a group, which bore an exact resemblance to the picture, and took photographs for the stereoscope (coloured so as to correspond with the picture), which he published and sold:—Held, that C. was entitled to an injunction to restrain the publication and sale of the photographs, if the picture had not previously been published.

But it appearing that the picture had been previously exhibited at the Royal Academy, London, and at the Manchester Exhibition of 1857, the court referred it to the master to inquire whether there were rules, resolutions, bye-laws or regulations to prevent the taking of copies, sketches or drawings of paintings or works of art sent there for exhibition. *Turner* v. *Robinson*, supra.

Copy of Central Figure of Picture — Sentiment of Picture.]—Where a picture contains a direct copy of a substantial portion of a copyright word, that substantial portion constitutes an infringement if it is a copy in the ordinary sense, and particularly where the sentiment expressed in the copyright picture has also been embodied. *Brooks* v. *Religious Tract Society*, 45 W. R. 476.

Painting — Tableau Vivant — Infringement.]—To constitute an infringement of the copyright of a painting under section 1 of the Copyright Act, 1862, the reproduction must be something which is itself in the nature of a picture, and accordingly a tableau vivant after a painting, so far as it consists of a merely temporary arrangement of living figures, is not a reproduction of the painting or the design thereof within the prohibition of the section. *Hanfstaengl* v. *Empire Palace* (No. 1). 63 L. J., Ch. 417; [1894] 2 Ch. 1; 7 R. 375; 70 L. T. 459; 42 W. R. 454—C. A.

—— **Tableau Vivant — Rough Sketch in Newspaper.**]—A sketch in a daily illustrated newspaper of a tableau vivant representing a picture may, though the tableau does not, constitute an infringement of the copyright of the picture, within the meaning of section 1 of the Fine Arts Copyright Act, 1862; but whether it does or does not is a question of fact, and depends upon whether or not the sketch can fairly and reasonably, and as it would be judged by a jury, be considered a copy or reproduction of the picture or of the design thereof. *Hanfstaengl* v. *Empire Palace* (No 2), 63 L. J., Ch. 681; 7 R. 385; [1894] 3 Ch. 109; 70 L. T. 854; 42 W. R. 681—C. A. Affirmed in H. L., 64 L. J., Ch. 81; 11 R. 88.

Owner assigning for Purpose of Engraving.]—When the owner of the copyright of a painting assigns the copyright for the purpose of producing an engraving of one size, the right of producing copies of the painting in other ways, or by engravings of other sizes, remains in him and can be assigned by him to any other person. *Lucas* v. *Cooke*, 13 Ch. D. 872; 42 L. T. 180; 28 W. R. 439.

Infringement by Assignee for particular Purpose.]—And, if the assignee of the right of copying a painting in a particular way alleges that some other publication is an infringement of his copyright, the onus is on him to show that that publication has been taken from his copy, and not from the original painting. *Ib.*

Licence to reproduce Imitation.]—The assignees, duly registered, of the copyright in a picture sold to the plaintiff the sole right to reproduce it in chromo for two years. This agreement of sale was not registered. While it was in force the defendant published the same subject by chromo-lithography, independently, not directly copying plaintiff's chromo-lithograph. The plaintiff's chromo-lithograph plate was not engraved with the name of the proprietor or date of publication, as required by the act 15 & 16 Vict. c. 12, s. 11. It was objected, that the plaintiff could not recover damages from the defendant for piracy of his copyright, because, first, the plaintiff's chromo was not duly engraved; and secondly, there was no registration of the assignment to the plaintiff within 25 & 26 Vict. c. 68. But, held, on the first point, that the copyright in the original picture had been violated by the production of the defendant's chromo-lithograph, which was not simply an imitation of the plaintiff's chromo-lithograph; and on the second point, that the plaintiff was not an assignee of the copyright within the meaning of the act, but a licensee to reproduce an imitation of the picture, as to whose license no registration is required. *Tuck* v. *Canton*, 51 L. J., Q. B. 363.

Picture—Licence to Copy.]—The author of a picture wrote a letter to the art critic of the "Queen," an illustrated paper belonging to the defendant, in which, after stating that a sketch of the picture had appeared in another newspaper, she said, "I do not know if that would prevent the 'Queen' people liking to have it.

The original picture is all but sold to another newspaper for a Christmas number." She went on to say that she was only selling the colour copyright, and retained the right to reproduce in monochrome, and that K. & Co. had the picture in their possession, and had undertaken all negotiations. A sketch and photograph of the picture were enclosed. The author shortly afterwards sold the entire copyright to K. & Co., without notice of the letter:—Held, that the letter did not operate as a license to the defendant to reproduce the picture in monochrome. *London Printing Alliance* v. *Cox*, 60 L. J., Ch. 707; [1891] 3 Ch. 291; 65 L. T. 60—C. A.

Registration—Assignment.]—K & Co., after the assignment to them, wrote a letter to A. accepting a proposal that they should produce for A. a large number of copies of the picture at a price per thousand, "which price includes sole and entire copyright"; the copies to be delivered some within five and the rest within seven months; payment to be by bills of five, six, and seven months from delivery of goods, a further price to be paid for the picture, K. & Co. to insure it and take all risks during the progress of the work. K. & Co. were subsequently registered as proprietors. In an action by A. and K. & Co. for infringement of the copyright:—Held, that A., not being registered as proprietor, could not maintain the action, and (diss. Lindley, L.J.), that the letter of K. & Co. to A. operated as an assignment of the copyright to A., and that K. & Co. having thus ceased to be proprietors, their subsequent registration as such was invalid, and that they likewise could not maintain the action. *London Printing Alliance* v. *Cox*, supra.

—— **Description.**]—The object of the 25 & 26 Vict. c. 68, is that enough should be stated in the register of copyright to identify the picture, &c., and whether the description of the subject matter is sufficient for this purpose is a question of fact for the tribunal. *Graves* v. *Beal*, *Beal*, *Ex parte*, 9 B. & S. 395; 37 L. J., Q. B. 161; L. R. 3 Q. B. 387; 18 L. T. 285; 16 W. R. 852.

It is no defence that the copy was made or sold under a bonâ fide belief that the consent of the proprietor had been obtained, though it is ground for the infliction of a merely nominal penalty. *Ib.*

It is immaterial whether the copy of a painting, drawing, or photograph, as the case may be, is made by means of a painting, or of a drawing, or of a photograph. *Ib.*

If the design of a picture is made in violation of the statute, it is immaterial whether this is done directly from the original, or indirectly through the medium of a copy. *Ib.*

Registration of the proprietorship of the copyright of a painting is only primâ facie evidence of title, and may be rebutted by the terms of the assignment of the copyright to the person who has made the registration. *Lucas* v. *Cooke*, supra.

—— **Expunging Entries.**]—An information was laid by G. against W., charging that he, not being the proprietor of copyright in certain paintings and photographs mentioned in the information, had unlawfully sold copies thereof. At the hearing, certified copies of entries in the register kept under 25 & 26 Vict. c. 68, were produced as proof that G. was the proprietor of the paintings and photographs. The photographs were copies of engravings made for G. from engravings of which he was the proprietor. The description of one of the paintings in the register was, "A piper and a pair of nutcrackers," with the name of the painter, Sir E. Landseer, R.A. W. was convicted, and G. subsequently applied under 5 & 6 Vict. c. 45, s. 14, to have the entries expunged:—Held, first, that G. was not a person who could deem himself "aggrieved" within the meaning of that section. *Walker*, *Ex parte*, *Graves*, *In re*, 39 L. J., Q. B. 31.

Held, secondly, that the entries were not invalid by reason of their not showing that the author or former proprietor had registered in addition to G. *Ib.*

Held, thirdly, that the description—"A piper and a pair of nutcrackers"—was not so uncertain as that the court would upon the application of G. expunge the entry. *Ib.*

There may be copyright in a photograph taken from an engraving of a painting. *Ib.*

—— **Right of Action before Plaintiff's Registration.**]—The act 25 & 26 Vict. c. 68, provides for registration of proprietorship and assignments of copyright in paintings, and enacts that no proprietor of any such copyright shall be entitled to the benefit of the act until registration, and no action shall be sustainable, nor any penalty be recoverable, in respect of anything done before registration.—Semble, a registered proprietor cannot sue for offences under the act committed when an earlier proprietor was on the register. *Dupuy* v. *Dilkes*, 48 L. J., Ch. 682.

In an action under the above act seeking penalties, an injunction and other relief in respect of unlawful repetitions of a picture, the main object of the suit being the recovery of penalties:—Held, that the plaintiffs ought not to be permitted, upon the facts appearing at the trial, to raise a claim for relief under the same statute in respect of unlawful sales, that case not being made by their pleadings. *Ib.*

—— **Sale, after Registration, of Copies made before Registration.**]—The plaintiffs were the owners of a drawing which they entrusted in confidence to the defendant in Germany to produce certain copies. The defendant executed the work, and also made other copies for himself and sent them to England. Subsequently the plaintiffs registered their copyright in the drawing under 25 & 26 Vict. c. 68. After such registration the defendant, without the consent of the plaintiffs, sold the copies which he had made for himself and sent to England before the registration. In an action by the plaintiffs for an injunction and to recover penalties and damages, under the 25 & 26 Vict. c. 68, ss. 6 and 11:—Held, that the plaintiffs were entitled to an injunction and damages for breach of contract and good faith, and (diss. Lopes, L.J.) to an injunction, damages, and delivery of pirated copies under the statute, notwithstanding that by s. 4 no proprietor was to be entitled to the benefit of the act until registration, and no action was to be sustainable in respect of anything done before registration; but were not entitled to penalties, on the ground that production abroad is not unlawful within the meaning of s. 6. *Tuck* v. *Priester*, 56 L. J., Q. B. 553; 19 Q. B. D. 629; 36 W. R. 93; 52 J. P. 213—C. A. Reversing 57 L. T. 110.

—— **Designation of Firm.**]—Where prints, engravings, and similar articles are the property of

a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of the Copyright of Designs Act (8 Geo. 2, c. 13), s. 1, by printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business. *Rock* v *Lazarus*, 42 L. J., Ch. 105; L. R. 15 Eq. 104; 27 L. T. 744; 21 W. R. 215.

—— **Foreign Painting—English Copyright—Right to Sue for Infringement.**]—In order to entitle the owner of the English copyright in a foreign painting to sue in this country in respect of an infringement of such copyright, it is not necessary for him to have registered his ownership under the International Copyright Acts, but he must have previously registered himself as proprietor of the copyright under s. 4 of the Copyright Act, 1862. *Fishburn* v. *Hollingshead*, 60 L. J., Ch. 768; [1891] 2 Ch. 371; 64 L. T. 647.

Photographs—Engravings from—Licence.]—A., the proprietor and publisher of a magazine, agreed verbally with B. to purchase from him the right to engrave photographs to illustate a series of articles in the magazine. A. afterwards commenced publishing these articles in a separate form, illustrated by engravings from the same photographs. B. brought an action, and claimed a writ of injunction, and A. filed a bill for a declaration that under the verbal agreement, he was entitled to republish the engravings taken from B.'s photographs; for specific performance of the agreement, by his granting him a licence in writing to use the photographs for the purpose of engraving and publishing in the magazine, or in any republication of the articles which they illustrated, and that the action might be restrained:—Held, that the verbal agreement extended to the use of the photographs in the magazine only, that there was no part performance by B. of a contract or a licence to publish in a separate form, and that there had been no acquiescence. *Strahan* v. *Graham*, 16 L. T. 87; 15 W. R. 487. Affirmed on appeal, 17 L. T. 457.

Photograph—Copy of Different Size—Publication in Illustrated Paper.]—One of the defendants made a drawing on a larger scale of an original photograph, of the copyright in which the plaintiff was the owner, and sold it to the other defendants, who reproduced the drawing as a full-page illustration in an illustrated newspaper of which they were the proprietors:—Held in an action for an injunction restraining the defendants from making and publishing copies of the photograph, and for penalties under the Fine Arts Copyright Act, 1862, and for damages, that the drawing was a copy of the photograph within the meaning of the Act, and that the plaintiff was entitled to the injunction and to penalties and damages. *Bolton* v. *Aldin*, 65 L. J., Q. B. 120.

Photograph of Engraving.]—A photograph of an engraving from a picture is a photograph in which copyright is given by 25 & 26 Vict. c. 68, s. 1. *Walker, Ex parte, Graves, In re*, L. R. 4 Q. B. 715; 20 L. T. 877; 17 W. R. 1018.

See also *Walker, Ex parte*, ante, col. 541.

—— **"Author"—Joint Authors.**]—A. and B. carried on business in co-partnership as photographers under the firm of the L. Company. They did not take photographs themselves, but employed managers and a large staff of photographic artists and assistants. One of their managers, thinking that the photograph of the Australian cricketers would sell well, arranged for the photographs to be taken without any payment being made for taking them, and sent one of the artists in the employ of the firm to take the negative. From this negative the photograph was in the usual way produced and sold by the firm in the ordinary course of business; and A. and B. registered themselves under the Copyright Act, 1862, in their individual names as the proprietors and authors of the photograph. In an action by the firm to restrain the pirating of their copyright in the photograph:—Held, that A. and B. were not the authors of the photograph. *Nottage* v. *Jackson*, 52 L. J., Q. B. 760; 11 Q. B. D. 627; 49 L. T. 339; 32 W. R. 106—C. A.

Semble, that the person who took the negative was the author. Two or more persons may be registered under the Act as the "authors" of a painting, or a drawing, or a photograph; but in such a case, quære, whether the copyright would subsist for the joint lives of the authors, and seven years afterwards, or for the lives and life of the survivors and survivor and seven years afterwards. *Ib.*

A person to whom the copyright in a picture has been assigned by the author, of which assignment a memorandum has been duly registered, has a good title under 25 & 26 Vict. c. 68, s. 1, although the original copyright of the author has not been registered. *Ib.*

—— **Negative made "for or on behalf of another person for a good or valuable consideration."**]—The principal person under whose immediate direction a photograph is taken is the "author" of the photograph within s. 1 of the Fine Arts Copyright Act, 1862, notwithstanding that another person acting under his direction poses the subject and performs the other manual operations. *Nottage* v. *Jackson*, supra, distinguished. *Melville* v. *"Mirror of Life" Co.*, 65 L. J., Ch. 41; [1895] 2 Ch. 531; 13 R. 852; 73 L. T. 334.

Where a photograph of a person is taken without payment by him, but on the terms that the photographer shall keep the negative, with the right of selling copies, the case is not within the proviso contained in s. 1 requiring an agreement in writing, since the negative is not made "for or on behalf of another person." *Ib.*

The words "any other person" in s. 6 mean any person other than the author of the photograph, and will therefore include the subject of the photograph himself. *Ib.*

—— **Implied Contract—Breach of Faith.**]—A photographer, who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also on the ground that such sale or exhibition was a breach of confidence. *Pollard* v. *Photographic Co.*, 58 L. J., Ch. 251; 40 Ch. D. 345; 60 L. T. 418; 37 W. R. 266.

Action for Copies.]—A person lending prints or photographs to another, who, with his consent, takes and sells copies, can not only sue in detinue

for the originals, but also for the copies, and can likewise sustain an injunction to prevent the sale of any copies remaining, and this quite apart from copyright, and although there has been a publication. *Mayall* v. *Higbey*, 1 H. & C. 148; 31 L. J., Ex. 329; 8 Jur. (N.S.) 622; 6 L. T. 362; 10 W. R. 631.

Sculpture—Casts of Fruit and Leaves.]—54 Geo. 3, c. 56, s. 1, which provides that every person who makes or causes to be made any new and original sculpture, model, copy, or cast of the human figure, or of any animal, or of any animal combined with the human figure, or of "any subject being matter of invention in sculpture," is to have the sole right and property in such sculpture, model, copy, or cast for a term of fourteen years, includes new and original casts of fruit and leaves. *Caproni* v. *Alberti*, 65 L. T. 785; 40 W. R. 235.

Injunction, when Granted.]—In an action for infringement of copyright in a painting to recover damages and penalties under ss. 6 and 11 of the Copyright Act, 1862, and for an injunction, the jury found a verdict for the plaintiff for nominal damages, stating that they found that the defendant had acted innocently. There was no threat of repetition of the infringement:—Held, that the judge had jurisdiction to grant an injunction. *Lucas* v *Williams*, 61 L. J., Q. B. 595; [1892] 2 Q. B. 113; 66 L. T. 706—C. A.

Evidence—Proof that Picture Sold is Copy of Original Painting—Production of Original.]—In an action for infringement of copyright in a painting, evidence of persons who have seen the original painting is admissible to prove that a picture sold by the defendants and produced in court is a copy of the original, without the production of the original. *Ib.*

Penalties for Infringement]—A penalty recovered for an offence against the provisions of the 25 & 26 Vict. c. 68, is in the nature of a punishment for a criminal offence, and a person sentenced to pay such a penalty cannot, by executing a deed of arrangement with his creditors under the provisions of the Bankruptcy Act, 1861, escape from the liability to pay the penalty, nor from the imprisonment consequent on a failure to pay it. *Graves, Ex parte*, L. R. 3 Ch. 642; 19 L. T. 241; 16 W. R. 993.

The sale of every photographic copy made in violation of the 25 & 26 Vict. c. 68, is the subject of a distinct penalty, although there is only one sale. *Graves* v. *Beal, Beal, Ex parte*, 9 B. & S. 395; 37 L. J., Q. B. 161; L. R. 3 Q. B. 387; 18 L. T. 285; 16 W. R. 852.

A penalty with costs inflicted by summary proceeding before a magistrate for infringement of the 25 & 26 Vict. c. 68, followed by commitment to the house of correction for a time certain, unless the penalty shall be sooner paid, constitutes a debt provable within the meaning of the bankrupt laws, and is barred by a deed duly executed under sect. 192 of the Bankruptcy Act of 1861. The Court of Bankruptcy has jurisdiction to entertain an application for the release of the debtor from custody under the commitment, and will order such release, unless good cause is shown to the contrary. *Johnson, Ex parte* and *In re*, 15 L. T. 163; 15 W. R. 160.

E. INTERNATIONAL COPYRIGHT.

Rights of Foreigners—Books.]—Before the statutes the court would not protect a foreigner's copyright. *Delondre* v. *Shaw*, 2 Sim. 237.

The privileges conferred by 54 Geo. 3, c. 150, did not extend to books printed abroad. *Clementi* v. *Walker*, 4 D. & R. 598; 2 B. & C. 861; 2 L. J. (O.S.) K. B. 176; 26 R. R. 596.

—— **Where Resident—Publication.**]—The object of the 8 Anne, c. 19, was to encourage literature among British subjects, which description includes such foreigners as, by residence here, owe the crown a temporary allegiance; and any such foreigner, first publishing his work here, is an author within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication. *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; 3 C. L. R. 625; 24 L. J., Ex. 81; 1 Jur. (N.S.) 615 (overruling *Boosey* v. *Jefferys*, 6 Ex. 580; 20 L. J., Ex. 354; 15 Jur. 540—Ex. Ch.; *Cocks* v. *Purday*, 5 C. B. 860; 17 L. J., C. P. 273; 12 Jur. 677; *Boosey* v. *Davidson*, 13 Q. B. 257; 18 L. J., Q. B. 174; 13 Jur. 678; and *Ollendorf* v. *Black*, 4 De G. & S. 209; 20 L. J., Ch. 165; 14 Jur. 1080. And affirming *Boosey* v. *Purday*, 4 Ex. 145; 18 L. J., Ex. 378; 13 Jur. 918; and *Chappell* v. *Purday*, 14 M. & W. 303; 14 L. J., Ex. 258; 9 Jur. 495).

Copyright commences by publication; if at that time a foreign author is not in this country, he is not a person whom the statute meant to protect. *Ib.*

B., a foreigner, resident at Milan, composed a musical work, and, according to the law of Milan, assigned his copyright to R., also a foreigner, who, coming to London, assigned his interest therein to an Englishman, but for publication in Great Britain and Ireland only, and thereupon the first publication took place in England:—Held, that B. had no copyright in the publication. *Ib.*

—— **"Author."**]—The word "author" is used in 5 & 6 Vict. c. 45, without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects. *Routledge* v. *Low*, 37 L. J., Ch. 454; L. R. 3 H. L. 100; 18 L. T. 874; 16 W. R. 1081.

Under 5 & 6 Vict. c. 45, the first publication of a book must, to secure British copyright to its author, be made in the United Kingdom. *Ib.*

British copyright, when once it exists, extends, under s. 29, over every part of the British dominions. *Ib.*

The protection of the statute is given to every author who first publishes in the United Kingdom, wheresoever he may then be resident, or of whatever state he may be the subject.—Per Lord Cairns, C., and Lord Westbury. *Ib.*

And see S. C., 33 L. J., Ch. 717; 10 Jur. (N.S.) 922; 10 L. T. 838; 12 W. R. 1069. Affirmed on appeal, 35 L. J., Ch. 114; L. R. 1 Ch. 42; 11 Jur. (N.S.) 939; 13 L. T. 421; 14 W. R. 90.

See also *Bentley* v. *Foster*, 10 Sim. 329.

—— **Serial Tale.**]—An alien author of a serial tale, in course of publication in a foreign periodical magazine, by residing in British territory at the date of the publication in England of the last few chapters of the tale, which were first published here, acquires all the rights of a

British subject in respect of the copyright of such chapters. *Low* v. *Ward*, 37 L. J., Ch. 841; L. R. 6 Eq. 415; 16 W. R. 1114.

Re-translation.]—If a foreigner translates an English work, and then an Englishman re-translates the foreign work into English, that would be an infringement of the original copyright. *Murray* v. *Bogue*, 1 Drew. 353; 22 L. J., Ch. 457; 17 Jur. 219; 1 W. R. 109.

Sale of Imported Copies.]—Where an English copyright is subsisting in a book first published in a foreign country, it is unlawful for any one, without the consent of the proprietor of the English copyright, to import into England for sale copies of the book published abroad, though lawfully printed by the owner of the original copyright in the country where the book was first published. So held by Lindley, L.J., and Rigby, L.J. (dissentiente Lopes, L.J.). *Pitts* v. *George*, 66 L. J., Ch. 1; [1896] 2 Ch. 866; 75 L. T. 320; 45 W. R. 164—C. A.

Held by Lindley, L.J.—That s. 3 of the International Copyright Act, 1844, incorporates with that act the provisions of the Copyright Act, 1842, and gives to the owner of the copyright in England of a book first published abroad the same protection against importation into England for sale or hire of reprints of the book made without the consent of the proprietor of the copyright, as is given by ss. 15 & 17 of the act of 1842 to the owner of the copyright in a book first published in the United Kingdom; and the provisions of those sections can be applied in the case of the importation for sale of copies printed in the country where the book was first published, though such importation is excepted from the prohibition against importation contained in s. 10 of the act of 1844. *Ib.*

Held by Rigby, L.J.—That s. 3 of the act of 1844 makes provision, by means of the incorporation into that act of the provisions of s. 15 of the act of 1842, against importations for sale or hire; while s. 10 contains an absolute prohibition of importations, even for private use—copies made in the country where the book was first published, which are excepted from the prohibition contained in s. 10, being included in that contained in s. 3. *Ib.*

Held by Lopes, L.J.—That ss. 3 & 10 of the act of 1844 must be read together—s. 3 as dealing with foreign countries not being the country where the book was first published, and s. 10 as excepting that country. *Ib.*

The registered proprietors of an English copyright magazine brought an action against the agents in England of an American firm of publishers for an injunction to restrain them from selling or importing for sale in this country a magazine published by the American firm, and containing matter pirated from the plaintiffs' copyright. The defendants, by their statement of defence, stated that they had determined not to sell the copies complained of, in consequence of a notice received from the plaintiffs shortly before the commencement of the action, and before the defendants themselves had had the opportunity of inspecting such copies:—Held, that s. 17 of the Copyright Act, 1842, mentions two offences, that of "to import for sale" and that of to "sell knowingly" unauthorised publications, and therefore that ignorance of the nature of the imported copies could not be a defence where the offence charged was "importing for sale," but only where the offence charged was "selling knowingly." *Cooper* v. *Whittingham*, 49 L. J., Ch. 752; 15 Ch. D. 501; 43 L. T. 16; 28 W. R. 720.

An owner of an English copyright is entitled to an ex parte injunction against the agents of a foreign firm in respect of the offence of "importing for sale" piracies, but if it is intended to take proceedings in respect of "selling knowingly," the better course is to give the importers notice of their importations. Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the court has no discretion to refuse him costs. Where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed. *Ib.*

—— **Subsequent Publication by Others.**]—A book is published in a foreign country, copies of which are bought and then published in this country:—Held, that persons who purchase a part of such work and publish it here, have no copyright therein. *Guichard* v. *Mori*, 9 L. J. (O.S.) Ch. 227.

Registration.]—The 7 & 8 Vict. c. 12, 15 & 16 Vict. c. 12, and the convention with France and order in council made thereunder, do not exempt authors of works in France claiming copyright in this country from the conditions affecting authors of works in this country. *Cassell* v. *Stiff*, 2 Kay & J. 279.

The order in council of the 10th of January, 1852, providing that French works must be registered at Stationers' Hall within three months after the first publication thereof in France, "or, if such works be published in parts, then within three months after the publication of the last part thereof":—Held, that a French newspaper, published weekly, and not intended to be completed in any definite number of parts, must be registered within three months after the commencement, or, if it had commenced before 1852, within three months after the date of the order in council. *Ib.*

Neglect to register on the part of the officials at Stationers' Hall prevents an author having the benefit of the statute as against the public. *Ib.*

Dramatic Work—Where First Published or Represented.]—A naturalised American was the author of a drama which had been first represented in America, and subsequently, with his consent, at the defendant's theatre in England. The drama had not been printed for publication. The defendant afterwards having proposed to represent the play again in London without the consent of the plaintiff, the plaintiff brought an action against him to restrain him from so doing:—Held, that the drama had, within 7 Vict. c. 12, s. 19, been first published out of her Majesty's dominions, and that the plaintiff had no exclusive right of representing it in England. *Boucicault* v. *Chatterton*, 35 L. T. 541. Affirmed, 46 L. J., Ch. 305; 5 Ch. D. 267; 35 L. T. 745; 25 W. R. 287.

—— **Where no Treaty.**]—The 7 & 8 Vict. c. 12, s. 19, applies to British subjects first publishing in a country with which no international convention exists. *Boucicault* v. *Delafield*, 1 H. & M. 597; 33 L. J., Ch. 38; 9 Jur. (N.S.) 1282; 9 L. T. 709; 12 W. R. 101.

Where a British subject caused a dramatic piece, of which he was the author, to be first publicly represented in a foreign country:—Held, that as he had not complied with the provisions of the 7 & 8 Vict. c. 12, he was, by reason of the 19th section, not entitled in this country to any copyright in his drama, nor to the exclusive right to the representation thereof, though he could not by any possibility have complied with such provisions, no regulation having been made according to the course pointed out in the act as to international copyright between the two countries.

Registration of Translation.]—The assignee of a foreign dramatic work, in order to entitle himself to the exclusive right to represent it on the stage in English, must register a translation. Such translation must be sufficiently literal to enable an Englishman to see from it the character of the original work. *Wood* v. *Chart*, 39 L. J., Ch. 641; L. R. 10 Eq. 193; 22 L. T. 432; 18 W. R. 822.

When the original work sought to be protected was a French comedy entitled "Frou-frou," and the version sanctioned by the foreign authors and published in England was entitled "Like to Like," the names of the characters and the scenery were changed from French to English; in some instances English manners were substituted for French; and considerable omissions of speeches and alterations of passages were made:—Held, that the version was not a translation within the meaning of the 15 Vict. c. 2, International Copyright Act, such as to entitle the foreign authors and their assignee to the benefit of the statute. *Ib.*

Translation not Literal.]—Section 6 of the International Copyright Act, 1886, does not revive a right of preventing unauthorised translations of a foreign work in England which under the previously existing law had expired before the passing of the act. *Lauri* v. *Renad*, 61 L. J., Ch. 580; [1892] 3 Ch. 402; 67 L. T. 275; 40 W. R. 679—C. A.

A "translation" of a foreign play, in order that it may be protected under the law of International Copyright, does not necessarily require to be an absolutely literal translation; it is sufficient if it is substantially a translation. *Ib.*—Per Kekewich, J.

Opera—Airs Republished as Dance Music.]—To publish in the form of quadrilles and waltzes, the airs of an opera, of which there exists an exclusive copyright, is an act of piracy. The English assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright. Semble, that a foreigner who resides and publishes in England is within the same protection. *D'Almaine* v. *Boosey*, 1 Y. & Coll. 288; 4 L. J., Ex. Eq. 21.

—— **Assignee in England—Importation before Publication.**]—In 1830 a foreigner resident in Paris made a legal assignment of his copyright in an opera to L., resident in England, and L., in the same year, sold his interest to C., without executing any written memorandum. C. died in 1834, and in 1836 C.'s executrix obtained a legal assignment. In the meantime copies of the full score had been imported into England, and sold in London by several tradesmen. In 1841 P. published and sold the overture of the opera in London:—Held, that C.'s executrix could not maintain an injunction against P. for piracy. *Chappell* v. *Purday*, 4 Y. & Coll. 485; 10 L. J., Ex. Eq. 50.

Quære, whether, after a foreigner has published his work in a foreign country, he can at common law assign his copyright, limited to Great Britain, to a British subject, so as to give the assignee the benefit of the statutes relating to copyright. *Ib.*

Registration—Date of Publication.]—By s. 6 of the International Copyright Act, 7 Vict. c. 12, no author of any musical composition, first published in a foreign country, or his assigns, shall be entitled to the benefit of the act, unless, within the time mentioned in the order of council applying to that country, the musical composition shall have been registered, together with the title, the name and abode of the author, the name and abode of the proprietor of the copyright, the time and place of the first publication, representation, or performance, and, in case of publication, accompanied by the deposit of a printed copy of such publication. B., the assign of an opera composed by O., made an entry in pursuance of the above section, stating correctly the title of the opera (which at the date of such entry had not been published), the name of the author, and of the proprietor of the copyright, and the date of its first representation, but went on to give, as the date of its first publication, the date of the publication of a pianoforte arrangement by S., and deposited a copy of such arrangement:—Held, that the requirements of the statute necessary to protect the opera having been complied with, the superfluous entry as to the publication of the pianoforte arrangement, and the deposit of the same, did not invalidate the registration as a registration of the opera. *Boosey* v. *Fairlie*, 48 L. J., Ch. D. 697: 4 App. Cas. 711.

Semble, that where an opera is protected under the act, an adaptation of an unprotected pianoforte arrangement into an opera by independent labour is an infringement of the right to the opera. *Ib.*

Musical Compositions.]—N. composed and published an opera in full score at Berlin, and after his death, B. arranged the score of the whole opera for the pianoforte; in registering this arrangement in England, N.'s name was inserted as composer:—Held, that the arrangement for the pianoforte was an independent musical composition, of which B., not N., was the composer; and the entry made under 7 & 8 Vict. c. 12, s. 6, was invalid, and gave no title to the assignee of the registered composition. *Wood* v. *Boosey*, 7 B. & S. 869; 36 L. J., Q. B. 103; L. R. 2 Q. B. 340; 15 L. T. 530; 15 W. R. 309. Affirmed, 9 B. & S. 175; 37 L. J., Q. B. 84; L. R. 3 Q. B. 223; 18 L. T. 105; 16 W. R. 485—Ex. Ch.

Act of 1886—Saving of Rights and Interests Previously Acquired.]—The International Copyright Act, 1886, by s. 6, provides that, upon an order in council being made, foreign composers shall be entitled to copyright in the United Kingdom in respect of works first produced before such order comes into operation, "provided that where any person has, before the date of the publication of an order in council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any

rights or interests arising from or in connection with such production which are subsisting and valuable at the said date." An order in council was made applying the act to French subjects. The plaintiff, a French subject, had composed and first produced in France a musical composition called the "Caprice Polka" before the order came into operation, but had not acquired copyright in the United Kingdom. Before the date of the publication of the order, an English publisher had printed and published this work in England, and the defendant, a bandmaster, had purchased a copy for 5*s.* for the use of his band, and had played it by his band both before and after such date. In an action for damages for the infringement of copyright and for an injunction:—Held, that there was evidence to warrant the finding that the defendant had an interest arising from or in connection with the lawful production of the work in the United Kingdom, which was subsisting and valuable when the order in council was published, and that he was, therefore, protected by the proviso to s. 6. *Moul* v *Groenings*, 60 L. J., Q. B. 715; [1891] 2 Q. B. 443; 65 L. T. 327; 39 W. R. 691—C. A.

Trade-mark—Interest in Advertising—"Subsisting and valuable Interests"]—A foreigner registered under the International Copyright Act, 1886, a picture painted abroad that had previously been used by the defendants as a trade-mark, and also for advertising purposes. In an action to restrain infringement of copyright:—Held, that the defendants as proprietors of the trade-mark had an interest in advertising it, that such interest was arising from or in connection with the trade-mark, and was subsisting and valuable within the proviso to s. 6 of the above act, and that therefore the user by them of the picture for advertising purposes was consequently protected *Moul* v. *Groenings* ([1891] 2 Q. B. 443), explained. *Schauer* v. *Field*, 62 L. J., Ch. 72; [1893] 1 Ch. 35; 3 R. 78; 68 L. T. 81; 41 W. R. 201.

"Interest" arising from Production of Work in this Country.]—The proviso in s. 6 of the International Copyright Act, 1886, does not protect infringers unless their "interest" is shown to be direct, subsisting and pecuniary. *Hanfstaengl Art Publishing Co.* v. *Holloway*, 62 L. J., Q. B. 347; [1893] 2 Q. B. 1; 5 R. 358; 68 L. T. 676; 57 J. P. 407.

Artistic Works—Registration by Foreigner in this Country—Retrospective Effect of Statute.]—The provisions of s. 6 of the International Copyright Act, 1886, are retrospective and apply to all literary and artistic works produced before the date of the Order in Council of 28th November, 1887, whether such works were produced before or after the passing of the act. It is not necessary for the copyright to be registered in this country under the act of 1862, to entitle the owner to sue for an infringement under the International Copyright Act, 1886. *Ib.*

Prints.]—Prints engraved and struck off abroad, but published here, were not protected from piracy. *Page* v. *Townsend*, 5 Sim. 395.

A proprietor of a foreign print cannot claim copyright therein, under 7 & 8 Vict. c. 12, unless the date of publication and name of the proprietor are engraved on the plate, and printed on the print, as required by 8 Geo. 3, c. 13. *Avanzo* v. *Mudie*, 10 Ex. 203.

H. J. N.

CORNWALL.

See CROWN.

CORONER.

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1. ELECTION AND APPOINTMENT.

Qualification.]—A freeholder of the county, having a place in the county where he has a right to reside, is capable of being elected coroner. *Nottingham, Coroner, In re*, 7 L. J., Ch. (O.S.) 61.

Such a person, being elected coroner, will not be removed from the office, because he has also a residence in a town comprised within the ambit of the county, but not being part of the county, which has been his more usual place of abode. *Ib.*

Qualification of Electors.]—The qualification of a voter for coroner is the possession of a legal freehold, and equitable freeholds have not a right to vote in the election of a coroner. *Reg.* v. *Day*, 3 El. & Bl. 859; 2 C. L. R. 1685; 23 L. J., Q. B. 317; 1 Jur. (N S.) 107; 2 W. R. 515.

Neither does a right of common in gross confer such right. *Ib.*

Validity of Votes.]—In holding a court for the election of a coroner, and making a return to the writ for his election, the sheriff exercises judicial functions; and therefore a quo warranto does not lie to inquire into the validity of votes given at the election, notwithstanding the 7 & 8 Vict. c. 92, s. 10, and 23 & 24 Vict. c. 116, s. 2, do not allow time for a scrutiny before the sheriff before the close of the poll. *Reg.* v. *Diplock*, 10 B. & S. 613; 38 L. J., Q. B. 297; L. R. 4 Q. B. 549; 21 L. T. 24; 17 W. R. 823.

At Adjourned County Court.]—A sheriff having received a writ for the election of a coroner for the county more than six days before the next county court, did not, on the day when the next county court was held, proceed to the election, but gave notice that the election would take place at a county court to be held by adjournment fourteen days afterwards: an election at that adjourned county court was

void, as not being in conformity to 58 Geo. 3, c. 95, s. 1. *Stafford Coroner, In re*, 2 Russ. 475; 5 L. J., Ch. (o.s.) 26.

After Judgment of Ouster.]—After judgment of ouster upon an information in the nature of a quo warranto against a person returned by the sheriff as duly elected to the office of coroner, a new writ de coronatore eligendo issues as of course. *Hemel Hempstead Coroner, In re*, 5 De G. M. & G. 228; 3 W. R. 192.

It is no ground for withholding the writ, that the judgment of ouster was founded upon the fact that the votes constituting the majority for the person returned were bad, and though it is alleged on oath that the result of a scrutiny would be to place the opposing candidate in a majority. *Ib.*

Semble, that the sheriff cannot, under 7 & 8 Vict. c. 92, s. 13, enter into the question of scrutiny. *Ib.*

—— **Amending Return.**]—D. was returned duly elected as coroner by the sheriff, but judgment of ouster was given against him by the court of queen's bench, on the ground that certain persons who voted for him were not entitled to vote; and thereupon a new writ de coronatore eligendo issued. On the application of P., the only other candidate, liberty was given to the sheriff to amend his return, and the execution of the new writ was suspended. *Pope, Ex parte, Hemel Hempstead Coroner, In re*, 2 W. R. 630.

Application for Postponement.]—Certain freeholders of a county presented a petition to the Lord Chancellor, praying that a writ issued for the election of a coroner might be set aside, or its execution stayed until after a meeting of the sessions, at which the magistrates of the county intended to propose a division of the office. The Lord Chancellor, in the absence of any authority in support of the application, refused to interfere. *Salop County Coroner, In re*, 1 Mac. & G. 377.

In Boroughs.]—Quære, whether a coroner in a borough, under 5 & 6 Will. 4, c. 76, s. 62, can regularly be appointed before the grant of a court of quarter sessions has passed the great seal, though within ten days after her Majesty's pleasure to make the grant has been notified to the council. But a coroner having acted under such appointment, and been recognised in his office by the council for several years:—Held, that the office was full, and that a quo warranto information lay to oust a subsequently appointed coroner. *Reg.* v. *Grimshaw*, 10 Q. B. 747; 16 L. J., Q. B. 385; 11 Jur. 965.

A coroner cannot be elected at a meeting of the council held by adjournment from a quarterly meeting, no summons or notice having been previously served upon the members of the council stating that such business was to be transacted. *Ib.*

A coroner appointed under 5 & 6 Will. 4, c. 76, s. 62, is not a corporate officer within 9 Anne, c. 20, and therefore the relator in a quo warranto, in which judgment has been given for the crown against the defendant for exercising such office of coroner, is not entitled to his costs from the defendant under the latter act. *Reg.* v. *Grimshaw*, 2 B. C. Rep. 146; 5 D. & L. 249; 12 Jur. 134.

In Duchy of Lancaster.]—By a charter of Edw. 3, the king granted to the earl (afterwards duke) of Lancaster, that he might have the return of all writs of the king and his heirs, and summons of the exchequer, and the attachment as well of pleas of the crown as of other pleas whatsoever, in all his lands and fees, so that no sheriff or other bailiff or minister of the king, or his heirs, might enter those lands or fees to execute the same writs and summons, or to make attachment of pleas of the crown, or other pleas aforesaid, or to do any other office there, unless in default of the earl and his bailiffs and ministers:—Held, that thereby the right to appoint coroners within the duchy of Lancaster was granted, and that such right was an exclusive one; that, therefore, notwithstanding modern usage to the contrary, the county coroner had no authority to exercise the office within any of the possessions of the duchy, concurrently with the duchy coroners, nor unless in default of their performance of the office. *Jewison* v. *Dyson*, 9 M. & W. 540; 11 L. J., Ex. 401.

Upon a question whether the crown in right of the duchy of Lancaster had the exclusive right, under this grant, of appointing a coroner within the honour of Pontefract, evidence of appointments of coroners, and of their acting in other parts of the duchy out of the honour of Pontefract, was admissible. *Ib.*

By an ancient order by the chancellor and council of the duchy, after reciting that the court was informed that the coroners within the honour of Pontefract, parcel of the duchy, had usually returned their inquests to the crown-office without taking notice therein that they arose within the liberties of the duchy, it was ordered that the coroners should thenceforward specify in their returns when and where the inquest was held:—Held, admissible, although no proof was given of anything done under it. *Ib.*

The coroner for such part of the duchy of Lancaster as is within the county of Middlesex is not entitled to be appointed coroner of one of the districts of the county under 7 & 8 Vict. c. 92, s. 27. *Payne, Ex parte*, 6 L. T. 536.

Additional Coroner—Death.]—Order that a writ should be issued for the election of an additional coroner for the county of Salop. Proceedings on the death of a coroner for the election of a successor. *Salop Coroner, In re*, 3 Swan. 181.

By County Council—Coroner of the Liberty of the Tower.]—The appointment of franchise coroners, not being within the administrative business of counties formerly carried on by the justices in quarter sessions, is not transferred by the Local Government Act, 1888, to the county councils; nor is the power of appointing any coroners other than those formerly elected by the freeholders given by s. 5 or any other sections of that act. *London County Council, Ex parte*, 61 L. J., Q. B. 27; [1892] 1 Q. B. 33; 65 L. T. 614; 56 J. P. 279.

The merger of the liberty of the Tower of London in the administrative county of London, under the provisions of s. 48 of the Local Government Act, 1888, "for all the purposes of that act," will not, therefore, include the appointment of a coroner for that liberty under the terms of its charter, so as to transfer the

power of appointment to the London County Council. *Ib.*

New Writ.]—The under-sheriff, under pretence of administering the oath, swears a candidate coroner. The court ordered him to show cause why he should not be committed, and not to file a return to the writ without leave of the court. But this is not a good cause to direct the new writ to the other coroner. *Jones, Ex parte*, Mos. 254.

Disqualification—Justice of the Peace.]—A justice of the peace does not become disqualified from acting as such by reason of his being elected coroner for the county or division for which he so acts as justice. *Davis* v. *Pembrokeshire JJ.*, 7 Q. B. D. 513.

2. Deputy.

Reasonable Cause for Absence of Coroner.]—By 6 & 7 Vict. c. 83, s. 1, coroners are empowered to appoint deputies, provided that no deputy shall act "except during the illness of the coroner, or his absence from any lawful or reasonable cause." By s. 2, no inquisition shall be quashed by reason of such inquisition having been taken before any deputy instead of the coroner himself. A person being indicted for perjury committed upon an inquest held before a deputy-coroner, and the objection having been taken that there was no lawful or reasonable cause for the absence of the coroner:—Held, first, that the question of lawful or reasonable cause was one for the judge, not for the jury. *Reg.* v. *Johnson*, 42 L. J., M. C. 41; L. R. 2 C. C. 15; 27 L. T. 801; 12 Cox, C. C. 264.

Held, secondly, that whatever the cause of absence, by s. 2 a valid inquisition might have been founded upon the inquest, and therefore the deputy had jurisdiction, and perjury was committed. *Ib.*

Under 6 & 7 Vict. c. 83, s. 1, it is a lawful or reasonable cause for the absence of the coroner, and the acting of his deputy on an inquest, that the coroner was engaged in holding another inquest. *Reg.* v. *Perkin*, 7 Q. B. 165; 14 L. J., M. C. 87; 9 Jur. 686.

Where the jury is sworn, and the inquest commences properly before a deputy, he should continue holding the inquest to its conclusion, although in the course of it the principal coroner may be accidentally present. *Ib.*

An inquisition held by a deputy is properly described as taken before the principal coroner. *Ib.*

It is properly signed in the name of the principal coroner by his deputy. *Ib.*

Before 6 & 7 Vict. c. 83.]—A coroner, who is a judicial as well as a ministerial officer, could not appoint a deputy to hold an inquest. *Rex* v. *Ferrand*, 3 B. & Ald. 260; 1 Chit. 745; 22 R. R. 373.

Where a coroner's clerk, in the absence of his principal, summoned a jury, and charged the jury super visum corporis, and examined witnesses, and, after sitting several days, the coroner himself proceeded in person with the inquest, and afterwards had a view of the body without the presence of the jury, and then proceeded with the inquest without re-swearing the jury or the witnesses previously examined:—Held, that the proceedings were altogether illegal, and that an inquisition found under such circumstances might be quashed. *Ib.*

An inquest was held on a person deceased, in the coroner's absence, by C. A., his clerk, who signed the inquisition, "C. A.," coroner; and other irregularities took place in the proceedings, but they did not appear on the face of the inquisition. On an application by the father of the deceased, eight months after the inquest, to have the inquisition brought up by certiorari to be quashed, that a new inquest might be held, on affidavit of the facts, and on a suggestion that the cause of death had not been properly investigated, the court refused to interfere. *Davies, In re*, 8 A. & E. 930; 1 P. & D. 116.

Where an inquisition was signed "A., deputy steward and coroner," the court refused to quash it in toto as necessarily void for want of authority, as it might mean coroner and deputy steward. *Carruthers, Ex parte*, 2 Man. & Ry. 397.

Privilege from Arrest.]—*See* infra.

3. Jurisdiction.

In what Cases.]—A coroner has power to hold an inquest where he has reasonable suspicion that death is due to other causes than common illness. *Reg.* v. *Stephenson*, 53 L. J., M. C. 176; 13 Q. B. D. 331; 52 L. T. 267; 33 W. R. 44; 15 Cox, C. C. 679; 49 J. P. 486—C. C. R.

Prison for County—Inquest on Prisoner.]—Notwithstanding the transfer of prisons to the Secretary of State by the Prison Act, 1877, a prison, as to which no rules have been made under s. 30 of the act, and which at the commencement of the Prison Act, 1865, was a prison belonging to a county, is still the county prison, although locally situate within the limits of a city, and therefore the jurisdiction to hold inquests on prisoners dying in such prisons is in the coroner for the city, and such jurisdiction is not affected by s. 171, sub-s. 1, of the Municipal Corporations Act, 1882. *Reg.* v. *Robinson*, 19 Q. B. D. 322; 57 L. T. 275; 35 W. R. 843; 16 Cox, C. C. 287; 52 J. P. 22.

Where Death Occurred.]—Where a death occurred in the county of W., from an injury received in the county of S., the coroner's inquest was rightly held in the county of W. *Reg.* v. *Grand Junction Ry.*, 3 P. & D. 57; 11 A. & E. 128, n.

Where Body Found.]—By an inquisition taken by a coroner of a borough upon a body lying dead there, it appeared that the death was caused accidentally by the deceased falling, in the county, from a carriage, and that he died in the borough, and the jury found the death to have happened accidentally, and laid a deodand on the carriage. The court (before 6 & 7 Vict. c. 12) quashed the inquisition, as the coroner of the borough had no jurisdiction to inquire in the case of death occasioned by an accident happening out of the borough. *Reg.* v. *G. W. Ry.*, 3 Q. B. 333; 3 Railw. Cas. 161; 2 G. & D. 773; 11 L. J., M. C. 86; 6 Jur. 823.

If a person is found drowned in a river within the concurrent jurisdiction, exclusive of all others, of the coroner for a city and the admiralty, and the body is taken to a place on shore beyond the city limits, the coroner and jury of the city cannot view the body at such place for the

purpose of an inquest; and an inquisition taken on such view will be quashed:—So held on an inquisition taken after 6 & 7 Vict. c. 12. *Reg.* v. *Hinde*, 5 Q. B. 944; 13 L. J., M. C. 150; 8 Jur. 927.

In a case of manslaughter, the cause of the death and the death occurred in a county, and the body, after death, was removed to a city; the coroner of the city held the inquest, and E. was tried for the manslaughter on the inquisition:—Semble, that the inquest was properly held, under 6 & 7 Vict. c. 12, although that statute is a little obscurely worded. *Reg.* v. *Ellis*. 2 Car. & K. 470.

An inquest taken by a coroner for a liberty of an honour must show on the face of it that it was taken within such honour. *Reg.* v. *Pomfret Liberty*, 8 Jur. 910.

To hold Second Inquest]—A coroner has no power, after holding an inquest super visum corporis, and recording the verdict, to hold a second like inquest, mero motu, on the same body; the first not having been quashed, and no writ of melius inquirendum having been awarded. *Reg.* v. *White*, 3 El. & El. 137; 29 L. J., Q. B. 257; 6 Jur. (N.S.) 868; 2 L. T. 463; 8 W. R. 380.

Accident where no Death.]—A coroner has no ex officio jurisdiction at common law to hold any other inquest than one on a dead body, super visum corporis. He cannot, therefore, hold an inquest to inquire into the origin of a fire by which no death has been occasioned. *Reg.* v. *Herford*, 3 El. & El. 115; 29 L. J., Q. B. 249; 6 Jur. (N.S.) 750; 2 L. T. 459; 8 W. R. 579.

On Several Bodies.]—One inquisition may be taken on the bodies of several persons killed by the same cause and dying at the same time. *Reg.* v. *West*, 1 G. & D. 481; 1 Q. B. 826; 2 Railw. Cas. 613; 5 Jur. 484.

During an affray in which shots were fired by certain constables, A. was killed and B. and C. were mortally wounded by gunshots. A jury was summoned, pursuant to the precept of the coroner, and sworn upon an inquest upon the body of A. After viewing the body the inquest was adjourned to a subsequent day. B. died before the day to which the inquest stood adjourned, and the jury sworn upon A.'s inquest were, by the direction of the coroner, summoned to hold an inquest upon B.; and upon C.'s death, which occurred two days later, the same jury proceeded to investigate the circumstances attending the deaths of the three persons, notwithstanding the protest of counsel who appeared for the constables:—Held, that the proceedings were irregular and the inquisition was quashed. *Mitchelstown Inquisition, In re*, 22 L. R. Ir. 279.

Treasure Trove.]—The jurisdiction of a coroner with regard to treasure trove is confined to an inquiry as to who were the finders and who is suspected thereof. *Att.-Gen.* v. *Moore*, 62 L. J., Ch. 607; [1893] 1 Ch. 676; 3 R. 213; 68 L. T. 574; 41 W. R. 294.

—— **Title of Crown—Grant to Subject.**]—The Crown is primâ facie entitled to treasure trove, and it is not necessary that an inquest should be held for the purpose of informing the Crown as to its rights; but its title may be displaced by a grant to a subject of the franchise of treasure trove. *Ib.*

4. Privileges.

From Action.]—An action does not lie against a coroner for defamatory words spoken by him while holding an inquest. *Thomas* v. *Churton*, 2 B. & S. 475; 31 L. J., Q. B. 139; 8 Jur. (N.S.) 795; 6 L. T. 320.

Trespass will not lie against a coroner for turning a man out of a room where he is about to hold an inquisition. *Garnett* v. *Ferrand*, 6 B. & C. 611; 9 D. & R. 657; 5 L. J. (O.S.) K. B. 221: 30 R. R. 467.

From Arrest.]—A coroner is privileged from arrest on civil process, while on his way to hold an inquest. *See* 6 H. & N. 501; 30 L. J., Ex. 77; 7 Jur. (N.S.) 103; 3 L. T. 754; 9 W. R. 281.

—— **Deputy.**]—A deputy coroner for a county, whilst on his way to hold an inquest, is privileged from arrest on civil process. If arrested under such circumstances, the court will order his discharge. *Middlesex Deputy Coroner, Ex parte*, 6 H. & N. 501; 30 L. J., Ex. 77; 7 Jur. (N.S.) 103; 3 L. T. 754; 9 W. R. 281.

5. Remuneration.

Salary.]—When the salary of a county coroner, holding office at the time of the passing of 23 & 24 Vict. c. 116, has once been fixed under that act at not less than the average amount of the fees, mileage, and allowances received during five years before the 31st of December, 1859, and where the salary of such coroner is subsequently revised after a period of five years, the salary may be fixed at less than the average amount of the fees, mileage, and allowances which would have been received during the preceding five years. *Driffield, Ex parte*, L. R. 7 Q. B. 207; 20 W. R. 240.

—— **Quinquennial Period—Date whence Time runs—Successor—Remedy of Coroner—Mandamus.**]—The quinquennial period of five years, for which a county coroner's salary is fixed under s. 4 of the County Coroners Act, 1860, ends with the coroner's death and his successor on his election is entitled to have a new settlement or fixing of his salary, and such salary so fixed continues for a period of five years from the time it is so fixed, without reference to the time when it was last fixed for his predecessor, and the coroner is entitled to the salary so fixed for the whole of the term of five years, even although in the meantime the district to which the coroner was assigned has been, by Order of the Privy Council, subdivided, and a new coroner appointed and assigned to a part of that district. The coroner, however, cannot bring an action against the justices of the county, quâ justices, or any number of them acting for the whole, claiming a declaration of rights that he is entitled to the full salary fixed, or a mandamus to enforce those rights; the action is not such an action wherein, under the Judicature Act or otherwise, a declaration of rights may be made, or a mandamus granted, as a declaration of rights is only made, or a mandamus granted, where the action is such that relief can be given, and the rights claimed, enforced in that action, whereas in a case like the present the only appropriate remedy is the prerogative writ of mandamus to the justices

Baxter v. *London County Council*, 63 L. T. 767 ; 55 J. P. 391.

Fees before 23 & 24 Vict. c. 116.]—The coroners of franchises which did not contribute to the county rates were not entitled to the fees given by 25 Geo. 2, c. 29, or to any fees to be paid by the county. *Rex* v. *Yorkshire, W. R. JJ.*, 7 Term Rep. 51.

A coroner under 25 Geo. 2, c. 29, s. 1, was not entitled to any compensation for the miles travelled by him in returning to his usual place of abode from taking an inquisition. *Rex* v. *Oxfordshire JJ.*, 2 B. & Ald. 203.

The court refused to compel the sessions to allow an item in the coroner's account, because the justices were of opinion there was no ground for holding the inquisition. *Rex* v. *Kent JJ.*, 11 East, 229 ; 10 R. R. 484.

A coroner was not entitled to be paid for an inquisition taken upon a dead body, under 25 Geo. 2, c. 29, unless it was signed by all the jurors. *Rex* v. *Norfolk JJ.*, 1 Nolan, 141.

Where a coroner held two or more inquisitions at the same place on the same day, he was only entitled to one sum of 9*d.* a mile for travelling expenses from the place of his abode to the place were the inquisitions were holden. *Rex* v. *Warwick JJ.*, 5 B. & C. 430 ; 8 D. & R. 147 ; 4 L. J., K. B. (O.S.) 206 ; 29 R. R. 281.

A coroner was not entitled to the fee of 20*s.* mentioned in 25 Geo. 2, c. 29, for holding an inquest, unless in the judgment of the quarter sessions it was proper that such inquest should have been held, and the court would not review the judgment of the sessions on this point, and refused to grant a mandamus to the sessions to pay such fees. *Reg.* v. *Gloucestershire JJ.*, 7 El. & Bl. 845 ; 27 L. J., M. C. 15 ; 3 Jur. (N.S.) 980 ; 5 W. R. 655.

But the court made absolute a rule for a mandamus to pay the fee of 6*s.* 8*d.* on inquests which the sessions had held not to be duly holden, that the question might be discussed on the record whether, under 7 Will. 4 & 1 Vict. c. 68, the coroner was entitled as of right to the fees and disbursements mentioned in that statute. *Ib.*

The due taking of an inquisition by a coroner was a condition precedent to his being entitled to remuneration under Geo. 2, c. 29. *Reg.* v. *Carmarthenshire JJ.*, 2 New Sess. Cas. 679 ; 10 Q. B. 796 ; 16 L. J., M. C. 167 ; 11 Jur. 819.

But a coroner was entitled to be reimbursed the compulsory payments made by him under 6 & 7 Will. 4. c. 89, and 7 Will. 4 & 1 Vict. c. 68, s. 2, and the justices in quarter sessions had no discretion. *Ib.*

—— **Compensation on Division of District.**]—The power of ordering compensation to coroners for the loss of emoluments arising out of a change made under 7 & 8 Vict. c. 92, in the divisions of a county for the purpose of holding inquests, is confined to cases where such county has been customarily divided into districts for the purpose of holding inquests during the space of seven years before the passing of the act, as provided by s. 6. *Reg.* v *Lechmere*, 16 Q. B. 284 ; 20 L. J., Q. B. 169 ; 15 Jur. 558.

6. Removal.

In what Cases.]—On an order for a removal of a coroner from his office, the practice still prevails of issuing writs de coronatore exonerando and de coronatore eligendo at the same time since 23 & 24 Vict. c. 116, s. 6. *Ward, In re*, 3 De G. F. & J. 700 ; 30 L. J., Ch. 775 ; 7 Jur. (N.S.) 853 ; 4 L. T. 458 ; 9 W. R. 843.

A coroner was discharged from his office for neglect of duty by the authority of the great seal. *Pasley, Ex parte*, 3 Dr. & War. 34.

Confinement in prison out of the county is a sufficient ground for the removal of a coroner from his office, although during his absence another coroner of the same county performed his duties. *Parnell, Ex parte*, 1 J. & W. 451.

The great seal has power independently of the 25 Geo. 2, c. 29, to remove coroners from their office for neglect of duty. *Ib.*

Notice to a coroner of a petition for his removal is not necessary. *Ib.*

The practice is to issue the writs de coronatore exonerando and de coronatore eligendo at the same time ; the latter is dated last, but it is not irregular to execute it before a return made to the former. *Ib.*

The court has power to remove coroners where they misbehave or live out of the county ; but will not order a writ de coronatore exonerando till an affidavit of service of the petition at his last place of abode. *Warwick Freeholders, Ex parte*, 3 Atk. 184.

7. Duties.

Misbehaviour in Office—Unnecessary Delay.]—A coroner is not justified in delaying the inquest upon a dead body in a state of decomposition for so long a period as five days in order that the body may be identified, and buried and registered under the right name, and the mere fact that it has been placed in a mortuary can make no difference. *Hull, In re*, 9 Q. B. D. 689.

—— **Neglect or Refusal to hold Inquest—Discretion.**]—A coroner received from the proper police authorities a report with a view to an inquest, that a man within his district, aged sixty-one, had been found dead in his bed. It did not appear on the one hand that there had been any previous disease or illness, or, on the other hand, that there was any suspicion of violence, suicide, or crime. A medical man, moreover, refused to give a certificate of the cause of death, and the friends and relatives of the deceased made no objection to an inquest :—Held, that the coroner had, in the absence of further information as to the cause of death, no discretion to refuse to hold an inquest upon the ground that it was unnecessary. *Ib.*

When a precept is issued and a jury is summoned to attend an inquest, the coroner is bound to proceed with the inquiry, and cannot dismiss the jury without doing so. A refusal to proceed with an inquest under such circumstances is a misbehaviour within s. 6 of 23 & 24 Vict. c. 116. *Ward, In re*, 3 De G. F. & J. 700 ; 30 L. J., Ch. 775 ; 7 Jur. (N.S.) 853 ; 4 L. T. 458 ; 9 W. R. 843.

—— **Taking Bribe.**]—A coroner is guilty of an indictable offence in taking a sum of money for not holding an inquest ; whether he has any pretence for holding the inquest or not, he is equally criminal in having extorted money to refrain from doing his office. *Rex* v. *Harrison*, 1 East, P. C. 482.

—— **In Taking Verdict.**]—After the jury retired, the coroner, upon being informed that

they had agreed, but before their verdict was given, entered the room where they were in consultation and took their verdict in the room before returning into open court :—Held, that this was misconduct on the part of the coroner, and the inquisition was quashed. *Michelstown Inquisition, In re*, 22 L. R. Ir. 279.

Fresh Inquiry.]—When material evidence has been rejected at a coroner's inquest, and the jury has brought in an inconclusive verdict, and fresh evidence which will throw light upon the inquiry is forthcoming, the court will quash the inquisition, and send it down to the coroner to hold a fresh inquiry before a fresh jury. Such fresh inquiry must be held super visum corporis. *Reg.* v. *Carter*, 45 L. J., Q. B. 711 ; 34 L. T. 849 ; 24 W. R. 882 ; 13 Cox, C. C. 220.

At an inquest the question to be decided by the jury was whether the deceased was shot by accident or by her husband ; the latter was examined and cross-examined, but the body was not examined as to the direction of the bullet :—Held, that a second inquest was unnecessary, as from the incidents of the struggle, the point as to suicide or murder was not likely to be explained satisfactorily. *Reg.* v. *Coulson*, 55 J. P. 262.

Preventing Inquest being held — Misdemeanour.]—It is a misdemeanour to destroy a dead body with intent to prevent an inquest in a case where a coroner has jurisdiction to hold one. *Reg.* v. *Stephenson*, 53 L. J., M. C. 176 ; 13 Q. B. D. 331 ; 52 L. T. 267 ; 33 W. R. 44 ; 15 Cox, C. C. 679 ; 49 J. P. 486—C. C. R. S. P.. *Reg.* v. *Price*, 53 L. J., M. C. 51 ; 12 Q. B. D. 247 ; 33 W. R. 45, n. ; 15 Cox, C. C. 389.

Duty as to Evidence.]—On inquests held on the bodies of dead bastard children, it is the bounden duty of the coroner to tell the jury, in all cases where there is not the most clear and decisive proof that the child was born alive, that they ought never to think of returning a verdict of wilful murder against the mother. *Rex* v. *Bayley*, Car. C. L. 243.

An inquisition jury ought to have pointed out the precise time at which the accident happened that caused the death of the deceased, and also the precise time at which the death took place. *Reg.* v. *Brownlow*, 3 P. & D. 52 ; 11 A. & E. 119 ; 8 D. P. C. 157 ; 9 L. J., M. C. 15 ; 4 Jur. 103.

A coroner on an inquisition super visum corporis ought to hear evidence on oath, not only on the part of the crown, but on the part of the person accused. *Rex* v. *Scorey*, 1 Leach, C. C. 43.

It is the duty of a coroner, in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death. *Rex* v. *Quinch*, 4 Car. & P. 571.

It is the duty of a coroner to read over to every witness examined on the inquest the evidence which he has given, and to desire the witness to sign it. *Reg.* v. *Plummer*, 1 Car. & K. 600 ; 8 Jur. 921.

A coroner ought not to exclude the testimony of parties who have material evidence to offer, on the ground that their testimony may tend to criminate themselves. *Wakley* v. *Cooke*, 4 Ex. 511 ; 19 L. J., Ex. 91.

Where, on a criminal information against a coroner for corruption in his office, by secretly examining witnesses before the jury was sworn, he was found guilty, the judge refused to commit him or hold him to bail, no disposition to escape or abscond being manifested or shown. *Rex* v. *Whitcomb*, 1 Car. & P. 124.

Binding over Witnesses.]—It is the duty of a coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him. *Reg.* v. *Taylor*, 9 Car. & P. 672.

However, if a coroner binds over all the witnesses on both sides, no blame is imputable to the clerk of indictments, if he requires them all to be put on the back of the bill, and examined before the grand jury. *Ib.*

Expenses of Permanent Medical Witness.]—An agreement by the corporation of the City of Dublin to pay a fixed yearly salary, in lieu of fees, to a medical practitioner permanently appointed by the coroner to attend as medical witness at all inquests to be held in the city of Dublin, is not warranted by 9 & 10 Vict. c. 37, s. 28 ; and payments made on account of such salary ought not to be allowed by the public auditor. *Reg.* v. *Finlay*, Ir. R. 11 C. L. 498.

Identifying Accused.]—A party had been committed for trial upon a charge of murder. A coroner's jury was sitting upon the dead body of the deceased. The court refused an application for a habeas corpus to bring up the prisoner for the purpose of identifying him, as he might be identified by the evidence of the witnesses who were examined before the magistrates, or by a witness sent to the prison for that purpose. *Cooke, In re*, 7 Q. B. 653 ; 14 L. J., M. C. 188 ; 9 Jur. 869.

Quære, whether the court has power to grant the writ in such a case ; Coleridge, J., affirming that it has. *Ib.*

Adjournment.]—If an inquest on a dead body is adjourned, and on the day appointed, the court is not formally opened and further adjourned, the proceedings drop, and the court is dissolved, and everything else done in the matter of the inquest is coram non judice ; and this is so even where the adjournment takes place only for the purpose of drawing up a formal inquisition after the jury has in substance agreed upon their verdict. *Reg.* v. *Payn*, 34 L. J., Q. B. 59 ; 10 Jur. (N.S.) 1150 ; 11 L. T. 488, 707 ; 13 W. R. 206, 383 ; 10 Cox, C. C. 64. S. P., *Reg.* v. *Mallet*, 1 Cox, C. C. 336.

Discharging Jury.]—When a coroner's jury cannot agree on an inquest to inquire into the death of a person, the coroner cannot discharge them, but they must be remitted to the judges of the next assizes for the county, and if they cannot agree, the judge of the assize trying prisoners will discharge them. *Reg.* v. *Reinheatz*, 4 F. & F. 1094.

When a precept is issued and a jury is summoned to attend an inquest. the coroner is bound to proceed with the inquiry, and cannot dismiss the jury without doing so. *Ward, In re*, 3 De G. F. & J. 700 ; 30 L. J., Ch. 775 ; 7 Jur. (N.S.) 853 ; 4 L. T. 458 ; 9 W. R. 843.

Committal for Trial of Persons Charged.]—When a person is committed for trial on a coroner's inquisition for manslaughter. the case ought properly to be investigated by the magis-

trates, in order that the prisoner may have the opportunity of calling witnesses, and having them bound over to appear at the trial, under 30 & 31 Vict. c. 35, s. 3. *Reg.* v. *Spoor*, 11 Cox, C. C. 550.

8. Inquisitions.

a. Form and Mode of Taking.

Jury—Exemptions.]—The exemptions in the schedule to the Juries Act, 1870, apply to jurors summoned to serve upon coroners' inquests. *Reg.* v. *Dutton*, or *Dutton, In re*, 61 L. J., Q. B. 190; [1892] 1 Q. B. 486; 66 L. T. 324; 40 W. R. 270; 56 J. P. 455.

Swearing Jurors, and View.]—It is not necessary that the jurors should be sworn super visum corporis, or that they should all be sworn at one time, or that they should all view the body at the same time. *Reg.* v. *Ingham*, 5 B. & S. 257; 33 L. J., Q. B. 183; 10 Jur. (N.S.) 968: 10 L. T. 456; 12 W. R. 793; 9 Cox, C. C. 508.

After a jury had viewed the body and heard part of the evidence, another person was sworn, viewed the body, and took part in the proceedings on hearing that portion of the evidence which had been previously taken read over to him:—Held, a sufficient ground for bringing up the inquisition. *Reg.* v. *Yorkshire Coroner*, 9 L. T. 424; 9 Cox, C. C. 373.

Where the court has quashed an inquisition and sent it down to the coroner to hold a fresh inquiry before a fresh jury, such fresh inquiry must be held super visum corporis. *Reg.* v. *Carter*, 45 L. J., Q. B. 711; 34 L. T. 849; 24 W. R. 882; 13 Cox, C. C. 220.

Presumption as to Number.]—After a verdict, the court will presume that a coroner's inquisition was found by twelve jurors, if twelve were necessary. *Taylor* v. *Lambe*, 6 D. & R. 188; 4 B. & C. 138.

Form of.]—A coroner's inquisition is an indictment, within 24 & 25 Vict. c. 100, s. 6, and it is, therefore, unnecessary to set forth therein the manner in which, or the means by which, the death of the deceased was caused. *Reg.* v. *Ingham*, 5 B. & S. 257; 33 L. J., Q. B. 183; 10 Jur. (N.S.) 958; 10 L. T. 456; 12 W. R. 793; 9 Cox, C. C. 508.

It is no objection to an inquisition for murder that the offence is stated to have been committed on the 26th day June, omitting the word "of." *Rex* v. *Huggins*, 3 Car. & P. 414.

An inquisition in which the thing causing the death was described as "the goods and chattels of the proprietors of the H. & S. railway" (without mentioning their corporate name):—Held, bad. *Reg.* v. *West*, 10 L. J., M. C. 133.

An inquisition for manslaughter, stating the inquest to have been held on the 5th of January, in the 7 Will. 4, and in the year 1837, and that J. M. of, &c., on the 28th of December, in the year aforesaid, made an assault, &c., is bad, as the offence is charged to have been committed on an impossible day. *Rex* v. *Mitchell*, 7 Car. & P. 800.

—— **Negligent Omission of Duty.**]—A coroner's inquisition which, after stating the cause of death of the deceased to be injuries caused by a fall, alleges that by the neglect of three specified persons to fence, or cause to be fenced, a quarry, the deceased fell therein, "and that, therefore" the three specified persons did feloniously kill the deceased, may be quashed, inasmuch as it professes to be founded on particular facts under which the duty to fence, or cause to be fenced, arose, but omits to set out any facts from which such a duty as that alleged would arise. *Reg.* v. *Oxford Circuit Assize Clerk*, 66 L. J., Q. B. 271; [1897] 1 Q. B. 370; 76 L. T. 260; 45 W. R. 543; 18 Cox, C. C. 518; 61 J. P. 197.

An inquisition was quashed in which no neglect of duty was set out such as would constitute the crime of manslaughter. *Reg.* v. *Pocock*, 5 Cox, C. C. 172.

—— **What Defects may be Amended.**]—An omission in an inquisition to state the time at which the offence was committed, when time is not of the essence of the offence, is cured by s. 2 of 6 & 7 Vict. c. 83. *Reg.* v. *Ingham*, 5 B. & S. 257; 33 L. J., Q. B. 183; 10 Jur. (N.S.) 968; 10 L. T. 456; 12 W. R. 793; 9 Cox, C. C. 508.

By s. 20 of the Coroners Act, 1887, if in the opinion of the court having cognisance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter, sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the court may order the proper officer of the court to amend any defect. On a rule for a certiorari to bring up and quash an inquisition charging that "the directors of the Great Western Railway Company" did feloniously kill and slay G.:—Held, that the Queen's Bench division had no power to amend the inquisition by sufficiently designating the directors by name, because the power to amend was limited by s. 20 to the court before whom the persons charged should be brought for trial. *Reg.* v. *G. W. Ry. Directors*, 37 L. J., M. C. 31; 20 Q. B. D. 410; 58 L. T. 765; 36 W. R. 506; 16 Cox, C. C. 410; 52 J. P. 772.

An inquest omitting to state the place where the death happened, or where the body was found, were defects in substance, and could not be amended, and the inquisition was quashed. *Rex* v. *Evett*, 6 B. & C. 247; 9 D. & R. 237; 5 L. J. (O.S.) M. C. 36.

—— **Signature and Names.**]—It must be signed as well by all the jurors as the coroner. *Rex* v. *Norfolk JJ.*, 1 East, P. C. 383.

If the names of the jurors were not set out in the caption, and the inquisition was not signed by the jurors with their names at length, the inquisition was bad. *Rex* v. *Bowen*, 3 Car. & P. 602.

If some of the jurors signed with their marks, such marks ought to have been verified by an attestation. *Ib.* S. P., *Reg.* v. *Stockdale*, 8 D. P. C. 517.

A juror who has put his mark must be taken primâ facie to have done so in the presence of the other jurors. *Lewin's Case*, 2 Lewin, C. C. 125.

It was no objection that one of the jurors did not sign his christian name at length, if the names of the jurors were set out at length in the body of the inquisition. *Rex* v. *Bennett*, 6 Car. & P. 179.

If several persons on an inquest had the same christian and surname, it was not necessary, in the caption or the inquisition, to distinguish them by abode or addition. *Rex* v. *Nicholas*, 7 Car. & P. 538.

—— **Affirmation.**]—If an inquisition states it to have been taken on the affirmation of a man, it should state that man to be either a Quaker or a Moravian. *Rex* v. *Polfield*, 2 D. P. C. 469.

On Parchment, not Paper.] — A coroner's inquisition should be on parchment, and not on paper. *Rex* v. *Bearers*, 1 East, P. C. 383.

An inquisition, finding a person felo de se, will be quashed if written on paper. *Reg.* v. *Whalley*, 7 D. & L. 317; 19 L. J., Q. B. 14.

b. Quashing.

Proceedings.]—Though the court will sometimes quash an inquisition on motion for palpable defects, the most convenient course is to put the party contesting it to demur. *Reg.* v. *Brownlow*, 11 A. & E. 119; 3 P. & D. 52; 9 L. J., M. C. 15.

A rule to quash an inquisition upon an objection relating only to the finding as to one person named therein, need not be served upon the other persons named. *Reg.* v. *Mallet*, 1 Cox, C. C. 336.

An inquisition may be quashed where a verdict has been found against a person confessedly innocent, but the court will not quash it where there has been any evidence, even though it may be insufficient to warrant the finding of the jury. *Six Mile Bridge Inquisition, In re*, 6 Cox, C. C. 122.

If an inquisition be insensible as it stands, and there are no words the rejection of which would make it clearly intelligible, it must be quashed. *Reg.* v. *Midland Ry.*, 2 Cox, C. C. 1.

Jurisdiction.]—The jurisdiction of the Queen's Bench Division to quash an inquisition for irregularity on the face of it is left untouched by s. 20 of the Coroner's Act, 1887. *Reg.* v. *G. W. Ry. Directors*, 57 L. J., M. C. 31; 20 Q. B. D. 410; 58 L. T. 765; 36 W. R. 506; 16 Cox, C. C. 410; 52 J. P. 772.

On what Grounds.]—It is no ground for a certiorari to bring up an inquisition that evidence not upon oath was received. *Reg.* v. *Ingham*, 5 B. & S. 257.

Or that the direction of the coroner to the jury was improper. *Ib.*

Or that there was no evidence to warrant the finding of the jury. *Ib.*

The court refused to quash an inquisition on the ground that evidence was received not upon oath, there being no mala praxis, and no mischief having resulted, and the jury having found their verdict upon the other evidence only. *Reg.* v. *Staffordshire Coroner*, 10 L. T. 650.

On an application to quash a coroner's inquisition, the court will not examine the depositions returned by the coroner on certiorari, for the purpose of inquiring whether the evidence was sufficient to support the verdict of the coroner's jury. *Mitchelstown Inquisition, In re*, 22 L. R. Ir. 279.

The court will quash an inquisition in which the facts of the case are stated, and the verdict found is not warranted by such facts. *Cully, In re*, 2 N. & M. 61; 5 B. & Ad. 230; 2 L. J., M. C. 102.

The court will not quash an inquisition unless it appears bad on the face of it, or fraud is shown. It is no ground to quash it that it is alleged that the coroner misdirected the jury. *Reg.* v. *M'Intosh*, 7 W. R. 52.

Partly Bad.] — Where a jury found that a deceased person committed suicide "whilst suffering under the cruel conduct of Mr. S.," a clergyman, and the coroner had taken this down as the finding of the jury:—Held, that the court would not grant a certiorari to bring up the inquisition for the purpose of quashing so much of the finding as was irrelevant. *Scratchley, Ex parte*, 2 D. & L. 29.

An inquisition charging two persons with having caused the death may, for misconduct in the coroner in reference to one only, be quashed as to that one only. *Reg.* v. *Mallet*, 1 Cox, C. C. 336.

An inquisition may be quashed in part for uncertainty, and stand good for the residue. *Carruthers, Ex parte*, 2 M. & Ry. 397.

In Particular Instances.]—*See* SUPRA.

Action for Imprisonment — Costs.] — In an action for causing the plaintiff to be taken into custody, and imprisoned, it appeared that he was arrested, by a coroner's warrant, for manslaughter. He was admitted to bail, with two sureties, and afterwards, on his application to the Queen's Bench, the inquisition was quashed:—Held, that he was entitled to recover, as part of the special damage, the cost of setting aside the inquisition. *Foxhall* v. *Barnett*, 2 El. & Bl. 928; 2 C. L. R. 273; 23 L. J., Q. B. 7; 18 Jur. 41; 2 W. R. 61.

c. Removal for Trial.

In what Cases.]—The Court of Queen's Bench will remove a coroner's inquisition, or an indictment to be found at an ensuing assizes, for murder, from a county at large to the Queen's Bench by certiorari, if it appears that a fair trial cannot be had in the county. *Reg.* v. *Palmer*, 5 El. & Bl. 1024; 2 Jur. (N.S.) 235.

And by 19 & 20 Vict. c. 16, *the court may direct the trial to take place at the Central Criminal Court.*

d. Admissibility in Evidence.

In Civil Cases.]—The finding of a jury on a coroner's inquisition throws the burden of proof in a civil case on the party alleging the contrary. *Prince of Wales Association Co.* v. *Palmer*, 25 Beav. 605.

In Information for Libel.]—Information for libel alleged that a person unknown had committed a murder on G., and that H. had been charged with it. The information set out the libel, and charged that it imputed the murder to C. The libel, as set out, spoke of the murder of G., and stated H. had been accused of it:—Held, that the indictment was proved by evidence, that a person had been murdered, that H. was charged with the murder, and that, on an inquest held upon the body, witnesses called the dead person by the name of G. *Reg.* v. *Gregory*, 8 Q. B. 308; 15 L. J., M. C. 38; 10 Jur. 387.

Held, also, that the last fact might properly be proved by the coroner who held the inquest, and that he might for the purpose use an instrument which he had drawn up as an inquisition, whether it was or not a valid and formal inquisition. *Ib.*

An inquisition on paper only, instead of

parchment (but not having been quashed), is admissible in evidence, not as an inquisition proving the statements therein contained, but to show that an inquiry into the subject-matter of it did in fact take place *Ib*

Depositions]—Depositions taken before the coroner of a witness too ill to attend may be sent before the grand jury *Reg* v *Mooney*, 9 Cox, C C 411

So depositions of a prisoner at a coroner's inquisition, after a caution by the coroner, may be read *Reg* v *Colmer*, 9 Cox C C 506

The court will not grant a rule nisi to remove the depositions taken before a coroner, and to bail a party charged upon the inquest with manslaughter without an affidavit of what took place before the coroner *Rex* v *Mills*, 4 N & M 6

Statements made before Coroner] — In an action by a widow to recover compensation for the death of her husband, who was accidentally killed by a brougham on the highway, evidence as to a statement made by F the driver of the brougham, before the coroner, to the effect that "he had a Russian prince, who did not understand the English language and that he would not allow him to pull up as he was in a hurry to go to a wedding which was the cause of his not stopping at the time of the accident, and that the brougham belonged to the defendant, and that F was driving it for him, is inadmissible *Brooker* v *Floyd*, 13 L T 79

9. Other Matters

Execution of Process] — An attachment against the sheriff must issue to elisors in the first instance if the coroner is the defendant in the cause *Reg* v *Glamorganshire Sheriff*, 1 D (N S) 308, 5 Jur 1010

The directions in 8 & 9 Vict c 18, s 39, requiring inquisitions to be held before coroners where sheriffs are interested, were introduced for the protection of the party against whom the interest would operate and may be waived by him *Baddeley, Ex parte*, 5 Railw Cas 542

Semble, that the court has no power under 3 & 4 Will 4 c 17 to direct a writ of trial to the coroner *Levy* v *Magnay*, 10 M & W 664, 2 D (N S) 512, 12 L J, Ex 345

Deodands]—*Forfeiture in respect of, abolished by* 9 & 10 Vict c 62 Previously thereto see *Reg* v *Polworth*, 1 G & D 211, 1 Q B 818, 10 L J, M C 118, 6 Jur 190

Four deodands having been estreated into the Court of Exchequer, under 3 & 4 Will 4, c 99, s 29, upon four coroner's inquisitions, which found that the deaths of four persons were respectively caused on a certain day, by a certain steam-engine, and each imposed a deodand of 125*l* on the engine, the court refused to stay proceedings on three inquisitions on payment of one deodand of 125*l*, but left the defendants to their remedy by traversing, or quashing the inquisition *Att-Gen* v *Eastern Counties Ry*, 3 Railw Cas 145.

J M.

CORPORATION.

[BY A H BITTLESTON.]

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A. MUNICIPAL.

I CORPORATE NAME AND DESCRIPTION

See Municipal Corporations Act, 1882 (45 & 46 Vict c 50), ss 8, 241

Proper Title]—The proper style of municipal corporations in cities, under 5 & 6 Will 4, c 76, is the "Mayor, Aldermen and Citizens, and not the "Mayor Aldermen and Burgesses' of the city *Att-Gen* v *Worcester Corporation*, 2 Ph 3, 15 L J Ch 398 S P, *Rochester Corporation* v *Lee*, 15 Sim 376

Effect of 5 & 6 Will 4, c 76]—Municipal corporations, as altered by 5 & 6 Will 4, c 76 are but a continuance of the old corporations *Att Gen* v *Kerr*, 2 Beav 420 S P, *Att Gen* v *Leicester Corporation*, 9 Beav 546, *Ludlow Corporation* v *Tyler*, 7 Car & P 537

Description]—The mayor, jurats, and commonalty of the ancient town of Rye were held to take lands by a devise to the right worshipful the mayor, jurats, and town council of the ancient town of Rye *Att Gen* v *Rye*, 7 Taunt 546, 1 Moore, 267

The 'mayor, aldermen and commons, in common council assembled, are not sufficiently described in the proceedings under a private act of parliament, by 'the mayor and commonalty and citizens, though in fact the latter includes the former *Rex* v *Croke* Cowp 29

In ejectment, the demise was laid to be by the mayor, burgesses &c, of the borough town of M, and, on the trial it turned out from the charter that the name of the corporation was "the mayor, &c, of M" —Held, that this was no variance, it appearing from the charter which was in evidence that M was a borough town *Doe* d *Walden* v *Miller*, 1 B & Ald 699, 19 R R 427

Where corporation mistake their name in granting leases, help given in chancery *Anon*, Cary, 31

See also *Shrewsbury* v *Hart*, *Croydon Hospital* v *Farley*, *Carlisle* v *Blamire*, and *Church* v *Imperial Gas Light and Coke Co*, **B** II

Whether Corporation a "Person"]—The 39 Eliz c 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them A municipal corporation is included in the words "every person and persons," and may exercise the powers given by the act. *Newcastle Corporation* 12 Cl & F 402

Trustees of a will had power to grant leases to any 'person or persons they should think fit — Held, that this authorised them to grant a lease to a limited company *Jeffreck's Trusts, In re*, 51 L J, Ch 507

A corporation is included in words 'person or persons *Hereford Corporation* v *Morton*, 15 L T 187, 15 W R 110

Under a local act a summary remedy was provided against a person accidentally damaging a lamp and a pillar attached thereto, which had been set up by any person or persons at his or their private expense or which belonged to the company supplying the gas —Held, that the act applied to a lamp and pillar set up by a corporation, although the gas was provided by contract between a company and the corporation *Ib*

Whether the word "person in a statute can be treated as including a corporation must depend on the consideration of the object of the statute, and of the enactments passed with a view to carry that object into effect *Pharmaceutical Society* v *London and Provincial Supply Association*, 49 L J Q B 736 5 App Cas 857; 43 L T 389, 28 W R 957, 45 J P 20—H L. (E)

Primâ facie Evidence of Existence]—The insertion of the name of a town in Schedule (A) of the 5 & 6 Will 4, c 76 is primâ facie evidence of the existence of a municipal corporation there. *Rex* v *Green* 1 N & P 631, 6 A & E 548, W W & D 291

It is not necessary to produce the charter of a city to prove that it is a municipal corporation, the production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence if it proves that the councillors of the ward were present on the occasion, and it is a sufficient compliance with 5 & 6 Will 4, c 76, s 43 *Reg* v *Turner*, 12 Cox, C C 313.

II CHARTERS

See also cases post, **B** I

a GRANT

See Municipal Corporations Act, 1882 (45 & 46 Vict c 50), ss 210—218

Validity of—Petition, Counter-Petition, Question for Jury]—A petition, which had been agreed upon at a meeting of the ratepayers of the parliamentary borough of Manchester, convened by public advertisement and which was in fact attended by 1 000, and which petition was afterwards signed by 4 000 inhabitant householders of the borough, was presented to her Majesty, praying for the grant of a charter of incorporation to the inhabitants under the 7 Will 4 & 1 Vict c 78, s 49 Afterwards, and before the day appointed for this petition being taken into consideration by the privy council, a counter-petition, signed by 6,000 of such inhabitant householders, was presented to her Majesty, praying her not to grant such charter The whole number of such inhabitant householders of the borough amounted to 48,000 —Held, that the second petition did not necessarily, in point of law, deprive her Majesty of the power to grant such charter upon the first petition, but that, whether the first petition was, under all the cir-

cumstances, the petition of the inhabitant householders of the borough, so as to authorise the exercise of the powers conferred by 7 Will. 4 & 1 Vict. c. 78, s. 49, was a question of fact for a jury; and that the determination of the privy council to advise the crown to grant the charter upon such petition was not conclusive of its validity. *Rutter* v. *Chapman*, 10 L. J., Ex. 495; 8 M. & W. 1—Ex. Ch.

Prerogative of Crown.]—The grant of such charter of incorporation is an exercise of the common-law prerogative of the crown, although it extends to the new corporation the powers of the 5 & 6 Will. 4, c. 76, which the crown has power to do only by virtue of 7 Will. 4 & 1 Vict. c. 78, s. 49. *Ib.*

The crown may, by its common-law prerogative, appoint, in such charter, the number, and set out the limits, of the wards in the new borough. *Ib.*

To Part of a Borough.]—Such charter may be granted to a part only (to be defined therein) of the borough, from the whole of which the petition emanated, and need not be conferred upon the inhabitant householders of the whole borough. *Ib.*

Power of Appointing—Delegation.]—The crown may also, by such charter, delegate to an individual the power of appointing the first members of such corporation; or may, at all events, appoint a person to ascertain the individuals who compose the class to whom the charter is granted. *Ib.*

Such charter is not void, because it directs the person appointed to make out the first list to include in it only "all inhabitant householders within the borough who shall possess the qualification required by the 5 & 6 Will. 4, c. 76," instead of including also all persons occupying shops, &c., within the borough, and being inhabitant householders residing within seven miles thereof, according to the schedule. *Ib.*

Petition not Signed by Majority.]—Under the 7 Will. 4 & 1 Vict. c. 78, the crown may grant a charter of incorporation, though the petition for it is not actually signed by a majority, either in persons or property, of the inhabitant householders. *Reg.* v. *Boucher*, 2 G. & D. 737; 3 Q. B. 641; 6 Jur. 851. *Reg.* v. *Warwickshire JJ.*, 11 L. J., Q. B. 299.

When Town within a County.]—There having been a de facto grant of a charter of incorporation to a town within a county, and a de facto grant of a separate quarter sessions to it, the court quashed a county rate which included the town, and refused to entertain objections to the validity of the grant of quarter sessions, on the ground that the grant of the crown ought in such a case to be directly impeached by scire facias. *Ib.*

Presentation of Petition.]—The power of the crown to grant a charter of incorporation under 7 Will. 4 & 1 Vict. c. 78, s. 49, attaches on the presentation of a petition under the act, and whatever happens afterwards only affects its discretion. *Reg.* v. *Aberavon* (*Corporation*), 11 L. T. 417; 13 W. R. 90.

Such a petition must be a petition representing the wishes of the majority of the inhabitant householders, and this is a question of fact for the jury. *Ib.*

Semble, that inhabitant householders in that section includes compound householders (under 13 & 14 Vict. c 99) as well as ratepayers. *Ib.*

Validity of Charter, how questioned.]—Where the crown had granted a separate court of quarter sessions to a borough, but the county justices afterwards made an order assessing the borough to the county rate on the ground that the grant was invalid, the court quashed the order of justices, and refused to consider the validity of the grant by the indirect proceeding of a certiorari to quash the rate. *Reg.* v. *Warwickshire JJ.*, 11 L. J., Q. B. 299.

The court of chancery will not inquire into the validity of a charter, but will act upon it as being valid until proper proceedings are taken to set it aside. *Att.-Gen.* v. *Avon Corporation*, 33 Beav. 67; 9 Jur. (N.S.) 1117; 11 W. R. 709. Affirmed on appeal, 9 L. T. 187—L. J.

See *Robinson* v. *London Hospital*, 10 Hare, 19; 22 L. J., Ch. 754.

—— **Quo Warranto.**]—The court will not grant a quo warranto against an individual to try the legality of a charter of a municipal incorporation. *Reg.* v. *Jones*, 8 L. T. 503. S. P., *Queen* v. *Taylor*, 3 P. & D. 652; 9 L. J., Q. B. 219.

Explanation by Usage.]—A grant of immunity to burgesses, their heirs and successors, was expounded by the usage to be a grant to burgesses, corporators only, and not to the burgage tenants and their heirs. *Tewkesbury* v. *Bricknell*, 2 Taunt. 120; 11 R. R. 537.

—— **Inhabitants.**]—The word inhabitants, in a charter, has not, in itself, any definite legal meaning, but must be explained in each case, extrinsically, as by evidence of usage, or by reference to the context and objects of the charter. *Rex* v. *Mashiter*, 6 A. & E. 153; 1 N. & P. 314; 6 L. J., K. B. 121. S. P., *Rex* v. *Davey*, 6 A. & E. 374.

Effect of.]—A charter of incorporation granted under 7 Will. 4 & 1 Vict. c. 78, s. 49, to a borough previously possessing a body corporate, but not named in the schedules to 5 & 6 Will. 4, c. 76, confers upon it the same powers and privileges as if it had been so named. *Att.-Gen.* v. *Avon Corporation*, supra.

The corporation established under the charter is identical with that previously existing, although the governing body may be different, and the property of the old corporation becomes vested in the new by virtue of the charter. *Ib.*

b. CONSTRUCTION.

Words of Permission—Obligatory.]—If there are words of permission in a charter to do an act which is clearly for the public benefit, they are obligatory; therefore, where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but which had been long disused, the court granted a mandamus to compel such court to be held, at the instance of an inhabitant of the town, though he was not a corporator. *Rex* v. *Hastings*, 1 D. & R. 148; 5 B. & Ald. 692, n.; 24 R. R. 657.

Charter confirming Privileges.]—By several charters the sheriffs of Norwich were to be chosen by the citizens and commonalty from themselves; a subsequent charter confirming former privileges, and regulating the time and mode of electing sheriffs, omitted the words "from themselves." The usage, however, both before and since had been to elect from among the freemen:—Held, that the last charter was not meant to vary the qualification; and that the restriction in the former charter could not be dispensed with; and that the election of a person not free was irregular. *Rex* v. *Grout*, 1 B. & Ad. 104.

Tolls—Grant of Exemption.]—By a charter of Eliz., her majesty granted to the inhabitants of T. to be incorporated by the name of the mayor and burgesses of the borough of T., and also granted and confirmed to the mayor and burgesses, and their successors, "all messuages, lands, tenements, customs, privileges, immunities, advantages, &c., within the borough, which the mayor and burgesses or inhabitants, by whatever names or name, corporate or incorporate, by reason or colour of any prescription, for fifty years past, had held; and that the burgesses and inhabitants of the borough, and their successors, thenceforth for ever should be free from toll, passage, pontage, murage, anchorage, coynage, wharfage, cranage, keyage, &c., for all goods which were their own, throughout the kingdom of England, except the city of London":—Held, that this exemption from tolls and dues did not extend to tolls and duties arising and due by prescription to the corporation of T. within that borough. *Truro* v. *Reynalds*, 1 M. & Sc. 272.

Immemorial Custom—Licence to Fish.]—The corporation of Colchester having in 1740 become suspended by reason of proceedings on quo warranto, an act was passed for preserving the Colne fishery, which had been by ancient charters vested in them. By that act, after reciting the charters and letters-patent of incorporation, that the mayor and commonalty, and their predecessors, had from time immemorial, as well by virtue of their prescriptive rights as of the letters-patent, granted licences to oyster-dredgers to dredge and take oysters in the fishery, and had held courts, and made rules and orders for governing and preserving the fishery; and that, by reason of the judgment of the King's Bench, there remained no mayor, alderman or justices of peace, nor persons to hold courts, or make or enforce rules for the government and preservation of the fishery, it was enacted, that it should be lawful to and for the justices residing within the borough, or within the Colchester division of the county of Essex, and they were thereby required, to hold courts, appoint officers, and grant licences to such oyster-dredgermen as should apply for the same, under the usual and accustomed payments and fees, and in such manner as the corporation, or their predecessors, had theretofore used to grant such licences. By the act a penalty was imposed upon non-licenced persons dredging in the fishery, and the payments and fees for licences, and all fines, were to be paid to the justices, and after the re-incorporation of the borough, to the chief magistrate, and applied in the first place in payment of the necessary charges of obtaining the act, and then to the assignees of a mortgage on the estates of the late mayor and commonalty. In 1763, by a charter of Geo. 3, the borough was re-incorporated. In an action against the new corporation for refusing to grant a dredging licence to the plaintiff, the declaration averred that he, before and at the time of his applying for such licence, was an oyster-dredgerman, qualified and entitled to apply for, demand, and have a licence from the corporation under the act of parliament to dredge and take oysters in the fishery under the usual and accustomed payments and fees; that he claimed at the proper court to be licensed: and that the corporation refused to license him; —Held, that, whatever the immemorial custom might be, there was nothing in the act of parliament which imposed upon the corporation the duty or obligation of granting licences for any accustomed payment or fee, and that consequently the declaration was bad. *Mills* v. *Colchester Corporation*, 17 C. B. (N.S.) 635.

Necessary Majority.]—A charter granted to a corporation, consisting of two bailiffs and twelve assistants and commonalty, or the greater part of them, of whom the bailiffs for the time being shall be two, to do corporate acts:—Held, that the necessary majority must consist of the two bailiffs and a majority of twelve assistants. *Godmanchester Corporation* v. *Phillips*, 6 N. & M. 211; 4 A. & E. 550; 1 H. & W. 686; 5 L. J., K. B. 108.

Exclusion of County Justices.]—A charter granting jurisdiction to borough magistrates over a district not within the borough, does not exclude the county justices, without express words. *Blankley* v. *Winstanley*, 3 Term Rep. 279; 1 R. R. 704.

And though such charter contains words of reference to former charters, in which exclusive jurisdiction is given to the borough justices within the borough, and adds that they shall have jurisdiction within the new district in tam amplo modo et formâ, &c.; yet if there is in the latter charter a saving clause of the rights of the crown and of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices. *Ib.*

Until Oath Taken, Title Incomplete.]—By a charter, Edw. I. granted to the burgesses of C., that the constable of his castle of C. for the time being should be mayor of that borough, "sworn as well to the king as to the burgesses, who, on oath for preserving the king's right being first taken, should swear to the burgesses, that he would preserve the liberties of the burgesses, granted by the king, and faithfully do those things which to the office of mayoralty belong in the borough." By letters patent, William IV. granted the office of the castle of C.:—Held, that until oath taken, according to the charter, the title of the grantee was incomplete. *Rex* v. *Roberts*, 5 N. & M. 130; 3 A. & E. 771; 1 H. & W. 444; 4 L. J., M. C. 118.

Residence.]—Where a charter of a borough directed that when any of the capital burgesses should happen to die, or dwell out of the borough, or be removed, it should be lawful for the remainder to elect others in the place of those so happening to die or be removed, omitting the intermediate circumstance of dwelling out of the borough:—Held, that these words were not so unambiguous as to warrant the court to interfere, by granting a mandamus calling on the mayor and burgesses

to elect and swear in two capital burgesses, in the room of two non-resident capital burgesses, who had not been previously removed by the corporation from their offices, for the purpose of taking this matter into consideration. *Rex* v. *Truro*, 3 B. & Ald. 590; 2 Chit. 257.

Usage differing from Charter.]—Election of burgesses must be as directed by charter, though usage different. *Powell* v. *Rex*, 2 Bro. P. C. 298.

Extension of Words beyond Natural Import.]—The words of a grant from the crown, by a contemporaneous exposition and constant usage, may be extended beyond their natural import, so as to confer a right to exercise an office within a city and the liberties thereof, granted only to be exercised within the city. *London* v. *Long*, 1 Camp. 22; 10 R. R. 618.

Limitation of Words]—But "burgesses" who, by charter, have the right to elect a mayor, cannot be limited by usage. *Rex* v. *Goldsmith*, 4 B. & Ad. 835.

In Latin.]—Evidence of usage and practice admitted to explain a charter in the Latin language, and of the reign of Philip and Mary. *Att.-Gen.* v. *Boston Corporation*, 9 Jur. 838.

Usage contrary to Charter void.]—See *Rex* v. *Salway*, 7 L. J. (o.s.) K. B. 277; 9 B. & C. 424; 4 Man. & Ry. 314.

By-law contrary to Charter bad.]—See *Rex* v. *Bumstead*, 9 L. J. (o.s.) K. B. 321; 2 B. & Ad. 699; *Tucker* v. *Rex*, 2 Bro. P. C. 304; *Hoblyn* v. *Rex*, 2 Bro. P. C. 329.

Conservancy of River.]—By a public act passed in the reign of Henry VIII. the corporation of the city of Exeter was empowered to remove obstructions to the navigation of the river Exe, paying compensation to the owners of the soil, where the obstructions were situated:—Held, first, that this act did not confer the conservancy of the river on the corporation. *Exeter Corporation* v. *Devon (Earl)*, L. R. 10 Eq. 232; 23 L. T. 382; 18 W. R. 879.

Held, secondly, that it did not entitle the corporation to file a bill in equity to restrain the erection of a pier in the river. *Ib.*

Held, thirdly, that it did not confer any right or privilege on the corporation within the General Pier and Harbour Act, 1861, s. 14, so as to prevent the erection of a pier in the river without their consent being obtained. *Ib.*

City of London—Right to Fines.]—The charters of the city of London vest in that body, fines for misdemeanours committed within the city, though imposed or adjudged by the court of king's bench, sitting in banc in Westminster, after a trial at the sittings at Guildhall. *Rex* v. *London Corporation*, 1 C. M. & R. 1; 4 Tyr. 709; 3 L. J., Ex. 223.

"Amercement"—Bail—Forfeited Recognisance.]—A charter of the year 1399 granted to a corporation "all fines for trespass and other offences whatsoever and also fines for licences to agree and all amercements ransoms and forfeited issues forfeitures year day waste and estrepment. . . ." A second charter of the year 1448 granted to the same corporation "all issues fines and amercements from whatsoever pledges and mainpernors." . . .:—Held, that the words did not in either case include recognisances estreated on the failure of persons accused of felony or misdemeanour to appear and take their trial at assizes. *Nottingham Corporation, In re*, 66 L. J., Q. B. 883; [1897] 2 Q. B. 502; 77 L. T. 210: 61 J. P. 725—D.

Grant to Mayor, Aldermen, and Burgesses—No Right, in absence of Usage, in Individual Burgesses.]—See *Potter* v. *Berry*, **A.** III. a.

c. RENEWAL OF.

Effect of]—A new charter granted where there is a prior subsisting one, is void ab initio; because two corporations, for the same purposes of government, cannot legally exist within the same place, and at the same time. *Rex* v. *Amery*, 2 Bro. P. C. 336.

But a new charter of incorporation, granted after a judgment of seizure quousque, &c., to a new body in the same place, is good, notwithstanding a charter of restitution is afterwards granted to the old corporation; and such charter of restitution is absolutely void. *Rex* v. *Monk*, 2 Term Rep. 515: 1 Term Rep. 575. But see *S. C.*, 4 Term Rep. 122.

A right of free fishery was granted to a borough, by a charter of Richard I., which recited a previous enjoyment of the franchise by the borough. In 1740, by reason of judgments of ouster against all the existing members of the corporation, it became incapable of continuing itself, and there was no mayor or alderman till 1763, when a new charter of incorporation was granted to the borough, by which all the former rights, liberties and fisheries were ratified, confirmed and restored to the new corporation:—Held, that there had been no entire dissolution of the corporation, and that, by virtue of the new charter of incorporation, the revived one became owners of all their former franchises, and were entitled to the fishery. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 173; 10 Jur. 610.

New Charter varying Modes of Election.]—By an ancient parliament roll, it appeared that the commons, by their petition exhibited in parliament, prayed Edward III. that the charter made to his liege subjects, burgesses of the town of Bristol, and the franchises by him granted to his burgesses, should be ratified and confirmed in that parliament. The answer to the petition was, that it was assented to and agreed in parliament that the franchises whereof the petition made mention should be ratified and confirmed under the great seal. The charter was ratified by Edward III. accordingly:—Held, that the crown was not prevented by this proceeding in parliament from granting a new charter to the burgesses of Bristol, varying the mode of electing the mayor from that provided for in the charter recited in the petition to the king in parliament. *Rex* v. *Haythorne*, 5 B. & C. 410; 8 D. & R. 228.

Queen Anne, by a charter, granted to the burgesses of Bristol, that they should be a body corporate, and released to the corporation that power of removing its members which had been reserved by a former charter of King Charles II., and released any just cause of complaint which might be against the corporation for having

acted in opposition to it:—Held, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by Charles II., and that the queen's charter was not therefore void, although the supposed charter of Charles II. did not exist. *Ib.*

d. ACCEPTANCE OF.

Sufficient Acceptance.]—By a new charter, an old corporation, consisting of a mayor and burgesses, was made to consist of a mayor, aldermen, chief burgesses and burgesses; the three former to constitute the common council. The common council and a majority of the burgesses expressed their assent to the new charter, some by voting at an election held under it, and others by a written declaration:—Held, that this was a sufficient acceptance of a new charter. *Rex* v. *Hughes*, 1 M. & Ry. 625; 7 B. & C. 708; 6 L. J. (O.S.) K. B. 190; 31 R. R. 288.

Effect of.]—A corporation being disabled to act, accepting a new charter, is not dissolved, but dormant; and after such acceptance the new corporation is the same as the old one. *Colchester* v. *Seaber*, 3 Burr. 1866; 1 W. Bl. 591.

By letters-patent the king granted to the mayor and burgesses of Lyme Regis, the borough or town so called, and also the pier, quay, or cob, with all liberties and profits belonging to the same, and remitted also twenty-seven marks of their ancient rent, payable to the king; and he willed that the mayor and burgesses and their successors, all and singular the buildings, banks, sea shores, &c., within the borough, or thereto belonging, or situate between the same and the sea, and also the pier, at their own costs and charges thenceforth for ever should repair, maintain, and support, as often as it should be necessary:—Held, first, that the mayor and burgesses of Lyme, having accepted the charter, became legally bound to repair the buildings, banks, sea shores, and mounds; secondly, that, this obligation being one which concerned the public, an indictment would lie, in case of non-repair, against the mayor and burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual. *Lyme Regis* v. *Henley*, 2 Cl. & F. 331; 8 Bligh (N.S.) 690; 3 B. & Ad. 77; 5 Bing. 91; 3 M. & P. 278.

III. CORPORATE BODY.

a. BURGESSES.

See Election Law, II. 1.

See Municipal Corporations Act, 1882, ss. 9, 201–209.

Rights of.]—Burgesses created by 5 & 6 Will. 4, c. 76, are not entitled to any share or benefit of the corporate property enjoyed by the freemen and burgesses of a borough before that act passed. *Hulls* v. *Estcourt*, 2 H. & C. 47; 32 L. J., Ex. 193; 9 Jur. (N.S.) 695; 8 L. T. 539; 11 W. R. 672.

In an action by some (on behalf of all) of the freemen of a borough to establish the right of all the individual freemen to share for their private benefit the net proceeds of certain properties vested in the corporation:—Held, on demurrer, that the effect of the saving of rights in s. 2 of the Municipal Corporations Act of 1835 was to legalise the beneficial interests therein mentioned, without reference to the legality of their origin, and, in particular, to obviate any objection which might otherwise arise in respect of the tendency towards a perpetuity of any such beneficial interest. *Prestney* v. *Colchester Corporation*, 51 L. J., Ch. 805; 21 Ch. D. 111.

An action to establish such rights as aforesaid may be brought by parties claiming to be entitled, without an information by the attorney-general. *Ib.*

In such an action it was held on demurrer that in order to enable the plaintiffs to avail themselves of such saving of rights as aforesaid, it was sufficient for them, after stating the title of the corporation by charter or otherwise to the property in question, to aver that at the time of the passing of the act the rents, tolls, and profits claimed by them were not, nor ever had been, nor ought to have been, held and applied to public purposes, but then were, and always had been, held and applied for the particular benefit of the freemen, and without pleading that such rents, tolls, and profits had been enjoyed or acquired by virtue of any specific statute, charter, by-law, or custom, or expressly to aver that any custom to such effect as aforesaid existed. *Ib.*

In cases where the land belonging to a corporation is taken by a railway company, and the purchase money is paid into the bank, the court will not allow any steps to be taken with reference to the final application of such purchase unless it be satisfied that the freemen are represented. *Lincoln Corporation, Ex parte, G. N. Ry., In re*, 6 Railw. Cas. 738.

A burgess filed a bill in equity against a corporation not within 5 & 6 Will. 4, c. 76, and their solicitor, alleging that they were trustees of estates for themselves, the town, and the inhabitants, and that he, as a senior burgess, was individually entitled to rights in the lands, most of which had been sold, and praying that the corporation might be restrained from selling what remained of the corporation estates:—Held, that if the plaintiff had any right he was entitled to it in his corporate and not in his individual capacity. *Evan* v. *Avon Corporation*, 29 Beav. 144; 30 L. J., Ch. 165; 6 Jur. 1361; 3 L. T. 347; 9 W. R. 84.

If a burgess claims an individual right of pasturage in a part of the corporate estates, it must be considered as made in his corporate and not in his individual capacity, and where the particular lands had been sold, no distinct claim could be made by him individually for compensation out of the unsold property of the corporation. *Ib.*

By the Freemen of the Borough of Leicester Act, 1845, certain allotments of land were vested in the "deputies" in trust for the freemen of the borough of Leicester and their widows, resident within the borough. By the Leicester Extension Act, 1891, the boundaries of the existing borough were extended so as to comprise certain additional places:—Held, that the latter act extended the benefits of the Freemen's Act to all freemen resident within the extended area of the borough. *Leicester Freemen* v. *Lewitt*, 62 L. J., M. C. 51; 5 R. 211; 68 L. T. 201; 57 J. P. 344—D.

A right of election given by charter to "the burgesses" cannot be limited by usage to the capital burgesses. *Rex* v. *Goldsmith*, 4 B. & Ad. 835.

An entry by two persons, who were burgesses of a borough, on a field in private occupation in the borough for the purpose of sporting cannot be justified under a charter granting sporting rights within the borough to the mayor, aldermen, and burgesses, in the absence of evidence of the right under the charter having been exercised by individual burgesses. *Potter* v. *Berry*, 6 W. R. 71.

Under s. 233 of the Municipal Corporations Act, 1882, burgesses are entitled to inspect the minutes of all acts of committees submitted to the council, whether these acts are finally approved or not. *Williams* v. *Manchester Corporation*, 45 W. R. 412.

Disfranchisement of, by Corporation.]—See *Rex* v. *Great Grimsby*, **A.** III. c.

b. COUNCILLORS AND ALDERMEN.

See Election Law, II. 2. b.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 34—42.

Mode and Time of questioning Title to Office.]—An application for a quo warranto calling on a person to show by what warrant he holds the office of alderman, must be made within twelve months of his becoming disqualified. It is not sufficient that it is within twelve months of notice of his disqualification by his name being struck off the burgess list. *Birkbeck, Ex parte*, L. R. 9 Q. B. 256; 22 W. R. 229. *But see now* Municipal Elections Act, 1882.

Disqualification from Acting—Composition or Bankruptcy.]—The plaintiff, an alderman, by letter proposed to his creditors a composition on his debts, and on their agreeing to accept it, he gave a bill of sale of his stock-in-trade to raise money to pay the composition:—Held, that he did not thereby cease to hold office as alderman, for he had not compounded either "by deed" according to the Municipal Corporations Act, 1835, s. 52, or "under the Bankruptcy Act, 1869," according to s. 21 of the Debtors Act, 1869. *Aslatt* v. *Southampton Corporation*, 50 L. J., Ch. 31; 16 Ch. D. 143; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

Held, also, that under the Judicature Act, 1873, s. 25, sub-s. 8, an injunction would be granted to restrain the town council from declaring his office void and electing a successor. *Ib.*

Held, further, that an action for this purpose was not business assigned to the Queen's Bench Division by the Judicature Act, 1873, s. 34. *Ib.*

The act of compounding with creditors under the Bankruptcy Act, 1869, s. 126, does not of itself render an office void, though it disqualifies the officer from acting by the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 52. The acceptance of a composition by creditors does not amount to the "obtaining of a certificate or payment in full of debts" within that section. *Hardwick* v. *Brown*, L. R. 8 C. P. 406; 28 L. T. 502; 21 W. R. 639.

Incompatible Offices—Accepting New Office.]—A corporator accepting a new office incompatible with the old one, thereby absolutely vacated and surrendered the latter. By a charter of a borough, there were to be ten aldermen and ten capital burgesses; and vacancies in the body of aldermen were to be filled up out of the capital burgesses:—Held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office. *Rex* v. *Hughes*, 6 D. & R. 443; 8 D. & R. 708; 5 B. & C. 886. S. P., *Rex* v. *Hubbald*, 9 D. & R. 143; 6 B. & C. 139; 5 L. J. (o.s.) M. C. 24.

The acceptance by a person holding a corporate office of another incompatible office, does not operate as an absolute avoidance of the corporate office, though it might be ground of amotion; and the acceptance of an incompatible office does not operate as an absolute avoidance of a former office, in any case where the party could divest himself of that office by his own act, and without the concurrence of another authority to his resignation or amotion, unless such authority is privy and consenting to the second appointment. *Rex* v. *Patteson*, 4 B. & Ad. 9; 1 N. & M. 612; 2 L. J., K. B. 33.

Held, also, that as long as he was an alderman and justice of the peace of a city of a county he was not a person capable of being appointed county treasurer. *Ib.*

Where a rule is obtained for a quo warranto, upon the ground that a party has vacated a corporate office, by having accepted a second incompatible office, the affidavits must show a valid appointment to the second office, the acceptance of which is made the ground of amotion. *Rex* v. *Day*, 9 B. & C. 702; 4 M. & R. 541; 7 L. J. (o.s.) K. B. 308. See *Rex* v. *Pateman*, *Rex* v. *Jones* and *Rex* v. *Tizzard*, A. VII. a.

Action for Penalties—Procedure.]—An action under section 224 of the Municipal Corporations Act, 1882, to recover a fine from any person for acting in a corporate office without being qualified is not a "proceeding" to which the Public Authorities Protection Act, 1893, applies, and therefore section 224 of the act of 1882 is not repealed by the act of 1893. *Humphriss* v. *Worwood*, 64 L. J., Q. B. 437.

Resignation—Power to Withdraw.]—Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36, which enacts that a person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof, the resignation is completed by the delivery of the writing to the town clerk and the payment of the fine, and cannot afterwards, even with the assent of the corporation, be withdrawn. *Reg.* v. *Wigan Corporation*, 54 L. J., Q. B. 338; 14 Q. B. D. 908; 52 L. T. 435; 33 W. R. 547; 49 J. P. 372.

Deputy of, not a Justice of the Peace.]—A charter provided that there should be two aldermen in a borough who should act for one year, by themselves, or their deputies; that, on their death or removal, other aldermen should be elected, who should act for the rest of the year, by themselves, or their deputies; that, in the absence of the aldermen, new aldermen might be elected in their room; and that the aldermen for the time being should be justices of the peace for the borough:—Held, that the deputy of an alderman was not a justice of the peace for the borough. *Jones* v. *Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 Car. & P. 459, 699; 3 L. J. (o.s.) K. B. 112; 27 R. R. 474.

c. AMOTION OF MEMBERS.

By-law giving Power of Amotion for just Cause, good.]—See *Rex* v. *Richardson*, **B.** IX. b.; and *O'Grady* v. *Mercers' Hospital*, **B.** V.

Effect of Municipal Corporation Acts, 1835 & 1882.]—Per Lopes, L.J.: The Municipal Corporation Acts have not taken away the power of a corporation to amove any of its members who is guilty of corrupt and dishonest conduct in his office. *Booth* v. *Arnold*, 64 L. J., Q. B. 443; [1895] 1 Q. B. 571; 14 R. 326; 72 L. T. 310; 43 W. R. 360—C. A.

Power to Amove, how to be Exercised.]—If a corporation amoves a member upon a non-charter or prescription day, it is as necessary that each member should be summoned, and have notice of the particular business intended to be proceeded upon, as in the case of a select number. *Rex* v. *Doncaster*, 2 Burr. 738; 2 Ld. Ken. 391.

A particular summons of a corporation assembly is requisite to amove a member. *Rex* v. *Liverpool*, 2 Burr. 723; 2 Ld. Ken. 424.

A power reserved to the crown in a charter of incorporation to amove, by order of council, one or more of the corporators, which declared that all or any of them so amoved should actually, and without further process, be amoved, and which also provided, at the same time, that upon such amotion the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re-election; and therefore an amoval of all is illegal and void. *Rex* v. *Amery*, 1 Anstr. 178; 2 Br. P. C. 336; 2 Term Rep. 515; 1 Term Rep. 575; 1 R. R. 306, 533. *But see* 4 Term Rep. 122.

Where a charter declared that "it should be lawful for the mayor and capital burgesses to remove any of their body for non-residence within the borough":—Held, that this gave them a discretionary and not a compulsory power of amotion. *Rex* v. *Westlooe*, 5 D. & R. 414.

Where non-residence is a ground for removing a corporator, it is unnecessary to summon him previously to come and reside. *Rex* v. *Lyme Regis*, 1 Dougl. 149.

A mandamus was refused to compel a corporation to meet for the purpose of considering the propriety of removing non-resident members, where the charter in terms required residence. *Rex* v. *Totness*, 5 D. & R. 481.

For what Cause.]—An alderman of London in custody in execution, and under an escape warrant, without probability of discharge, may be amoved. *Rex* v. *London*, 4 Dougl. 361.

A corporation, possessed of a common, made a by-law that every freeman might stock thereon with ten sheep. A freeman, who had stocked his full number, stocked ten more in the name of another freeman. For this he was disfranchised by the corporation:—Held, to be no cause of disfranchisement; and a peremptory mandamus was ordered to restore him. *Rex* v. *Great Grimsby*, 1 L. J., M. C. 23.

Remedy for Illegal Amotion.]—A town council, upon insufficient grounds, and by an illegal mode, passed a resolution removing an alderman, and declaring his office void. At the next meeting the council formally rescinded the previous resolution. The alderman obtained a rule for a mandamus to the corporation to restore him, on the ground that he might be liable to proceedings, if he continued to act merely upon the rescission of the resolution:—Held, that the corporation had done all they could do, and that there was no wrong which the mandamus could remedy. *Reg.* v. *Ryde Corporation*, 28 L. T. 629.

As to removing a Member without hearing him.]—See *Reg.* v. *Saddlers' Co.*, 10 H. L. Cas. 404, post, **B.** IX. b.

As to the Duty of the Council to declare the Office of Mayor, Alderman, or Councillor to be vacant on Bankruptcy or Absence.]—See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39.

IV. MAYOR.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 15, 16, 34-42.

Cannot sue as Individual on Contract entered into by him on behalf of himself and the other Burgesses.]—The highest bidder for lands sold by auction, and the mayor of a corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough, the vendors of the lands, signed a contract in which they mutually promised to fulfil the conditions of sale on their respective parts; the conditions stated the title of the corporation to the premises, and stipulated that they should convey and might re-sell on default; the only act therein mentioned to be done by the mayor was the receiving the deposit:—Held, that he could not maintain an action in his individual capacity against the purchaser for breach of this contract. *Bowen* v. *Morris*, 2 Taunt. 374.

Disqualification—Interest in Contract.]—In an action against a defendant for penalties for acting as mayor while disqualified, it appeared that persons who had contracted with the council, who were constituted the local board of health, to construct public works in the borough, purchased from the defendant iron work for the purpose of fulfilling their contract:—Held, that the defendant had not an interest in the contract within 5 & 6 Will. 4, c. 76, s. 28. *Le Feuvre* v. *Lankester*, 3 El. & Bl. 530; 2 C. L. R. 1426; 23 L. J., Q. B. 254; 18 Jur. 894; 2 W. R. 307.

The defendant, having contracted with commissioners under a local act to erect waterworks for supplying the town with water, assigned by deed the contract and the works in an incomplete state to the commissioners. The deed contained a covenant on the part of the commissioners to pay the defendant 850*l.* if they should abandon the works, or, having completed them, should obtain a specified supply of water of a certain quality. There followed a covenant on the part of the defendant not to molest or obstruct the commissioners in proceeding with the works. By the order of the general board of health, by which the town council was constituted the local board of health, the powers, contracts, and property of the commissioners were vested in the town council. The sum of 850*l.* remained unpaid when the defendant was elected and acted as mayor:—Held, that he was not disqualified from acting as mayor by the deed, because the first covenant was a security for the payment of

money only, within the 5 & 6 Vict. c. 104, s. 1, and both covenants were merely ancillary to the assignment, and therefore, independently of the 5 & 6 Vict. c. 104, s. 1, not within 5 & 6 Will. 4, c. 76, s. 28. *Ib.*

Acting without Authority—Costs of Relator.]—A quo warranto alleged that there was a town called Bala, and that the defendant, without right, exercised the office of mayor of the town, and, together with two other persons, the powers and privileges of a body corporate, by the name and description of the mayor and bailiffs of the borough of Bala. He let judgment go by default, whereupon judgment of ouster was entered up with costs to the relator:—Held, that the relator was entitled to costs under 9 Anne, c. 20, s. 5, as on this record it must be taken against the defendant that the office which he was charged with assuming was a corporate office in a corporate place. *Lloyd* v. *Reg.*, 2 B. & S. 656; 31 L. J., Q. B. 209; 10 W. R. 625—Ex. Ch.

Appointing Deputy.]—Until he has taken the oath of office, a mayor cannot appoint a deputy. *Rex* v. *Roberts*, 5 N. & M. 130; 3 A. & E. 771; 1 H. & W. 444; 4 L. J., M. C. 118.

Acting as a Justice of the Peace.]—A mayor of a borough (who is a justice of the peace by virtue of his office, under 5 & 6 Will. 4, c. 76, s. 57) is not a justice of the quorum. Per Cockburn, C.J. Semble, by Blackburn, J., that he is. *Reg.* v. *Llangian*, 4 B. & S. 249; 32 L. J., M. C. 225; 8 L. T. 422; 11 W. R. 776.

Before 24 & 25 Vict. c. 75, s. 1, the mayor was not entitled under 5 & 6 Will, 4, c. 76, s. 57, to preside at meetings of the justices. *Lloyd, Ex parte*, 30 L. J., Q. B. 2; 6 Jur. (N.S.) 1094; 3 L. T. 270; 9 W. R. 34.

Salary of.]—Sums of money to meet payments for purposes unauthorised by the Municipal Corporations Act, 1882, should not be added to the mayor's salary so as to evade the provisions of that act. *Att.-Gen.* v. *Cardiff Corporation*, 63 L. J., Ch. 557; [1894] 2 Ch. 337; 8 R. 268; 70 L. T. 591.

A reasonable addition may be made to the salary of the mayor in anticipation that increased expenditure may be incurred by him in celebrating some national event. *Ib.*

See also *Att.-Gen.* v. *Blackburn Corporation*, 57 L. T. 385; **A.** IX. a.

Order, not under Seal, for Goods by de facto Mayor—Recognition of Contract—Liability of Corporation.]—See *De Grave* v. *Monmouth*, **B.** X. b.

V. TOWN COUNCIL.

Powers — Purchase of Lands.]—The town council of a borough contracted to purchase baths and washhouses which had been commenced by a private society, and were held under a sub-lease of a portion of lands comprised in a lease of land demised by the owner of the fee, and which were thus subject to a rent in addition to the rent reserved in the sub-lease, and to the covenants and conditions in the original lease:—Held, that it would be a breach of trust for the town council to purchase lands, the interest in which might be lost by the default of others, and that specific performance ought not to be enforced. *Mulholland* v. *Belfast Corporation*, 9 Ir. Ch. R. 292.

—— **Contract for Prison Purposes.**]—Where a grant of quarter sessions has been made by the crown, under 5 & 6 Will. 4, c. 76, to a newly incorporated borough without a gaol, the town council has no power, under 5 Geo. 4, c. 85, and 5 & 6 Will. 4, c. 76, to contract with the justices of the county to send the borough prisoners to the county gaol. *Reg.* v. *Lancashire JJ.*, 3 P. & D. 86; 11 A. & E. 144; 9 L. J., Q. B. 9; 4 Jur. 121.

Court of Requests — Regulation of Fees.]—By an act of parliament a court of requests was created at Bristol, and fees, according to a table, were fixed to be paid to the assessor and officers of the court, with power for the justices of the peace for the city, at any general quarter sessions of the peace, to lessen or reduce them. By 6 & 7 Will. 4, c. 105, s 8, everything provided in any local act of parliament to be done by the justices or by some particular class or description of members of such body corporate, being justices, at some court of general or quarter sessions assembled, and which does not relate to the business of a court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council. The town council, acting under 5 & 6 Will. 4, c. 76, s. 124, and 6 & 7 Will. 4, c. 105, s. 8, by an order of council reduced the fees payable to the assessor and clerk of the court:—Held, that the regulation of the fees of the court of requests was a matter relating to the business of a court of civil jurisdiction, and that the town council had no authority to interfere with it. *Palmer* v. *Powell*, 6 M. & W. 627; 9 L. J., Ex. 209; 4 Jur. 825.

Meetings—Notice of.]—The 5 & 6 Will. 4, c. 76, s. 69, requires notice of the business to be transacted at meetings of the town council to be given to every member three days before the meeting, but excepts the four quarterly meetings for the transaction of general business:—Held, that this exception only applies to the ordinary routine business, and would not justify the transaction of special business, such as the election of a coroner, without notice. *Reg.* v. *Grimshaw*, 10 Q. B. 747; 16 L. J., Q. B. 385; 11 Jur. 965.

When the powers of trustees under a local act have been transferred to the body corporate of a borough, under 5 & 6 Will. 4, c. 76, s. 75, the procedure is to be according to that directed by s. 60, and not that directed by the local act; and therefore the notice of meeting directed by s. 69, for the meetings of the town council, is the proper notice to enable them to exercise the powers under the local act. *Kidderminster Town Council* v. *Court*, 1 El. & El. 770; 28 L. J., M. C. 148; 5 Jur. (N.S.) 1055.

A local act for paving a borough provided that all orders and proceedings of the commissioners for executing the act should be made at a public meeting, of which notice in writing should be given, by affixing the same upon the door of the parish church, on the Sunday, and upon the town hall two days preceding such intended meeting. Under 5 & 6 Will. 4, c. 76, s. 75, the powers of the commissioners were transferred to and were thenceforth exercised by the town council of the borough. By s. 69, all acts whatsoever authorised or required by virtue of this act to be done by the council of such borough may be done by the

majority of members present at any meeting held in pursuance of this act; provided always that, previously to any meeting of the council held by virtue of this act, a notice of the time and place of such intended meeting shall be given three clear days at least before such meeting, by fixing the said notice on or near the door of the town hall of the borough:—Held, that notice of a meeting of the town council, for the purpose of appointing overseers to make a rate for the purposes of the local act, was properly given by affixing the same on or near the door of the town hall, in accordance with 5 & 6 Will. 4, c. 76, s. 69. *Ib.*

Where a notice of a meeting for corporate purposes is regularly given, a majority of those present has power to do any corporate act: but if the meeting is accidental, they can only proceed to business if they are unanimous: for if one member only dissents, he has an absolute negative. *Rex* v. *Kynaston*, 2 Selw. N. P. 1143.

—— **Minutes of.**]—Under 5 & 6 Will. 4, c. 76, s. 69, the minutes of a meeting of a town council ought to be entered and signed by the chairman at the time of the meeting, and not afterwards. *Reg.* v. *Evesham Corporation*, 3 N. & P. 351; 8 A. & E. 266; 1 W. W. & H. 428; 2 Jur. 819.

Members of, personally liable to Corporation for Improper Alienation of Property.]—See *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1.

VI. RECORDER.

See Municipal Corporations Act, 1882, ss. 163, 165—168, 175—177.

Jurisdiction.]—By 5 & 6 Will. 4, c. 76, s. 105, the recorder of a municipal borough has no power in quarter sessions to hear an appeal against a refusal to grant a licence for keeping an inn. *Reg.* v. *Cockburn or Bristol Recorder*, 4 El. & Bl. 265; 24 L. J., M. C. 43; 1 Jur. (N.S.) 373; 3 W. R. 69. See also *Reg.* v. *Deane*, 2 Q. B. 96; 10 L. J., M. C. 126.

The recorder of a borough has jurisdiction to hear an appeal against an order made by justices for the costs of removing an insane pauper to a lunatic asylum. *Reg.* v. *St. Lawrence*, 11 Ad. & E. 170; 3 P. & D. 155; 4 Jur. 245.

The recorder of a borough, which is a county of a city, has jurisdiction to appoint inspectors of weights and measures for the district, and to audit their accounts, under 5 & 6 Will. 4, c. 76, s. 105. *Reg.* v. *Kingston-upon-Hull Recorder*, 7 L. J., M. C. 100.

The plaintiff was appointed by the justices of the county of S. in quarter sessions inspector of weights and measures, for a district comprising the town of B. Subsequently the town of B. was incorporated, and obtained a grant of a separate court of quarter sessions. The recorder of B., in quarter sessions for B., appointed the defendant inspector of weights and measures. The justices for the borough of B. in petty sessions appointed the plaintiff inspector:—Held, that the appointment was neither in the recorder in quarter sessions, nor in the justices of the borough in petty sessions, but in the quarter sessions for the county of S., in virtue of whose appointment the plaintiff recovered. *Daly* v. *Sharwood*, 6 El. & Bl. 830; 25 L. J., M. C. 122; 3 Jur. (N.S.) 63; 4 W. R. 775.

The justices of the borough of L. made an order for the removal of a pauper from L. to A.; notice of appeal was given by the overseers of A. to the sessions of the county in which L. was situate, instead of to the borough sessions, and on discovering their error, a letter was written one day before the holding of the borough sessions, abandoning the notice, whereupon the respondents attended at the last-named sessions, and obtained an order for their costs:—Held, that the recorder for the borough had jurisdiction to make such order, and that under the circumstances the respondents were entitled to their costs. *Reg.* v. *Leeds Recorder*, 3 El. & El. 561; 30 L. J., M. C. 86; 7 Jur. (N.S.) 210; 3 L. T. 699; 9 W. R. 270.

The recorder of a borough has power, under 11 & 12 Vict. c. 78, to reserve questions of law for the consideration of the judges. *Reg.* v. *Masters*, T. & M. 1; 1 Den. C. C. 332; 3 New Sess. Cas. 326; 2 Car. & K. 930; 18 L. J., M. C. 2; 12 Jur. 942; 3 Cox, C. C. 178.

The authority of a recorder of a borough is not determined or suspended by the coming of the judges into the county, and acting under their commissions of oyer and terminer and general gaol delivery; and therefore he may hold quarter sessions of the peace during the time of the assizes in the same county. *Smith* v. *Reg.* 3 New Sess. Cas. 564; 13 Q. B. 738; 18 L. J., M. C. 207; 13 Jur. 850.

—— **Costs.**]—The recorder of a municipal sessions may, on ordering costs, refer the taxation of the amount to an officer of the court; but such taxation must be adopted by him during the continuance of the same sessions. An order for such costs, founded on a subsequent adoption, is invalid. *Reg.* v. *Long*, 1 G. & D. 367; 1 Q. B. 740; 6 Jur. 98.

Writ of Error, to whom Directed.]—A writ of error should be directed to the judge, and not to the recorder of a borough court, but, in such case, an amendment will be allowed. *Spencer* v. *Haggiadur*, 5 D. & L. 68; 11 Jur. 948.

Deputy Recorder—Jurisdiction.]—On an appeal against a poor-rate at a borough quarter sessions the rate was ordered to be amended, with costs, and the appeal was adjourned to the next sessions for the purpose of ascertaining the amount of the costs. At the next sessions the deputy recorder, who was a ratepayer in one of the parishes in the union, made an order which fixed the amount of the costs:—Held, that the making such order was a judicial act; that the deputy recorder was not a justice of the peace for the borough, and therefore the 16 Geo. 2, c. 18, did not apply; and consequently the order was void. *Reg.* v. *Cambridge Recorder*, 8 El. & Bl. 637; 27 L. J., M. C. 160; 4 Jur. (N.S.) 334; 6 W. R. 80. *See* 40 Vict. c. 11.

—— **Appointment.**]—A borough having first received a recorder by a charter of Car. 1, a subsequent charter of Car. 2, after nominating S. to be the first and modern recorder under that charter, declared that it should be lawful for S., the modern recorder, to nominate a sufficient person to be his deputy in the office, and to have the same powers:—Held, that this did not extend the power of appointing a deputy to the successors of S. in the office of recorder. *Rex* v. *St. Albans*, 12 East, 559.

By charter a corporation was to have a capital seneschal or high-steward, and a sub-seneschal or under-steward, by the latter of whom the judicial ministerial functions of a recorder were to be performed, but no authority was given him to appoint a deputy; and although a by-law of the corporation required that the under-steward, or his sufficient deputy, should be attendant at every court, to discharge the duties of his office:—Held, that the under-steward could not appoint a deputy generally to discharge all his ministerial duties. *Rex* v. *Gravesend Corporation*, 4 D. & R. 117; 2 B. & C. 602; 2 L. J. (O.S.) K. B. 94.

A justification in an action stated that by custom a court of record had, from time immemorial, been holden before the steward and portreeve of a borough, or their sufficient deputy or deputies: and that a court was holden according to such custom before A., being the deputy of B., who was then steward and portreeve of the borough:—Held, that upon this plea the two offices must be taken to have been compatible, and that the steward and portreeve might be united in the same person; and that the appointment of the deputy by the person holding both offices was sufficient. *Green* v. *Davies*, 3 B. & Ald. 60.

Recorder representing County Authority under Highway Act.]—*See* WAY.

As to the Liability of the Borough Fund for the Salary of the Recorder, where the Population is less than Ten Thousand.]—See *Thetford Corporation* v. *Norfolk County Council*, 67 L. J., Q. B. 55; 77 L. T. 498.

VII. OFFICERS.

a. TOWN CLERK.

See Municipal Corporations Act, 1882, ss. 17, 43, 75.

Appointment.]—By a local act of parliament creating a court of request for a borough, it was enacted, that the mayor, recorder, deputy recorder, aldermen, and common councilmen for the time being of the borough, the justices of the peace for a certain district, together with other persons therein mentioned, should be the commissioners thereof; and that in case of a vacancy in the situation of clerk of the court, the mayor and aldermen of the borough for the time being, or the major part of them, should appoint a successor, and that until such appointment should be made, the commissioners, or any three or more of them, should nominate officers to do the business of the court. At a meeting of the town council, specially summoned for the purpose of electing a clerk, the plaintiff, who was a member of the council, was elected by the council, and before the end of the election he tendered to the mayor his resignation of the office of town councillor, together with 50*l.* as a fine on resignation, under 5 & 6 Will. 4, c. 76, s. 51. No by-law had been made to enforce a fine on resignation, and therefore the mayor returned the 50*l.* in the presence of the council, after the election. The plaintiff's seat in the council was afterwards filled by the election of another person; and at a quarterly meeting of the town council, of which no notice had been given, the plaintiff was again elected by the town council:—Held, first, that neither s. 73 of 5 & 6 Will. 4, c. 76, nor s. 8 of 6 & 7 Will. 4, c. 104, was applicable to this case. *Staniland* v. *Hopkins*, 9 M. & W. 178.

—— **Within 5 & 6 Will. 4, c. 76, s. 72.**]—Held, secondly, that the case was within s. 72 of 5 & 6 Will. 4, c. 76; the true construction of which was, that the body corporate, under that act, should be trustees or commissioners for executing, by the town council, the powers and provisions of all acts of parliament, of which powers and provisions the old body corporate, or any of the members thereof, in their corporate capacity, were sole commissioners or trustees before the election of the town council; and as the mayor and aldermen were, by the local act, sole trustees or commissioners for the purpose of appointing the clerk, that their powers devolved upon the town council, and that the plaintiff was duly elected at the first meeting; that, under all the circumstances of the case, the plaintiff's resignation of the office of town councillor was sufficient; but that, if it was not, his election to the office of clerk had the effect of vacating his office of town councillor. *Ib.*

A borough, until May 1st, 1836, had its own quarter sessions, and W. held the offices of town clerk and clerk of the peace. He resigned, and thereupon, by a resolution of the town council, on July 20th, 1836, S. was elected town clerk; but no step was taken towards investing him with the office. At an adjourned meeting of the council, July 25th, 1836, a resolution was passed, rescinding that of July 20th, and by another resolution T. was elected town clerk. In August, 1836, the borough obtained a grant of quarter sessions, and on August 15th T. was, by resolution of the council, elected clerk of the peace:—Held, on motion for a quo warranto information against T., at the instance of S., for claiming to exercise the two offices, that T. was legally appointed town clerk on July 25th, and clerk of the peace on August 15th; that the offices were not full at the time of such respective elections; that T. could not be presumed to claim the office of clerk of the peace as incidental to the office of town clerk, by the appointment of July 25th, no specific act appearing to have been done by him in the capacity of clerk of the peace between that time and August 15th. *Reg.* v. *Thomas*, 8 A. & E. 183; 3 N. & P. 288; 7 L. J., Q. B. 141; 2 Jur. 347.

Objection to Title.]—The office of town clerk, under the 5 & 6 Will. 4, c. 76, is not the same as in the old corporations; and an objection to his title under that act is not aided by the fact of his having held the office for more than six years before the act passed, under a valid appointment. *Rex* v. *Poole*, 1 Jur. 942.

Fees and Remuneration.]—A town clerk of a borough cannot maintain an action against the corporation for fees in respect of the performance of the duties imposed upon him by the Reform Act or the Municipal Corporations Act; although he receives no stated salary as town clerk, and although the then corporation, in several years before the passing of the Municipal Corporations Act, made payments to him for the performance of the duties imposed on him by the Reform Act. *Jones* v. *Carmarthen Corporation*, 8 M. & W. 605; 10 L. J., Ex. 401.

Salary in Lieu of Fees.]—An agreement between a municipal corporation and their town

clerk, that he shall receive a fixed salary in lieu of the fees payable under 5 & 6 Will. 4, c. 76, s. 124, and that, to carry out such agreement, he shall pay over to the borough fund so much of the amount received for fees as exceeds that salary, is illegal. *Liverpool Corporation* v. *Wright*, 1 Johnson. 359; 28 L. J., Ch. 868; 5 Jur. (N.S.) 1156; 7 W. R. 728.

A town council resolved, "that one hundred guineas be fixed as the salary of the town clerk, for his attendance on the business of the council and committees, and that he be paid the usual charges in defending and bringing actions." On motion to review the taxation of the town clerk's bills:—Held, that the master proceeded on the right principle, in considering the salary as a remuneration for all business, except bringing and defending actions. *Thomas* v. *Swansea Corporation*, 2 D. (N.S.) 470; 12 L. J., Ex. 73.

Where a town clerk was appointed to his office upon a resolution of the council, fixing his salary, as town clerk, at 250*l.* a year, and setting out the duties of his office as town clerk to be, among other things, to prepare all precepts, orders, and other documents required for levying borough rates, to abide by and see all orders of the council properly carried out, and all necessary documents prepared for so doing, and to act as the professional adviser of the mayor and council in the business of the council, but with the proviso, that he be paid the usual professional charges for conducting or opposing actions or suits, and all travelling and other expenses out of pocket:—Held, that he was entitled to be paid his charges for documents prepared and attendance given as a solicitor, upon instructions of the council, in order to obtain legal advice as to the validity of a borough rate, against the enforcement of which the council was threatened with litigation; for that such charges were either, within the meaning of the resolution, charges for conducting or opposing an action or a suit, or they were charges for business done upon request, wholly without any of the terms or consideration of the resolution, since the duty of the town clerk, as such, as specified in the resolution, was, in such a case, only to advise to the best of his ability, and not to guarantee the legal accuracy of his opinion. *Reg.* v. *Prest*, 16 Q. B. 33; 20 L. J., Q. B. 17; 15 Jur. 554.

The business which a town clerk was to perform, as specified in his appointment, included "parliamentary proceedings":—Held, that he could not recover any remuneration beyond his salary for time occupied in attendance on and correspondence with the council, and journeys to London, with reference to bills in parliament relating to the town. *Morgan* v. *Birmingham Corporation*, 5 W. R. 291.

"Expenses Incurred."]—A town clerk cannot claim repayment of money expended by him in the employment of persons to do work in preparing the register of parliamentary electors which he and his clerks might have done. *Reg.* v. *Kingston-on-Hull* (*Governors and Guardians*), 3 W. R. 524.

By 6 & 7 Vict. c. 18, the town clerks of boroughs are directed to prepare the list of persons entitled to vote for the election of members of parliament; and by s. 55, the expenses incurred by them in carrying the act into effect are to be repaid:—Held, that the words "expenses incurred" are confined to costs out of pocket, and that a town clerk is not entitled to any further remuneration or the time and labour he may devote to the performance of the duties imposed on him by the act. *Reg.* v. *Kingston-on-Hull* (*Governors and Guardians*), 2 El. & Bl. 182; 22 L. J., Q. B. 324; 17 Jur. 914.

Under 6 & 7 Vict. c. 18, s. 48, the town clerk of a borough is bound, incidentally to his office, to cause the lists of voters to be copied and printed, and to have the names arranged and numbered; and if he hires a person to do this for him, to make copies for the printer, and to superintend the printing, he is not entitled to be reimbursed the expense by the parish officers under s. 55, unless he cannot, by the reasonable labour of himself and his ordinary assistants, perform the duty without extra aid. But he is entitled to be reimbursed for the expense of printing. *Reg.* v. *Allday*, 7 El. & Bl. 799; 26 L. J., Q. B. 292; 3 Jur. (N.S.) 961; 5 W. R. 625.

Lien as a Solicitor.]—A town clerk has a lien on papers of the corporation with respect to which he has done work as an attorney or a solicitor, but not on such as he holds merely as town clerk. *Rex* v. *Sankey*, 5 A. & E. 423; 6 N. & M. 839; 5 L. J., K. B. 255.

Incompatible Offices.]—Where a town clerk's accounts were allowed by the aldermen, or where a town clerk acted ministerially, under the aldermen, who were judicial officers, the offices were incompatible, and the appointment of an alderman to be the town clerk vacated his former office. *Rex* v. *Pateman*, 2 Term Rep. 777; 1 R. R. 621.

In a borough, by charter, the mayor, burgesses, and commonalty were to elect a town clerk, who was also to be clerk of the peace, clerk of assize, and prothonotary; and the mayor, recorder, and town clerk were to hold pleas of certain actions. The mayor, recorder, and a common council were to enact by-laws for the good order and government of the borough. None of the common council held any judicial office in any court where the town clerk officiated. His accounts were audited by a committee, named by the mayor and burgesses in common hall. No fixed salary was allowed by the corporation; but he was remunerated by certain fees of right payable to him:—Held, that the offices of common councilman and town clerk were not incompatible. *Rex* v. *Jones*, 1 B. & Ad. 677; 9 L. J. (O.S.) K. B. 103.

The common clerk of a borough was appointed by the mayor, aldermen, and bailiffs, removable at their pleasure, and with a salary variable at their pleasure; and it was his duty to attend the corporate meetings, and take minutes of the proceedings. The office of such common clerk, and that of alderman, are incompatible; and the acceptance of the former vacated the latter. *Rex* v. *Tizzard*, 4 M. & R. 400; 9 B. & C. 418; 7 L. J. (O.S.) K. B. 275.

A jurat of the corporation of Hastings might be elected town clerk of the corporation. *Milward* v. *Thatcher*, 2 Term Rep. 81; 1 R. R. 431.

But the two offices were incompatible, and the acceptance of the latter, though an inferior office, vacated the former. *Ib.*

Receiving Trust Moneys for Corporation.]—A municipal corporation were trustees of a charity. They permitted their town clerk to receive and retain the trust moneys, instead of seeing it applied to the purposes of the trust:—Held, that the corporation and the town clerk were liable for the breach of trust. *Att.-Gen.* v. *Leicester Corporation*, 7 Beav. 176.

As to Liability to Dismissal.]—See *Tibbits, In re, Eggington, Ex parte*, and *Rex* v. *Harris*, A. VII. i.

b. CLERK OF THE PEACE FOR BOROUGH AND CLERK TO BOROUGH JUSTICES.

See Municipal Corporations Act, 1882, ss. 164, 159.

Nature of Appointment]—A clerk to the justices of a borough, appointed under 5 & 6 Will 4, c. 76, s. 102, holds office only during the pleasure of the justices, and therefore a quo warranto will not lie for his office. *Reg.* v. *Fox*, 8 El. & Bl. 939; 27 L. J., Q. B. 151; 4 Jur. (N.S.) 410; 6 W. R. 282.

—— **Interest in Prosecutions.**]—Where a person is interested in the prosecution of parties committed for trial by the justices of a borough, this does not disqualify him from being appointed clerk to the justices, nor is the office avoided if, after such appointment, he becomes so interested. He is only liable under 5 & 6 Will. 4, c. 76, s. 102, as having acted illegally. *Ib.*

Acting as—Penalty.]—By 5 & 6 Will. 4, c. 76, s. 102, the penalty of 100*l* is confined to those persons who, being aldermen or councillors or clerks of the peace of the borough, shall act as clerks to the justices of the borough, and at the same time be employed in the prosecution or defence of any prisoner committed by such justices, and is not extended to all persons who shall act as clerks to the justices, and at the same time be employed in the prosecution or defence of any prisoner committed by such justices. *Coe* v. *Lawrence*, 1 El. & Bl. 516; 22 L. J., Q. B. 140: 17 Jur. 1115; 1 W. R. 146.

Interest in Prosecutions—Indictment.]—A clerk to the justices of a borough which had no separate quarter sessions was in partnership with P., who was clerk of the peace for the county, and who was entitled to receive fees upon the arraignment and trial of all prisoners at the quarter sessions of the county. By arrangement between him and P., the former was entitled to receive, and did receive, one-half of the fees taken by P.:—Held, that such clerk was liable to an indictment under s. 102, being interested in the prosecution of offenders within the proviso to s. 102. *Reg.* v. *Fox*, 1 El. & El. 729; 29 L. J., M. C. 54; 5 Jur. (N.S.) 1241; 1 L. T. 216; 8 W. R. 93—Ex. Ch.

Held, by the Queen's Bench, that 18 & 19 Vict. c. 126, s. 18, providing compensation to clerks of the peace for the diminution of their fees, did not affect the operation of 5 & 6 Will. 4, c. 76, s. 102. *Ib.*

A deed was subsequently entered into between the partners, by which the clerk to the borough justices was to have no interest in the fees received by P.:—Held, that the clerk thereby ceased to be interested in the prosecutions, the mere fact of partnership with P. not constituting such interest. *Fox* v. *Williams*, 3 L. T. 268.

Removal.]—The removal of clerk of the peace of a borough for misbehaviour is vested by 5 & 6 Will. 4, c. 76, s. 105, in the recorder; such power of removal being given by 1 Will. & M. sess. 1, c. 21, s. 6, to the quarter sessions in counties, and the town council has no power to remove. *Reg* v. *Hayward*, 2 B. & S. 585; 31 L. J., M. C. 177; 9 Jur. (N.S.) 45; 6 L. T. 285; 10 W. R. 558.

Salaries and Fees.]—As to the liability of the borough fund for the salaries of the recorder and clerk of the peace, and the fees of the clerk to the visiting justices of borough asylums, in boroughs where the population is less than 10,000 (the county council being only liable in such boroughs for the salary of the clerk to the borough justices at petty sessions), see *Thetford Corporation* v. *Norfolk County Council*, 67 L. J., Q. B. 55; 77 L. T. 498.

c. TREASURER.

See Municipal Corporations Act, 1882, ss. 18, 43.

Appointment—Bond for Discharge of Duties.]—The 5 & 6 Will. 4, c. 76, s. 58, required that the council of a borough should annually elect the treasurer of the borough. While that act was in force, M. was elected treasurer for "the year ending 9th November, 1842, if it should so long please the council, but not otherwise." He gave a bond with sureties for the discharge of the duties of his office. The bond recited the election, and was conditioned for the due accounting by M. for all such moneys, &c., "as I, M., shall or may recover, or receive, in virtue of my appointment as treasurer as aforesaid, during the whole time of my continuing in the said office, in consequence of the election, or under any annual or future election of the council to the said office." After this bond had been given, the 6 & 7 Vict. c. 89, was passed. The 6th section repealed the 58th section of the previous statute, and directed that, instead of the treasurer being annually elected, he should "hold his office during the pleasure of the council for the time being." M. was re-elected in November, 1843, after the passing of this latter statute; no fresh bond was taken:—Held, that, under the original bond, the sureties continued liable; that the election in November, 1843, was a future election, within the true intent and meaning of the bond. *Oswald* v. *Berwick-upon-Tweed Corporation*. 5 H. L. Cas. 856; 25 L. J., Q. B. 383; 2 Jur. (N.S.) 743; 4 W. R. 738. Affirming, 3 El. & Bl. 653—Ex. Ch.

—— **Change in Tenure.**]—A condition of a bond dated the 8th October, 1839, after reciting that P. had been appointed treasurer of a borough under the 5 & 6 Will. 4, c. 76, was, that he should account for and apply all money which should come to his hands as treasurer "(whether by virtue of his present or any subsequent appointment to the office), according to the directions of the statute, and in every other respect act in conformance with the same, and all other laws and regulations now or hereafter to be in force touching the office of treasurer, or the person or persons performing or liable to perform the duties thereof." In an action against the sureties for a breach of duty by him as treasurer under an appointment by virtue of the 6 & 7 Vict. c. 89, s. 6, which enacted that the treasurer, instead of being annually elected, as under the 5 & 6 Will. 4, c. 76, s. 58, should thenceforth hold his office during the pleasure of the council for the time being:—Held, that the bond remained in force notwithstanding the change in the tenure of the office. *Dartmouth Corporation* v. *Silly*, 7 El. & Bl. 97; 26 L. J., Q. B. 90; 3 Jur. (N.S.) 434; 5 W. R. 255.

—— **Year of Office.**]—The condition of a bond, after reciting that S. had been appointed treasurer of a borough, under 5 & 6 Will. 4, c. 76 (which by s. 58 required the treasurer of every borough to be appointed every year), was, that he should faithfully, and according to the provisions of the act, and of such statutes as might thereafter be passed relating to the office, conduct himself in the office, and perform all the duties thereof:—Held, that the bond did not extend beyond the year of office for which S had been appointed at the time of the execution of the bond. *Cambridge Corporation* v. *Dennis*, E. B. & E. 660; 27 L. J., Q. B. 474; 5 Jur. (N.S.) 265; 6 W. R. 653.

Appointment by Majority of Members present at Meeting.]—See *Cortis* v. *Kent Waterworks Co.*, **B.** II.

Payments by.]—The treasurer of a corporation paid to their former clerk (the defendant) his year's salary, both parties believing him authorised to make the payment. In fact he had no such authority, and the corporation afterwards repudiated the payment, and discharged the defendant from his situation. The defendant kept the money, treating it as having been paid on behalf of the corporation. The plaintiff having, as the present clerk to the corporation, brought an action to recover a sum of money paid to the defendant on account of the corporation, and the defendant having pleaded a set-off for unpaid salary, being the sum so paid to him without authority by the treasurer, the plaintiff relied on the payment of the salary as an answer:—Held, that the payment was an answer to the set-off, the corporation being entitled to ratify the act of their treasurer at the time of trial. *Simpson* v. *Eggington*, 10 Ex. 844; 24 L. J., Ex. 312.

Before the Municipal Corporations Act.]—By the Gravesend Pier Act, 3 & 4 Will. 4, c. 101, s. 18, the corporation is empowered to appoint clerks, treasurers, collectors, and such other officers or assistants as they may think necessary for the purposes of the act. By s. 19, it shall not be lawful for the corporation to appoint the person who may be appointed the clerk in the execution of the act, the treasurer for the purposes of the act; and a penalty is imposed on any person being the clerk, or his partner or clerk, who shall in any manner officiate for the treasurer:—Held, that by the latter section, the corporation was prohibited from appointing the clerk to such officer as assistant treasurer; but, where the corporation had so appointed the clerk, and he had discharged some of the duties of the treasurer, it was a question for the jury, whether he did so bonâ fide, and in the belief that he was legally appointed by them as an independent officer, or colourably and in evasion of the act; and, in the former case, he would not be liable to the penalty for officiating for the treasurer, but in the latter he would. *Hawkins* v. *Newman*, 4 M. & W. 613; 1 H. & H. 471; 8 L. J., Ex. 82.

Action Referred by—No Personal Liability.]—Where a company was authorised by statute to sue and be sued by their treasurer, who was to incur no personal liability, and two actions against and by the treasurer had been referred to arbitration, a motion for attachment against the treasurer for non-payment of the damages and costs awarded was refused, but a mandamus to him to pay was granted. *Corpe* v. *Glyn*, 1 L. J., K. B. 272.

d. JUDICIAL ASSESSORS.

See Municipal Corporations Act, 1882, ss. 175—177.

Salary—Action for.]—The judge and assessor of a borough court, who has been appointed by the borough council with a salary, under 5 & 6 Will. 4, c. 76, cannot maintain an action against the corporation for the amount of such salary. *Addison* v. *Preston Corporation*, 12 C. B. 108; 21 L. J., C. P. 146; 16 Jur. 643.

e. CORONER.

See Municipal Corporations Act, 1882, ss. 171—174.

Appointment.]—Quære, whether a coroner in a borough, under the 5 & 6 Will. 4, c. 76, can regularly be (by s. 62) appointed before the grant of a court of quarter sessions has passed the great seal, though within ten days after her Majesty's pleasure to make the grant has been notified to the council. *Reg.* v. *Grimshaw*, 10 Q. B. 747; 16 L. J., Q. B. 385; 11 Jur. 965.

But a coroner having acted under such appointment, and been recognised in his office by the council, for several years:—Held, that the office was full, and that an information, in the nature of a quo warranto, lay to oust a subsequently appointed coroner. *Ib.*

A coroner cannot be elected at a meeting of the council, held by adjournment from a quarterly meeting, no summons or notice having been previously served upon the members of the council stating that such business was to be transacted. *Ib.*

—— **Validity of.**]—The validity of a charter incorporating a borough cannot be questioned by an information in the nature of a quo warranto against the coroner of the borough questioning his right to the office, to which he had been appointed under the charter. *Queen* v. *Taylor*, 3 P. & D. 652; 9 L. J., Q. B. 219.

Illegality—Costs of Relator.]—Previously to 5 & 6 Will. 4, c. 76, a mayor, by virtue of his office, was coroner of the borough. On the passing of that act, a separate court of quarter sessions was granted, and a coroner was appointed by virtue of s 62. Upon an information for exercising the office of coroner, judgment having been given for the crown:—Held, that the relator was not entitled to costs under 9 Anne, c. 20, the office not being a corporate office within the meaning of that statute. *Reg.* v. *Grimshaw*, 2 B. C. Rep. 146; 5 D. & L. 249; 12 Jur. 134.

See CORONER.

f. OVERSEERS.

See Municipal Corporations Act, 1882, ss. 75, 238.

Appointment.]—The mayor or head officer of towns corporate and boroughs has the sole appointment of overseers by virtue of 43 Eliz. c. 2, s. 8, and 5 & 6 Will. 4, c. 76. s. 6. *Reg.* v. *Preston*, 12 Q. B. 391; 3 New Sess. Cas. 312; 18 L. J., M. C. 10; 13 Jur. 7.

A person appointed to act as overseer for collecting a borough rate in a portion of a parish, under 7 Will. 4 & 1 Vict. c. 81, s. 3, is not one of the borough officers who are to be appointed in every year under 5 & 6 Will. 4, c. 76, s. 58. *Birmingham Corporation* v. *Wright*, 16 Q. B. 63; 20 L. J., Q. B. 214.

g. Officers of Gaol.

Chaplain.]—Prior to 5 & 6 Will. 4, c. 76, the city of Bath was incorporated by the name of the mayor, aldermen, and citizens of the city of Bath. The charter contained the grant of a gaol and a limited criminal jurisdiction, to be exercised by the recorder and the corporate justices, but not extending to felonies. It also authorised the mayor, aldermen, and citizens annually to elect two of themselves to be bailiffs of the city, and directed that the bailiffs for the time being should be keepers of the gaol thereof. After the passing of the 5 & 6 Will. 4, c. 76, the new corporation received the grant of a separate court of quarter sessions, with power to try felonies, and persons were appointed justices for the city by commission; but the corporation continued to elect one bailiff, who continued to be the keeper of the gaol, and appointed the gaoler. In 1842 a new gaol and house of correction were built under 7 Will. 4 & 1 Vict. c. 78, to which the town council appointed a chaplain:—Held, that the right to appoint the chaplain of the new gaol and house of correction, under 2 & 3 Vict. c. 56, s. 15, was in the town council, by virtue of their authority to appoint the keeper of the prison, and not in the borough justices. *Reg.* v. *Bath and Wells (Bishop)*, D. & M. 173; 5 Q. B. 147; 12 L. J., Q. B. 324; 7 Jur. 766.

Keeper of Gaol.]—By 7 Will. 4 & 1 Vict. c. 78 (repealed), s. 38, all the powers of regulation which before 5 & 6 Will. 4, c. 76, were possessed by the justices having the government of any gaol, shall be exercised by the justices, "provided that no order made by the justices in pursuance of these powers, which shall require the expenditure or payment of any money, shall be of force until confirmed by the council of that city or borough":—Held, that the proviso gave to the council a control over the amount of the salary of the keeper of the gaol. *Reg.* v. *York Corporation*, 1 El. & Bl. 588; 22 L. J., M. C. 73; 17 Jur. 667; 1 W. R. 149.

In a borough there had been a prison for temporary confinement without a residence for a gaoler, and the corporation appointed him. That being inadequate, a second prison and house of correction, with residence for a gaoler, were built under local acts, and the power of appointing the gaoler thereto was vested in the justices of the borough in quarter sessions. That being also inadequate, a new prison was built as a substitute for it, under the Gaol Acts from 4 Geo. 4, c. 64, to 2 & 3 Vict. c. 56. By 4 Geo. 4, c. 64, s. 25 (which did not extend to the borough), the justices in quarter sessions are empowered to appoint the keepers for every prison within their jurisdiction, except the keeper of the common gaol:—Held, that the power of appointing a gaoler to the new prison was conferred on the justices of the borough by the operation of 7 Will. 4 & 1 Vict. c. 78, s. 38, which enacts, that all powers of regulation, and all things in relation to the regulation of gaols and houses of correction, should be exercised by the justices of the borough, or by the operation of 2 & 3 Vict. c. 56, s. 1, which extends to all gaols and houses of correction the provisions of 4 Geo. 4, c. 64. *Reg.* v. *Lancaster*, 10 Q. B. 962; 16 L. J., M. C. 139; 11 Jur. 735.

Held, also, that this prison was not a common gaol, within 4 Geo. 4, c. 64, s. 25; and that the appointment of a gaoler relates to the business of a court of criminal judicature, within the exception in 6 & 7 Will. 4, c. 105, s. 8. *Ib.*

Surgeon.]—The 2 & 3 Vict. c. 56, s. 1, which enacts, that the 4 Geo. 4, c. 64, shall extend to all gaols, except as to the classification of prisoners, is to be construed with reference to 7 Will. 4 & 1 Vict. c. 78, and its effect is to put all borough gaols, with reference to 4 Geo. 4, c. 64, on the same footing with the gaols of the boroughs enumerated in Schedule (A) of that act, so as to affect them by the provisions of that act, and by all subsequent enactments relative thereto. *Hammond* v. *Peacock*, 1 Ex. 41; 16 L. J., M. C. 154.

The appointment, therefore, of a surgeon of a gaol of a corporation is vested in the justices of the borough, and not in the recorder or town council, and they are to make the appointment at a quarterly sessions, and at a subsequent sessions to direct a reasonable sum to be paid to him as a salary, and also sums of money for medicines and other articles. *Ib.*

h. Constables.

Special.]—The 1 & 2 Will. 4, c. 41, is not repealed with respect to the appointment and remuneration of special constables within boroughs by 5 & 6 Will. 4, c. 76, s. 83. *Reg.* v. *Hulton*, 13 Q. B. 592; 19 L. J., M. C. 32; 13 Jur. 1093.

A borough newly incorporated under 5 & 6 Will. 4, c. 76, is (in respect of its liabilities under ss. 114, 117) a town contributory to the public rate for the county within the 1 & 2 Will. 4, c. 41, s. 13; and its justices, therefore, may order the county treasurer to pay the recompense and costs of the staves of special constables appointed by them under the latter act. *Ib.*

The 5 & 6 Will. 4, c. 76, s. 83, empowering borough justices to appoint special constables once a year, and to pay them out of the borough fund, does not supersede the general authority given to justices of any town, &c., by 1 & 2 Will. 4, c. 41, s. 1, to appoint special constables on information that a riot may be apprehended. *Ib.*

Cost of Maintenance.]—The cost of the pay and clothing of the police of a borough (of which cost by the Local Government Act, 1888, s. 24, sub-s. 2 (j), the county council are to pay one-half), includes the cost of police belonging to another force and temporarily added to the borough force under s. 25 of the Police Act, 1890. *Reg.* v. *West Riding of Yorkshire County Council*, 64 L. J., M. C. 145; [1895] 1 Q. B. 805; 14 R. 391; 72 L. T. 520; 43 W. R. 386; 59 J. P. 340.

Superannuation.]—The 11 & 12 Vict. c. 14, s. 2, authorises the establishment of a police superannuation fund in boroughs, which is to be applied in paying superannuation or retiring allowances to police constables, as follows:—If a constable has served fifteen years he is entitled to retire on a superannuation allowance equal to half his pay; but if he is then able and willing to continue to serve, he shall then receive one-

third also, and no more of the above-named allowance from the superannuation fund. By s. 3, no police constable shall be entitled to superannuation who is under fifty, unless reported unfit for service :—Held, that a policeman who had served fifteen years and continued in the force, but who was under fifty, was not entitled to receive the reduced allowance under s. 2. *Hobson* v. *Kingston-upon-Hull Corporation*, 4 El. & Bl. 986 ; 24 L. J., Q. B. 251 ; 1 Jur. (N.S.) 892 ; 3 W. R. 405.

See also POLICE.

i. PROCEEDINGS AGAINST OFFICERS FOR MISCONDUCT.

Grounds for Removal.]—Semble, that to justify the removal of a corporate officer, there must be misconduct specially in the execution of his office ; and misconduct in duties which he has performed for the corporation, but which are not necessarily any part of his official duty, is not sufficient. *Reg.* v. *Newbury Corporation*, 1 Q. B. 751 ; 1 G. & D. 388 ; 10 L. J., Q. B. 250 ; 6 Jur. 385.

Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner that court will refuse to interfere, on the mere ground that the power has not been wisely or discreetly put in force in the particular case. *Osgood* v. *Nelson*, 41 L. J., Q. B. 329 ; L. R. 5 H. L. 636. Affirming, 10 B. & S. 119 ; 20 L. T. 958 ; 17 W. R. 895—Ex. Ch.

In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the court will not interfere with the decision arrived at by the corporation. *Ib.*

A refusal by the town clerk to deliver up to the town council certain corporation documents, and the corporation seal, and an opposition by him to a petition by the council to obtain the appointment of charity trustees, do not constitute sufficient cause to warrant his removal from an office held during good behaviour. Nor is such cause furnished by his acting in concert with another person, who addressed abusive language to an alderman and magistrate of the borough in a public part of the borough. *Tibbits, In re*, 2 P. & D. 498 ; 10 A. & E. 374.

The 5 & 6 Will. 4, c. 76, s. 60, which gives a summary remedy against a corporate officer who refuses to comply with the provisions of the act, as to giving up to the town council of the borough all documents in his custody, and paying over moneys, does not take away the right of action which the corporation has against such officer for the breach of duty imposed by that section. *Lichfield Corporation* v. *Simpson*, 8 Q. B. 65 ; 15 L. J., Q. B. 78 ; 9 Jur. 989.

The summary remedy provided by 5 & 6 Will. 4, c. 76, s. 60, of committing to gaol town clerks or other officers appointed by a town council, who wilfully refuse to account or deliver up books to the council, is in the nature of civil process ; and an arrest under a warrant of commitment upon a Sunday is illegal. *Eggington, Ex parte*, 2 El. & Bl. 717 ; 2 C. L. R. 385 ; 23 L. J., M. C. 41 ; 18 Jur. 224 ; 2 W. R. 10. See *Eggington* v. *Lichfield Corporation*, 5 El. & Bl. 100 ; 24 L. J., Q. B. 360 ; 1 Jur. (N.S.) 908.

A person so arrested cannot be legally detained under a second warrant, subsequently lodged against him, which has been issued at the instance of the same parties, though not in their capacity as town council, but as commissioners under a local act. *Ib.*

But a detainer under a ca. sa., subsequently issued by a third party, and without collusion, is a valid ground for refusing to discharge the prisoner. *Ib.*

A., having the office of town clerk of a borough to hold and exercise for life by himself or his sufficient deputy, appointed a deputy in 1823. A bill of indictment having been found against A. for forgery, he in April, 1829, quitted the country. The deputy died on the 23rd of April, 1830. At a meeting of the corporation held on the 31st of May, 1830, by adjournment from the 27th of April, one of the grand common days, it was resolved to remove A. from office, on the ground that he had neglected to attend, by himself or deputy, at that adjourned meeting, and at other meetings of the corporation :—Held, first, that the want of summons to A. was no objection to the removal, he not being within reach. *Rex* v. *Harris*, 1 B. & Ad. 936 ; 9 L. J. (O.S.) K. B. 165.

Held, secondly, that A. was properly removed from his office, inasmuch as under the circumstances he must be presumed to have left the country without any intention to return, and therefore, on the death of his deputy, there was no person capable of executing his office. *Ib.*

Notice.]—Held, thirdly, that no previous notice to the members of the corporation of the purposes of the meeting was necessary, inasmuch as it was held by adjournment from one of the grand common days, when every member of the corporation is supposed to be present. *Ib.*

Who may Remove.]—The clerk of the peace for a borough can only be removed by the recorder, and not by the town council. *Reg.* v. *Hayward*, 2 B. & S. 585 ; 31 L. J., M. C. 177.

Delegation of Powers.]—A corporate body having the power to dismiss one of its officers holding a freehold office on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office :—Held, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself. *Osgood* v. *Nelson*, supra.

j. OTHER MATTERS.—*See* PUBLIC OFFICER.

VIII. BOROUGH RATES.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 144—153.

Contributory to County Rates.]—Before the passing of 2 & 3 Will. 4, c. 64, the borough of

New Windsor included part of the parish of Clewer in Berks, which was exempt from the county rate, and on the passing of that act a further part of the parish of Clewer, which part up to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Will. 4, c. 76, the boundaries of the municipal borough were made co-extensive with those of the parliamentary borough. The borough has a separate court of quarter sessions and a charter containing a non-intromittant clause:—Held, that the borough of New Windsor was liable to contribute to the account for "other purposes" in respect of the part of the parish of Clewer which, before the passing of 2 & 3 Will. 4, c. 64, was chargeable with county rate. *Reg.* v. *Monck*, 46 L. J., M. C. 251; 2 Q. B. D. 544; 36 L. T. 720—C. A. Affirming, 24 W. R. 248.

The crown had granted a separate court of quarter sessions to a borough in pursuance of 5 & 6 Will. 4, c. 76, s. 103, and there being no gaol in existence in the borough, the county justices assessed the borough to the county rate:—Held, that the rate could not be enforced upon the borough so long as the charter remained unrepealed, and that the validity of it could not be determined by the indirect proceeding of a certiorari to quash the rate. *Reg.* v. *Boucher*, 2 G. & D. 737; 3 Q. B. 641; 6 Jur. 851.

County Gaol in Borough.]—The 4 Geo. 4, c. 64, s. 48, does not exempt a county gaol situate in a borough from borough rates. *Bedfordshire JJ.* v. *Bedford Commissioners*, 7 Ex. 658.

By whom "made and levied"—Precept by Mayor to Overseers of Parish.]—By a local improvement act "as to all rates made and levied by the municipal corporation of H., the N. Railway Company shall be assessed at one fourth of the net annual value." The H. corporation before and after the act obtained their borough and watch rates in parish S. by means of warrants addressed by the mayor to the overseers of S., ordering them to pay the several amounts required out of the poor rate, and the overseers assessed the ratepayers accordingly as in poor-rate valuations:—Held, that the H. corporation and not the overseers "made and levied" these watch and borough rates, and therefore that the N. railway were assessable in parish S. only at one-fourth the net annual value. *North-Eastern Ry.* v. *Sutton Overseers*, 51 J. P. 165.

Insertion in Precept of Amount to be levied in the Pound.]—The Municipal Corporations Act, 1882 (s. 144), provides that a town council may order a borough rate to be made, and for such purpose may assess the contributions on the several parishes in proportion to the total annual value of each parish ratable to the poor, and s. 145 provides that the overseers shall pay the contributions to the council, or as they order. The plaintiffs levied a borough rate, and in the precepts to the overseers, in addition to naming the amount of the contribution required from each parish, they stated the amount in the pound of the rate:—Held, that the insertion in the precept of the amount to be levied in the pound did not invalidate the rate. *Durham Corporation* v. *Fowler*, 58 L. J., Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456.

Altered by Overseers.] — The council of a borough made a borough rate to levy 669*l.*, and assessed a portion of that sum on a parish within the borough. The rate ordered was 6*d.* in the pound on the value of messuages, and the council appointed overseers to levy it in the parish. The overseers, in consideration of circumstances peculiar to the parish, made and assessed the rate on that parish at 7*d.* in the pound:—Held, that the rate of 7*d.* was invalid. *Reg.* v. *New Windsor Corporation*, 7 Q. B. 908; 13 L. J., Q. B. 337.

Orders of Town Council.]—A town council of a borough, upon the recommendation of the finance committee, made an order that a fair and equal rate, for and as a borough rate, under 5 & 6 Will. 4, c. 76, should be made on the several parishes, parts, and districts within the borough, for raising 1,654*l.* 1*s.* 9*d.*, and that part of the parish of S. which lies within the borough should be rated in 365*l.* 8*s.*, the sums rated being estimated at 1*s.* in the pound; and with respect to that part of the parish of S. which lies within the borough, it was ordered that the persons appointed to act as overseers within such part should levy, collect, and pay the amounts so rated, and that a warrant under the corporate seal should issue, directed to the town clerk, authorising him to demand, collect, and receive of such persons the amount so rated, and for that purpose to issue his warrant to such persons, requiring them to collect, levy, and pay the same to him. Such warrant was accordingly issued to the town clerk, commanding him to demand, collect, and receive of the persons appointed to act as overseers within such part of the parish of S. the sum rated; and to issue his precept to such persons to collect, levy, and pay the same to him. The town clerk issued his precept to the special overseers, requiring them, by virtue of an order of the town council, to levy, collect, and pay to him, by a fair and equal rate, to be made and collected by them, the sum of 365*l.* 8*s.* The special overseers thereupon made "a borough rate upon the messuages, &c., within that part of the parish of S. which is situated within the borough, after the rate of 1*s.* 2*d.* in the pound," for 427*l.* 17*s.* The town council also made an order for a watch rate, for raising 685*l.* 2*s.*, at 6*d.* in the pound, that part of the parish of S. within the limits of the borough being rated at 153*l.* 7*s.*; the same steps as in the case of the borough rate were taken to raise the amount; and the special overseers made a watch rate, after the rate of 6*d.* in the pound, for 160*l.* 9*s.* 5*d.* The sums assessed upon plaintiff were levied by two warrants of distress.—Held, first, that the orders of the town council for a borough rate and a watch rate were valid. *Cobb* v. *Allan*, 10 Q. B. 683; 16 L. J., Q. B. 397; 11 Jur. 1081.

Held, secondly, that the order of the town council, that the special overseers should levy, collect, and pay the amount rated, empowered them to levy and collect it by a rate. *Ib.*

Bygone Expenses.]—5 & 6 Will. 4, c. 76, s. 92, does not authorise the council to make a rate to satisfy bygone expenses. *Woods* v. *Reed*, 2 M. & W. 777; M. & H. 256; 6 L. J., M. C. 105; 1 Jur. 407. See *Att.-Gen.* v. *Lichfield Corporation*, 11 Beav. 120; 17 L. J., Ch. 472.

A municipal corporation has no power to levy a borough rate for the purpose of paying retrospectively for past liabilities. *Reg.* v. *Dublin Corporation*, 2 L. R. Ir. 371.

The borough fund, which was otherwise sufficient for all legitimate purposes, was rendered insufficient by reason of illegal payment having been made out of it, and the corporation imposed a borough rate to make up the deficiency :—Held, that the rate was illegal, and that all orders and resolutions of the corporation imposing it, and their precept to the collector-general to levy it, should be quashed. *Ib. See also next case.*

—— **Rate made in Public.**]—The borough fund being insufficient for the purposes specified in 5 & 6 Will. 4, c. 76, s. 92, a meeting of the town council was held. At this meeting, which was not public, an estimate of expenses was made, and the estimate contained these items : "Compensation to the late town clerk, three years and a-half, 105*l.* 14*s.* 10*d.*; law expenses, 800*l.*" The council ordered a rate to be made on the parishes within the borough ; and subsequently a warrant signed by the mayor was issued to the treasurer. This warrant directed the treasurer, "within 100 days from the date hereof, to demand, collect, and receive," from the churchwardens and overseers of the several parishes, the respective sums assessed upon them. On the same day the treasurer issued his precept to the overseers and churchwardens of St. M. (a parish within the borough), requiring them to pay to him the amount of the borough rate assessed on that parish, "within 100 days next after the receipt hereof." On the 29th July, 1847, a copy of this precept was served upon one of the overseers of St. M. He appealed against the rate, but it was confirmed. He ceased to be overseer in March, 1848, and in August of that year, having been summoned for non-payment of the rate before the mayor and another justice of the borough, a warrant of distress was issued, signed by them, under which his goods were seized, and he thereupon brought replevin :—Held, first, that a borough rate need not be made in public. *Jones* v. *Johnson* (*in error*), 7 Ex. 452 ; 21 L. J., M. C. 102 ; 16 Jur. 840—Ex. Ch.

Held, secondly, assuming the words in the above section "to be incurred" have reference to the time of making the rate, yet that as it did not appear that the items in the estimate were really bygone expenses (the compensation to the town clerk not having been then fully ascertained, and the council, before the delivery of the solicitor's bill of costs, being justified in treating the expenses of litigation as expenses not actually incurred), the rate could not be said to be retrospective, and was, therefore, valid in this respect. *Ib.*

Freeing Bridge from Toll—Improvement not authorised—Payment out of General or Improvement Rate.]—A private improvement act gave the municipal borough power to levy general and improvement rates, and the latter were to be applied (amongst other ways) "in carrying the several purposes of this act . . . . into execution, and for the improvement or benefit of the borough in such manner as the corporation from time to time think fit." The corporation of the borough, in order to provide a free passage over a foot-bridge subject to tolls, made an agreement with the owner of the bridge that, in consideration of a yearly sum to be paid by the corporation, the bridge should be opened for the free use of passengers, but this improvement was not amongst those specifically authorised by the legislature :—Held, that this agreement was not ultra vires or void, but that no payments could be made thereunder by the corporation out of the general or improvement rates, and that only an accidental surplus (if any such existed after applying the rates to their respective purposes) could be applied for such payments. *Newcastle-upon-Tyne Corporation* v. *Att.-Gen.*, 62 L. J., Q. B. 72 ; [1892] A. C. 568 ; 1 R. 31 ; 67 L. T. 728 ; 56 J. P. 836—H. L. (E.)

Repair of Highways.]—Before the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, the borough of A. was divided into a town and a country district, each maintaining its own highways. That act was incorporated in a local act for the improvement of the borough of A., except so far as anything in the former act was varied or otherwise provided for by this. By the latter act, the mayor, aldermen, and burgesses of A. were empowered to cause any street in the borough to be sewered and paved at the expense of the adjoining landowners, and certify the same, when completed, to be a public highway ; and that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses and lands within the borough. By 10 & 11 Vict. c. 34, s. 48, commissioners (that is, the persons or body corporate intrusted to execute any local improvement act incorporated with this) shall be the surveyors of all highways within the limits of such local act, and shall have within those limits all the power of surveyors ; and the inhabitants of the district within those limits shall not be liable to highway rates in respect of roads within other parts of the parish in which the district is situate. By s. 49, the commissioners are to be indictable for non-repair of any public highway within the limits of such local act, in the same manner as the inhabitants thereof, or of any parish or other district therein, were liable before the passing of such act :—Held, that the mayor, aldermen, and burgesses of A. were bound, as commissioners, under 10 & 11 Vict. c. 34, to rate the whole borough for the repair of highways paved and certified under the local act, and likewise to rate the whole for repair of the public highways not so paved and certified ; and that a rate upon the country district alone for repair of the highways within it (not paved or certified) was bad. *Slater* v. *Ashton-under-Lyne Corporation*, 18 Q. B. 398 ; 21 L. J., M. C. 185 ; 16 Jur. 992.

Watch Rates.]—By 5 & 6 Will. 4, c. 76, s. 92, the council of a borough was authorised to impose a watch rate on all property in the borough, situate within 200 yards of any street or continuous line of houses. By 2 & 3 Vict. c. 28, s. 1, the council is authorised, if they think fit, to cause the whole of the borough to be watched, and to order that the whole borough shall be assessed to a watch rate. Such an order having been made by a council of a borough :—Held, that all property within the borough, though situate more than 200 yards from any street or continuous line of houses, was liable to be rated ; and that there was nothing in the 2 & 3 Vict. c. 28, to limit that liability. *G. W. Ry.* v. *Maidenhead Town Council*, 11 C. B. (N.S.) 653 ; 31 L. J., M. C. 113.

Arable and meadow lands in a parish were exempt from a town rate under a local act. The

town having been incorporated under 5 & 6 Will. 4, c. 76, and the borough declared co-extensive with the parish, a borough rate was made for purposes including the expenses of the constabulary force:—Held, that under 5 & 6 Will. 4, c. 76, ss. 84, 92, all property within the borough was ratable to the watch rate, provided it was within 200 yards from a street or continuous line of houses, but that so much of the lands as was beyond that limit continued not ratable. *Hallet* v. *Brighton Overseers*, 7 El. & Bl. 342; 26 L. J., M. C. 61; 3 Jur. (N.S.) 237; 5 W. R. 198.

Limitation of Amount.]—By a local act a town council was empowered to make a rate for defraying the expenses of a library and a museum. It was provided that the amount to be levied should "not in any one year exceed 1*d.* in the pound upon the ratable value of the property within the borough liable to such rate":—Held, that the amount must not exceed 1*d.* in the pound upon the ratable value of the property within the borough actually capable of producing and yielding the amount. *Brown, Ex parte*, 31 L. J., M. C. 108; 6 L. T. 241.

Publication.]—Under 5 & 6 Will. 4, c. 76, s. 88, the town council of a borough took on themselves the powers given to inspectors under 3 & 4 Will. 4, c. 90, as to lighting a township in the borough, and made an order on the overseers to collect and pay a sum named. Within the township was a parochial church or chapel, being the only place where poor rates had ever been published; but there were also, within the township, two other churches of the established church recently built, and some dissenting places of worship. The rate made by the overseers, in compliance with the order, was published in the first-named church or chapel only:—Held, an insufficient publication under 7 Will. 4 & 1 Vict. c. 45, s. 2, and that the rate ought to be quashed on appeal. *Reg.* v. *Whipp*, 4 Q. B. 141; 3 G. & D. 372.

Appeal.]—The power of appeal against a borough rate, under 5 & 6 Will. 4, c. 76, s. 92, is confined to the grounds of appeal against a county rate, under 55 Geo. 3, c. 51, s. 14, and therefore an individual cannot appeal for any personal grievance, or on the ground of the rate being retrospective. *Reg.* v. *Bath Recorder*, 1 P. & D. 622; 9 A. & E. 871: 8 L. J., M. C. 96.

—— **Notice of.**]—Notice of appeal against a borough rate must state directly that the party appealing is aggrieved, or must show facts from which it can be collected. *Rex* v. *Bond*, 6 A. & E. 905. S. P., *Rex* v. *Poole Recorder*, 1 N. & P. 756; W. W. & D. 497; 6 L. J., M. C. 119.

Notice of appeal to the town clerk is sufficient, as he is the officer of the town council who made the rate. *Rex* v. *Carmarthen Recorder*, 3 N. & P. 19; 7 A. & E. 756; 7 L. J., M. C. 17.

—— **Rate for Particular Purpose.**]—Where a borough rate on the face of it purports to be made for a particular purpose, and if no express power to appeal against it is given, an appeal will not be allowed merely to ascertain whether it is made for that purpose. *Reg.* v. *Ipswich Recorder*, 8 D. P. C. 103; 1 W. W. & H. 337.

Where no express power of appeal against a borough rate is given, none exists merely on account of its being a borough rate. *Ib.*

The 7 Will. 4 & 1 Vict. c. 81, s. 2, authorised a borough rate to meet certain expenses not levied under 5 & 6 Will. 4, c. 76, s. 92, and provided that "every such rate shall be made, levied, and recovered in the manner provided by the said act for regulating corporations, and by this act;" no appeal lies against the rate. *Ib.*

—— **Rate abandoned.**]—Where an appeal against a borough rate was, at the request of the town clerk, adjourned from the Epiphany to the Michaelmas sessions, but in the meantime the rate was abandoned:—Held, that the recorder ought to have heard the appeal, although there was no rate produced, and no secondary evidence of it given. *Reg.* v. *Stamford Recorder*, 1 P. & D. 72; 8 L. J., M. C. 49; 2 Jur. 965.

—— **Assessment Committee.**]—The council of a borough made a borough rate to meet the expenses of a local improvement act, and other sanitary acts, as well as for the purpose to which the borough fund is applicable under 5 & 6 Will. 4, c. 76; and assessed the same upon a railway situate in that part of the borough which was in the commissioners' district. The railway company, who claimed exemption from so much of the rate as was applicable to sanitary purposes, gave due notice of appeal, but did not seek relief from the assessment committee:—Held, first, that the company had a right to appeal without going before the assessment committee, for the latter, there being no objection to the valuation list, could not have given any relief. *Reg.* v. *L. & N. W. Ry.*, 46 L. J., M. C. 102.

Held, secondly, that the local improvement act was not repealed ipso facto by the later public acts, and an exemption granted to the railway company in 1848 still continued in force; such exemption must, therefore, be given effect to by the authority, whosoever that might be (whether the commissioners or the town council), who exercised the power of that act within the part of the district included in the borough. *Ib.*

Enforcing Payment—Warrant of Distress.]—A town council of a borough levied a borough rate under 5 & 6 Will. 4, c. 76, s. 92; an out township being one of the townships assessed by such rate. The rate was duly levied and paid. The overseers of the parish having appealed to the borough quarter sessions against the rate, the sessions made an order to amend the rate by increasing the amount at which the township was assessed. No notice of the appeal was given to the out township. The overseers of the out township having refused to pay the additional amount assessed:—Held, that the remedy of the town council, if any, for enforcing the payment of such additional rate was by a warrant of distress issued by the mayor or two justices for the borough, under 7 Will. 4 & 1 Vict. c. 81, s. 1, and not by a mandamus to the overseers to enforce such payment. *Reg.* v. *Hunslet Overseers*, 1 El. & El. 775; 28 L. J., M. C. 180.

—— **Mandamus.**]—A peremptory writ of mandamus, requiring a corporation to enforce payment of the existing borough rates, or to cause to be collected another rate, and out of the same to pay money under a compensation bond, is bad, because it directs payment to be provided in a particular mode, by making or enforcing a borough rate, without showing that the existing

borough fund is insufficient; and this objection may be made as an answer to a rule for an attachment against those who have disobeyed the writ. *Reg.* v. *Poole Corporation*, 1 G. & D. 728. *S. C.*, nom. *Reg.* v. *Ledgard*, 1 Q. B. 616.

—— **Against Overseer.**]—By 5 & 6 Will. 4, c. 76, s. 92, councils of boroughs are authorised to order borough rates to be made within their boroughs, and for that purpose are to have all the powers which county justices have by virtue of the 56 Geo. 3, c. 51, for the levying of county rates. The council of a borough ordered a borough rate to be made, and assessed upon the township, in respect of a portion of it, namely, the hamlet, which was within the borough, a certain sum. An overseer of the township was called upon to pay the assessment, and having failed to do so, the mayor of the borough issued a warrant, under which the overseer's goods were seized. The overseer having brought an action against the mayor for the seizure of the goods:—Held, that the council of the borough had no authority to make the assessment in question, and that inasmuch as the mayor had no jurisdiction to issue the warrant, trespass was the proper remedy. *Fearnley* v. *Worthington*, 1 Man. & G. 491; 1 Scott (N.R.) 432; 4 Jur. 918.

The warrant of a treasurer to overseers is not vitiated by reason of its fixing a time for payment of the rate different from and more extended than that named by the justices in their warrant to the treasurer. *Jones* v. *Johnson*, 7 Ex. 452, supra, col. 601.

—— **Distress.**]—An overseer's goods are liable to distress, although he is out of office at the time of the seizure, the distress being given for the offender's goods. *Ib.*

A distress warrant is not less that of the mayor, although signed by another person in his capacity of a magistrate, as well as in that of the mayor of the borough. *Ib.*

A warrant is sufficient under the 27 Geo. 2, c. 20, although it does not fix the time for the termination of the sale. *Ib.*

Receiver.]—A corporation was authorised by act of parliament to raise money for local improvements upon the security of the borough rates. The act contained a provision that the corporation should in every year pay off at least 100*l.* of the principal of the borrowed money together with the interest due thereon, and that the creditors to be paid off should be determined by ballot:—Held, that the creditors were entitled to be repaid their principal only in the way mentioned by the act, and that a creditor who was unpaid could not by giving notice to the corporation to repay his principal, entitle himself to have a receiver of the rates appointed by the court. *Preston* v. *Great Yarmouth Corporation*, 41 L. J., Ch. 760; L. R. 7 Ch. 655; 27 L. T. 87; 20 W. R. 875.

Application of — Jurisdiction of Court of Chancery to control—Information at Suit of Attorney-General.]—Where a local act authorised a corporation to levy rates and to apply them in a particular manner, and particularly in a sinking fund, in order to extinguish the incumbrance of rates, being to cease upon payment of the debts:—Held, that a provision for laying the accounts before parliament annually, did not oust the jurisdiction of the Court of Chancery. In such a case the crown has a right on behalf of those persons on whom the rates may in future be levied, to see that the funds are properly applied according to the act, and it may therefore proceed either by the ancient writ of account in the nature of a commission, or by the modern and more convenient proceeding by information at the suit of the Attorney-General and that with or without the assistance of a relator:—Held, that an information at the suit of the Attorney-General against the corporation stating the facts charging mismanagement, and praying that the act might be carried into execution and an account taken of moneys borrowed and rates received, &c., was improperly dismissed as for want of jurisdiction. *Att.-Gen.* v. *Dublin Corporation*, 1 Bli. (N.S.) 312; 9 Bli. (N.S.) 395; 3 Cl. & F. 289. And see *Frend* v. *Dennett*, 5 L. T. 73.

IX. BOROUGH FUND.

a. Application of.

Trust for Public Purposes.]—Liability of the new municipal corporations and the ratepayers of their borough for the breaches of trust of the old corporations, and the costs of obtaining redress. The new corporations succeed to the debts and duties of the old corporations, whose place they now occupy, as well as to their estates, property, and right. *Att.-Gen.* v. *Leicester Corporation*, 9 Beav. 546. And see *Att.-Gen.* v. *Kerr*, 2 Beav. 420; 9 L. J., Ch. 190; 4 Jur. 406.

By the Municipal Corporations Act (6 Will. 4, c. 76) the property of the old corporations thereby remodelled is to be held subject to the performance of their public duties, and the court has jurisdiction to interpose to prevent any disposition of such property which would be a violation of that trust. *Att.-Gen.* v. *Liverpool Corporation*, or *Aspinall*, 1 Myl. & Cr. 171; 2 Myl. & Cr. 613; 7 L. J., Ch. 51.

The members of the governing body are the agents of a corporation; and if they exercise their functions for the purpose of injuring its interests and alienating its property, they are personally liable for any loss occasioned thereby. *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1; 10 L. J., Ch. 53; 7 L. J., Ch. 76; 9 Sim. 30.

A borough fund is constituted, by 5 & 6 Will. 4, c. 76, a trust fund for public purposes, and, as such, is subject to the ordinary jurisdiction of the Court of Chancery for the prevention of breaches of trust and confidence, whether reposed in an individual or in a corporation. *Parr* v. *Att.-Gen.*, 8 Cl. & F. 409; 6 Jur. 245. S. P., *Att.-Gen.* v. *Lichfield Corporation*, 11 Beav. 120; 17 L. J., Ch. 472.

Promoting and Opposing Bills in Parliament.]—A municipal corporation will be restrained by injunction from employing the property vested in them towards promoting in parliament a bill that has been introduced by them to obtain new powers, whether the purposes of such bill are or are not of public utility, and although there is no evidence that there is any intention to defray the costs of applying for the bill out of such property. But an injunction to restrain the corporation from applying for such bill will be refused, at all events if the corporation agree that the parties applying for the injunction shall be treated as parties entitled to oppose the bill

before the parliamentary committee. *Att.-Gen.* v. *Waterford Corporation*, Ir. R. 9 Eq. 522.

By the 5 Geo. 4, c. 49, the corporation of Plymouth were empowered to make certain waterworks, and were required to supply a certain daily quantity of pure, wholesome, fresh water for the use of her Majesty's naval establishments, in consideration whereof they were to be entitled to an annuity. They failed in an application for an act to extend their powers. They were restrained from applying any part of the borough fund in paying the expenses of the application to parliament. *Att.-Gen.* v. *Plymouth Corporation*, 1 W. R. 445.

Municipal corporations having been reduced by the Municipal Corporations Act, 1835, from the position of owners of property to that of trustees, possess the ordinary right of trustees to defend their trust property and their rights as trustees from attack at the expense of the trust estate. Consequently, a municipal corporation has the right, either under s. 92 of the Municipal Corporations Act, 1835, or under the general law applicable to trustees, to defray, out of the borough funds or rates, the expenses of any attack made by bill in parliament, whether against their existence as a corporation, or against their property, or only against their rights, powers, or privileges; and that right is not taken away by the Municipal Corporations (Borough Funds) Act, 1872. *Att.-Gen.* v. *Brecon Corporation*, 48 L. J., Ch. 153; 10 Ch. D. 204; 40 L. T. 52; 27 W. R. 332.

A waterworks company, established to supply water to a borough, was empowered by act of parliament to make rules and regulations, which before coming into force were to be approved of by two justices of the borough. Certain of such proposed rules and regulations having been brought before the justices for approval, it was thought by the corporation that they should be opposed. Expenses were incurred in so opposing them, and the opposition was, in great part, successful. The company also promoted a bill in parliament with the view of obtaining further powers. The corporation, conceiving that the bill was objectionable, opposed it in parliament, and eventually it was withdrawn. Orders were made for the payment, out of the borough fund, of the expenses incurred in opposing the rules and regulations, and the bill promoted by the company:—Held, that as the expenses above mentioned could not be expenses "necessarily incurred in carrying into effect the provisions" of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), within s. 92, and as they did not fall within any of the payments specified in the act, that they were not chargeable upon the borough fund, and that the orders were invalid. *Reg.* v. *Sheffield Corporation*, 40 L. J., Q. B. 247; L. R. 6 Q. B. 652; 24 L. T. 659; 19 W. R. 1159.

A corporation is justified, if acting bonâ fide, in applying its funds in opposing parliamentary bills which would affect its existence, and materially injure its powers as a corporation, though no such power is expressly given to it by its incorporating act. *Bower* v. *Sligo Commissioners*, 4 Ir. R., C. L. 489.

During the progress of the Liverpool Tramways Act, 1871, through parliament, the Liverpool town council authorised the town clerk to make terms for the purchase of tramways with the company promoting the bill. Amongst other terms of arrangement he agreed that the corporation should pay the expenses of the bill if they resolved to take the tramways according to their powers in the bill. The council consented to these terms, and after the act was passed resolved to take the tramways; they afterwards resolved to pay the expenses agreed to. The surplus of the borough funds in the year of these resolutions was less than the amount of the expenses, but in the subsequent years the surplus was greater than that amount:—Held, upon mandamus to the town council to pay these expenses, that there was nothing in the Municipal Corporations Act, 1835, to prevent the payment of this claim. *Reg.* v. *Liverpool Corporation*, 28 L. T. 500; 21 W. R. 674.

An application by a corporation of part of the surplus borough fund, arising from borough rates, in payment of the costs of a partially successful opposition to the passing through parliament of a bill for the construction of waterworks, containing powers so to interfere with the stream of a river passing through the town as to prevent its efficient action in the removal of the sewage of the town, and thereby indirectly affecting the value of the ratable houses in the borough, the tolls of the market and other property constituting the borough fund, is not so clearly contrary to the spirit of the 5 & 6 Will. 4, c. 76, which provides for the application of such surplus fund, as to form the ground of an interlocutory injunction by the Court of Chancery restraining such application. *Att.-Gen* v. *Wigan Corporation*, 5 De G. M. & G. 52; 23 L. J., Ch. 429; 18 Jur. 299; 2 W. R. 308.

The 5 & 6 Will. 4, c. 76, s. 92, enables the surplus of the borough fund to be applied for the public benefit of the inhabitants and improvement of the borough. By an act subsequently passed, the corporation of a city was authorised to levy certain tonnage dues to be applied in a specified manner, and after they were satisfied, the remainder to be applied to certain purposes, some of which were the same as those to which the surplus of the borough fund was made applicable: and distinct accounts were directed to be kept of the tonnage dues and borough fund. The treasurer mixed the two funds at his banker's. The corporation proposed to obtain an act of parliament for improving a river flowing through the city, and applied money from the funds at the banker's in paying certain expenses. An information was filed by the Attorney-General, at the relation of ratepayers, praying an injunction to restrain this application to parliament at the expense of the borough fund, and the same was granted. *Att.-Gen.* v. *Norwich Corporation*, 21 L. J., Ch. 139—L.JJ.

Where the promotion of a bill in parliament had been consented to in accordance with s. 4 of the Borough Funds Act, 1872, in consideration of certain benefits being conferred upon the owners of property in a borough by such bill upon its becoming an act of parliament: and the promoters of the bill caused the coming into operation of the act at a later date than that at which the bill, as drawn at the time such consent thereto was given, intended:—Held, that the court could not allow advantage to be taken by the owners of the benefits under the act previous to its coming into operation, upon grounds of equity, and that no breach of faith had been committed by the promoters of the bill. *Birkenhead Corporation* v. *Crowe*, 46 J. P. 551.

—— **Costs of Solicitor.**]—A municipal corporation is not liable for the costs of an attorney conducting on their behalf an opposition to a bill in parliament affecting their privileges, unless the retainer is under the common seal. *Sutton* v. *Spectaclemakers' Co.*, 10 L. T. 411; 12 W. R. 742.

Costs of Legal Proceedings]—The costs of defending quo warranto informations against an alderman of a borough, and of prosecuting a criminal information against a person for assaulting a justice, are not payable out of the borough fund. *Reg.* v. *Bridgewater Council*, 2 P. & D. 558.

But a municipal corporation is justified in discharging out of the corporate funds the expenses of defending quo warranto informations against individual members, if the object of such informations is to impeach the title or destroy the legal existence of the corporation as a body. *Holdsworth* v. *Dartmouth Corporation*, 11 A. & E. 490; 9 L. J., Q. B. 121; 4 Jur. 605. S. P., *Att.-Gen.* v. *Norwich Corporation*, 2 Mylne & C. 406; 1 Jur. 398. See also *Clifton, Dartmouth, and Hardness Corporation* v. *Holdsworth*, 13 L. J., Ch. 178; 8 Jur. 741.

Expenses of resisting an application for a mandamus, directed to a corporation, in order to try a question, which of two councillors was legally elected, cannot be legally defrayed out of the borough fund, it not appearing that the rights of the corporation were in any way affected by the issue in question. *Reg.* v. *Leeds Corporation*, 4 Q. B. 796; D. & M. 143; 12 L. J., Q. B. 369; 7 Jur. 669.

Expenses of a prosecution by a mayor for a riot and assault upon him whilst engaged in the revision of the burgess list, will not be allowed to be charged upon the borough fund, unless there is an order or a resolution of the town council previously to the prosecution, authorising the expenses. *Reg.* v. *Lichfield Council*, D. & M. 491; 4 Q. B. 900; 12 L. J., Q. B. 308; 7 Jur. 670. S. P., *Reg.* v. *Stamford Council*, 13 L. J., Q. B. 177; 8 Jur. 538.

The costs of litigation undertaken by a corporation malâ fide and from improper motives, or in respect of a matter in which the corporation is only collaterally interested, cannot be charged upon the borough fund. If, however, the litigation is undertaken in the bonâ fide assertion of the rights of the corporation, the costs incurred may properly be charged upon the fund, although the litigation has not resulted in favour of the corporation. *Reg.* v. *Tamworth Corporation*, 19 L. T. 433; 17 W. R. 231.

Burgesses having been omitted from the list of voters obtained a rule nisi in the queen's bench, calling on the mayor to show cause why he should not hold a court to revise the list. The mayor instructed an attorney to show cause. The court made the rule absolute. The attorney brought an action against the corporation for his costs:—Held, that, the litigation on the part of the mayor having been justifiable, the costs were payable out of the borough fund. *Lewis* v. *Rochester Corporation*, 9 C. B. (N.S.) 401; 30 L. J., C. P. 169; 7 Jur. (N.S.) 680; 3 L. T. 300; 9 W. R. 100.

Where a town council removed a town clerk from his office by resolution for misconduct, and refused his claim of compensation:—Held, that the costs of an attorney employed in opposing a mandamus to assess compensation were properly chargeable to the borough fund, although the jury found the issues ultimately raised on the mandamus for the late town clerk, it not being shown that the town council acted otherwise than bonâ fide in the removal. *Reg.* v. *Lichfield Town Council*, 10 Q. B. 534; 16 L. J., Q. B. 333; 11 Jur. 888.

The attorney having been retained generally by a resolution of the town council, and having also been authorised and retained by resolution of the town council to take proceedings in opposition to the rule nisi for the mandamus:—Held, that this was a sufficient retainer to warrant the payment to him of the costs of defending the issues. *Ib.*

Held, also, that it was no objection to the order for payment on account, the attorney not having delivered a bill, and it not appearing that the sum ordered to be paid exceeded the sum due to the attorney. *Ib.*

Where money had been bonâ fide paid upon an order of the council, to a town clerk, for professional business done by him as a solicitor, upon instructions given by the corporation, the mere fact of his having had no retainer under the seal of the corporation is no sufficient ground why the court should, under 7 Will. 4 & 1 Vict. c. 78, s. 44, quash the order of the council, as for a misapplication of the borough funds. *Reg.* v. *Prest*, 16 Q. B. 33; 20 L. J., Q. B. 17; 15 Jur. 554.

Costs incurred by a town council in taking legal advice as to the validity of a borough rate, which they intended to enforce, but concerning which they were threatened with litigation, if they should persevere in their intention, are costs chargeable upon the borough fund. *Ib.*

A corporation held trust estates for charitable uses, and the surplus of the proceeds was to be applied for the benefit of the borough. After the passing of 5 & 6 Will. 4, c. 76, the town council presented a petition to the lord chancellor for leave to attend before the master and propose a list of persons, being members of the corporation, as trustees for those estates:—Held, that an order for payment out of the borough fund of the costs of those proceedings was illegal, the management of the trust estates being taken away from the corporation by 5 & 6 Will. 4, c. 76, s. 71. *Reg.* v. *Warwick Corporation*, 15 L. J., Q. B. 306; 10 Jur. 962.

—— **Licensing Appeals.**]—On August 13 the watch committee resolved to authorise the chief constable to obtain legal assistance at the licensing sessions. On August 21 the council passed a like resolution. The chief constable successfully opposed some licensees, five of whom appealed to quarter sessions. On October 10 the watch committee, having taken the opinion of counsel, refused to authorise the chief constable to act as respondent. On October 15 the council resolved to allow him to so act, and to pay his costs. When the appeals came on he appeared and opposed them, and they were dismissed with costs. The amount recovered on taxation was 132*l.* 5*s.* less than he had to pay. On November 19 the watch committee resolved to pay these costs. This action was brought by the plaintiffs as ratepayers to restrain this payment:—Held, that, under these circumstances, there was no right to use the borough funds for this purpose, for one watch committee has no power to apply to the council to pay certain moneys

which a former watch committee has said ought not to be paid. Semble, that in certain cases a watch committee may have power to incur legal expenses in connection with the opposition to licences either at brewster or quarter sessions. *Att.-Gen.* v. *Tynemouth Corporation*, 76 L. T. 566.

—— **Actions against Constables.**]—The chief constable of a borough, having, by the direction of borough magistrates, laid an information against a person for conspiracy, an action for malicious prosecution was brought by such person against him and a verdict recovered for 200*l.* :—Held, that it was not competent to the town council to order payment of the chief constable's costs out of the borough fund or rate under 5 & 6 Will. 4, c. 76, s. 82. *Reg.* v. *Exeter Corporation*, 6 Q. B. D. 135 ; 44 L. T. 101 ; 29 W. R. 441 ; 45 J. P. 158.

A member of the constabulary force of the borough of Liverpool was made the subject of a libellous article in a newspaper, in reference to his conduct as inspector of public-houses, in giving a good character to an applicant for a licence, at the meeting of the magistrates of the borough in licensing session, whom he knew to have been the keeper of a house of ill-fame. Upon an intimation from, though without the official sanction of, his superior authorities, he took criminal proceedings by way of summons before a magistrate against the publisher of the libel, and incurred expenses thereon. The watch committee, with the subsequent approbation of the town council, made an order on the borough treasurer for the payment of a sum of money on account of such expenses. The Liverpool borough fund has a surplus :—Held, that such order was not in respect of an allowance, nor a charge nor an expense for the purposes of the constabulary force within the 5 & 6 Will. 4, c. 76, s. 82, nor an application of the fund for the public benefit of the inhabitants of the borough within s. 92, and that a rule must go for a certiorari to bring up the order for the purpose of being quashed. *Reg.* v. *Liverpool Corporation and Town Council*, 41 L. J., Q. B. 175 ; 26 L. T. 101 ; 20 W. R. 389. See *Att.-Gen.* v. *Compton*, 1 Y. & Coll. C. C. 417.

Under 5 & 6 Will. 4, c. 76, s. 82, a council of a borough cannot make an order that the treasurer shall pay costs of defending borough constables on a prosecution incurred by them in the discharge of their duty. *Reg.* v. *Thomson*, 5 Q. B. 477 ; D. & M. 497. S. P., *Reg.* v. *Stamford Town Council*, 13 L. J., Q. B. 177 ; 8 Jur. 558.

Such order must be made by the watch committee, with the approbation of the council. *Ib.*

—— **Payment of Money under Illegal Contract—Action against Officer for Penalty—Order of Council for payment of Officer's Costs.**]—Where an officer employed by a borough council, acting as the local authority under the Public Health Act, 1875, makes with the council a contract in which he is interested, in violation of s. 193 of that Act, the court when called upon under s. 141 of the Municipal Corporations Act, 1882, to remove into the queen's bench division, and quash an order for payment of money to the officer under such contract, will not exercise the discretion given by the section so as to inquire whether the illegality of the contract is in substance or in form, but will, in pursuance of the policy of the Public Health Act, consider it to be of substance, and quash the order as of course ; and if an action be brought against the officer to recover the penalty provided by s. 193 of the Public Health Act, 1875, for being concerned in such contract, and the penalty be recovered, the court will also quash an order of the council for the payment of the officer's costs of defending the action. *Reg.* v. *Ramsgate Corporation*, 58 L. J., Q. B. 352 ; 23 Q. B. D. 66 ; 61 L. T. 333 ; 37 W. R. 781 ; 53 J. P. 740.

Compensation to Officers.]—Under 5 & 6 Will. 4, c. 76, ss. 66, 67, a corporation executed a bond for payment of an annuity to a person removed from office ; and also for payment, on demand, of arrears due before the date. The obligee consenting not to press for the arrears, the council passed a resolution to pay him interest thereon :—Held, that such resolution and orders of the council for payment of the interest were unsanctioned by s. 92. *Reg.* v. *Warwick Council*, 8 Q. B. 926 ; 15 L. J., Q. B. 306 ; 10 Jur. 962.

A bond payable out of a borough fund, given by the town council to an officer to secure to him compensation for offices, some of which he continued to hold, and a rate levied for the purpose of discharging the bond, is illegal, and the rate being on that account illegal also, the Court of Chancery has jurisdiction over both matters. *Att.-Gen.* v. *Parr*, 8 Cl. & F. 409 ; 6 Jur. 245.

Chain for Mayor.]—The purchase of a gold chain for the mayor of a borough, out of the borough fund, is illegal. *Att.-Gen.* v. *Batley Corporation*, 26 L. T. 392.

Jubilee Festivities.]—A municipal corporation passed resolutions to the effect that pursuant to s. 15. sub-s. 4, of the Municipal Corporations Act, 1882, a certain sum should be paid to the mayor by way of remuneration, and that the mayor should be requested to take such steps as he might deem proper for the due celebration of her majesty's jubilee. Some of the burgesses moved to restrain the corporation from applying any part of the borough fund for this purpose :—Held, that the provisions of the Municipal Corporations Act, 1882, had not been contravened, and that an interlocutory injunction would not be granted. *Att.-Gen.* v. *Blackburn Corporation*, 57 L. T. 385. See *Att.-Gen.* v. *Cardiff Corporation*, cols. 583 and 613.

Power to take Lands compulsorily for Public Improvement—Agreement to sell part of Lands to be so taken.]—A municipal corporation was empowered by act of parliament to take compulsorily, for the purpose of a public improvement, the lands comprised in the book of reference to the act, wherein were included the lands of A. The lands so comprised were more than were actually required for the purpose of the improvement, and the act empowered the corporation to raise money upon the lands authorised to be acquired, and to pay off the debt thus incurred out of the proceeds of superfluous lands. Before the act received the royal assent, the corporation agreed to sell to a railway company a portion of the lands of A., and, after the passing of the act, gave notice to A. of their intention to take all his lands. A. then filed a bill to restrain them from taking more than they actually required for the

purpose of the improvement:—Held, that the corporation was entitled to take all the lands of A., including that portion which they only required for the purpose of the re-sale. *Galloway* v. *London Corporation*, 35 L. J., Ch. 477; L. R. 1 H. L. 34; 12 Jur. (N.S.) 747; 14 L. T. 865.

Held, also, that the agreement entered into in anticipation of the act did not incapacitate them from doing so. *Ib.*

—— **Mortgage of Surplus Land.**]—An act gave a corporation compulsory powers of purchasing land to make a market. The 29th section required it to sell the surplus not wanted, and to give certain parties a right of pre-emption, the produce to be applied "to the purposes of the act." The 30th section gave the corporation power to borrow on debenture, the 32nd section power to mortgage or sell any of its lands "for the purposes of the act," and the 33rd section provided that the act should not empower the corporation to sell without the approbation of the lords of the treasury:—Held, that the 32nd section did not authorise a mortgage of the surplus land for the purposes of the act, but that it must be sold as directed by the 29th section. *De Winton* v. *Brecon Corporation*, 26 Beav. 533; 5 Jur. (N.S.) 882.

Held, also, that a mortgage only of the lands of the corporation required the assent of the lords of the treasury. *Ib.*

Purchase of Site for and Erection of Corn Market.]—When a local authority was empowered by act of parliament to "enlarge and improve the market place" in a borough "with all proper works and conveniences connected therewith or belonging thereto," and, for the purposes of the act, to borrow money on the credit of the borough fund and to purchase lands:—Held, that the purchase of a site near the place where the principal market of the borough was usually held, and the erection thereon of a new corn exchange, was a lawful exercise of the powers conferred by the act, for which money might be borrowed on the credit of the borough fund. *Att.-Gen.* v. *Cambridge Corporation*, L. R. 6 H. L. 303; 22 W. R. 37.

Power under Private Act to contribute Capital—Interest before Payment—Public Benefit.]—A corporation of a borough, who are authorised by a special act to contribute 10,000*l.* to the funds of a college, and have resolved that the sum shall be paid at a time not yet arrived, are not entitled to pay interest on the sum in the meantime. *Att.-Gen.* v. *Cardiff Corporation*, 63 L. J., Ch. 557; [1894] 2 Ch. 337; 8 R. 268; 70 L. T. 591.

Payments by a corporation of a borough to a university college established within the borough are not "for the public benefit of the inhabitants and improvement of the borough" within section 143 of the Municipal Corporations Act, 1882. *Ib.*

Borrowing Money.]—By an act passed in 1851, certain property before vested in commissioners, was vested in a corporation. Powers were given to the council of purchasing land for the purposes of the act, and of executing improvement works specified in a schedule; the expenses of the works for making new approaches to the town hall, and for enlarging and altering the existing streets to be defrayed by a street improvement rate, not exceeding 6*d.* in the 1*l.*, and mortgageable to the extent of 100,000*l.*; and all other expenses of carrying the act into execution to be defrayed by a borough improvement rate not exceeding 2*s.* in the 1*l.*, and mortgageable to the extent of 150,000*l.* From the street improvement rate certain classes of persons were wholly exempted, and canal and railway companies were in part exempted. Nothing therein contained was to alter any of the powers, privileges and authorities vested in the corporation by any past or future acts in relation to municipal corporations. By another local act, passed in 1861, other specified improvements were provided for, and it was declared that the expenses of widening and improving certain specified streets were to be defrayed out of the street improvement rate. The 23 & 24 Vict. c. 16 (Corporation Mortgages Act, 1860), empowers corporations generally, with the approbation of the treasury, upon application made after due notice given, to make purchases of land for public purposes; but nothing therein contained is to repeal, abridge or affect any power or authority of any body corporate or council under any local act. The corporation having contracted for the purchase of land for the widening of a street (not comprised in the works specified in the local acts of 1851 and 1861), and having (after due notice given, and after all parties interested in the scheme had been heard before a commissioner deputed by the treasury) obtained the sanction of the treasury to the purchase of the land, and the charging of the borough fund with the purchase-money:—Held, that the corporation was lawfully empowered to raise the purchase-money out of the borough fund. *Att.-Gen.* v. *Birmingham Corporation*, L. R. 3 Eq. 552.

A covenant by a corporation to repay money borrowed after the passing of the 5 & 6 Will. 4, c. 76, is valid, although the money was not borrowed for any of the purposes to which the borough fund is applicable by s. 92, and although the covenant is contained in a mortgage deed, made without the approbation of the lords of the treasury. *Payne* v. *Brecon Corporation*, 3 H. & N. 572; 27 L. J., Ex. 495; 6 W. R. 801.

A bond given by a corporation, after the passing of the 5 & 6 Will. 4, c. 76, but before the passing of the 6 & 7 Will. 4, c. 104, to secure a sum of money borrowed for the purpose of paying debts contracted by the corporation before the passing of the first-mentioned act, is valid, notwithstanding the 92nd section of the former act might interpose a difficulty in the way of the obligee's obtaining satisfaction of a judgment thereon. *Pallister* v. *Gravesend Corporation*, 9 C. B. 774; and *Arnold* v. *Gravesend Corporation*, 2 Kay & J. 574; 25 L. J., Ch. 776; 2 Jur. (N.S.) 703; 4 W. R. 478.

Judgment upon a bond given by a corporation before the 5 & 6 Will. 4, c. 76, under 1 & 2 Vict. c. 110, s. 13, operates as a charge upon all lands and hereditaments of the corporation, whether acquired before or after the passing of the Municipal Corporations Act, the court being of opinion that even if the latter statute, standing alone, would have prevented the judgment creditor from charging after acquired lands, which, semble, it would not, that objection was removed by 6 & 7 Will. 4, c. 104, s. 1; and that the power by that section given to corporations of charging their lands and hereditaments for securing repayment and

satisfaction of any debt contracted by them before the passing of the 5 & 6 Will. 4, c. 76, is a power which they might exercise for their own benefit, within the meaning of 1 & 2 Vict. c. 110, s. 13, the words "for his own benefit" meaning no more than for his own use, not as a trustee. *Ib.*

A judgment entered up against a corporation for a debt contracted subsequently to the 5 & 6 Will. 4, c. 76, is no charge upon any part of the corporate property not authorised to be charged therewith in the manner pointed out by s. 94. *Ib.*

A corporation borrowed 200*l.* of M., to enable them to pay L., their treasurer, sums which he had paid to creditors of the old corporation, and gave M. their promissory note for the amount. They did not, however, pay over the sum to L., but suffered him to receive their accruing income in reduction of what was due to him, and applied the amount to purposes to which the income would otherwise have been applicable:—Held, that the corporation had no authority to give the note, as it was not given to secure a debt due prior to the passing of the 5 & 6 Will. 4, c. 76. *Att.-Gen.* v. *Lichfield Corporation*, 13 Sim. 547.

Payment of Debts.]—Where money, the produce of the sale of corporation lands, has been paid into court under an act of parliament authorising the court to make such order concerning it for the benefit of the parties interested as the court shall think fit, it is not competent for the court, since the stat. 5 & 6 Will. 4, c. 76, s. 92 (the Municipal Corporation Act), to order the principal money to be paid in discharge of corporation debts accruing since the passing of that act; the dividends only can be applied for that purpose. The trusts of the Municipal Corporation Act are applicable to personal as well as real estates. *Hythe Corporation, Ex parte*, 4 Y. & Coll. 55.

The compensation for lands of a corporation allowed to be applied in the redemption of an incumbrance upon other lands of the same corporation, under the 5 & 6 Will. 4, c. 76, s. 92. *Cambridge Corporation, Ex parte, Eastern Counties Ry., In re*, 6 Hare, 30.

Power of Alienation.]—The stat. of the 27 Eliz. c. 20, authorised the corporation of Plymouth to construct a watercourse or conduit for bringing a supply of fresh water from a distance to Plymouth, for public objects, as, for the supply of the ships and town, and to scour the haven. Mills were erected on the watercourse, and the corporation afterwards conveyed away a portion of their interest in the leat:—Held, that the corporation had undertaken the performance of a public trust, and could not divest themselves of the means of fully executing it; that the primary duty of the corporation was to provide for the public objects contemplated by the act; and that the surplus water only, after satisfying the public purposes, could be applied to the use of the mills. The court also considered it to be doubtful whether the corporation could alienate the watercourse, or any part, for satisfying their own debt. *Att.-Gen.* v. *Plymouth Corporation*, 9 Beav. 67; 15 L. J., Ch. 109.

Primâ facie a municipal corporation has full power to dispose of all its property, like a private individual, and it lies on the person alleging the contrary to establish a trust. *Evan* v. *Avon Corporation*, 29 Beav. 144; 30 L. J., Ch. 165; 6 Jur. 1361; 9 W. R. 84.

The attorney-general has power to restrain, or afterwards impeach, the alienation of corporate property made pending the granting of the charter. *S. C.*, 33 Beav. 67; 9 Jur. (N.S.) 1117; 8 L. T. 594; 11 W. R. 709. Affirmed, 9 L. T. 187.

General right of corporations, of whatever nature at law, to alienate their lands, held in fee, subject as to ecclesiastical corporations to the restraining statutes; and no instance of a trust attached upon the ground of misapplication, as not to corporate purposes, except the case of corporations holding to charitable uses. *Colchester Corporation* v. *Lowten*, 1 Ves. & B. 226; 12 R. R. 216.

—— **Consent of Commissioners.**]—The consent of the Lords Commissioners of the Treasury to the alienation of the property of a corporation required by 5 & 6 Will. 4, c. 76, s. 94, is sufficiently signified by a letter signed by their secretary. Such consent can authorise no alienation or charge of the corporate property, further than is specified in the memorial on which it is founded. *Arnold* v. *Gravesend Corporation*, 2 Kay & J. 574; 25 L. J., Ch. 776; 2 Jur. (N.S.) 703; 4 W. R. 478.

Taking in Execution.]—Execution cannot by virtue of 5 & 6 Will. 4, c. 76, s. 92, be had against the property of a corporation, acquired since the passing of that statute, in satisfaction of a debt contracted by the old corporation. *Arnold* v. *Rigge*, 13 C. B. 745; 1 C. L. R. 309; 22 L. J., C. P. 235; 17 Jur. 896; 1 W. R. 389.

Vesting of Property on Incorporation—Transfer of Stock.]—The words "council of such borough" in s. 310 of the Public Health Act, 1875, mean the mayor, aldermen, and burgesses acting by the council. The effect of the section, therefore, is that, when the district of a local board is incorporated as a borough, all the property of the board (including property acquired by them by purchase after the passing of the act) vests at once in the corporation, without the necessity of any conveyance or transfer. In such a case the Bank of England are bound, on the request of the corporation, to register in their corporate name government stock previously standing in the books of the bank in the name of the local board, without requiring any transfer to be executed. *Hyde Corporation* v. *Bank of England*, 51 L. J., Ch. 747; 21 Ch. D. 176; 46 L. T. 910; 30 W. R. 790.

Repairs to Pew.]—A corporation had, during all the time of living memory, repaired from the corporation funds a pew in a parish church, to which the members of the corporation had been used, in their character of corporators, to resort for worship. It did not appear that the corporation possessed any hall or other building within the parish:—Held, that such repairs might be defrayed, from time to time, under s. 92 of 5 & 6 Will. 4, c. 76. *Reg.* v. *Warwick Corporation*, 15 L. J., Q. B. 306; 10 Jur. 962.

Fees.]—Fees, which a justices' clerk in a borough is authorised to take, by a table regularly allowed and confirmed, under 5 & 6 Will. 4, c. 76, s. 124, in respect of charges against per-

sons apprehended and brought before the borough justices by constables appointed by the watch committee, disposed of by such justices, and which fees the clerk to the justices cannot recover from such person or persons, either on account of their not being specifically imposed on them by acts of parliament, or from their inability to pay, are expenses necessarily incurred in carrying into effect the provisions of the act, under s. 92; and a mandamus will go to direct their payment out of the borough fund. *Reg.* v. *Gloucester Corporation*, D. & M. 677; 5 Q. B. 862; 13 L. J., Q. B. 233; 8 Jur. 573.

Improvement not Specifically Authorised—Freeing Bridge from Toll—Agreement for, not Void, but Borough Fund not Applicable, excepting any Accidental Surplus.]—See *Newcastle-upon-Tyne Corporation* v. *Att.-Gen.*, col. 602.

Non-Rateability of.]—Property forming part of the borough fund, which, by the Municipal Corporation Act (5 & 6 Will. 4, c. 76), s. 92, is to be applied to purposes that are for the public benefit of the borough, is not rateable to the relief of the poor. *Reg.* v. *Liverpool Corporation*, 9 Ad. & E. 435; 8 L. J., M. C. 41.

A municipal corporation is not rateable to the relief of the poor in respect of its property, although outside the limits of the borough. *Reg.* v. *Exminster*, 9 L. J., M. C. 108.

Property Subject to Charitable Trust.]—A testator, in 1586, devised a manor to trustees for the founding, by the mayor and aldermen of Bristol, of a hospital for the education of poor infants and orphans, and that they should be for ever the governors of the same. Queen Elizabeth, by a charter, ordained that the mayor and common council, and their successors, should be called "The Governors of the Hospital of Queen Elizabeth of Bristol," and should have the government of all the orphans, and of all the lands, tenements, &c., and should be a body corporate and politic of itself, for ever capable of holding lands. The hospital and lands continued vested in the mayor and common council down to the passing of the 5 & 6 Will. 4, c. 76. By s. 71, where the body corporate of any borough shall stand seised of any estate or interest of any hereditaments in trust for charitable uses or trusts, all the estate, right, interest and title, and all the powers of such body corporate, in respect of the uses and trusts, shall continue in the persons who, at the time of the passing of the act, were trustees, until the 1st of August, 1836, or until parliament shall otherwise order. Provided that, if parliament shall not otherwise direct on or before the 1st of August, 1836, the lord chancellor shall make such orders as he should see fit for the administration, subject to such charitable uses or trusts, of such trust estates. No act of parliament was passed on the subject prior to the 19th of October, 1836, on which day the lord chancellor appointed new trustees of the hospital lands:—Held, first, that the meaning of 5 & 6 Will. 4, c. 76, s. 71, was that the estate and interest in the uses and trusts only, and not in the legal estate, were continued in those in whom it was vested by the act up to the 1st of August, 1836; secondly, that the legal estate remained, and always had been, vested in the corporation, the 71st section affecting only the equitable interest or right of administering the charitable funds; and therefore that the corporation was entitled to recover the lands in ejectment. *Doe* d. *Bristol Hospital of Queen Elizabeth Governors* v. *Norton*, 11 M. & W. 913; 12 L. J., Ex. 418; 7 Jur. 751.

Semble, that if property is granted to a corporation, subject to a payment for charitable purposes imposed by the grantor, this falls under the provisions of 5 & 6 Will. 4, c. 76, s. 71; and that s. 68 applies, not to such property, but to cases where the payment has been made by the gift of the corporation itself. *Rex* v. *Sankey*, 5 A. & E. 423; 6 N. & M. 839; 2 H. & W. 275; 5 L. J., K. B. 255.

Property of Hospital—Purchase by Corporation.]—A hospital having a corporate charter was established in close connection with a municipal corporation. The ex-mayor was to be the governor, the masters and assistants were elected from the corporation, and the mayor and aldermen were visitors:—Held, that the corporation and hospital were incapable of contracting, and a purchase by the corporation of property belonging to the hospital was set aside. *Att.-Gen.* v. *Plymouth Corporation*, 9 Beav. 67; 15 L. J., Ch. 109.

See also, as to the power of municipal corporations to purchase, sell, mortgage, and lease corporate land, to contract loans, to transfer stock, to maintain bridges, to sell, &c., advowsons, and as to the misapplication of corporate property, the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 105–132; and as to the payments to be made to, and the application of, the borough fund, ss. 139–143.

b. How Charge objected to.

Mandamus.]—An order made by a town council for the payment by the treasurer of a sum of money out of the borough fund having been brought up by certiorari and quashed, a mandamus was applied for, commanding the town council to cause the treasurer of the borough to render an account for the purpose of having that sum of money restored to the borough fund. The court discharged the rule, upon the ground that there had been no demand upon the town council, and subsequently refused a second application, founded upon a demand and refusal made since the first. *Reg* v. *Stamford Corporation*, 9 Jur. 159.

The court will not grant a mandamus to the mayor of a borough to hold a fresh meeting of the ratepayers of the borough for the purpose of granting or withholding their consent to the incurring by the governing body of a borough the expense of opposing a bill in parliament under 35 & 36 Vict. c. 91, s. 4, after a prior meeting has been held where a poll has been refused, in order that at the fresh meeting a poll of the ratepayers of the borough may be taken, upon the application of a ratepayer of the borough, who is also one of the promoters of the bill. *Reg.* v. *Peterborough Corporation*, 44 L. J., Q. B. 85; 23 W. R. 343.

Register of Owners and Proxies, whether necessary—Poll.]—The town council of a borough is not bound, under the Public Health Act, 1875, sched. II. r. 19, to keep a register of owners and proxies for the purpose of taking a poll in the borough with respect to the application, under 35 & 36 Vict. c. 91, of the borough funds in opposing local and personal bills in

parliament. *Ward* v. *Sheffield Corporation*, 56 L. J., Q. B. 418; 19 Q. B. D. 22.

By Certiorari.]—Where an order for payment of money out of a borough fund is brought up by certiorari, and quashed with costs, the court should decide, when the quashing is ordered, who is to be charged with the costs as the prosecutor of the order, and the name of such party should be inserted in the rule. *Reg.* v. *Dunn*, D. & M. 737; 5 Q. B. 959; 13 L. J., Q. B. 237; 8 Jur. 773.

An order signed by the mayor, at the meeting of a town council properly convened, and in which the majority concurred, for payment of certain illegal expenses and sum of money out of the borough fund, may be removed by certiorari, though it is not signed by three members of the council, and countersigned by the town clerk, according to 5 & 6 Will. 4, c. 76, s. 59. *Reg.* v. *Lichfield Town Council*, D. & M. 491; 4 Q. B. 670; 12 L. J., Q. B. 308; 7 Jur. 670.

Where an order of the council of a borough for the payment of a sum of money out of the borough fund is removed by certiorari, objections not appearing upon the face of it may be shown by affidavits. *Reg.* v. *Lichfield Town Council*, 10 Q. B. 534; 16 L. J., Q. B. 333; 11 Jur. 888.

The court is not bound either wholly to confirm, or wholly to disallow, the order of the council of a borough, brought before it by certiorari, but has a discretion over the order as well as over the costs, and therefore no less power to modify than either to confirm or disallow the order. *Reg.* v. *Prest*, 16 Q. B. 33; 20 L. J., Q. B. 17; 15 Jur. 554.

See *Reg.* v. *Liverpool Corporation and Town Council* and *Reg.* v. *Ramsgate Corporation*, col. 611.

By Injunction.]—See *Att.-Gen.* v. *Waterford Corporation*, col. 607; *Att.-Gen.* v. *Wigan Corporation*; *Att.-Gen.* v. *Norwich Corporation*, col. 608; and *Att.-Gen.* v. *Blackburn Corporation*, col. 612.

X. BOROUGH BY-LAWS.

And see cases, post, **B.** IX. (col. 644).

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 23, 24.

Validity—Prohibition of Music in Street.]—A by-law made by the council of a borough under s. 23 of the Municipal Corporations Act, 1882, provided that no person not being a member of her majesty's army or auxiliary forces, acting under the orders of his commanding officer, should sound or play upon any musical instrument, in any of the streets in the borough on Sunday:—Held, that such by-law was unreasonable and ultra vires, and therefore void. *Johnson* v. *Croydon Corporation*, 55 L. J., M. C. 117; 16 Q. B. D. 708; 54 L. T. 295; 50 J. P. 487.

Sect. 90 of the Municipal Corporations Act, 1835, gives powers to boroughs to make by-laws for the good rule and government of the borough, and for the prevention of all such nuisances as are not already punishable in a summary way. Under these powers the city of Truro made the following by-law:—"Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street, or near any house within the said borough, after having been required by any householder resident in any street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause," &c. Edwin Gay was summoned before the justices of Truro, on the 13th October, 1883, and convicted by them of an offence against the above by-law, and fined 2*l.* 2*s.* and costs. It was proved that Gay was a captain in the Salvation Army, and that on the morning of Sunday the 7th October, he was in Victoria Square, Truro, playing a concertina, and surrounded by a large crowd; that he was requested by the superintendent of police to desist from playing the concertina, but he refused to do so, the superintendent at the same time telling him that he had reasonable cause for asking him to desist, as several complaints had been made by the inhabitants. It was also proved that on many previous occasions the Salvation Army had marched through the streets, playing musical instruments, tambourines, and triangles; that they had been frequently cautioned and required to desist, as many complaints had been made of their proceedings. On a rule for a certiorari to remove the conviction into this court:—Held, that the by-law was not unreasonable, and that the conviction thereunder ought to stand; also that there was reasonable cause for calling on the prosecutor to desist from playing. *Reg.* v. *Powell*, 51 L. T. 92; 48 J. P. 740.

A by-law made by the town council of a borough under 5 & 6 Will. 4, c. 76, s. 90, provided that every person who in any street should sound or play upon any musical or noisy instrument, or should sing, recite, or preach in any street without having previously obtained a licence in writing from the mayor; and every person who, having obtained such licence, should fail to observe, or should act contrary to any of the conditions of such licence, should forfeit and pay a sum not exceeding 20*s.*, and not less than 1*s.*:—Held, that the by-law was unreasonable and ultra vires, and therefore void. *Munro* v. *Watson*, 57 L. T. 366; 51 J. P. 660.

B. used a concertina in a street in a borough, a by-law of which, made under 5 & 6 Will. 4, c. 76, prohibited the use of any noisy instrument to the annoyance of any of the inhabitants. The justices found it was a noisy instrument, and some inhabitants proved being annoyed:—Held, that it was not necessary to prove that the instrument was a public nuisance to all the inhabitants, and that the by-law was not ultra vires. *Booth* v. *Howell*, 53 J. P. 678.

See *Innes* v. *Newman*, infra.

—— **Prohibition of Juvenile Street Vendors.**]—The N. corporation made a by-law that parents should be liable to a penalty if they suffered a child to be selling articles in the street after a certain hour:—Held, that the by-law was in excess of the powers given by the Municipal Corporations Act, 1882, as being too general and absolute, and void. *Macdonald* v. *Lochrane*, 51 J. P. 629.

—— **Prohibition of Slaughter-houses.**]—A by-law that no person should slaughter animals within the walls of a city under certain penalties, is good, because merely a regulation of trade, and not a restraint, and other inhabitants are bound, as well as the members of the corporation. *Pierce* v. *Bartrum*, Cowp. 269.

—— **Regulation of Trades.**]—The common council of the city of London has by custom a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they should be licensed A by-law was made in common council, that 420 of such carts, and no more, should, by the president and governors of Christ's Hospital, be allowed or licensed to work for hire within the city:—Held, that such by-law was supported by the custom; and that the discretionary power of licensing was rightly and ex necessitate delegated by the common council to a smaller body. *Shaw* v. *Pope*, 2 B. & Ad. 465.

A custom of the city of London, that no person not being free may sell or put to sale any wares within the city or liberties by retail, or keep any shop or other place for show, sale, or putting to sale, of wares by retail, or for use of any art, trade, or mystery, within the city, liberties, or suburbs, is sufficient ground for a by-law forbidding any non-freeman to show, sell, or put to sale wares by retail within the city, liberties, or suburbs, or to use any art, trade, or mystery within the same. *Clarke* v. *Denton*, 1 B. & Ad. 92; 8 L. J. (o.s.) K. B. 333.

Where a municipal council had power to make by-laws for regulating and governing hawkers, a by-law prohibiting hawkers from plying their trade at all in part of the city was ultra vires. *Toronto Corporation* v. *Virgo*, 73 L. T. 449—P. C.

—— **Closing Cemetery.**] — A by-law of a municipal council in New South Wales, empowered to make by-laws for regulating the interment of the dead, prohibiting interment altogether in a particular cemetery is not ultra vires because it takes away from owners of burial places therein the only use of their property. *Slattery* v. *Naylor*, 57 L. J., P. C. 73; 13 App. Cas. 446; 59 L. T. 41; 36 W. R. 897.

—— **Betting in Streets.**]—A by-law made by a borough council, that any person who shall frequent or use any street or other public place for the purpose of bookmaking and betting shall be liable to a penalty, is not ultra vires, being aimed at persons standing on the pavement with books in their hands lying in wait for customers, and it has no application to a person happening to be in the street and casually making a bet. *Strickland* v. *Hayes* (65 L. J., M. C. 55; [1896] 1 Q. B. 290) commented on. *Burnett* v. *Berry*, 65 L. J., M. C. 118; [1896] 1 Q. B. 641; 74 L. T. 494; 44 W. R. 512; 60 J. P. 375; 18 Cox, C. C. 325.

The power of a borough council to make by-laws under section 23 of the Municipal Corporations Act, 1882, is not wholly restricted to offences for which a summary method of punishment already exists. *Ib.*

—— **Roundabouts, &c., on Land adjoining Street or Public Place.**]—A by-law made under s. 23 of the Municipal Corporations Act, 1882, providing that "no person shall, to the annoyance or disturbance of residents or passengers, keep or manage a shooting gallery, swingboat, roundabout, or other like thing, in any street or public place, or on land adjoining or near to such street or public place, provided always that this by-law shall not apply to any fair lawfully held," is not bad by reason that it extends to land adjoining or near to a street or public place. *Teale* v. *Harris*, 60 J. P. 744.

—— **Erection of Booths.**]—A by-law of a borough, which provides that no person shall erect any booth, or place any caravan for the purpose of any show or public entertainment in any public place within the borough, without the licence of the mayor, and that any such licence given at any other time than fair-time should be revoked by the mayor, if three inhabitant householders, residing within one hundred yards of the place for which it was granted, should memorialise the mayor to revoke it, is an unreasonable by-law, and therefore bad. *Elwood* v. *Bullock*, 6 Q. B. 383; 13 L. J., Q. B. 330; 8 Jur. 1044.

—— **Against Keeping Swine.**]—A by-law, made by a town council, under 5 & 6 Will. 4, c. 76, s. 90, imposing a fine upon every person "who shall keep, or suffer to be kept, any swine within the borough from the 1st day of May to the 31st day of October inclusive in any year," is a bad by-law. *Everett* v. *Grapes*, 3 L. T. 669.

—— **Ordinance of Burgesses — Pecuniary Benefits.**]—An act of parliament passed for dividing and inclosing open lands in a borough over which a corporation immemorially exercised the sole right of pasturage, enacted that those lands should be divided between and allotted to the lord of the manor and the corporation, and that the corporation should have power to make leases of their allotments, as the burgesses in common hall assembled should think proper. A rule, order or ordinance of the burgesses in common hall assembled, ordered that no lease should be made to one burgess of more than fifty or less than five acres; and it being the desire and opinion of the burgesses that every burgess residing within the borough should receive a benefit from the inclosure, it was further ordered that the rents arising from the inclosure should be paid and distributed yearly, by the common attorneys of the borough, among twelve senior burgesses residing within the borough, and that no burgess who should take a lease should be entitled to receive any of these rents:—Held, that the ordinance was a valid by-law, and that an action was maintainable on it at common law by the parties to whom pecuniary benefits were granted by it. *Swansea Corporation* v. *Hopkins*, 8 M. & W. 901—Ex. Ch. Affirming 8 L. J., Ex. 121.

Against Exposing for Sale Provisions unfit for Food.]—By the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 90, it is lawful for the council of a borough to make by-laws for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force in such borough. A town council of a borough made a by-law, "that if any butcher or dealer in meat, or any fishmonger, poulterer or other person, shall expose or offer for sale on his premises, or have in his possession with intent to sell or expose for sale, any meat, fish, poultry, or other victuals or provisions unfit for the food of man, he shall be subject to a penalty, to be recovered before justices, who shall decide on the unfitness." A grocer exposed for sale on his premises cheese which the justices held was unfit for food, and convicted him accordingly: — Held, that to expose for sale, or to have possession of with intent to sell, things unfit for food, was a nuisance at common law, that consequently the by-law

was within the powers of s. 90, and that the grocer was within the by-law. *Shillito* v. *Thompson*, 45 L. J., M. C. 18; 1 Q. B. D. 12; 33 L. T. 506; 24 W. R. 57.

—— **Enlarging or Limiting Class from which Officers chosen.**]—A by-law, enlarging or limiting the class of persons from whom a corporate officer is to be selected beyond the number or class described by the charter, is bad. *Rex* v. *Barnstead*, 9 L. J. (O.S.) K. B. 321; 2 B. & Ad. 699; *Tucker* v. *Rex*, 2 Bro. P. C. 304; *Lee* v. *Wallis*, 1 Ld. Ken. 292.

—— **Limiting Electoral Body.**]—*See* Vol. vi., ELECTION LAW, B. Municipal, col. 158.

—— **Limiting Number of Attorneys of Sheriff's Court.**]—In a city which was incorporated before time of memory, there had been a court from very ancient times, held first before the mayor and bailiffs, and, after a charter of Richard 2, before the mayor and sheriffs. By a by-law made in 3 & 4 Philip and Mary, by a select body of the corporation, who had immemorially made rules and regulations as to the practice of the court, and who had, at their discretion, selected the persons admitted to practise as attorneys there, it was ordered, that thenceforth there should be no more than four persons admitted to be attorneys of the sheriff's court; and from that time it did not appear that any more than that number had ever been allowed to practise:—Held, that the by-law was reasonable. *Rex* v. *York (Sheriffs)*, 3 B. & Ad. 770; 1 L. J., K. B. 211.

Against Temporary Obstructions — What Erections not within.]—Under a by-law made in pursuance of 5 & 6 Will. 4, c. 76, s. 90, the causing of a temporary obstruction in the streets was made punishable by fine. A. was convicted under this by-law for erecting a front to his house which encroached upon the footway. A case, stated by consent of the parties, found that this erection was substantially built, and formed the front of A.'s house, but submitted the question to the court:—Held, that, the offence not being within the by-law, the conviction must be quashed. *Reg.* v. *Dickenson*, 7 El. & Bl. 831; 26 L. J., M. C. 204; 3 Jur. (N.S.) 1076; 5 W. R. 654.

Sufficient Compliance with.]—Though a by-law of a corporation required an indenture of apprenticesh p to be inrolled; yet, if it had been exhibited to the town clerk, who marked it as being inrolled, it was sufficient, notwithstanding it was not inrolled in the corporation books *Rex* v. *Cambridge*, 2 Chit. 144.

Evidence of Breach — Annoyance of Inhabitants.]—In a prosecution under a by-law which prohibits any person from making a violent noise in the streets to the annoyance of the inhabitants, it is sufficient to prove that one inhabitant has been annoyed. *Innes* v. *Newman*, 63 L. J., M. C. 198; [1894] 2 Q. B. 292; 10 R. 348; 70 L. T. 689; 42 W. R. 573.

Mandamus.]—In the absence of any precedent, the court refused a rule nisi for a mandamus calling on the mayor of a town to propose a resolution to the burgesses in guild assembled, for repealing certain by-laws, though it was alleged that by-laws and ordinances might by charter be made, and had formerly been made at such guilds *Garrett* v. *Newcastle*, 3 B. & Ad. 252.

—— **"Shall be Lawful"—Optional.**]—The words "shall be lawful," when found in the by-laws of a corporation, are not to be construed as obligatory. Therefore, where a by-law ordained that under certain circumstances it should be lawful for bailiffs to admit to the freedom of the town certain persons:—Held, that this by-law was only optional, and that the admission of such persons to the freedom of the borough could not be enforced by a mandamus. *Rex* v. *Eye*, 2 D. & R. 172; 1 B. & C. 85; 4 B. & Ald. 271.

As to the Right of Free Trading in Boroughs, notwithstanding any By-Law.]—*See* 45 & 46 Vict. c. 50, s. 247.

XI. BOROUGH BOUNDARIES.

See Municipal Corporations Act, 1882, ss. 228, 229.

Liability to Repair.]—A borough incorporated by charter with a non-intromittent clause was enlarged under 2 & 3 Will. 4, c. 64, s. 35, and 5 & 6 Will. 4, c. 76, s. 7, by the addition of a parish in the same county, containing a bridge which until that time that county had repaired. There was no evidence that the borough had been used to maintain any bridges:—Held, that the transfer of the new district did not render the borough liable to repair the bridge. *Reg.* v. *New Sarum Borough*, 7 Q. B. 941; 2 New Sess. Cas. 133; 15 L. J., M. C. 15; 10 Jur. 176.

Effect of 6 & 7 Will. 4, c. 103.]—By a charter of Edw. 3, the men of the villa of Coventry, tenants of the queen mother of the manor of Chilesmore, in Coventry, were incorporated. The corporation consisted of the mayor, bailiffs, and men or commonalty of the villa of Coventry. By that and subsequent charters (some of the king, some of Isabel, the queeen of Edward 3, and others of the Black Prince), various franchises within the villa of Coventry, and throughout the view of frankpledge of the manor of Chilesmore and elsewhere, were granted to the mayor and bailiffs of Coventry. By a charter of Hen. 6, the villa of Coventry, with Radford, Keresley and other specified places, were made into a distinct county, called the county of the city of Coventry. By a charter of Jac. 1, regulating the government of the corporation, the aldermen of Coventry were made justices of the peace of the county of the city. There were ten aldermen of Coventry, being one alderman for each of ten wards; and the limits of the wards did not appear far to exceed the continuous lines of streets and houses, popularly known as the city of Coventry:—Held, that, under 6 & 7 Will. 4, c. 103, places being within the county of the city of Coventry, and through which the mayor and bailiffs of Coventry had a coroner, and other franchises, under the above charters, but being beyond the lines of such streets and houses, and not within any of the wards of Coventry, were not part of the city of Coventry. *Coventry Corporation* v. *Lythall*, 10 M. & W. 773; 12 L. J., Ex. 409.

Under previous Statutes.]—In boroughs, the limits of which for the purposes of parliamentary representation have been fixed by 2 & 3 Will. 4, c. 64, s. 35, Schedule O., and which are included in the 1st section of Schedules A. and B. to 5 & 6 Will. 4, c. 76, s. 7, all places within the limits so fixed are, by s. 8 of the latter act, parts of the

borough for all purposes; and an ancient borough market may be lawfully held within such limits, although outside the limits of the old municipal borough. *Dorchester Corporation* v. *Ensor*, 39 L. J., Ex. 11; L. R. 4 Ex. 335.

Extension of Borough—Privileges of Freemen.]—See *Leicester Freemen* v. *Lewitt*, col. 578.

As to dividing the Borough into, or altering the Boundaries of, Wards.]—*See* Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 30.

XII. BOROUGH PRISONS.

County Gaol—Expenses.]—A borough sending its prisoners to the county gaol, without any special contract, is liable under 5 & 6 Vict. c. 98, s. 18, to pay a proportion of the expenses of the enlargement of the prison necessary in order to conform to the requirements of 28 & 29 Vict. c. 126. *Reg.* v. *Wigan Corporation*, 39 L. J., M. C. 68; L. R. 5 Q. B. 267; 21 L. T. 715; 18 W. R. 455.

By 5 & 6 Vict. c. 98, s. 18, where no special contract shall be subsisting between the borough and county relative to the prisoners sent from the borough to the county prison, the borough shall pay to the county a proportionate share of the expenses of the conveyance, transport and maintenance of such prisoners, including therein repairs, alterations and additions to the prison. This provision refers to special contracts made, under 5 Geo. 4, c. 85, between the magistrates of boroughs and of counties for the support and maintenance of borough prisoners in county gaols. *Reg.* v. *New Sarum Corporation*, 2 El. & Bl. 654; 22 L. J., M. C. 155; 17 Jur. 934.

—— **Borough Prisoners.**]—Under 5 & 6 Will. 4, c. 76, s. 114, the treasurer of a county may make an order upon the council of a borough, having a separate court of quarter sessions, for the costs arising out of the punishment and maintenance of offenders committed for trial to the county assizes from the borough:—Held, that this clause applied to prisoners committed, in the first instance, to the borough gaol before trial, and, after trial at the assizes, committed to the county prison in execution of their sentences: and that the council was liable, although there was no contract in force, under 5 Geo. 4, c. 85, between the county and borough justices for the maintenance of such prisoners:—Held, also, that the council was made liable not only for the expenses of food, clothing and punishment of such prisoners, but for a proportionate share of the general expenses of the county gaol. *Reg.* v. *Johnson*, 2 P. & D. 610; 10 A. & E. 740; 8 L. J., M. C. 99.

—— **5 & 6 Vict. c. 98, s. 18—Special Contracts.**]—The 5 & 6 Vict. c. 98, s. 18, which enacts that where no special contract shall be subsisting between the borough and county relative to the prisoners sent from the borough to the county prison, the borough shall pay to the county a proportionate share of the expenses of the conveyance, transport and maintenance of such prisoners, including therein repairs, alterations and additions to the prison, refers to special contracts made under the 5 Geo. 4, c. 85. *Bramston* v. *Colchester Corporation*, 6 El. & Bl. 246; 25 L. J., M. C. 73; 2 Jur. (N.S.) 809; 4 W. R. 491.

The council of a borough having a grant of a separate court of quarter sessions, and having no gaol, entered into a contract with the county, that all prisoners who should be committed, or removed to, or confined in, the gaol of the county from the borough, should be supported and maintained therein during the agreement, at 7*s.* a head:—Held, that the agreement, while in force, exempted the borough from contribution to the county in respect of those things contracted for, but no further; that the words support and maintenance, used in the contract, included the expenses of keeping up the prison, and the borough was not liable to contribute in respect of those, but that the borough was liable to contribute in respect of the expenses of the conveyance of prisoners upon summary convictions, in respect of offences committed in the borough (but none other), and of prosecutions at assizes and sessions of borough offenders, and of lock-up houses for the county. *Reg.* v. *Gravesend Borough Council*, 5 El. & Bl. 459; 24 L. J., M. C. 141; 1 Jur. (N.S.) 878.

XIII. MUSEUMS AND LIBRARIES.

Establishment of.]—In 1864, a municipal corporation, as local board of health, purchased under the Public Health Act, 1848, s. 74, a piece of land of about ten acres to be added to a public garden of fifteen acres. In 1875 the corporation determined to appropriate about a quarter of an acre at one extremity of this piece of land as a site for the erection of town buildings, and of a museum, public library and school of art, and conservatory:—Held, by Bacon, V.-C., that no portion of the land could be appropriated for any of these objects, except the museum and conservatory. But held, on appeal, that the erection of a free library was also allowable, as being conducive to the better enjoyment of the public walks and grounds as such. *Att.-Gen.* v. *Sunderland Corporation*, 45 L. J., Ch. 839; 2 Ch. D. 634; 34 L. T. 921; 24 W. R. 991.

Adoption of Public Libraries in Borough.]—*See* LIBRARY.

XIV. BOROUGH COURTS.—*See* COURT.

XV. BOROUGH JUSTICES.—*See* JUSTICE OF THE PEACE.

XVI. CONTRACTS BY AND WITH.—*See* post, **B.** X. (col. 653.)

XVII. ACTIONS BY.—*See* post, **B.** VI. (col. 634.)

B. CORPORATIONS GENERALLY.

I. CHARTER.

See also cases ante, **A.** II. (col. 570.)

Prescription presumes a charter. *Anon.*, Lofft, 556.

Power to Bind Members.]—Although the charter of the Tobacco-Pipe Makers' Company may be inadequate to bind all the tobacco-pipe

makers in the kingdom, it is sufficient to bind such of them as become members of the corporate company. *Tobacco-Pipe Makers' Co.* v. *Woodroffe*, 7 B. & C. 838; 5 D. & R. 530; 4 L. J. (o.s.) K. B. 301.

Power to Exclude Part.]—A corporation has no power to exclude an integral part of the body, where a charter gives them a right of election. *Rex* v. *Head*, 4 Burr. 2513.

Right to a Livery.]—A company's right to have a livery must be founded on charter or custom: the court cannot presume they have it. *Vintners' Co.* v. *Passy*, 1 Burr. 235; 1 Ld. Ken. 500.

Consistency—Usage.]—A charter of Jac. 2 granted to the corporation of the master pilots and seamen of Newcastle-upon-Tyne primage, described in the charter as an ancient duty upon goods brought by ship into the Tyne, or any of the creeks of Newcastle, of which Sunderland was to be rated and accounted, in manner and form following, that is to say, aliens and strangers born, and all other persons arriving with ships in Newcastle within any of the creeks, and not belonging to the same, to pay before they departed with their ships, and every free merchant and inhabitant of Newcastle arriving in the Tyne with a ship within ten days after landing the goods. The charter also granted to the corporation all other perquisites, ancient duties and profits which they had heretofore lawfully had and enjoyed; and also provided that the sums granted by the charter should be in lieu of all other duties theretofore received:—Held, first, that the charter was not inconsistent with the claim of primage in respect of goods imported into Sunderland by merchants resident there. *Bradley* v. *Newcastle Pilots*, 2 El. & Bl. 427: 23 L. J., Q. B. 35; 18 Jur. 240; 1 W. R. 394—Ex. Ch.

Held, secondly, that evidence of usage was admissible in support of the claim. *Ib.*

Where a charter of Edw. 6 granted to the governors of a corporation the right of nominating and appointing, una cum assensu majoris partis inhabitantium of the vill of S., a chaplain to perform divine service in the vill:—Held, that a usage for the governors to nominate a chaplain, and to give notice to the inhabitants to meet at a future day and to assent to or dissent from the nomination so made, was not inconsistent with the words of the charter. *Rex* v. *Sandford Governors*, 1 N. & P. 328; W. W. & D. 177; 6 A. & E. 374; 6 L. J., K. B. 126.

Construction of.]—Where the words of a charter are doubtful, they may be explained by long usage. *Blankley* v. *Winstanley*, 3 Term Rep. 279; 1 R. R. 704. S. P., *Gape* v. *Handley*, 3 Term Rep. 288, n.; *Rex* v. *Osborne*, 4 East, 327; *Rex* v. *Varlow*, Cowp. 250. And see *Rex* v. *Tate*, 4 East, 337.

Ancient charters, if ambiguous, are to be explained by the usage under them; and the jury, in that case, may interpret the charter by the usage. *Newcastle Pilots* v. *Bradley*, 2 El. & Bl. 428, n.; 16 Jur. 494.

Contemporaneous documents, proceedings in causes relating to a charter, and parol testimony, may be resorted to in order to explain and give to the charter a construction, but not to contradict it. *Luxton School* v. *Scarlett*, 2 Y. & J. 330.

A by-law cannot explain a doubtful charter; if there is any ambiguity on the face of the charter, it is the province of the court to expound it. *Rex* v. *Tucker*, 2 Selw. N. P. 1141.

Where a company was incorporated by charter on a petition referring to 1 Vict. c. 73, but the charter did not mention the act:—Held, that the personal liability of individual members authorised by the act to be imposed in any charter of incorporation, either by reference to that act or otherwise, was not imposed by the mere fact that powers were granted by the charter which could not have been granted apart from the act, in the absence of any reference to the particular section. *Finnis* v. *Young*, 6 W. R. 577.

The charter of a corporation created for the purpose of regulating the trade of masonry in and about the city of London, provided that "there shall or may be four-and-twenty or more of the said company according to the discretion of the master and wardens for the time being, in manner and form hereafter in these presents expressed, to be named and chosen, which shall be, and shall be called the assistants," and in case of vacancies in the post of assistants the charter provided that "then and so often it shall and may be lawful to and for the master and wardens, and the remaining part of the assistants which shall then survive or remain, or any eight of them, at their wills and pleasures from time to time to choose and name one or more other or others of the said company, to be assistant or assistants:—Held, that it was obligatory on the corporation to always have at least twenty-four assistants. *Wells* v. *Masons' Co. of London*, 1 Cab. & E. 521.

Some forms prescribed for the government of a corporation may be imperative, and others directory only. *Foss* v. *Harbottle*, 2 Hare, 461.

Supplemental, when Invalid.]—In order to stop the sealing of a supplemental charter granted to an existing corporation, it must in general be shown that the proposed charter is contrary to law, or that no proper authority for the application has been given, or that some personal right of a member of the society would be wrongly interfered with. *Society of Attorneys, Ex parte*, L. R. 8 Ch. 163.

Grant of Revival.]—The proclamation of James 2, in the fourth year of his reign, for restoring corporations to their ancient charters, operated (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Charles 2 (but which surrenders were not inrolled), who had granted new charters; and overturned such new charters. *Newling* v. *Francis*, 3 Term Rep. 189; 1 R. R. 687.

Acceptance.]—The constitution of a corporation, as settled by an act of parliament, cannot be varied by the acceptance of any charter inconsistent with it. *Rex* v. *Miller*, 6 Term Rep. 268; 3 R. R. 172.

A charter granted by the crown to a corporation cannot be partially accepted, whether it is a charter of creation, or granted to a pre-existing corporation. *Rex* v. *Westwood*, 2 Dow & Clark, 21; 4 Bligh (N.S.) 213; 7 Bing. 1; 7 D. & R. 267; 4 B. & C. 781.

Unless it should appear to be the intention of the crown that the grantee should have the option to accept in part and reject in part. *Ib.*

Where a person has been admitted a member of a corporate company, and has acted as such, it is not competent to him, in an action for infringing by-laws, to dispute the acceptance of the charter by a majority of those whom it incorporated. *Tobacco-Pipe Makers' Co.* v. *Woodroffe*, 5 D. & R. 530; 7 B. & C. 838; 4 L. J. (o.s.) K. B. 301.

If a corporation by prescription will accept a charter limiting the corporation to a less number than existed by custom, the corporation will be bound by that acceptance, and no subsequent vicious custom departing from the charter can avail. *Page* v. *Rex*, 2 Ridgw. P. C. 502.

Surrender of.]—The surrender of a charter is void for want of inrolment. *Rex* v. *Osbourne*, 4 East, 327.

Valid, until Impeached.]—Where the charter of a corporation has been granted with certain terms or provisions, and the charter is subsisting and unimpeached, notwithstanding it might be open to the attorney-general or the crown to take proceedings for setting it aside, the court will still deal with the corporation as having all the rights and powers of an existing body. *Robinson* v. *London Hospital Governors*, 10 Hare, 19; 22 L. J., Ch. 754.

II. CORPORATE BODY.

Who are.]—The commissioners of the treasury are not a corporation. *Williams* v. *Admiralty Lords Commissioners*, 11 C. B. 424.

A charity was founded in the twelfth century, and was commonly called "The master, brethren and sisters of the Hospital of St. John the Baptist." In the time of Charles 2, the mastership of the hospital, and the lands belonging to it, were granted to a corporation. The leases of the hospital lands had never been granted by the corporation under the common seal, but in the lease the corporation was described as being the master of the hospital, and the rents were reserved to the master, brethren and sisters. An information was filed against the corporation, and the parties appointed trustees of the estates, under the 5 & 6 Will. 4, c. 76, to ascertain the charity lands, and to have a scheme for the regulation of the charity; to which information the master, brethren and sisters of the hospital were not made parties as a corporate body:—Held, that they did not form a corporate body; and, consequently, an objection, that they ought to have been made parties to the information as a corporation, was not sustained. *Att.-Gen.* v. *Chester Corporation*, 1 Hall & Tw. 46.

See *Salford Corporation* v. *Lancashire County Council*, 59 L. J., Q. B. 576; 25 Q. B. D. 384; 63 L. T. 409.

Where by the statutes under which river conservators acted, they were to take land by succession:—Held, that they were created a corporation by implication. *Tone Conservators* v. *Ash*, 10 B. & C. 349; 8 L. J. (o.s.) K. B. 226.

Where a statute vests property in commissioners and their successors, they are a corporation by implication. *Bower* v. *Griffith*, 16 W. R. 540, Ir.

A question was raised in this case upon petition whether certain trustees, appointed under an act of parliament for inclosing a piece of land, were to execute conveyances in their own names, or as a corporate body. The court held that, although the act did not expressly constitute them a corporation, yet, as the trusts to be executed were to continue for an unlimited time, the trustees must, by the very constitution of the body, and the powers given them, be taken to be a corporation. *Newport Marsh Trustees, Ex parte*, 16 Sim. 346; 18 L. J., Ch. 49; 12 Jur. 932.

Guardians of the poor held, by reason of the provisions in the act appointing them, to constitute a corporation, at all events for the purpose of being sued in the name of their treasurer for the time being in respect of a liability incurred by their predecessors in office. *Jefferys* v. *Gurr*, 2 B. & Ad. 833; 1 L. J., K. B. 23.

Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue to receive the dividends of stock, notwithstanding fluctuations in the number and identity of the members of the corporation. *Annesley, Ex parte*, 2 Y. & Coll. 350; 6 L. J. Ex. Eq. 81.

See *Furnival* v. *Coombs*, col. 656.

Rights by Prescription.]—A company by prescription may have more than one corporate name. *Shrewsbury* v. *Hart*, 1 Car. & P. 113.

A company by prescription and by custom may compel all of their trade to become members. *Ib.*

As to what is sufficient primâ facie evidence that a corporation is immemorial. *Jenkins* v. *Harvey*, 5 Tyr. 871; 1 Gale, 454.

Misdescription.]—A misdescription of a corporation, in omitting the name of the founder, in a conveyance of part of its estate for the redemption of the land tax, is immaterial; and if it had been material, it would have been cured by 54 Geo. 3, c. 173, s. 12. *Croydon Hospital* v. *Farley*, 2 Marsh. 174; 6 Taunt. 467.

Name.]—Where a corporation, declaring in an action by their modern name, stated that the citizens, &c., were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by A., declared on, were known by a certain other name, by which A. granted to them a certain water-course, and covenanted for quiet enjoyment:—Held, that the deed granting the water-course to them by such name was evidence as against the defendant, who claimed under that grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *Carlisle* v. *Balmire*, 8 East, 487; 9 R. R. 491.

Judicial Cognizance.]—Where a corporation declares in an action in the name by which it is incorporated by act of parliament, the court is bound, even after verdict, to notice that it is a corporation. *Church* v. *Imperial Gaslight and Coke Co.*, 3 N. & P. 35; 6 A. & E. 846; 1 W. W. & H. 137; 7 L. J., Q. B. 118.

Proof of Aggregate Corporation.]—To prove the existence of an aggregate corporation, consisting of different trades, entries of admission into the separate trades, as "into the company of carpenters, into the company of plasterers," are evidence to be left to the jury. *Carpenters' Co.* v. *Hayward*, 1 Dougl. 374.

Powers enjoyed by.]—In our opinion the

power of a corporation established for certain specified purposes must depend on what those purposes are, and except so far as it has express powers given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted. Per cur. *Reg.* v. *Reed*, 49 L. J., Q. B. 600; 5 Q. B. D. 483, 488; 42 L. T. 835; 28 W. R. 787; 44 J. P. 633—C. A.

A lay corporation may incorporate new members if it do not abuse its power. *Att.-Gen.* v. *Talbot*, 1 Ves. 78.

A corporation having accepted a charter, empowering the body thereafter to elect persons in the room of such members as should die or be disfranchised, cannot elect any persons except there be vacancies by such events. *Page* v. *Rex*, 2 Ridgw. P. C. 445.

As to the Construction of Powers to make and levy Rates given to Commissioners incorporated under Drainage Acts.]—See *Reg.* v. *Selby Dam Commissioners*, and *Reg.* v. *Tramore Drainage Board*, col. 633.

How Powers exercised.]—Where a certain number are incorporated a major part of them may do any corporate act, though nothing be mentioned in the charter. *Att.-Gen* v. *Davy*, 2 Atk. 212; West's Rep. t. Hardwicke, 121.

It is not necessary that every corporate act should be under the seal of the corporation. *Ib.*

Whether a corporation consisting of numerous governors would be bound by the acquiescence of some, standing by, permitting expenditure, &c., quære. *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188.

The act of the majority of a corporation is in general considered as the act of the whole. Therefore, where an act of parliament empowered a corporate body "at any meeting at which not less than thirteen should be present, by writing under their hands, to appoint a treasurer":—Held, that an appointment signed by twelve, at a meeting of seventeen, was valid. *Cortis* v. *Kent Waterworks Co.*, 5 L. J. (O.S.) M. C. 106; 7 B. & C. 316.

Where a power of doing corporate acts is not specially delegated to particular members, the general mode is for the members to meet on the charter days, and the major part who are present to do the act. *Rex* v. *Varlo*, Cowp. 248.

The crown, by letters patent, granted full power to the master and wardens of the corporation of bakers (there being four wardens), by themselves and their deputy or deputies, to overlook and correct the trade of baking:—Held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of persons to whom the power was given; and, if they acted as deputies, they were bound to show that they were appointed by the majority. *Cook* v. *Loveland*, 2 B. & P. 31; 5 R. R. 533.

In general, where the advowson of a vicarage is in a corporate body, the right of nomination is in the whole body; and, in cases of dispute, the majority will bind the whole. *Reg.* v. *Kendall*, 1 Q. B. 366; 10 L. J., Q. B. 137.

Where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance. *Smyth* v. *Darley*, 2 H. L. Cas. 789.

The omission to summon any one so entitled renders the acts done at such a meeting, in his absence, invalid. *Ib.*

When duly met, corporate acts may be done by the majority of those constituting the meeting. *Rex* v. *Monday*, Cowp. 530.

III. CORPORATE PROPERTY.

Misapplication of Funds.]—A corporation can act in any ordinary matter of business in the manner in which an individual conducting the same kind of business can act, and there is therefore nothing illegal or ultra vires in an association incorporated by royal charter defending their servant in an action for libel in respect of matter published by the servant, if the matter complained of was published in the usual course of their business, and such an application of their funds is not forbidden by their charter. *Breay* v. *Royal British Nurses Association*, 66 L. J., Ch. 587; [1897] 2 Ch. 272; 76 L. T. 735; 46 W. R. 86—C. A.

The governing body of a corporation which is in fact a trading partnership, cannot in general use the funds of the community for any purpose other than those for which they are constituted; whether that governing body is exclusively directors, or a council general, or the majority at the general meeting of the company. *Pickering* v. *Stephenson*, 41 L. J., Ch. 493; L. R. 14 Eq. 322; 26 L. T. 608; 20 W. R. 654.

Therefore the special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, are always to be construed as subject to a paramount and inherent restriction, that they are to be exercised in subjection to the special purposes of the original bond of association. That is not a mere canon in the English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence. *Ib.*

Copyhold.]—A corporation cannot hold land by copy of court roll. *Att.-Gen.* v. *Lewin*, C. P. Cooper, 54.

On Dissolution.]—If lands are given to a corporate body, and it is dissolved, they will revert to the donor, and not escheat. *Att.-Gen.* v. *Gower* (*Lord*), 9 Mod. 226.

Devise.]—Estate devised to a body corporate, which cannot take by the Statute of Mortmain, in trust to sell land and apply the proceeds for persons competent to take; though the devise of the legal estate is void at law, yet the trusts shall not be defeated; the heir-at-law therefore considered as a trustee for the purpose. *Sonley* v. *Clockmakers' Co.*, 1 Bro. C. C. 81.

A devise to a corporation for its own purposes, although void at law, is good in equity. *Incorporated Society for Protestant Schools* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; Sau. & Sc. 559.

Where a person gives a debt by will to a corporation, it vests in them in law, and they may recover it in the ecclesiastical court. *Att.-Gen.* v. *Pyle*, 1 Atk. 435.

Commissioners Incorporated under Drainage

Act—Power to make Rate to satisfy Judgment.]—Certain commissioners were incorporated under a Drainage Act (48 & 49 Vict. c. 185), for the purpose of executing and maintaining certain drainage works. By s. 38 of the act, the costs of and incidental to the taking over and enlarging, repairing, renewing, or cleansing in the first instance of any drains and works incident to drainage works, were to be borne by the owners of lands in certain specified proportions, provided that the total amount to be expended under the powers of the act should not exceed 15,000*l.* Section 40 provided that fourteen days before every annual general meeting the commissioners were to have estimates prepared of all the moneys required to meet the claims for the ensuing year, such estimates to show in separate items, among others, the amount, if any, for constructing new works, and also the costs of carrying out the objects of the act; and s. 41 provided that to provide for so much of the "expenses aforesaid" as were properly chargeable out of the rates for the current year, the commissioners were to make, within a month after such meeting, one rate for the owners and another for the occupiers of lands in accordance with such estimates. The plaintiff obtained judgment in an action brought against the commissioners for damages for injury caused to his property by the negligence of their servants in constructing certain new works. The commissioners had raised and expended the whole of the 15,000*l.* which they were authorised under the act to expend on the initial execution of the drainage works, and had no goods on which execution could be levied to satisfy the plaintiff's judgment:—Held, that s. 38 did not limit the provisions of ss. 40 and 41, and that the plaintiff's claim being in respect of the construction of new works within s. 40, the commissioners had power, under ss. 40 and 41, to make and levy a rate to satisfy the judgment which had been obtained against them. *Reg.* v. *Selby Dam Commissioners*, 61 L. J., Q. B. 372; [1892] 1 Q. B. 348; 66 L. T. 17; 56 J. P. 356—C. A.

A contractor who obtained a judgment against a drainage board for extra works, executed by him under agreement with the board, applied for a mandamus to compel the board to levy a rate to satisfy the amount of the judgment:—Held, that the mandamus should be refused, as rates were leviable by the board for the maintenance of works only, and not for their construction. *Reg.* v. *Tramore Drainage Board*, 30 L. R., Ir. 329.

IV. RIGHTS AND LIABILITIES OF CORPORATORS.

A member of an incorporated company, entering into a contract with the company, must be deemed, in respect of that contract, a stranger. *Hill* v. *Manchester Waterworks Co.*, 2 N. & M. 573; 5 B. & Ad. 866; 3 L. J., K. B. 19.

Corporators are not individually answerable for acts done in their corporate capacity, from which detriment happens; at least not without proof of malice. *Harman* v. *Tappenden*, 1 East, 555; 3 Esp. 278; 6 R. R. 340. S. P., *Rex* v. *Wadham College*, 1 East, 560, n.

The court will not grant a criminal information against the members of a corporation for the misapplication of the corporation money. *Rex* v. *Watson*, 2 Term Rep. 199; 1 R. R. 461.

The individual members of a corporation at common law, which is seised in fee simple of freehold lands, have no estate, either legal or equitable, in those lands or any part of them, so as to confer the franchise for a county, albeit their individual shares in the profits derived by the corporation from and out of such lands exceed 40*s.* annually. *Acland* v. *Lewis*, 1 K. & G. 334; 9 C. B. (N.S.) 32; 30 L. J., C. P. 29; 7 Jur. (N.S.) 21; 3 L. T. 472; 9 W. R. 123.

Where a company was incorporated by charter on a petition referring to 1 Vict. c. 73, but the charter did not mention the act:—Held, that the personal liability of individual members authorised by the act to be imposed in any charter of incorporation, either by reference to the act or otherwise, was not imposed by the mere fact that powers were granted by the charter which could not have been granted apart from the act, in the absence of any reference to the act itself *Finnis* v. *Young*, 6 W. R. 577.

Contract by Churchwardens—Proviso negativing personal Liability void.]—See *Furnival* v. *Coombs*, col. 656.

V. AMOTION OF CORPORATORS.

See cases, ante, **A.** III. (col. 581.)

By-law giving Power of Amotion for Just Cause, good.]—See *Rex* v. *Richardson*, col. 649.

A corporation, whether eleemosynary or otherwise, has power to amove a member for sufficient cause, and will not be restrained by injunction from holding an inquiry into the conduct of a member, and expelling him if it thinks fit. The remedy of a member aggrieved by such proceeding is by visitation or mandamus in the respective cases of eleemosynary and civil corporations. *Rex* v. *Richardson* (1 Burr. 537) followed. The same principle applies where the amoved person is also an officer of the corporation. *O'Grady* v. *Mercers' Hospital*, 19 L. R. Ir. 350.

As to Removing a Member without Hearing him.]—See *Reg.* v. *Saddlers' Co.*, 10 H. L. Cas. 404, post, cols. 650, 651.

VI. RIGHT TO SUE.

For Penalties—Common Informer.]—A corporation cannot sue for penalties as a common informer unless expressly authorised by statute. *St. Leonards, Shoreditch, Guardians* v. *Franklin*, 47 L. J., C. P. 727; 3 C. P. D. 377; 39 L. T. 122; 26 W. R. 882.

Where, therefore, by a local act penalties were imposed for selling one sort of coal for another within twenty-five miles of the General Post Office, and the penalty was recoverable by the "person or persons who shall inform or sue for the same":—Held, that a corporation could not sue for the penalty. *Ib.*

—— For Half of Penalty Recovered—Proof.]—By 5 & 6 Will. 4, c. 76, s. 48, an overseer neglecting to sign the burgess list of a borough is liable to a penalty of 50*l.*, to be recovered by any person suing within three calendar months; and the money so recovered, after payment of the costs and expenses attending the recovery, is to be paid and apportioned, one moiety to the person suing, the other moiety to the treasurer of the borough. The defendant

recovered a penalty against an overseer, with taxed costs as between party and party, and received the amount:—Held, that, in an action against the defendant by the corporation for money had and received, it was sufficient, primâ facie, for the corporation to prove the recovery and receipt of the penalty and the taxed costs; and that, in default of proof by the defendant of extra expenses, the corporation was entitled to a verdict for half the penalty. *Harwich Corporation* v. *Gant*, 5 El. & Bl. 182; 1 Jur. (N.S.) 708; 3 W. R. 493.

To Support Members' Rights.]—A corporation may join in a suit to establish a claim of exemption on behalf of its individual members. *London City* v. *Liverpool Corporation*, 3 Anstr. 738.

Abatement of Suit.]—A suit by a corporation does not become defective on the death of some of the members; otherwise of a suit by the members in their individual character. *Blackburn* v. *Jepson*, 3 Swan. 138.

To set aside Acts done in its Name.]—A corporation may institute a suit for setting aside transactions fraudulent against it, although carried into effect in its name by members of the governing body; and that right is not affected by the attorney-general having also power to call in question such transactions. *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1; 10 L. J., Ch. 53; 4 Jur. 1174. *And see* 9 Sim. 30; 7 L. J., Ch. 76; 1 Jur. 890.

For Loss of Monopoly of Granting Degrees—Suit must be by Corporation.]—A member of a corporation cannot institute a suit against the governing body of the corporation unless there is also an infringement of a personal or a proprietary right, or an injury to him as an individual. It must be by the corporation itself, or by information by the attorney-general if it is for an injury to the public. *McCormac* v. *Queen's University*, 15 W. R. 733. And see *Prestney* v. *Colchester Corporation*, 51 L. J., Ch. 805; 21 Ch. D. 111.

The loss of a monopoly of university degrees is not a personal injury. *Ib.*

For Libel.]—A corporation may maintain an action of libel in respect of a statement reflecting on its character in the conduct of its business without proof of special damage. *South Hetton Coal Co.* v. *North-Eastern News Association*, 63 L. J., Q. B. 293; [1894] 1 Q. B. 133; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196—C. A.

A municipal corporation cannot maintain an action for libel in respect of a letter charging the corporation with corruption, for it is only the individuals, and not the corporation in its corporate capacity, who can be guilty of such an offence. *Manchester Corporation* v. *Williams*, 60 L. J., Q. B. 23; [1891] 1 Q. B. 94; 63 L. T. 805; 39 W. R. 302; 54 J. P. 712.

A company incorporated under 19 & 20 Vict. c. 47, may maintain an action for a libel calculated to injure the company; and it is no answer that the defendant is a shareholder in the company. *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87; 28 L. J., Ex. 201; 5 Jur. (N.S.) 226; 7 W. R. 265.

The governing body of a corporation, which is in fact a trading partnership, cannot in general use the funds of the community for any purpose other than those for which they are constituted. The costs therefore of a prosecution for libel are not properly payable out of the assets of the company. *Pickering* v. *Stephenson*, 41 L. J., Ch. 493; L. R. 14 Eq. 322; 26 L. T. 608; 20 W. R. 654.

In Names of Individual Members.]—Upon a bill filed originally in the individual names of a corporation, adding their corporate character, and in abatement a bill of revivor in their corporate name only, demurrer for want of privity overruled; the naming of individuals, where the proceedings purport to be in a corporate character, and the corporate names are added, is mere surplusage. *Walker* v. *Warden Christ's College*, 1 Bli. (N.S.) 9.

Of Foreign Corporation in Corporate Name.]—A corporation instituted by foreigners in accordance with the laws of their country may sue in this country by their corporate name. And if the name by which they have declared be not directly consistent with the one specified in the charter, proof that they are the same company is a sufficient answer to the objection. *National Bank of St. Charles* v. *De Bernales*, 1 R. & M. 193; 1 Car. & P. 569.

Action by Company in Name of Treasurer referred—Non-Performance by Company of Award—Attachment against Treasurer refused—Mandamus to pay.]—See *Corpe* v. *Glyn*, 1 L. J., K. B. 272, ante, col. 593.

As to Right to Sue on Contracts.]—*See cases*, post, **B.** X. (col. 653.)

VII. LIABILITY TO BE SUED.

For Libel.]—A count against a railway company, being a corporation aggregate, for a malicious libel, is good, for a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action. *Whitefield* v. *S. E. Ry.*, El. Bl. & El 115; 27 L. J., Q. B 229; 4 Jur. (N. S.) 688; 6 W. R. 545.

Quære, whether a corporation can, through its servants, be guilty of actual malice. *Nevill* v. *Fine Arts and General Insurance Co.*, 64 L. J., Q. B. 681; [1895] 2 Q. B. 156; 14 R. 587; 72 L. T. 525; 59 J. P. 371—C. A.

For Acts Contrary to Law.]—A corporation is not liable for acts contrary to law, of which their attorney may be guilty in conducting legal proceedings. *Eggington* v. *Lichfield Corporation*, 5 El. & Bl. 100; 24 L. J., Q. B. 360; 1 Jur. (N.S.) 908.

For Misfeasance by Servants.]—A corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided the acts are sufficiently connected with the scope and action of its incorporation. *Green* v. *London General Omnibus Co.*, 7 C. B. (N.S.) 290; 29 L. J., C. P. 13; 6 Jur. (N.S.) 228; 1 L. T. 95; 8 W. R. 88.

Therefore, in an action against a company established for conveying passengers by omnibuses in the streets of London, charging that

the company by its servants, wrongfully, vexatiously and maliciously did certain acts (describing them) with a view to, and which in the result did, obstruct and annoy the plaintiff in the conduct of a similar trade:—Held, that, as the acts complained of were connected with the object and purpose for which the company was incorporated, the company was responsible. *Ib.*

For fraudulently Trading in Name of Another.]—Quære, if an action will lie against a trading corporation for fraudulently carrying on a business under the same name as that under which another traded, in order to induce persons to believe that the business of both was the same. *Lawson* v. *Bank of London*. 18 C. B. 84; 25 L. J., C. P. 188; 2 Jur. (N.S.) 716; 4 W. R. 481.

For Acts of Agents—Scienter.]—With respect to questions of scienter, there is no difference between a corporation and an individual; and whatever is notice to a person competent to receive it is notice to the corporation. *Stiles* v. *Cardiff Steam Navigation Co.*, 33 L. J., Q. B. 310; 10 Jur. (N.S.) 1199; 10 L. T. 844; 12 W. R. 1080.

A person, innocently and without negligence, went on to the premises belonging to a corporation, where he was bitten by a dog which was chained in a place in which it could not be seen, the dog had previously bitten a person, as was known to some of the servants of the corporation, but those servants had no control over its affairs, or over the dog:—Held, that, assuming the corporation knew the dog was a mischievous one, and accustomed to bite, the corporation would be liable in an action brought by the person bitten; but that there was no evidence to show that the corporation had such knowledge, and that, in the absence of such evidence, the action was not maintainable. *Ib.*

For False Imprisonment.]—A railway company, though a corporation, is liable in an action for false imprisonment, if that imprisonment is committed by its authority; such authority need not be under seal, but it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the company to do so. *Goff* v. *G. N. Ry.*, 3 El. & El. 672; 30 L. J., Q. B. 148; 7 Jur. (N.S.) 286; 3 L. T. 850. See *Eastern Counties Ry.* v. *Brown*, infra.

For Malicious Prosecution.]—An action for a malicious prosecution cannot be brought against a corporation, as such an action requires the existence of malice, and a corporation cannot have malice. Per Alderson, B.: *Stevens* v. *Midland Counties Ry.* 10 Ex. 352; 2 C. L. R. 1300; 23 L. J., Ex. 328; 18 Jur. 932. But see, as to this case, *Bank of New South Wales* v. *Owston*, 48 L. J., P. C. 25; 4 App. Cas. 270; 40 L. T. 300; and *Edwards* v. *Midland Ry.*, infra.

A man was arrested on a warrant issued on the sworn information of an officer employed by an incorporated railway company on a charge of theft; he was taken before a magistrate and remanded for a week at the request of an attorney employed by the company; he was ultimately discharged. At the trial of an action for malicious prosecution, the plaintiff denied that he was guilty of the theft; and the judge nonsuited. The company was a corporation aggregate:—Held (per Kelly, C.B., and Cleasby, B.), that the nonsuit was wrong; and per Bramwell, B., that the nonsuit was right; and that no action for malicious prosecution would lie against the railway company, for a corporation aggregate is in law incapable of acting maliciously. *Henderson* v. *Midland Ry.*, 24 L. T. 881; 20 W. R. 23.

An action for malicious prosecution does not lie against a corporation aggregate, a corporation aggregate being incapable of malice or motive. *Abrath* v. *North-Eastern Ry.*, 55 L. J., Q. B. 457; 11 App. Cas. 247; 55 L. T. 63; 50 J. P. 659—Per Bramwell, Lord.

An action for a malicious prosecution will lie against a corporation. *Stevens* v. *Midland Counties Ry.* (supra) not followed. *Edwards* v. *Midland Ry.*, 50 L. J., Q. B. 281; 6 Q. B. D. 287; 43 L. T. 694; 29 W. R. 609; 45 J. P. 374. S. P., *Kent* v. *Courage & Co.*, 55 J. P. 264, per Pollock, B.

For Breach of Trust.]—A municipal corporation was trustee of a charity. It permitted its town clerk to receive and retain the trust moneys, instead of applying them to the purposes of the trust:—Held, that the corporation and the town clerk were liable for the breach of trust. *Att.-Gen.* v. *Leicester Corporation*, 7 Beav. 176.

For Frauds.]—A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed through the agency of individuals who act fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood, had his agent so misconducted himself. *Ranger* v. *G. W. Ry.*, 5 H. L. Cas. 72.

An action for deceit will lie against a corporation for the fraud of its agent, acting within the scope of his authority, where the corporation takes any benefit from such fraud. *Mackay* v. *Commercial Bank of New Brunswick*, 43 L. J., P. C. 31: L. R. 5 P. C. 394; 30 L. T. 180; 22 W. R. 473.

For Distress.]—A corporation is liable in tort for the tortious act of its agent, though not appointed by seal, if such act is an ordinary service, such as a distress, professedly made under a statute for a debt due to the corporation; and a jury may infer the agency from an adoption of the act by the corporation, as from having received the proceeds of the seizure. *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526; 3 N. & M. 771; 3 L. J., K. B. 165.

For Trespass.]—An action of trespass lies against a corporation aggregate for an act done by its agent within the scope of his authority; and it is not necessary to show the appointment or authority of the agent under the seal of the corporation. *Maund* v. *Monmouthshire Canal Co.*, 4 Man. & G. 452; 3 Railw. Cas. 159; Car. & M. 606; 2 D. (N.S.) 113; 5 Scott (N.R.) 457; 11 L. J., C. P. 317; 6 Jur. 932.

For Assault.]—If a servant of a corporation aggregate commits an assault by the authority of the corporation, an action of trespass for assault and battery may be maintained against the corporation. *Eastern Counties Ry.* v. *Broom*, 6 Ex. 314; 20 L. J., Ex. 196; 15 Jur. 297—Ex. Ch.

If an assault is committed on behalf and for

the benefit of a corporation aggregate, the corporation may ratify the act of the agent; and if they do so they render themselves liable to an action of trespass for the assault. *Ib.*

If a servant of a railway company, acting on behalf of the company, assaults and imprisons a passenger to compel him to pay his fare for riding in a carriage of the company, the act of the servant is one which may be for the benefit of the company, and may be ratified by them. *Ib.*

For Conversion.]—Trover lies against a corporation; and if it is essential to their conversion of the property, as the detainer of bank-notes by the Bank of England, that they should have authorised it under their seal, such authority will be presumed after verdict. *Yarborough* v. *Bank of England*, 16 East, 6; 14 R. R. 272.

Trover for quicks and plants against a railway company. On the trial the judge ruled that there was sufficient evidence of a conversion by the company. To this ruling the company excepted. Verdict for the plaintiff. A bill of exceptions set forth the whole evidence. By this it appeared that the plaintiff was a contractor, planting hedges for the company at one of their stations, and was owner of live thorns which had been by leave of F., who was the general superintendent of the company, placed in a piece of ground belonging to the company, and close to the station. The plaintiff demanded these thorns from the stationmaster, and was referred to F., who, professing to act for the company, refused to let the plaintiff remove them. It did not appear when or under what circumstances the thorns were brought to the station:—Held, that it is the duty of a company carrying on trade to have on the spot an officer with authority to do for the company all that, in the ordinary exigencies of their business, might require to be done promptly; that in this respect there is no difference between an ordinary partnership and a corporation; that there was sufficient evidence that F. had authority to this extent from the company; and that it was not necessary to show any authority under seal. *Giles* v. *Taff Vale Ry.*, 2 El. & Bl. 822—Ex. Ch.

Held, also, that to give up, or refuse to give up, on demand, goods left with the company, in the course of their trade as carriers, was an act within the scope of such authority; and that these thorns were so left, and therefore there was evidence of a conversion by the company. *Ib.*

For Money Wrongfully Received.]—An action lies against an aggregate corporation to recover money which has been wrongfully received by the corporation. *Hall* v. *Swansea Corporation*, 5 Q. B. 526; D. & M. 475; 13 L. J., Q. B. 107; 8 Jur. 213.

—— **Penalties—Merchant Seamen Society.**]—The 7 & 8 Vict. c. 112, relating to merchant seamen, is an act relating to trade or navigation, therefore all penalties recovered under it are by virtue thereof payable to the Merchant Seamen Society, and are within the proviso of 5 & 6 Will. 4, c. 76, s. 126, which disentitles certain boroughs to penalties recovered under any act relating to trade or navigation. *Seamen's Hospital Society* v. *Liverpool Corporation*, 4 Ex. 180; 18 L. J., Ex. 371.

For Maintenance.]—A corporation in liquidation, as distinct from the liquidator thereof, is incapable of maintenance. *Metropolitan Bank* v. *Pooley*, 54 L. J., Q. B. 449; 10 App. Cas. 210; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.)

For Negligence.]—The Trinity House was incorporated by charter in the reign of Henry 8, for the purpose, inter alia, of ordering and erecting lighthouses, beacons, and buoys. Its powers were extended by several charters and statutes, until it became the general lighthouse authority for England and Wales. By the Merchant Shipping Act, 1854, s. 389, the superintendence and management of all lighthouses, buoys, and beacons in England and Wales, and certain other places, were, with certain objections, vested in the Trinity House:—Held, that the Trinity House was not a department of State, so as to be exempt from liability for negligence of its servants. *Gilbert* v. *Trinity House Corporation*, 56 L. J., Q. B. 85; 17 Q. B. D. 795; 35 W. R. 30.

A beacon erected by and vested in the Trinity House, having been nearly destroyed, a stranger applied to the Trinity House, and obtained leave to remove the remains of it. He removed part of the remains, but left an iron stump standing up above a rock under the water. A vessel struck against the iron stump and was lost:—Held, that the Trinity House was liable. *Ib.*

The R., which was anchored in F. outer-harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the R. where to beach her. Before the R. left the outer harbour, S. came on board, although a Trinity House pilot was in the vessel, and when she had arrived near the place where she was to be beached gave directions as to the lowering of her anchor. The R. overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found as a fact that there was negligence on the part of S., and that the place where the R. grounded was outside the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed his functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the R. *The Rhosina*, or *Edwards* v. *Falmouth Harbour Commissioners*, 54 L. J., P. 72; 10 P. D. 131; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. C. 460—C. A.

By act of parliament, 26 & 27 Vict. c. 89, the harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, inter alia, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. 146, a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, was to be paid to the defendants, and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—Held, that the statutes imposed upon the defen-

dants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that, not having done so, they were liable in damages to the plaintiff. *Dormont* v. *Furness Ry.*, 52 L. J., Q. B. 331; 11 Q. B. D. 496; 49 L. T. 134; 5 Asp. M. C. 127; 47 J. P. 711. See also *Reg.* v. *Williams*, 53 L. J., P. C. 64; 9 App. Cas. 418; 51 L. T. 546.

A municipal corporation employing workmen to lay down gas pipes in the borough is responsible for the negligence of the persons employed. *Scott* v. *Manchester Corporation*, 1 H. & N. 59; 26 L. J., Ex. 132. Affirmed on appeal, 2 H. & N. 204; 26 L. J., Ex. 406; 3 Jur. (N.S.) 590; 5 W. R. 598—Ex. Ch.

A corporation of a town caused a washhouse to be erected, with a wringing machine, under the Baths and Washhouses Act (9 & 10 Vict. c. 74), which vests such houses in the corporation, the actual management being in the council, the members of which are not to be personally liable. The wringing machine was originally intended to be worked by hand, and being worked by steam, a projecting handle was needlessly retained, which went round with great rapidity, and had no protection. Those who used the washhouse paid for the use of it, and a female using the machine, without negligence on her part, was caught by the handle when thus revolving, and was injured:—Held, that the corporation was liable to an action for the injury. *Cowley* v. *Sunderland Corporation*, 6 H. & N. 565; 30 L. J., Ex. 127; 4 L. T. 720; 9 W. R. 668.

The principle on which a private person or a company is liable for damages occasioned by the neglect of servants, applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators or to that of the corporation; but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; L. R. 1 H. L. 93, 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.

For Nuisance on Highway.]—The municipality of B., incorporated under New South Wales Acts, No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell. In an action claiming damages against the municipality (a) for negligence in constructing the street; (b) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea the general issue), the chief justice directed the jury that the defendants, under their act of incorporation, were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was, arose from the operation of the weather, or wear and tear, it having been properly constructed originally, they were not liable. Verdict for defendants:—Held, on the motion for a new trial, that as regards (b) there was misdirection. The barrel drain was not only made by the defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence, the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff, who had sustained direct and particular damage from their breach of duty. *Bathurst Borough* v. *Macpherson*, 48 L. J., P. C. 61; 4 App. Cas. 256; 41 L. T. 773—P. C.

In the case of Boards of Health.]—*See* LOCAL GOVERNMENT.

In the Metropolis.]—*See* METROPOLIS.

Power of Commissioners, incorporated under Drainage Act, to levy a Rate for Construction of New Works—Damages for Negligently constructing included in Power.]—See *Reg.* v. *Selby Drainage Commissioners*, col. 633.

Judgment against Drainage Board in Action by Contractor for extra Works—No Power to levy Rate to satisfy Judgment.]—See *Reg.* v. *Tramore Drainage Board*, col. 633.

For Non-Repair.]—If a party sustain damage from the overflowing of the sea, in consequence of the non-repair of sea-walls which, by the terms of their charter, a corporation is bound to repair, he may maintain an action against the corporation for compensation. *Henly* v. *Lyme Regis Corporation*, 5 Bing. 91; 6 L. J. (O.S.) C. P. 222; 30 R. R. 542.

An action lies against a corporation for not repairing a creek into which the tide of the sea flowed and reflowed (but not saying it was a navigable river), as from time immemorial they had been used; and saying "as from time immemorial they had been used," is well enough, without alleging that they were bound, ratione tenuræ, or other special cause. *Lynn* v. *Turner*, Cowp. 86.

Prescription.]—A corporation may be liable to repair the banks of a river by prescription. *Anon.*, Lofft, 556.

Statute of Limitation.]—A corporation shall have the benefit of the Statute of Limitation as well as any private person. *Wych* v. *East India Co.*, 3 P. W. 310.

Foreign Attachment.]—A corporation carrying on business within the city of London is not liable to the process of foreign attachment issuing out of the mayor's court. *London Joint Stock Bank* v. *London Corporation*, 1 C. P. D. 1; 45 L. J., C. P. 213; 33 L. T. 781. Affirmed on other grounds, 5 C. P. D. 494; 42 L. T. 747; 28 W. R. 696—C. A.

Attachment.]—An attachment does not lie against a corporation for non-performance of an

award. *Mackenzie* v. *Sligo and Shannon Ry.*, 9 C. B. 250.

Where a company was authorised by statute to sue and be sued by their treasurer, who was to incur no personal liability, and two actions against and by the treasurer had been referred to arbitration, a motion for attachment against the treasurer for non-payment of the damages and costs awarded was refused, but a mandamus to him to pay was granted. *Corpe* v. *Glyn*, 1 L. J., K. B. 272.

In Name of Treasurer for time being.]—Where a former treasurer of guardians of the poor had been compelled to pay money which the then guardians ought to have paid, it was held that the private act under which the guardians acted constituted them a corporation for some purposes, and that such former treasurer could sue the guardians who had succeeded to office in the name of their present treasurer for money paid. *Jefferys* v. *Gurr*, 2 B. & Ad. 833; 1 L. J., K. B. 23.

In Name of Governing Body for time being.]—If a corporation cannot be made a party to a record in consequence of the non-appointment of officers, the governing body for the time being will sufficiently represent the existing interest. *Daugars* v. *Rivaz*, 29 L. J., Ch. 685; 6 Jur. (N.S.) 854; 8 W. R. 225.

Corporation Books and Records.]—*See* EVIDENCE — DOCUMENTARY; AND DISCOVERY — INSPECTION OF PUBLIC DOCUMENTS.

As to Liability on Contracts.]—*See cases*, post, **B.** X. col. 653.

As to Liability to Criminal Proceedings.]—*See* CRIMINAL LAW, **A.** I. Persons capable of Committing Offences. 4. Corporations.

VIII. DISSOLUTION.

The King may, at his discretion, seize the franchise of a corporation guilty of an offence amounting to a forfeiture. *Rex* v. *Ironsonby*, 1 Ves. J. 8; 5 Bro. P. C. 287. And see *Bagg's case*, 11 Cob. 93.

The King cannot by his prerogative destroy a corporation. *Rex* v. *Amery*, 2 Term Rep. 515; 1 Term Rep. 575; 2 Bro. P. C. 336; 1 Anstr. 178; 1 R. R. 306, 533. But see *S. C.*, 4 Term Rep. 122.

What Amounts to.]—When an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved that the crown may grant a new charter. *Rex* v. *Pasmore*, 3 Term Rep. 199; 1 R. R. 688.

The major part of an integral part of a corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies, and continuing itself. *Rex* v. *Morris*, 3 East, 213; 4 East, 17.

A right of free fishery was granted to a borough, by a charter of Richard I., which recited a previous enjoyment of the franchise by the borough. In 1740, by reason of judgment of ouster against all the existing members of the corporation, it became incapable of continuing itself, and there was no mayor or alderman till 1763, when a new charter of incorporation was granted to the borough, by which all the former rights, liberties, and fisheries were ratified, confirmed, and restored to the new corporation:—Held, that there had been no entire dissolution of the corporation, and that, by virtue of the new charter of incorporation, the revived one became owner of all the former franchises, and were entitled to the fishery. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 173; 10 Jur. 610.

Land Reverts to Donor on.]—See *Att.-Gen.* v. *Gower*, col. 632.

IX. BY-LAWS.

And see ante, **A.** X. col. 619.

a. POWER OF MAKING.

Inconsistent with Charter.]—A corporation by charter cannot make by-laws inconsistent with the intention, or counteracting the directions of the charter. *Rex* v. *Cutbush*, 4 Burr. 2204.

A company without any power by its charter may of course make by-laws: but if it has a particular power to make by-laws for the management of its trade, it cannot make by-laws for carrying on projects foreign to the affairs of the company. *Child* v. *Hudson's Bay Co*, 2 P. W. 207.

All by-laws made by corporations must be consistent with, and subordinate to, their constitution by charter. *Hoblyn* v. *Rex* (*in error*), 2 Bro. P. C. 329.

See also *Rex* v. *Tucker*, col. 628; and *Reg.* v. *Darlington School*, col. 647.

To incur a Forfeiture.]—A corporation created by letters-patent, with a power of making by-laws, cannot make any laws to incur a forfeiture. *Kirk* v. *Nowill*, 1 Term Rep. 118; 1 R. R. 160.

Neither can a corporation created by an act of parliament, unless such a power is expressly given. *Ib.*

Incident to whole Body.]—The power to make by-laws is incident to the whole body of every corporation; and, therefore, if a charter gives to a select body a power to make by-laws touching certain matters therein specified, that does not take away from the body at large their incidental power to make by-laws touching other matters not specified in the charter. *Rex* v. *Westwood*, 2 Dow & Cl. 21; 4 Bligh (N.S.) 213; 7 Bing. 1; 7 D. & R. 267; 4 B. & C. 781.

Repeal.]—Every by-law may be repealed by the same body which made it. *Rex* v. *Ashwell*, 12 East, 22.

The rule is that a corporation has power to make by-laws; it is strange, therefore, to go into equity, to execute the private statutes of a foundation under a charter. Where such statutes do not appear to have been observed in any one instance, a court of law will presume a subsequent by-law to repeal and alter them. *Att.-Gen.* v. *Myddleton*, 3 Ves. 330.

Effect of a general Power.]—Where a com-

mission had issued under the great seal to inspect the management of the governors of a free grammar school, and power was given to the commissioners to make by-laws, it was held that such power must be taken to be to make by-laws for the better regulating and preserving the charity; and that, if the commission gave any larger power, it would be void only pro tanto. *Eden* v. *Foster*, 2 P. W. 325.

Where two Governing Bodies — Regulation making an absolute Privilege Conditional— Notice.]—When in any trading corporation by prescription there is one governing body which has been used to make general orders, and another which has been used to regulate the business of the corporation, but which does not appear to have exercised the power of making general orders, it is questionable whether the latter body has power to make a general order imposing on their members conditions under which they are to hold advantages secured to them by general orders made by the other governing body. Semble, that the one has rather a legislative and the other an executive province; the latter having only power to regulate in particular cases, not to make a general regulation. *Hills* v. *Hunt*, 2 C. L. R. 1781; 15 C. B. 1.

If by such a general order a regulation is made, laying down a condition on which the members are to enjoy an advantage they possess under general rules of the corporation, and on breach of which they are no longer to enjoy it, although it may be doubtful whether such a case is governed by all the principles of law which apply to by-laws imposing penalties or forfeiture, the order or rule will be invalid, because unreasonable and unjust, unless distinct notice of its terms is given by the governing body which issues it, to all the members of the corporation who are affected by it. *Ib.*

Under Seal.]—A gas-light company was incorporated by an act of parliament, which provided that eighteen shareholders should be directors, and, as such, should use the common seal, manage the affairs of the company, lay out money, purchase lands, and make contracts for lighting, and for the sale of materials. The company was empowered to make by-laws under seal for its government, and for regulating the proceedings of the directors, officers, servants, &c. At a meeting of the company, a resolution was passed, not under seal, that a remuneration should be allowed to every director for his attendance on courts:—Held, that a director who had attended courts could not maintain an action for payments according to the resolution; for that it was not a by-law within the statute, nor a contract (if such could have been available) to pay the directors, or any of them, for their attendances, and the directors could not be considered as servants to the company, and, as such, entitled to remuneration for their labour according to its value. *Dunston* v. *Imperial Gas Co.*, 3 B. & Ad. 125; 1 L. J., K. B. 49.

How to be Exercised.]—By-laws made under statutory powers held not to be binding until made, confirmed, and published as by-laws in the manner prescribed by the statute. *London Association of Shipowners* v. *London and India Docks*, 62 L. J., Ch. 294; [1892], 3 Ch. 242; 67 L. T. 238—C. A.

b. VALIDITY.

Providing Dinners.]—In a company constituted by letters patent, with power to make reasonable by-laws, a by-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for so doing, or to pay a fine of 20*l.*, or excuse himself by swearing he is not worth 300*l.*, is a bad by-law. *Carter* v. *Sanderson*, 5 Bing. 79; 2 M. & P. 164; 6 L. J. (o.s.) C. P. 232.

So a by-law made by a prescriptive company of the city of London (with power under letters patent to make by-laws and fine for breach of them), that on the day of the election of the master and wardens of the company, in which the freemen had no voice, two of the freemen should provide a dinner for all the members of the company, and pay out of their own pockets such expenses as should be incurred beyond a sum allowed for the purpose, or be fined in default, is a bad by-law. *Scriveners' Co.* v. *Brooking*, 2 G. & D. 419; 3 Q. B. 95; 11 L. J., Q. B. 169; 6 Jur. 835.

Imposing Fines.]—Where the master, wardens and assistants of a corporation were authorised by their charter to make by-laws with penalties to the use of the corporation, a by-law imposing a fine on anyone of the livery refusing to take upon himself a certain office, and reserving the penalty to the master and wardens only for the time being, for the use of the corporation, is valid. *Graves* v. *Colby*, 1 P. & D. 235; 9 A. & E. 356; 1 W., W. & H. 705; 8 L J., Q. B. 57.

A by-law of a company incorporated by royal charter may be enforced by a penalty of "5*l.* to the use of the company, or less, at the pleasure and discretion of the company, so it be not under 40*s.*" *Piper* v. *Chappell*, 14 M. & W. 624; 9 Jur. 601.

A by-law imposing a fine must be clear and unambiguous. *Foster* v. *Moore*, 4 L. R., Ir. 670.

A by-law of a corporation founded on a custom to exclude foreigners, and authorising a distress for a penalty in case of a breach of the by-law, without a previous demand or refusal of such penalty, was bad. *Davies* v. *Morgan*, 1 C. & J. 587; 1 Tyr. 457; 9 L. J. (o.s.) Ex. 153.

For Forfeiture on Non-Payment of Calls.]—Hudson's Bay Company might by its by-laws make restrictions upon its stock, viz. that such stock shall first be liable to pay the debts due to the company from its own members, or answer calls upon the stock. *Child* v. *Hudson's Bay Co.*, 2 P. W. 207.

So a by-law of the company to seize a member's stock for a debt due from a member to the company, is good; but if the debt be not due to the company, but to its trustees, then the by-law will not extend to it. *Ib.*

A by-law of an incorporated company for water works provided that the members, after notice of default in paying a call, should pay in ten days from a service of such notice, or incur a forfeiture. Plaintiff made default, alleging his ignorance of the call and absence from town when the notice was sent:—Held, that he shall not be relieved against this forfeiture. *Sparks* v. *Liverpool Waterworks Co.*, 13 Ves. 428.

Limiting Discretion given by Charter to remove Master of School.]—Queen Elizabeth,

by a charter, founded and endowed a grammar school, and incorporated certain persons and their successors as governors, and granted them for ever power and authority from time to time of electing, nominating and appointing a master of the school, and of removing him from the school, according to their sound discretion, and of placing or appointing another more fit in his stead. The governors were empowered by the charter to make by-laws, and they enacted a by-law requiring certain qualifications in the future masters, and ordaining (for the encouragement of well-qualified persons to accept the office) that no master should be displaced, removed, or removable, unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause:—Held, that the governors had no right thus to limit the discretion by the charter, and that the by-law was void. *Reg.* v. *Darlington School Governors*, 6 Q. B. 682; 14 L. J., Q. B. 67—Ex. Ch.

Navigation Company—Sunday Navigation.]—An act empowered a navigation company to make by-laws for the government of the company, and for the good and orderly using the navigation; and also for the governing of the bargemen, watermen, and boatmen carrying goods, wares, or merchandise upon the navigation, and to impose and inflict on all persons offending against the same reasonable fines and forfeitures, not exceeding 5*l*. A by-law made by the company, that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted during such time, works of necessity only excepted; and that no person should navigate any boat or vessel along any part of the navigation on any Sunday, except for a reasonable distance for the purpose of mooring, or of going to, or returning from, divine worship, under a penalty of 5*l*., is void. *Calder and Hebble Navigation Co.* v. *Pilling*, 3 Railw. Cas. 735; 14 M. & W. 76; 14 L. J., Ex. 223; 9 Jur. 377.

Regulating Boats in Harbour — Harbour Commissioners.]—Harbour commissioners were empowered by statute to make by-laws for regulating and fixing the conduct and hire or fare of all boats or ferry boats plying in the harbour, and for regulating the conduct of boatmen, ferrymen, and others plying in the harbour:—Held, that a by-law, requiring the owners of boats carrying passengers within the port to take out an annual licence from the commissioners under a penalty, was ultra vires. *Londonderry Harbour Commissioners* v. *Londonderry Bridge Commissioners*, [1894] 2 Ir. R. 384.

Thames Watermen.]—A by-law of the Thames Watermen's Company, forbidding the employment by freemen of non-freemen in working barges, boats, &c., is valid, and within the powers conferred by 7 & 8 Geo. 4, c. 75. *Reg.* v. *Edmonds*, 3 C. L. R. 902; 24 L. J., M. C. 124; 1 Jur. (N.S.) 727; 3 W. R. 408.

Snow—11 & 12 Vict. c. 63, s. 55.]—The 11 & 12 Vict. c. 63, s. 55, empowers the local board of health to make by-laws for the removal by the occupier of dust, ashes, rubbish, filth, manure, dung, and soil in or by the side of any street. A by-law required all occupiers within the district to remove all snow or other obstructions from the footpath opposite their premises before 9 A.M.:—Held, that snow was not within the terms of s. 55, and therefore the by-law was invalid. *Reg.* v. *Rose*, 24 L. J., M. C. 130; 1 Jur. (N.S.) 802. *S. C.*, nom. *Reg.* v. *Wood*, 5 El. & Bl. 49; 3 W. R. 419.

Railway Company—Penalty or Forfeiture.]—An act of parliament empowered a railway company to make by-laws for the government of its affairs, and of its officers and servants, and to impose and inflict fines and forfeitures on all persons offending against the same, not exceeding 5*l*. A section empowered the company to make orders and regulations for the travelling upon the railway, and relating to the travellers or carriages passing upon it; such orders and regulations to be binding upon the company and passengers, on pain of forfeiting a sum not exceeding 5*l*. The act then inflicted penalties for different offences prohibited by it; and directed that all penalties and forfeitures inflicted or imposed by the act, or any by-laws, might be recovered in a summary way, half the penalty to go to the informer and the other half to the company. The act also enacted, that any officer or agent of the company might seize or detain without warrant any person, whose name and residence might be unknown, who should commit an offence against the act, and convey him before a justice of the peace. The company made a by-law, that every passenger should, on booking his place, be furnished with a ticket; and that every passenger who should not produce or deliver up his ticket when required, should pay the fare from the place from which the train originally started. C., who had paid for a ticket at an intermediate station on the line, lost the ticket, and refused to pay any fresh fare except for the distance he had actually come, whereupon the company, acting by their officer, at the arrival station took him into custody:—Held, that, assuming the by-law to be reasonable and valid, the arrest was illegal, as the by-law that a passenger should under such circumstances pay the entire fare, was not a by-law inflicting a penalty or forfeiture. *Chilton* v. *London and Croydon Ry.*, 16 M. & W. 212; 16 L. J., Ex. 89; 11 Jur. 119.

Part Good and Part Bad.]—One of the by-laws made by the pasture masters of the common pastures of a borough under a local act, passed to provide for the proper regulation thereof, provided that "if any person should stock or depasture a vicious horse on any part of the common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the stock and cattle, shall respectively forfeit and pay for every such offence 5*l*.:"—Held, that so much of the by-law as referred to the infliction of the fine upon the person actually transgressing the same was divisible from that portion which referred to the owner of the stock; that the former part of the by-law was reasonable and good, and might stand independently of the latter, which, if bad, might be rejected. *Reg.* v. *Lundie*, 31 L. J., M. C. 157; 8 Jur. (N.S.) 640; 5 L. T. 830; 10 W. R. 267.

A by-law may be good in part and bad in part, if the two parts are distinct from each other and separately entire. *Rex* v. *Faversham*, 8 Term Rep. 352; 4 R. R. 691.

Apprentices.]—A by-law, altering the qualification of persons to be taken as apprentices by the members of a corporation, in order to acquire their freedom by a certain servitude, is not warranted by a custom in such body, which claimed by prescription to make by-laws regulating the number of persons to be taken as apprentices. *Rex* v. *Toppenden*, 3 East, 186.

A by-law, made by a company in a corporation to restrain the number of apprentices to be taken by any of the members, is void. *Rex* v. *Coopers' Co. of Newcastle-on-Tyne*, 7 Term Rep. 543.

A by-law, which directed that a sum of money should be paid for the use of a corporation, on inrolling indentures of apprenticeship to one of its members, was bad. *Neresby* v. *Webster*, 1 Ld. Ken. 243.

Power of Amotion.]—A by-law to give power of amotion for just cause is a good by-law, though the corporation that made it had no power of amotion expressly given by charter, or claimed by prescription. *Rex* v. *Richardson*, 1 Burr. 519; 2 Ld. Ken. 85.

Regulating Admission of Freemen.]—A by-law to prevent any person from being made free of a company, until he shall have been called at three several meetings of the mayor and certain aldermen of the city, and the wardens and stewards of the several companies in it, before his admittance, and to be approved of by them, or a majority of them, is good. *Rex* v. *Durham*, 1 Burr. 127; 1 Ld. Ken. 512.

Freemen of City—Livery of Company.]—The company of poulters comprises all poulters in London and within seven miles thereof, and no one can be of the livery of a company unless he is a freeman of the city of London:—Held, that a by-law authorising the company to admit into the livery of the company any freeman of the company was a valid by-law, and must be intended to imply any freeman of the company who was also free of the city. *Poulters' Co.* v. *Phillips*, 6 Bing. (N.C.) 314; 8 Scott, 593; 9 L. J., C. P. 190; 4 Jur. 124.

Penalties for Non-attendance.]—By-laws for compelling, by means of pecuniary penalties, the attendance of members of a corporation at corporate meetings, and the acceptance of corporate offices, are reasonable, and may be enforced by action. *Tobacco-Pipe Makers' Co.* v. *Woodroffe*, 7 B. & C. 838; 5 D. & R. 530; 4 L. J. (O.S.) K. B. 301.

But a by-law, imposing a tax on the members of a corporation by the name of a quarterage of money, cannot be supported, unless it is shown that the necessities of the company require such contributions, and that the latter are commensurate with the former. *Ib.*

Election of Officers.]—By a charter, the company of patten-makers was made a corporation, having a master, two wardens, and twelve assistants, and the company was to elect yearly one of the two wardens to be master. By a by-law afterwards made and agreed to by the whole company, the master was thenceforth to be elected by the master, wardens, and assistants for the time being, in a particular mode (not prescribed by the charter) out of two or three meet and sufficient persons, being of the number of the master, wardens and assistants, and selected by the master and wardens. In case of an equality of voices, the master was to have a double vote:—Held, that the by-law was bad, because it extended the number of persons eligible by the charter to the office of master. *Rex* v. *Bumstead*, 2 B. & Ad. 699.

Where a charter of incorporation authorises the corporation to elect a master de seipsis, a by-law narrowing the body of electors is valid. *Rex* v. *Attwood*, 1 N. & M. 286; 4 B. & Ad. 481; 2 L. J., K. B. 57.

The existence of such a by-law may, without the intervention of a jury, be judicially inferred from an ancient usage for the election to be so conducted. *Ib.*

Though the by-law would be void if it also lessened the numbers of persons eligible to the office, such a view in the presumed by-law will not be inferred from the circumstance of the election by the limited body having almost uniformly fallen upon members of the limited body. *Ib.*

By a charter of Richard 2, the commonalty of company of mercers, which was one of the ancient guilds of the city of London, was to elect every year four wardens out of the commonalty. The practice from 1391 to 1463 had been for the out-going wardens to appoint their successors. From 1463 a select body had existed under the name of the court of assistants, who held their offices for life, and supplied vacancies in their own body by self-election out of the whole commonalty. The court of assistants had since 1463 always elected the wardens from the commonalty, and of late years exclusively out of their own court. On a quo warranto against the wardens so elected:—Held, that the usage was sufficient to warrant the presumption of a by-law, delegating to the court of assistants the power of electing wardens; and that such by-law would be valid, notwithstanding it limited the right of election to a select and self-elected portion of the whole body. *Reg.* v. *Powell*, 3 El. & Bl. 377; 23 L. J., Q. B. 199; 18 Jur. 771.

Bankrupts.]—A by-law of a corporate company declared that "no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the court, unless it be proved that such person after his bankruptcy or insolvency has paid his debts, or shall have established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency:—Held, that these words must be taken to mean not mere inability to pay debts in full, but inability proved by some outward act, a notorious or an avowed insolvency, such as a public stoppage in business, or the calling together of his creditors, and obtaining time, or terms of indulgence, or entering into a deed of composition, so as to mark, as a distinct fact, a period of time from which the insolvency, like the bankruptcy, might be computed. *Reg.* v. *Saddlers' Co.*, 10 H. L. Cas. 404; 32 L. J., Q. B. 337; 9 Jur. (N.S.) 1081; 9 L. T. 60; 11 W. R. 1004. Reversing the judgment of the Exchequer Chamber, 30 L. J., Q. B. 186; and affirming the judgment of the Queen's Bench, 3 El. & El. 42.

Where, therefore, a person duly qualified as a freeman, was elected a member of the court, being at that time in insolvent circumstances, and was admitted to office, and was afterwards declared a bankrupt:—Held, that he did not come within the meaning of the by-law. *Ib.*

After election, but before admission, the person

elected was asked by the clerk of the company whether he was solvent, to which he answered that he was as solvent as any member of the court, and could pay 20*s.* in the pound. This representation was false, and was afterwards made the ground of a resolution of the court, passed without notice to him, to remove him from office: —Held, that the insolvency was not within the meaning of the by-law; that the false representation was not one which affected his eligibility; and, consequently, that having been duly elected and admitted to the office, his removal without being heard in his defence was erroneous, and he was entitled to a peremptory mandamus. *Ib.*

c. In Restraint of Trade.

A by-law in restraint of trade was bad, unless there was a custom to support it. *Hesketh* v. *Braddock*, 3 Burr. 147.

A custom to exclude foreigners in a corporation, and a by-law made to support it, were good, but the penalty given by a by-law cannot be to a stranger. *Bodwic* v. *Fennell*, 1 Wils. 233.

A by-law, that no person not being free of the pewterers' company should exercise the trade of a pewterer within the city of London, was a by-law in restraint of trade, and was void without proof of a special custom to support it. *London Chamberlain* v. *Compton*, 7 D. & R. 597; 4 L. J. (o.s.) K. B. 49. S. P., *Clark* v. *Le Cren*, 9 B. & C. 52; 7 L. J. (o.s.) K. B. 186.

There is no instance of a by-law restraining individual members of a corporation from being concerned, either in any other place or within given limits, in the same trade as that of the corporation. *Adley* v. *Whitstable Co.*, 17 Ves. 322; 11 R. R. 87.

By-law even in restraint of trade to certain extent, which would not have been good under authority of charter, may be good by custom. Distinction between charter and contract. *Ib.*

That which may be subject of contract between different interests in partnership, might not be good as a by-law; for instance, an agreement among citizens of London not to sell except in markets of London, would be good, though a by-law to that effect has been declared bad by legislature. *Ib.*

As to validity of a by-law of a corporation (the company of Whitstable fishermen) that any freemen engaging in any other oyster fishery on the coast of Kent should forfeit 10*l.*, and until payment should be excluded from all share of the profits which should in the meantime be derived, as if he had wholly ceased to be a freeman; and whether such suspension is open to a mandamus as a temporary disfranchisement, quære. *Ib.* See also 19 Ves. 304; 1 Meriv. 107; 11 R. R. 87.

A power of making by-laws for good government does not authorise a by-law making it unlawful to carry on a lawful trade in a lawful manner. *Toronto Corporation* v. *Virgo*, 73 L. T. 449.

As to the Right of Free Trading in Boroughs, notwithstanding any Custom or By-law.]—*See* Municipal Corporations Act, 1882, s. 247.

d. Suing for Breach.

When Action Lies.]—For the breach of a duty imposed by a by-law made under the authority of a statute, the only remedy is that specifically prescribed by the statute. *Norton* v. *Kearon*, Ir. R., 6 C. L. 126.

Averments in Declaration.]—When, in a by-law of a corporation, making certain regulations, for breach of which parties are to be liable to be sued for a penalty, there is a separate proviso, making certain exceptions, a party suing for breach of the by-law need not aver, in the declaration, that the case was not within the exception in the proviso; but such fact, if it exists, must be shown by the defendant by way of excuse. *Shaw* v. *Poynter*, 4 N. & M. 290; 2 A. & E. 312; 4 L. J., K. B. 16.

A company was incorporated by an ancient charter, and empowered to make by-laws. The company made a by-law that the master and wardens might call, choose, and admit into the livery of the company such person free of the art or mystery of plumbing, as they should think fit; and that every person chosen should, immediately upon notice, prepare himself to serve the same place, at the next meeting of the master and wardens, in such seemly and decent manner as formerly had been used; and that every person chosen into the livery, and accepting the same, should use, wear, and keep the same livery according to the usage and warning given him for that purpose; and that he should bring in and pay at the next meeting, unto the master and wardens, to the use, maintenance, and relief of the company, and to the officers of the company, for entering the same, and for the warning given, such fees as formerly had been paid in like cases; "and which of them so-ever called and chosen into the livery refuseth to pay the fees, or what person or persons called and chosen to be of the same livery refuseth the same, shall forfeit and pay to the master and wardens for the time being, for every such default, 5*l.* or less, at the discretion and pleasure of the master and wardens, so it be not less than 40*s.*" In a declaration on this by-law, against a person who had been elected into the company, and taken the oath to obey the by-law:—Held, first, that the declaration was not bad for not showing that the company was a company that had a livery, a livery being mentioned in the charter and by-law. *Piper* v. *Chappell*, 14 M. & W. 624; 9 Jur. 601.

Held, secondly, that it was not bad for not showing that the party was a freeman of the city of London; for that the court could not take notice that none but freemen of the city were admissible into the livery of a company, unless it had been certified to the court by the recorder of London. *Ib.*

The breach alleged was, that the defendant, although requested, and a reasonable time had elapsed, and he was and continued such freeman, did not nor would attend or serve the place to which he had been chosen, and did not nor would attend and serve the place at the next meeting, or at any subsequent meeting of the master and wardens, but made default, and refused to prepare himself to serve the place:—Held, that the breach was well assigned; for that one refusal, to which by the by-law the penalty was attached, was the refusal to prepare to serve, and to serve at the next court. *Ib.*

Parties.]—Held, further, that the master and wardens alone might sue for the penalty, though

it was reserved to the use of the company generally. *Ib.*

The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens, for the use of the master, wardens, and company. *Feltmakers' Co.* v. *Davis*, 1 Bos. & P. 98.

A company was incorporated by a royal charter and empowered to make by-laws for the government of the society. They made a by-law that every freeman of the company should pay yearly to the company 8*s.*, to be paid quarterly, and that every person refusing should pay twice that sum:—Held, that an action on this by-law was rightly brought in the name of the company. *Tobacco-pipe Makers' Co.* v. *Loder*, 14 Q. B. 765; 20 L. J., Q. B. 414; 15 Jur. 1194.

Penalty—Previous Demand.]—A penalty of 20*s.* having been imposed by one of the by-laws of the butchers' company on all persons selling meat on a Sunday within their jurisdiction, it was declared by a subsequent clause that if any offender should deny, refuse, or neglect to pay the penalty, he should be liable to an action of debt:—Held, that it was not necessary to prove a previous demand in order to maintain such action. *Butchers' Co.* v. *Bullock* 3 Bos. & P. 434.

—— **Statute of Limitations.**]—An action for a penalty incurred under a by-law, made by virtue of a royal charter under the great seal, is "an action of debt grounded upon a contract without specialty," within 21 Jac. 1, c. 16, s. 3, and therefore is barred by that statute if not commenced within six years after the penalty is incurred. *Tobacco-pipe Makers' Co.* v. *Loder*, supra.

Proof of By-law.] — Sixty years' usage has been considered as evidence of a by-law. *Perkin* v. *Cutlers' Co.*, 1 Selw. N. P. 1145.

Evidence of a practice in contravention of a by-law is not receivable. *Sells* v. *Brown*, 9 Car. & P. 601.

X. CONTRACTS BY AND WITH.

a. Principles of Validity.

See also cases under COMPANY—CONTRACTS BY AND WITH.

When Ultra Vires.]—Primâ facie all corporate bodies are bound by contracts under their common seal, but this primâ facie power to contract cannot be insisted on as to matters where from the nature of the corporate body or the object of its incorporation, it is expressly or implicitly, by reasonable inference, prohibited from contracting. A contract as to such matters is ultra vires. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 6 H. L. Cas. 113; 26 L. J., Ch. 482; 3 Jur. (N.S.) 775.

There can be no doubt that a corporation is fully capable of binding itself by any contract except when the statutes by which it is created or regulated, expressly or by necessary implication, prohibit such contract between the parties. *Scottish North-Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382; 5 Jur. (N.S.) 697; 7 W. R. 458. See also *Taylor* v. *Chichester and Midhurst Ry.*, 39 L. J., Ex. 217; L. R. 4 H. L. 628; 23 L. T. 657. *Preston* v. *Liverpool, Manchester and Newcastle Junction Ry.*, 5 H. L. Cas. 605; 25 L. J., Ch. 421; 2 Jur. (N.S.) 241; 4 W. R. 383.

Where a corporation is created by an act of parliament for particular purposes, with special powers, their contract will bind them, unless it appears by the express provisions of the statute creating the corporation, or by necessary and reasonable inference, from its enactments, that the contract was ultra vires, or that the legislature meant that such a contract should not be made. *Bateman* v. *Ashton-under-Lyne Corporation*, 3 H. & N. 323; 27 L. J., Ex. 458; 6 W. R. 829.

A company was incorporated by an act of parliament for the supply of a district with water from certain sources within the district and empowered to break up highways and place pipes within the district, and to do all other acts which the company should deem necessary for supplying water to the inhabitants, according to the true intent of the act; and penalties were imposed on the company not supplying water to the inhabitants of dwelling-houses within the district. The members of the company were entitled to the net profits to be divided amongst them, except a surplus above seven per cent., which was to go in the reduction of the water rents. In consequence of the increase of population the supply of water within the district became insufficient both in quantity and quality. The company employed an engineer, who reported that a sufficient supply could not be obtained from existing sources, and recommended that a supply should be obtained from a brook beyond the district, which would be sufficient not only for the district but also for some adjoining populous villages. The company then determined to apply to parliament for powers to enlarge their works, so as to make the brook available for the entire district, which it was capable of supplying, and to increase their capital:—Held, that the company might lawfully take steps to apply to parliament for such extension of the undertaking, it being for the benefit of the corporate body; and that the contracts made by the company for the supply of plans, essential to the application to parliament, were not necessarily illegal or void, or otherwise incapable of being enforced against the company in a court of law. *Ib.*

A municipal corporation, having power by a local act to construct waterworks for supplying the borough with water, entered into an agreement under seal to refer to valuers the amount of compensation money, to be then paid for the damage which the owner, for the time being of a mill and premises, might sustain by the abstraction of the whole of the streams, springs, and waters which the corporation was authorized to take. The corporation at the time did not require, and had not since required, to divert more than a small portion of the streams for completing the waterworks, although they had given the owner notice of their intention to divert the whole:—Held, that such an agreement was not ultra vires of the corporation, as against the ratepayers. *Stone* v. *Yeovil Corporation*, 46 L. J., C. P. 137; 2 C. P. D. 99; 36 L. T. 279; 25 W. R. 240—C. A.

A covenant by a railway company to pay the costs of a bill in parliament, promoted by another railway company for its own purposes, held to be illegal and void, as being beyond the authority given to them by their act. *E. Anglian*

Ry. v. *Eastern Counties Ry.*, 11 C. B. 775 ; 21 L. J., C. P. 23 ; 16 Jur. 249.

See also *Macgregor* v. *Dover & Deal Ry.*, 18 Q. B. 618 ; 22 L. J., Q. B. 69. *Gage* v. *Newmarket Ry.*, 18 Q. B. 457 ; 21 L. J., Q. B. 398. *Mann* v. *Edinburgh Northern Tramways Co.*, 62 L. J., P. C. 74 ; [1893] A. C. 69 ; 68 L. T. 96.

By a statute incorporating a gas-light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs of the company, who were empowered to make orders under seal at their meetings for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special meeting of the company, a committee, previously appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company ; that such proposal had been made to him, and that he had accepted it. The meeting moved that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors, by a deed, in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it :—Held, that the seal was properly affixed by the directors ; that the granting of such annuity was warranted by the statute ; that it was a concern of the company, within the first-mentioned clause ; and that no order of the company under seal was necessary to authorise it. *Clarke* v. *Imperial Gas Light and Coke Co.*, 4 B. & Ad. 315 ; 1 N. & M. 206 ; 2 L. J., K. B. 30.

Improvement not specifically authorised—Freeing Bridge from Toll—Agreement for, not void, but Borough Fund not applicable, except any accidental Surplus.]—See *Newcastle-upon-Tyne Corporation* v. *Att.-Gen.*, col. 602.

Judgment against Drainage Board in Action by Contractor for extra Works—No Power to levy Rate to satisfy Judgment.]—See *Reg.* v. *Tramore Drainage Board*, col. 633.

Breach of Covenant.]—Where a corporation is created for certain purposes with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment, if money is so borrowed and so secured, and not duly repaid, an action may be maintained against the corporation on the breach of the covenant, although there are no specific statutory provisions enabling the corporation to bind itself by such a covenant. *Eastern Union Ry.* v. *Hart* (*in error*), 8 Ex. 116 ; 22 L. J., Ex. 20 ; 17 Jur. 89—Ex. Ch.

Bill of Exchange.]—An action will lie on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute. *Murray* v. *East India Co.*, 5 B. & Ald. 294 ; 24 R. R. 325. And see *Broughton* v. *Manchester Waterworks*, 3 B. & Ald. 1 ; 22 R. R. 278.

But a railway company incorporated by a special act of parliament containing the usual clauses, cannot draw, accept or indorse bills of exchange. *Bateman* v. *Mid-Wales Ry.*, 1 H. & R. 508 ; 35 L. J., C. P. 205 ; L. R. 1 C. P. 499 ; 12 Jur. (N.S.) 453 ; 14 W. R. 672.

Effect of Sealing.]—"Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed, . . . and as much as all the members of a partnership would be by a contract in which all concurred."—Per Parke, B. *South Yorks. Ry.* v. *G. N. Ry.*, 9 Ex. 55.

The contracts of corporations with the proper seal affixed are in like position to those of private persons ; so that where a contract with their common seal affixed is sent by a corporation to the other party to the agreement to be signed and is so signed ; or having been first signed by the other party an alteration is made in its terms by the corporation which is assented to by the other party, and the corporation seal is subsequently affixed, such contract is good. *Dartford Union* v. *Trickett*, 59 L. T. 754 ; 53 J. P. 277.

Though affixing the common seal to a deed of conveyance of a corporation is sufficient to pass the estate without a formal delivery, if done with that intent : yet it has no such effect if the order for affixing the seal is accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Co.* v. *Wilmot*, 9 East, 360 ; 9 R. R. 577.

In an action on a bond against a corporate company, where it is shown that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendant, under the plea of non est factum, to prove that several of the requisitions of the act necessary to the validity of the execution have not been complied with. *Hill* v. *Manchester Waterworks Co.*, 2 N. & M. 573 ; 5 B. & Ad. 866 ; 3 L. J., K. B. 19.

A contract under the seal of an incorporated company is not valid unless the seal was affixed with the authority of the directors meeting together as a board. *D'Arcy* v. *Tamar, Kit-hill and Callington Ry.*, 36 L. J., Ex. 37 ; L. R. 2 Ex. 158 ; 12 Jur. (N.S.) 548 ; 14 L. T. 626 ; 14 W. R. 968 ; 4 H. & C. 463.

Therefore, where by the special act of an incorporated company three directors were a quorum, and the secretary obtained at one time the authority of two directors to seal a bond for money due to the engineer of the company, and at another time the authority of another director :—Held, that the bond was not the deed of the company. *Ib.*

Contract by Churchwardens—No Common Seal.]—A., B., C., D., E., and F., churchwardens and overseers, contracted with G. for themselves and their successors, churchwardens and overseers. Proviso, that nothing should be construed to extend to any personal covenant, or in anywise to affect them in their private capacity :—Held, that although the churchwardens and overseers might be a corporation, yet, having no common seal of office, they could not bind their successors ; that the contract therefore constituted a personal covenant ; that the proviso was repugnant to it, and therefore void. *Furnival*

v. *Coombs*, 6 Scott (N.R.) 522 ; 5 Man. & G. 736 ; 12 L. J., C. P. 265 ; 7 Jur. 399.

Contracts as Board of Health.]—By 11 & 12 Vict. c. 63, s. 12, the municipal corporation of a borough is constituted a local board of health, and by s. 85 power is given to such board to enter into contracts for works, with a proviso that, before contracting, an estimate is to be obtained from the surveyor of the board ; and by s. 140, the expenses incurred by the board are to be borne and be paid out of the rates authorised by the act to be levied for that purpose :—Held, that a corporation may be sued on contracts entered into in their character as a board of health, and that the proviso in s. 85 is only directory, and not a condition precedent to the right to contract, although its non-observance might affect the right of the board to levy a rate for the purpose of such a contract. *Nowell* v. *Worcester Corporation*, 9 Ex. 457 ; 2 C. L. R. 981 ; 23 L. J., Ex. 139 ; 18 Jur. 64.

The Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 24 (repealed), which enacts, that in corporate boroughs the local boards "shall be the mayor, aldermen and burgesses acting by the council"—does not make the local board a new and separate body, but in substance enacts that in corporate boroughs the corporation shall be the local board ; and if in making contracts the name and style of the corporation "acting as the local board" are used, the corporation is the essential body and contracting party, and may be sued as such on the contracts. *Andrews* v. *Ryde Corporation*, L. R. 9 Ex. 302 ; 43 L. J., Ex. 174 ; 23 W. R. 58.

Restrictive Covenant—Building Scheme—Approval of Treasury.]—Although, in ordinary cases, where the conditions of sale, subject to which a sale, whether by auction or by private contract, is made, state that every purchaser shall enter into certain restrictive covenants limiting, for the benefit of the adjoining land, his right of user of the land conveyed to him, such conditions constitute a scheme enforceable by any purchaser against the vendor and any other purchaser with notice ; yet, if the vendor be a municipal corporation, ss. 108 & 109 of the Municipal Corporations Act, 1882, make it necessary that the approval of the Treasury (or, since the Local Government Act, 1888, of the Local Government Board) should be obtained not only to the conveyance to the purchaser, but also to the restrictive covenants on the vendor's part which are to be implied from the conditions. If, therefore, the Treasury has consented only to the conveyance and not to the implied covenants, such covenants cannot be enforced against the corporation, or against other purchasers from them even with notice. Semble (per Kay, L. J.), to establish that the Treasury have approved of such a scheme, it is not enough to show that, having had constructive notice of it, they have approved the sale ; it must appear that they have had full knowledge, and have deliberately signified their approval of the scheme. *Davis* v. *Leicester Corporation*, 63 L. J., Ch. 440 ; [1894] 2 Ch. 208 ; 7 R. 609 ; 70 L. T. 599 ; 42 W. R. 610—C. A.

Contract to teach a Trade.]—An apprenticeship deed, entered into with a corporation, is binding. *Burnley Equitable Co-operative Society* v. *Casson*, 60 L. J., M. C. 59 ; [1891] 1 Q. B. 75 ; 63 L. T. 652 ; 39 W. R. 124 ; 55 J. P. 166.

Contract entered into before Incorporation.]—An incorporated company will be bound by the agreement of the members acting on its behalf before incorporation, if it has received the benefit of the agreement. *Edwards* v. *Grand Junction Ry.*, 7 Sim. 337 ; 1 Myl. & Cr. 650 ; 6 L. J., Ch. 47.

Purchase by Municipality from Hospital in connection with it—Void in Equity.]—A hospital, having a corporate character, was established in close connection with a municipal corporation. The ex-mayor was to be the governor, the masters and assistants were elected from the corporation, and the mayor and aldermen were visitors :—Held, that the corporation and hospital were in equity incapable of contracting, and a purchase by the corporation of property belonging to the hospital was set aside. *Att.-Gen.* v. *Plymouth Corporation*, 9 Beav. 67 ; 15 L. J., Ch. 109.

See also, as to contracts with regard to the property of municipal corporations, Municipal Corporations Act, 1882, ss. 105—132.

b. WHERE SEALING UNNECESSARY.

Executed Contract.]—In the case of a contract entered into with a corporation, which is executed before action brought, and under which the defendant has received the whole benefit of the consideration for which he bargained, it is no answer to an action by the corporation, that the corporation itself was not originally bound by the contract, by reason of its not having been made under their common seal. *Fishmongers' Co.* v. *Robertson*, 6 Scott (N.R.) 56 ; 5 Man. & G. 131 ; 12 L. J., C. P. 185.

A steamship corporation bought by a parol contract of the defendant a quantity of ale for the use of the passengers on board the corporation's steam vessel, and paid the defendant for the same. The ale proved unfit for use :—Held, that the contract, although not under seal, being executed, the defendant was liable to the corporation in damages. *Australian Royal Mail Steam Navigation Co.* v. *Marzetti*, 11 Ex. 228 ; 3 C. L. R. 1179 ; 24 L. J., Ex. 273.

To enforce an executory contract against a corporation, it may be necessary to shew that it was by deed ; but where the corporation has acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998 ; 18 L. J., Q. B. 49 ; 13 Jur. 119.

An official assignee in bankruptcy verbally agreed with a corporation, who were mortgagees of the insolvent, to release to them the equity of redemption in consideration of their not proving their debt, which exceeded the value of the mortgaged property :—Held, that, after the assignee had released the equity of redemption, the corporation were precluded from proving the debt, notwithstanding that the agreement was not under seal, and, therefore, that the consideration for the release had not failed. *Melbourne Banking Corporation* v. *Brougham*, 48 L. J., P. C. 12 ; 4 App. Cas. 156 ; 48 L. T. 1.

An action is maintainable against a corporation aggregate on an executed parol contract. *Beverley* v. *Lincoln Gaslight and Coke Co.*, 2 N. & P. 283; 6 A. & E. 829; W. W. & D. 519; 7 L. J., Q. B. 113.

By a private act of parliament, three railway companies were consolidated into one company, but the provisions of this act were not to take effect till the commissioners of railways had certified that half the capital had been paid up and expended on the railways. The plaintiff served the company with burning oil and carriage oil for their carriages, and colours for their carriage department, under orders not under their common seal:—Held, that the plaintiff was entitled to recover against the company in an action for goods sold, without proof that the commissioners of railways had certified, and although the company had not contracted by any instrument under their common seal. *Denton* v. *East Anglian Ry.*, 3 Car. & K. 16.

—— **Use and Occupation.**]—A corporation may maintain an action on an executed contract; therefore they may sue for use and occupation, where the tenant has held premises under them and paid rent. *Stafford Corporation* v. *Till*, 4 Bing. 75; 12 Moore, 260; 5 L. J. (O.S.) C. P. 77.

So a corporation aggregate may maintain an action for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal. *Carmarthen Corporation* v. *Lewis*, 6 Car. & P. 608.

Where a corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable for use and occupation, though there is no contract under seal for such occupation. *Lowe* v. *North-Western Ry.*, 7 Railw. Cas. 524; 18 Q. B. 632; 21 L. J., Q. B. 361; 17 Jur. 375.

Where a corporation so occupying was a railway company, within the provision of 8 & 9 Vict. c. 16 (Companies Clauses Act), s. 97, that any contract which, if made between private persons, would be valid, though made by parol only, may be made by parol on behalf of the company by the directors, and shall bind the company, such parol contract may be presumed against the company in an action for use and occupation, in the absence of direct evidence to the contrary, upon proof of actual occupation by the corporation or its agent. *Ib.*

Ancillary to Purposes of Corporation.]—A trading corporation may make a binding contract, not under seal, relating to matters necessarily incident to the purposes and objects for which the corporation was created. *Henderson* v. *Australian Royal Mail Steam Navigation Co.*, 5 El. & Bl. 409; 24 L. J., Q. B. 322; 1 Jur. (N.S.) 830; 3 W. R. 571.

Whether any commercial or trading corporation can contract without seal or not depends, not upon the magnitude or the insignificance of the subject-matter, but upon whether or not the contract is for a purpose connected with the objects of the incorporation. *South of Ireland Colliery Co.* v. *Waddle*, 37 L. J., C. P. 211; L. R. 3 C. P. 463; 18 L. T. 405; 16 W. R. 756. Affirmed, 38 L. J., C. P. 338; L. R. 4 C. P. 617; 17 W. R. 896—Ex. Ch.

A company incorporated under the Companies Act, 1862, for the working of collieries, contracted with an engineer for the erection of a pumping-engine and machinery for that purpose, and paid him part of the price. In an action by the company against the engineer for a breach of contract in refusing to deliver the engine and machinery:—Held, that the action was maintainable, though the contract was not under seal. *Ib.*

By the articles of association of the company it was provided that the business thereof should be carried on under the management of the board of directors; and that the board, in addition to the powers and authorities by the statute and by the articles of association expressly conferred upon them, might execute all such agreements, and generally do all such acts and things as were by the statute and the articles of association directed or authorised to be executed or done by the company in meeting:—Held, that the contract in question was warranted by the articles of association, and that there was nothing in them or in the statute requiring it to be under seal. *Ib.*

An action is maintainable by a trading corporation on an executory contract for the supply of goods, for the manufacturing and supply of which the company was incorporated. *Church* v. *Imperial Gaslight and Coke Co.*, 3 N. & P. 35; 6 A. & E. 846; 1 W. W. & H. 137; 7 L. J., Q. B. 118.

Where the guardians of a union gave a verbal order for iron gates for the union workhouse; and the gates were supplied accordingly, and adopted by them:—Held, that this was a contract incident to the purposes for which they were incorporated, and therefore within the exceptions to the general rule, requiring contracts by corporations to be under seal. *Sanders* v. *St. Neots' Union Guardians*, 8 Q. B. 810; 15 L. J., M. C. 104; 10 Jur. 566.

Wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and such work is done or such goods are supplied and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot refuse to pay, upon the ground that the contract was not under seal. *Clarke* v. *Cuckfield Union Guardians*, 1 B. C. C. 81; 21 L. J., Q. B. 349; 16 Jur. 686.

Where, therefore, at a meeting of a board of the guardians of a poor-law union (which board was regularly constituted), a contract was entered into, not under seal, for the erecting of water-closets in the union, and they were accordingly put up:—Held, that the guardians were liable upon the contract for work and labour, and goods sold and delivered. *Ib.*

See *Smart* v. *West Ham Union*, 10 Ex. 867; 24 L. J., Ex. 201.

Guardians of a poor-law union, suspecting fraud by their clerk in the union accounts, employed the plaintiff to investigate them, and during the progress of such investigation, and after the appointment of a new clerk, also employed the plaintiff to make up the union accounts for the last half-year, which involved a fresh investigation by him of the old accounts. The plaintiff was employed under three several resolutions of the board of guardians, entered in their minute-book, but no contract was made under the seal of the board. In an action against the board for work and labour:—Held, by Erle, J. (dubitante Crompton, J.), that as the work done was incidental and necessary to the purposes for which the board of guardians

was created, and had been performed by the plaintiff at the request of the board, he was entitled to recover, though the contract was not under seal. *Haigh* v. *North Bierley Union Guardians*, El. Bl. & El 873; 28 L. J., Q. B. 62; 5 Jur. (N.S.) 511; 6 W. R. 679.

A. supplied coals from time to time to the guardians of a poor-law union, for the use of the workhouse, under articles of agreement executed by A., but not under the seal of the guardians. The guardians received and used some of the coals. In an action for the price of the coals delivered:—Held, that as the coals had been accepted by the guardians, and were such as must necessarily be from time to time supplied for the very purposes for which the guardians were incorporated, they were liable to pay for the coals although the contract was not under seal. *Nicholson* v. *Bradfield Union Guardians*, 7 B. & S. 747; 35 L. J., Q. B. 176; L. R. 1 Q. B. 620; 14 L. T. 830; 14 W. R. 731.

Where an act of parliament, creating a corporation, casts upon them the duty of paying a sum of money, debt will lie against them to recover that sum, although there is no contract under seal. *Tilson* v. *Warwick Gaslight Co.*, 4 B. & C. 982; 7 D. & R. 575; 4 L. J. (O.S.) K. B. 53; 28 R. R. 529.

Ratification.]—The deed of settlement of an electric telegraph company, incorporated by royal charter, empowered the directors to manage the affairs of the company, and to exercise all the powers of the company at large; but contracts, the consideration for which did not exceed 50*l.*, were required to be signed by at least three individual directors, or sealed with the seal of the company, under the authority of a special meeting, or a resolution of the directors. The chairman of the company made a parol agreement with the plaintiff, by which he was to be allowed 50*l.* per cent. on messages sent and received through the company's lines, and with his own hand entered a memorandum of the agreement in the minute-book of the company. The agreement was afterwards referred to and recognised in a correspondence between the plaintiff and the secretary of the company, and accounts were rendered and payments received by the plaintiff under the agreement by cheques; but there had not been a contract signed by three directors, or under the seal of the company:—Held, that assuming the agreement to be ultra vires of the chairman, it had been ratified and adopted by the company, so as to render them liable. *Reuter* v. *Electric Telegraph Co.*, 6 El. & Bl. 346; 26 L. J., Q. B. 46; 2 Jur. (N.S.) 1245; 4 W. R. 564.

If the mayor of a town order weights and measures, and, when supplied, they are examined at a full meeting of the corporation, this is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact that the mayor was afterwards ousted from his office by a judgment of the court makes no difference. *De Grave* v. *Monmouth Corporation*, 4 Car. & P. 111.

Contracts of Constant Occurrence and Urgency.]—A municipal corporation was possessed of a dock of which it allowed the use to ships needing repairs, under certain printed regulations. The plaintiff entered into a parol agreement with the corporation for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be let to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, and that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock, as far as possible, according to the order of entry in the book. The regulations contained provisions that the corporation should be entitled to detain the vessel in the dock until the dockage was paid: that the corporation foreman should open and shut the dock gates; and various other provisions tending to show that the corporation intended to retain possession of and control over the dock while in use by vessels. The corporation did not admit the plaintiff's vessel into the dock in her turn:—Held, in an action for breach of contract by him against the corporation, that the contract was not for an interest in land within the 4th section of the Statute of Frauds, and therefore need not be in writing; and, secondly, that the contract need not be under the seal of the corporation, being in respect of a matter of frequent ordinary occurrence, and often of urgency. *Wells* v. *Kingston-upon-Hull Corporation*, 44 L. J., C. P. 257; L. R. 10 C. P. 402; 32 L. T. 615; 23 W. R. 562.

Specific Performance of Agreement—Acquiescence.]—A corporation passed a resolution in 1860, agreeing to let to the plaintiff the flat part of the beach opposite to his field, for 300 years, at a nominal rent. He claimed all the beach comprised between lines drawn in prolongation of the sides of his field, and he built a wall and terrace along the part so claimed. In 1864 the corporation gave him notice to quit, and, after much negotiation, in 1869 brought an ejectment against him, and thereupon he filed a bill for specific performance:—Held, that though the agreement was not under seal the corporation was bound by acquiescence, and must perform the agreement to grant a lease. *Crook* v. *Seaford Corporation*, L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.

If a regular corporate resolution has been passed, and upon faith of it expenditure has been incurred, the court will compel corporation to make legal grant in pursuance of resolution, although not under corporate seal. *Marshall* v. *Queensborough Corporation*, 1 Sim. & S. 520.

Circumstances under which the specific performance of an agreement not under corporate seal was decreed. *Maxwell* v. *Dulwich College*, 4 L. J., Ch. 138.

Appointment of Solicitor.]—Where, by an act incorporating a railway company, the directors were empowered to appoint and displace any of the officers of the company, the appointment of an attorney to the company need not be under seal. *Reg.* v. *Cumberland JJ.*, 5 Railw. Cas. 332; 5 D. & L. 431; 17 L. J., Q. B. 102; 12 Jur. 1025.

An attorney authorised to appear for a party to a suit, has, incidentally, authority to refer it, without any fresh authority to that effect; and an attorney having appeared for a corporation in an action, to the knowledge of the directors, the corporation is bound by his acts as their attorney, though he was not authorised to appear under seal. *Faviell* v. *Eastern Counties Ry.*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297.

As to the Validity of an Appointment not under Seal of an Architect by a School Board, and the Liability of the Board to pay for Plans prepared by him under Orders not under Seal.] —See *Scott* v. *Great Clifton School Board*, 14 Q. B. D. 500, post, sub School.

Seal affixed when Contract partly performed.] —By s. 174 of the Public Health Act, 1875, every contract made by an urban authority whereof the value or amount exceeds 50*l*. shall be in writing and sealed with the common seal of such authority. The defendants, an urban authority, by contract not under seal employed the plaintiffs as engineers to perform certain work. The plaintiffs performed part of the work exceeding in value 50*l*., and then required the defendants to affix their seal to the contract. This the defendants did, believing that it was for the benefit of the ratepayers of the district that the contract should be completed :—Held, that as part of the work was unperformed when the seal was affixed, and there was consideration for affixing it in the plaintiff's promise to complete the work, it was competent for the defendants to constitute the contract a good contract under seal, within s. 174, in respect of the work already done, and therefore that the plaintiffs were entitled to maintain their action for the value of that work. *Mellis* v. *Shirley Local Board*, 54 L. J., Q. B. 408 ; 14 Q. B. D. 911 ; 52 L. T. 544.

c. NECESSITY OF SEALING.

Additional Works—Quantum meruit.] —A builder covenanted with a corporation to do certain specified work for a sum of money, and that if their architects should require any alterations or additions in the progress of the works, the architects should give to the builder written instructions signed by them, and that he should not be considered as having authority for the same without such written instructions. The corporation covenanted to pay him the agreed sum and the value of the additional work, if any. The plaintiff executed all the works to be done for the specified sum ; and the architects required him to make certain additions, by means of written instructions, signed by them ; and he executed all the additional works, and the corporation took possession of all the works :—Held, that the plaintiff was not entitled to be paid on a quantum meruit in respect of the additional works, as the corporation was incapable of making a new contract by parol. *Lamprell* v. *Billericay Union*, 3 Ex. 283 ; 18 L. J., Ex. 282. See *Clark* v. *Cuckfield Union Guardians*, 1 B. C. C. 81 ; 21 L. J., Q. B. 349 ; 16 Jur. 686.

Extra Work.] —An incorporated company entered into a contract under seal with A. for the execution of works, according to the terms of a specification annexed, which contained provisions for extra work. He entered upon the work under the superintendence of the company's engineer, and also under such superintendence, and with the approbation of the engineer, executed extra works, which, however, could not be considered within the provisions of the contract under seal. He afterwards made a claim upon the company to a much larger amount than that specified by the contract, and the directors paid him a sum generally on account. By 8 & 9 Vict. c. 16, s. 97, the directors of such a company may make parol contracts without the same being reduced into writing where such contracts would, if entered into between private persons, be valid, and by s. 98, the directors are bound to enter minutes of such contracts in a book, and by a clause of the special act of the company, three directors constituted a quorum :—Held, that as there was not any evidence that the company had contracted for this extra work under seal, or that they had entered into a contract for the same under the terms of the special act, or of any general act authorising the same, they were not liable to A. for the extra work so performed by him. *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Railw. Cas. 790 ; 6 Ex. 137 ; 20 L. J., Ex. 193.

Agreement for Certain Work—Dismissal.]—A railway company incorporated by act of parliament entered into an agreement, not under seal, with a contractor, that he should execute certain works upon the railway for the purpose of changing the system of locomotion which they then employed, the rope and stationary engine system, to the ordinary locomotive principle. The contractor, in pursuance of the agreement, entered upon the works, and performed a portion of them ; but before they were completed he was dismissed by the company :—Held, that he could not recover the value of this work. *Diggle* v. *London and Blackwall Ry.*, 6 Railw. Cas. 590 ; 5 Ex. 442 ; 19 L. J., Ex. 308 ; 14 Jur. 937.

Contract under Seal—Extras verbally ordered by Surveyor—Liability.]—By 15 & 16 Vict. c. 85, s. 24, burial boards appointed under that act are incorporated and have a common seal ; and by s. 31 a board may enter into contracts with any person for building chapels and other premises, and doing any other works, which contracts must specify the work to be done, the prices to be paid, the time within which the work is to be done, and the penalty the contractor is to pay for non-performance ; the contracts are also to be entered in a book to be kept by the board for that purpose. The plaintiff contracted to do certain repairs to the chapels and premises of the defendants for 38*l*. The contract was accepted by the defendants, and the seal of the board was affixed to it. During the work the surveyor of the defendants verbally ordered the plaintiff to do many extra small repairs which were not included in the contract. The plaintiff sought to recover 13*l*. the cost of these extras, from the defendants, who denied their liability on the ground that they had not been contracted for under the seal of the board : —Held, by Fry, L.J., that the board was not liable, as they were bound to contract for such work as the plaintiff had executed strictly in accordance with the terms of s. 31. By Mathew, J., that the board was liable, as the extras were each of trivial importance, and the board could not be expected to affix their seal to every order for small matters as they were required. *Stevens* v. *Hounslow Burial Board*, 61 L. T. 839 ; 38 W. R. 236 ; 54 J. P. 309.

Local Improvements.]—A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds, for the making of improvements within the borough, except under the common seal. *Ludlow Corporation* v. *Charlton*, 6 M. & W. 815 ; 8 Car. & P. 242 ; 10 L. J. Ex. 75 ; 4 Jur. 657.

Under Public Health Act.]—The 11 & 12 Vict. c. 63, which establishes local boards, and gives them the power to make contracts binding on the district rates, requires, in the case of non-corporate districts, that the board shall cause a seal to be made for the use of such board in the execution of the act, and s. 85 requires that all contracts above 10*l.* shall be in a certain form in writing; and, in the case of a non-corporate district, sealed with the seal of the board, and signed by five or more members thereof:—Held, that s. 85 is not merely directory, but creates a condition, and therefore that a contract not under seal is void. *Frend* v. *Dennett*, 4 C. B. (N.S.) 576; 27 L. J., C. P. 314; 4 Jur. (N.S.) 897; 5 L. T. 73.

Section 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63) and s. 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) enact (without any words of prohibition) that "every contract made by a local board or by an urban authority, whereof the value or amount exceeds [10*l.*] 50*l.*, shall be in writing, and sealed with the common seal of such authority." A local board and an urban authority under these acts verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to and approved and used by the local board, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans; nor was there any resolution of the board authorising their preparation:—Held, that, by reason of the non-compliance with the statutory requirements, the contract could not be enforced, notwithstanding that the jury found that the board authorised their surveyor to procure the plans and ratified this act, that new offices were necessary for the purposes of the board, and that the plans were necessary for the erection of them. *Hunt* v. *Wimbledon Local Board*, 47 L. J., C. P. 540. Affirmed, 48 L. J., C. P. 207; 4 C. P. D. 48; 39 L. T. 35; 27 W. R. 123—C. A.

See further, LOCAL GOVERNMENT.

Not Incidental to Purposes of Corporation.]—The guardians of a union, who are, by 5 & 6 Will. 4, c. 69, s. 7, and 5 & 6 Vict. c. 27, s. 16, a corporate body, by direction of the poor law commissioners, under 6 & 7 Will. 4, c. 96, s. 3, entered into an agreement, under seal, with a party for making a survey and a map of one of the parishes comprised in the union. A reduced plan being also required, a verbal order for it was given to the surveyor. In an action for the price of the reduced plan:—Held, that this was not a contract incident to the purposes for which the guardians were incorporated, and therefore not within the exceptions to the general rule, requiring contracts by a corporation to be made under seal. *Paine* v. *Strand Guardians*, 8 Q. B. 326; 15 L. J., M. C. 89; 10 Jur. 308.

—— **Copper Miners—Contract for Rails.**]—In an action for breach of a contract to purchase from the plaintiffs iron rails, it was proved that the plaintiffs were incorporated by a charter for the purpose of carrying on the business of copper miners, and the contract in question, which was not under seal, had been made by an agent on behalf of the plaintiffs with the defendant:—Held, first, that the action could not be maintained by the corporation as the contract was not under seal, and did not fall within any of the exceptions to the general rule that a corporation can only bind itself by deed. *Copper Miners' Co.* v. *Fox*, 16 Q. B. 229; 20 L. J., Q. B. 174; 15 Jur. 703.

Held, secondly, that the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation. *Ib.*

Held, thirdly, that no other charter authorising the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority. *Ib.*

Held, fourthly, that as the corporation could not be sued on this contract, and as the alleged promise by them formed the consideration for the defendant's promise, the corporation could not sue upon the contract. *Ib.*

—— **Scavenging Docks.**]—Action by a corporation incorporated as a dock company, by a statute containing no express provisions as to the manner in which the corporation might be bound by contracts. The action was on an agreement to execute a contract under seal for scavenging the docks for a year. Plea, that the agreement on behalf of the corporation was by parol only, and not authorised under its seal:—Held, that though a corporation, incorporated for trading purposes, has impliedly power to contract by parol for purposes necessary to carry on the trade, the subject of this contract was not of that nature; that the corporation, therefore, was not bound; and therefore the defendant was not liable; and the plea was good. *London Dock Co.* v. *Sinnott*, 8 El. & Bl. 347; 27 L. J., Q. B. 129; 4 Jur. (N.S.) 70; 6 W. R. 165.

—— **To Supply Water-Pipes.**]—A corporation cannot sue on an executory contract not under seal, unless empowered by its act of incorporation. An act of parliament empowered the directors of a water company to make "contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons engaged in the undertaking":—Held, that an agreement for the fabrication and supply of pipes at certain stated periods, was not valid unless under seal. *East London Waterworks Co.* v. *Bailey*, 4 Bing. 283; 12 Moore, 533; 5 L. J. (O S) C. P. 175. See remarks on this case in *Church* v. *Imperial Gas Light and Coke Co.*, 6 A. & E. 246; ante, col. 660.

Appointment of Officers—Medical Officer to Corporation.]—The appointment by a corporation, such as a board of poor-law guardians, of a person to be medical officer to the corporation for any fixed or definite period of time, ought to be under seal. *Dyte* v. *St. Pancras Board of Guardians*, 27 L. T. 342.

—— **Engineer.**]—A municipal corporation, by a contract not under its common seal, employed an engineer to perform services for the promoting of a bill in parliament to enable the corporation to purchase certain gasworks and to become manufacturers and vendors of gas not only within, but also outside, the municipal boundaries:—Held, that the corporation acted ultra vires in so employing the engineer, and that he could not recover for his services. *Clemenshaw* v. *Dublin Corporation*, Ir. R. 10, C. L. 1; *Cf. Bateman* v. *Ashton-under-Lyne*, col. 654.

—— **Clerk.**]—The contract for the engage-

ment of a clerk to the master of a workhouse by a board of guardians must in order to bind the guardians, be under their seal *Austin* v *Bethnal Green Guardians* 43 L J C P 100, L R 9 C P 91, 29 L T 807, 22 W R 406

Trustees were created by statute a body corporate, for the management of the navigation of a river, with a common seal and a perpetual succession The statute empowered them to levy tolls, and enacted that it should be lawful for them to allow to any officer or servant an annuity or allowance Their clerk removable at their will and pleasure, for forty years having in 1865 resigned, owing to ill health the trustees duly passed a resolution (not sealed) that his resignation "be accepted and that a retiring pension of 300*l* per annum, free of income tax, be granted to him during the remainder of his life The pension was duly paid quarterly for some years until the defendants, who had meanwhile been substituted by statute for the trustees with all their powers, and subject to all their liabilities duly passed a resolution to reduce the pension to 150*l* per annum, to be paid during their pleasure and made the first quarterly payment on the reduced scale The clerk having brought an action to recover the difference —Held, that the resolution of 1865 was revocable, and that he could not recover *Marchant* v *Lea Conservancy Board*, 43 L J, Ex 44, L R 9 Ex 60, 30 L T 367—Ex Ch

—— **Solicitor**]—A corporation cannot make a valid appointment of an attorney to conduct suits, or manage the affairs of the corporation, except under its common seal And such attorney, if such appointment has not been under the common seal, cannot recover for business done, although the council of the borough has passed a resolution, directing that the business should be done by him, and was cognizant of its progress *Arnold* v *Poole Corporation*, 5 Scott (N R) 741 2 D (N S) 574, 4 Man & G 860, 12 L J, C P 97, 7 Jur 653

The Corporation of London, which by custom appoints in each year an attorney by warrant, without sealing or signing, is estopped by matter of record to say that his act is not their act *Ib*

A municipal corporation is not liable for the costs of an attorney conducting on their behalf an opposition to a bill in parliament affecting their privileges, unless the retainer is under the common seal *Sutton* v *Spectaclemakers Co*, 10 L T 411, 12 W R 742

A highway board passed a resolution directing their clerk to take the necessary steps to oppose, on behalf of the board, a bill in parliament which contained provisions contrary to the Railway Clauses Acts, and which would prejudicially affect certain of the highways within the district In pursuance of such resolution the clerk to the board instructed the plaintiffs, a firm of solicitors, to oppose the bill In an action by the plaintiffs to recover their costs of such opposition from the board —Held, that the purpose for which they had been retained was not incidental to the purpose for which the highway board was incorporated, and that as they had not been retained under the seal of the board they had no right of action against the board *Phelps* v. *Upton Snodsbury Highway Board*, 1 Cab &. E 524, 49 J P 408 *Cf Reg* v. *Cumberland*, and *Favrell* v *Eastern Counties Ry*., col. 662

—— **Coal Meter**]—In a declaration, it was alleged that a corporation had, by persons appointed by them, the sole and exclusive privilege of measuring and weighing all coals imported into the port of London and also the right and privilege of appointing to perform such work a sufficient number of fit and proper persons and of fixing a reasonable rate of payment for such work such payment to be made to the persons who should do the work and to be for their use and benefit And the declaration charged the defendant with importing coals without paying for the weighing of them, and that the plaintiff had been appointed meter, to whom such payment ought to be made In proof of the plaintiff's appointment as meter, he gave in evidence an entry, not under seal, in the corporation books stating that he was so appointed The plaintiff had ever since acted as a coal-meter —Held that payment in respect of the measurement was for the benefit of the meter only that he was an officer and not a mere servant of the corporation and therefore in appointment under seal was necessary *Smith* v *Cartwright*, 6 Ex 927, 20 L J, Ex 401

—— **Agent**]—A corporation was established by act of parliament, one section of which enacted that the court of directors should have power to use the common seal on behalf of the company, and all contracts relating to its affairs, which should be signed by any three of the directors, in pursuance of a resolution of a court of directors, should be binding on the company and all parties Another section enacted that the directors should have full power to employ the workmen, and regulate the traffic on the line and the rates and tolls, and appoint and displace the bankers and solicitors of the company, and all such managers officers, agents, clerks, workmen and servants as they should think proper By a resolution made at a court of directors, and signed by the chairman the plaintiff was appointed agent to the company, to negotiate with the London and North Western Railway Company or any other railway company, for the lease of the line of the company —Held, that the plaintiff was not entitled to recover for his service in respect of such negotiation, the resolution not having been sealed by the corporate seal or signed by three directors *Cope* v *Thames Haven Dock and Ry*, 6 Railw Cas 83, 3 Ex 841, 18 L J, Ex 345

—— **Director**]—At a general meeting of a company, incorporated by act of parliament, a resolution was agreed to and entered in their books, but not under seal, that a remuneration of one guinea should be allowed to each director for every attendance at a committee or a court — Held, that there was no contract upon which a director could maintain an action against the company for such remuneration, as, even if, in the absence of a sealed contract, a clerk or servant could have sued, the directors did not occupy an analogous position *Dunstan* v. *Imperial Gas Light Co*, 3 B & Ad 125, 1 L J, K B 49

Increase of Salary]—An agreement by a corporation with one of its officers for an increase of the salary of an office retained by him, as a compensation for the loss of an office of which he has been deprived under 5 & 6 Will 4, c 75, though upon an executed consideration, is not

binding upon the corporation, if the contract is not under the common seal of the corporation *Reg* v *Stamford Corporation*, 6 Q B 433, 8 Jur 909

Use and Occupation]—Although a corporation may be liable for use and occupation of premises, it can only be so for the period of actual occupation, and a continuous occupation for several years will not render the corporation tenants from year to year *Finlay* v *Bristol and Exeter Ry*, 7 Ex 409, 7 Railw Cas 449, 21 L J, Ex 117

A railway company, through their solicitor hired rooms from the 16th December, 1846, for one year, but occupied them until the 16th December, 1848, previously to which time they removed their furniture and effects, left the keys in the doors, and paid the rent up to this day, but gave no notice to quit —Held, that the company was not liable in an action for use and occupation for rent subsequently to 16th December, 1848 *Ib*

Verbal Agreement to pay for Buildings Confirmed by Resolution]—The agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially than would be required for his own purposes and would leave them for the use of the company, then the company would pay him 5,000*l* The cottages were accordingly built and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid 500*l* a year for the cottages by way of rent, with an option to the company to purchase them for 5 000*l* This agreement was confirmed by a resolution of the board of directors The company paid the 500*l* a year for some years, and then refused to pay —Held, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery, and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money *Crampton* v *Varna Ry* 41 L J Ch 817, L R 7 Ch 562 20 W R 713

Held, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company *Ib*

Specific Performance]—A court of equity will not compel a corporation to execute a legal assurance of corporate property, in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party, on the faith of the expressed legal assurance Quere, whether a corporation can borrow money except under seal *Wilmot* v *Coventry Corporation*, 1 Y & Coll 518

Letting Tolls]—A municipal corporation and local board, on the 17th of July, caused certain tolls to be put up for letting by auction, under conditions by which the purchaser was immediately on the fall of the hammer to pay a month's rent in advance, and to produce two sureties, who were forthwith to sign the conditions and a draft lease The highest bidder at the auction was declared the purchaser, and he paid a month's rent in advance, and signed an agreement to become lessee indorsed on the conditions, but he did not then, nor at any subsequent time, produce two sureties, and the corporation ultimately, in pursuance of the conditions, determined the contract and sold the tolls at a loss. The contract was not executed by the corporation under its common seal, nor signed on its behalf by any person authorised under seal to do so After the sale the corporation, on the 7th of August, by resolution, which was entered on the minutes under seal adopted the report of a committee, to the effect that the tolls had been put up to auction, and that the defendant had become a purchaser at a rent of 350*l*, and had paid a deposit of 29*l* 3*s* 4*d* Before this, however the defendant had on the 4th of August, written to the corporation saying that he could not carry out his contract, and asking for a return of the sum paid In an action against the defendant to recover damages for the breach of his agreement to take the tolls —Held, that the contract was one that required to be made under the common seal of the corporation, that not having been sealed nor signed by any person authorised under seal by them to do so the defendant was not bound by it that the payment of a month's rent in advance was not such a part performance as would have bound the corporation in equity specifically to perform their agreement and that the resolution of the 7th of August (even assuming it to be a ratification under seal of the contract) came too late *Kidderminster Corporation* v *Hardwick*, 43 L J, Ex 9, L R 9 Ex 13, 29 L T 612, 22 W R 160

Agreement by Tenant to Surrender Lease]—In order to render an agreement to surrender a lease granted by a municipal corporation enforceable against the tenant, the agreement must be under the seal of the corporation, or the committee appointed by the corporation to negotiate with the lessee must be appointed under seal, or the agreement must have been ratified by the corporation under seal or must have been performed in part or acted upon *Kidderminster Corporation* v *Hardwick* (L R 9 Ex 13), followed *Oxford Corporation* v *Crow*, [1893] 3 Ch 535, 8 R 279, 69 L J 228, 42 W R 200.

Entry in Books Signed by Majority]—An entry in the books of a corporation of the terms of an agreement entered into by it, does not bind it, although it is signed by a majority of the members *Carter* v *Ely (Dean)*, 7 Sim 211, 4 L J, Ch 132, 241

Ecclesiastical Corporation.]—An ecclesiastical corporation is not bound by any agreement, unless it can be manifested by deed *Ib*

d Leases by

Power to Make.]—Where a corporation has by a private act of parliament power to sell and exchange land, a power to lease the land and give the option of purchase to the lessee is implied *Female Orphan Asylum, In re*, 17 L T 59 15 W R 1056

An act authorised a corporation to construct a market-place, and place for a fair, and all necessary buildings and works for the sale of commodities, and a market-place for the sale of

cattle, with power to provide slaughter-houses, and, after various provisions, authorising the levying and taking of stallages, rents and tolls, enacting that the moneys arising from such stallages, rents and tolls, should be applied, first, in paying the expenses of obtaining the act and incident thereto; and, secondly, in making and maintaining the market or fair, and works connected therewith, and the slaughter-houses to be established or constructed, and in payment of the interest and repayment of the principal of all moneys borrowed on the security of the works, stallages, rents and tolls, and that the residue of such moneys (if any) should be retained by the corporation, to be applied by them as they should think fit:—Held, that, assuming the corporation to be entitled to grant leases of the market, market-place, and slaughter-houses, they were not entitled to demise the property at diminished rents upon payment of fines, the rents being devoted to the maintenance of the property. *Att.-Gen.* v. *Avon* or *Aberavon Corporation*, 3 De G. J. & S. 637.

—— **Lands held upon Trust—Lease at an Undervalue—Violation of Charter.**] — Where lands were held by a corporation aggregate upon certain trusts, and they granted a lease thereof to one of their own body, at a great undervalue, and in derogation of the trust, the lease was decreed to be set aside, and an account of the mesne profits of the lands directed to be taken from the time of the granting of the lease being less than twenty years. *Att.-Gen.* v. *Cashel Corporation*, 3 Dr. & War. 294; 2 Con. & L. 1.

A right of pasture over certain of his lands was granted by an archbishop of C. to the corporation of C., for the use of the corporation and the inhabitants of C. The corporation subsequently, by some means unexplained, became seised absolutely of part of these lands:—Held, that they were so seised in trust for the town of C., and that therefore a lease for ninety-nine years, made by them at a gross undervalue, should be set aside, and that though the absolute ownership might have been acquired by usurpation, the trusts would nevertheless have attached:—Held, also, that the lessee was entitled to an issue as to the identity of the lands in possession with those, or part of those, over which the right of pasture had been granted. *Ib.*

Charles I., subsequently to the acquisition of the absolute ownership, granted to the corporation a charter conferring on them certain privileges, directing the appointment of certain officers, and specifying the oaths to be taken on appointment. The mayor was to be bound by his oath not to permit any estate of inheritance in the lands in question to be parted with, or the rents to be assigned, for more than one year. Semble, the corporation adopting this charter, was bound by the restrictions of the oath, though the lands were not derived from the Crown; also that the lease in question was in violation of the oath. *Ib.*

Letting and Notice to Quit, not under Seal, by Agents not Appointed under Seal—Ejectment.]—On an ejectment upon the demise of a corporation, it appeared from the defendant's admissions that he had taken the land by permission of a servant of the corporation, and that another servant of the corporation had given him notice to deliver up possession. No lease, nor notice, nor appointment of the servants as agents, under seal, was produced:—Held, that the jury was rightly directed to find for the plaintiff if they thought the servants were authorised by the company to act. *Doe* d. *Birmingham Canal Co.* v. *Bold*, 11 Q. B. 127; 12 Jur. 350.

Lease Purporting to be by Corporation—Action for Breach by Individuals as Lessors.]—Action by A. and B. against the lessee, on an indenture of lease, which appeared to be made between D., therein described as master; and A., B., and two other persons, described as governors of a hospital; and the lessee. The demise was by the master and governors, and the covenants to and by the lessors were to and for the "master and governors and their successors." "In witness whereof the master and governors have hereunto affixed their common seal." One seal was affixed as the common seal of the lessors, none of whom signed the indenture, and the execution by the lessee was under his hand and seal. The declaration stated that he entered under the demise and enjoyed during the whole term. Breach, non-repair at the expiration of the term. Plea, that the indenture was not signed by the lessors or their agent, nor was there any demise so signed:—Held, that the seal affixed on the lessors' part, was not the seal, and the deed was not the deed of the individual lessors; that the want of execution by them was not, under the circumstances stated on the record, such a failure of consideration as to be an answer to the action; but that the lessee was entitled to judgment, because it appeared by the record that the demise was by a corporation, and the court could not judicially notice the fact, that no such corporation existed. *Cooch* v. *Goodman*, 2 G. & D. 159; 2 Q. B. 580; 11 L. J., Q. B. 225; 6 Jur. 779. See *Swatman* v. *Ambler*, 8 Ex. 72; 22 L. J., Ex. 81.

Acceptance of Rent.]—A lease, voidable by a corporation, may be set up merely by acceptance of rent, without evidence of any deed executed under their seal in that behalf. *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998; 18 L. J., Q. B. 49; 13 Jur. 119.

Payment and receipt of rent are evidence against a corporation of a demise by them from year to year. *Ib.*

One who enters upon, occupies and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation, but not sealed with its common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy. *Ecclesiastical Commissioners for England and Wales* v. *Merral*, 38 L. J., Ex. 93; L. R. 4 Ex. 162; 20 L. T. 573; 17 W. R. 676.

—— **Distress.**]—By an indenture between A., B., and C., bailiffs, and D., E., and F., aldermen, with the assent of the burgesses of the borough of M., of the one part, and S., of the other part, the bailiffs, aldermen, and burgesses, demised lands to S. for years, to be holden of the bailiffs, aldermen, and burgesses; and the deed was executed by A., B., and C. and D., E., and F., but not sealed with the corporation seal; S. having paid rent to the bailiffs as chief officers of the borough:—Held, that their servant might make cognizance for taking a distress under a demise

by the corporation, notwithstanding a notice had been given by the aldermen (one of whom was a party to the indenture) to pay the rent to them: for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation. *Wood* v. *Tute*, 2 Bos. & P. (N.R.) 247; 9 R. R. 645. See *Doe* d. *Carlisle* (*Earl*) v. *Woodman*, 8 East, 228; 9 R. R. 422.

Agreement for Lease—Specific Performance—Entry of Resolution—Erasure.]—The entry of a resolution in the minute book of a corporation, accepting a proposal for a lease of part of the corporate property, was partially erased. In the absence of evidence to the contrary, the erasure is to be presumed to have been made before the book was signed by the chairman of the meeting at which the resolution was passed. *Steevens' Hospital* v. *Dyas*, 15 Ir. Ch. R. 405.

If there has been part performance of a contract for a lease by a corporation, a court of equity will decree a specific performance of it, though the contract was not under the seal of the corporation. *Ib.*

A corporation, empowered by statute to make leases of the corporate property, under its common seal, for a certain term in possession, and at the highest rent; and the statute providing that all leases made in any other manner should be null and void, is not precluded by the statute from entering into an agreement for a lease, provided it is carried into effect without delay, by the execution of leases in compliance with the statute. *Ib.* See *Crook* v. *Seaford Corporation*, L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.

Bailiffs of corporation not compellable to make lease. *Strainger* v. *Derby* (*Bailiffs of*), Cary, 102.

Time is of the essence of a contract for the granting of a lease by a corporation, where part of the consideration is a fine which is to be divided amongst the existing members of the corporation. *Carter* v. *Ely* (*Dean*), 4 L. J., Ch. 132.

Void Lease — Prior Contract — Sufficiency of Resolution of Common Council.] — The Limerick Regulation Act (Local and Personal) enacted that the corporation property should be disposed of only for the public uses and charities of the city, and subject to certain control and formalities mentioned in the act, and that it should take effect from the 1st September, 1823. It received the royal assent on the 18th July, 1823. At a corporate meeting on the 30th August, certain property was leased to a member of the body, not for public purposes, and without the control or formalities required by the act:—Held, that notwithstanding the clause deferring its operation, the act was binding on the corporate property from the date of its passing, and the lease was therefore void. *Att.-Gen.* v. *Ball*, 10 Ir. Eq. R. 146. And see *Drogheda Corporation* v. *Holmes*, 5 H. L. Cas. 460.

A lease void under the act was attempted to be supported by a prior contract, which was not under the corporate seal, but was a resolution of the common council, who were in the habit of managing the corporate property. The proof that the property had been held for public trusts was defective, but the profits had been applied to public purposes for many years. The resolution was made in favour of the chamberlain of the corporation by the common council, which consisted of persons under his influence, and the rent, though fixed by valuators appointed by the common council, was under the value:—Held, that although equity might enforce a contract or resolution not under seal or binding at law against a corporation under circumstances, yet this resolution could not be enforced, and would not support the lease. *Ib.*

Lease made under Void Charter.] — A corporation by charter made a reversionary lease to J. of some lands. The charter being declared void by 1 Will. & M., sess. 2, c. 9, the lease is void also. *Peppard* v. *Drogheda Corporation*, 2 Bro. P. C. 321.

Sufficiency of Resolution of Corporation as to Renewal of Leases.]—By the 6 & 7 Will. 4, c. 100 (passed in August, 1836), no conveyance of lands in certain corporations (of which Drogheda was one) was to be made, unless in pursuance of a covenant, contract, or agreement made, or a resolution of the corporation duly entered in the corporate books, before the 16th February, 1836. This provision was continued by successive statutes, and incorporated into the 3 & 4 Vict. cc. 108 and 109. The corporation of Drogheda had from time to time passed resolutions as to the granting of leases of the corporate property, and on the 20th April, 1801, passed a resolution (which was duly entered in the corporate books), directing that "the auditors and viewers should, on reporting on petitions for the renewals of leases, take into consideration the value of the premises, and value the same at the full value between man and man, and that the petitioner so applying shall be then entitled to a renewal," on certain terms therein mentioned, "and that all reports shall hereafter be received at one assembly, and taken into consideration not sooner than the then following quarter assembly." A lease had been granted in 1785 for sixty-one years; in 1841 a petition was presented for its renewal: the petition was referred to the auditors and viewers, whose report was presented on the 7th of January, 1842, and on the same day a resolution ordering the renewal was passed:—Held, that this was not a resolution which brought the case within the exceptions in the statute; for it merely bound the corporation to receive the report, and afterwards to consider the propriety of acting upon it. The resolution need not be a contract. *Drogheda Corporation* v. *Holmes*, 5 H. L. Cas. 460.

Semble, this resolution was insufficient, although it might not be necessary that the resolution should be such as would form a binding contract, enforceable in a court of equity; and, further, the resolution, such as it was, had not been complied with, for the lease was granted at the same meeting at which the report of the auditors and viewers was presented. *Ib.*

Renewal of Leases.]—The 5 & 6 Will. 4, c. 76, s. 95, which enables municipal corporations to renew leases on a fine, in cases where sanctioned by ancient usage, or by custom or practice, at a fine certain, or where they have ordinarily made renewal upon an arbitrary fine, is to be construed liberally. *Att.-Gen.* v. *Great Yarmouth Corporation*, 21 Beav. 625.

The word renewal in 5 & 6 Will. 4, c. 76, s. 95,

does not mean a mere custom to let on lease at different rents; and though the renewals need not be on precisely the same terms, there must be such a uniformity as to show that the same lease has been renewed *Ib.*

Leases were granted by a corporation of the same property in 1778, 1798, and 1824, to the same lessee and his assigns, for twenty-one years, at a rent of 5*s.* In the two last instances alone, a fine of 7*s.* 6*d.* had been taken. The covenants varied, and there was an interval of six years between the second and third, during which there was a yearly tenancy.—Held, that the case did not come within 5 & 6 Will 4, c. 76, s. 95, and that a renewal could not be granted at an undervalue, and on a fine. *Ib.*

Mistake in Name — Rectification.] — Where corporation mistake their name in granting leases, help given in chancery. *Anon.*, Cary, 31.

See also as to the Power of Municipal Corporations to make Contracts with regard to Corporate Land, &c, Municipal Corporation Act, 1882, ss. 105—132.

A. H. B.

CORPSE.

Giving Bodies to Hospitals.]—A master of a workhouse was indicted for disposing of the dead bodies of paupers for the purpose of dissection and for gain to himself. On the death of the paupers he had caused their bodies to be shown to their relatives in coffins, and every appearance of regular funerals to be gone through; whereas, just before the funeral, other coffins had been substituted, and the bodies were afterwards taken to a hospital for dissection. The relatives had not, in accordance with the proviso in s. 7 of 2 & 3 Will. 4, c. 75, required that the bodies should be interred without anatomical examination; but the jury found that he had caused the appearance of funerals to be gone through with a view to prevent the relatives making such requirement, and that they would have so required but for the supposed funerals:—Held, that as, in fact, the relatives had not made the requirement which they had a right to make, the master of the workhouse was protected as a person having the lawful custody of the bodies, and was not therefore guilty of the offence charged *Reg.* v. *Feist*, Dears. & B. C. C. 59; 27 L. J., M. C. 164; 4 Jur. (N.S.) 541; 6 W. R. 546; 8 Cox, C. C. 18.

Property—Right to Possession of Body.]—There is no property in a dead body, but the executors have a right to the possession of the body, and their duty is to bury it, although there is a direction in the will that some other person should cause the body to be burnt. *Williams* v. *Williams*, 51 L. J., Ch. 385; 20 Ch. D. 659; 46 L. T. 275; 30 W. R. 438; 15 Cox, C. C. 39; 46 J. P. 726.

Cremation, whether a Misdemeanour.]—To burn a dead body, instead of burying it, is not a misdemeanour, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanour so to dispose of the body as to prevent the coroner from holding the inquest. *Reg.* v. *Price*, 53 L. J., M. C. 51; 12 Q. B. D. 247; 33 W. R. 45, n.; 15 Cox, C. C. 389. S. P., *Reg.* v. *Stephenson*, 53 L. J., M. C. 176; 13 Q. B. D. 331; 52 L. T. 267; 33 W. R. 44; 49 J. P. 486—C. C. R.

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A. GENERALLY.

Implied Repeal of Statutes by Order LXV.]—The effect of the Judicature Act, 1875, Ord. LV. of the Rules of Court, 1875, is to repeal the previous statutes as to costs with the exception of such of the provisions of the County Courts Act, 1867, as are expressly preserved by s. 67 of the Judicature Act. 1873. *Garnett* v. *Bradley*, 48 L. J., Ex. 186; 3 App. Cas. 944; 39 L. T. 261; 26 W. R. 698. S. P., *Parsons* v. *Tinling*, 46 L. J., C. P. 230; 2 C. P. D. 119; 35 L. T. 851; 25 W. R. 255.

The combined effect of the Judicature Act and Ord. LV. of the Rules of Court, 1875, giving the judges of the High Court of Justice a discretion as to costs in all cases, with certain exceptions specified in the order, is to repeal all previous enactments directing costs to follow certain rules. *Mercers' Co., Ex parte*, 48 L. J., Ch. 384; 10 Ch. D. 481; 27 W. R. 424.

But Order LXV. r. 1 (1883), does not apply to costs which are specially given by statute to a particular individual as a matter of right. *Reeve* v. *Gibson*, 60 L. J.. Q. B. 451; [1891] 1 Q. B. 652; 39 W. R. 420—C. A. S. P.. *Hasker* v. *Wood*, 54 L. J.. Q B. 419; 33 W. R. 697.

Section 9 of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that persons taking proceedings in a superior court, which they might under s. 3 of that act have taken in a county court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior court, is inconsistent with and is repealed by Order LV. r. 1, of the Rules of the Supreme Court, 1875, and Order LXV. r. 1, of the Rules of the Supreme Court, 1883. *Tenant* v. *Ellis* (6 Q. B. D. 46) approved. *Rockett* v. *Clippingdale*, 60 L. J., Q. B. 782; [1891] 2 Q. B. 293; 64 L. T. 641—C. A.

Section 7 of the County Courts Admiralty Jurisdiction Act, 1868, which deprived the plaintiff of, and also rendered him liable to be condemned in costs, where in an action brought in a superior court, which might by that act be tried by a county court having admiralty jurisdiction, he did not recover a sum exceeding what a county court had by that act jurisdiction to try without agreement, is repealed by the effect of Ord. LV. of the Judicature Act, 1875. *Tenant* v. *Ellis*, 50 L. J., Q. B. 143; 6 Q. B. D. 46; 43 L. T. 506; 29 W. R. 121.

Where Provision as to Costs omitted in Act.]—The court has now, under the Judicature Act, 1875, and Ord. LV. of Rules of Court, 1875, a discretion as to directing payment of costs where a provision as to costs is omitted in any public or private act. *St. Katharine's Hospital, Ex parte*, 17 Ch. D. 378.

Where a previous statute is silent as to the costs of particular proceedings under it, the combined effect of the Judicature Act and Ord. LV. of the Rules of Court, 1875, giving the judges of the High Court of Justice a discretion as to costs in all cases, supplies the omission. *Mercers' Co., Ex parte*, 48 L. J., Ch. 384; 10 Ch. D. 481; 27 W. R. 424.

The Commissioners of Works and Public Buildings compulsorily took, under 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34, certain lands, and paid the purchase-money or compensation into court. Neither of these acts contained any provision for the payment by the commissioners of the costs of applications for payment out. Upon a petition for payment out of a fund by the persons entitled thereto:—Held, that the Lands Clauses Consolidation Act, 1845, was not incorporated in the Acts 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34, and that r. 1 of Ord. LXV. did not give the court power to order the payment of costs where before

the Judicature Act it would not have had jurisdiction to do so. *Mercers' Co., Ex parte* (10 Ch. D. 481) questioned; *Garnett* v. *Bradley* (3 App. Cas. 944) distinguished; *Foster* v. *G. W. Ry.* (8 Q. B. D. 515) followed; and dicta in *Wood's Estates, In re* (31 Ch. D. 607) dissented from. *Mills' Estate, In re*, 56 L. J., Ch. 60; 34 Ch. D. 24; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151—C. A. S P., *Cherry's Settled Estates, In re*, 4 De G. F. & J. 332; 31 L. J., Ch. 351; 8 Jur. (N.S.) 446; 6 L. T. 31; 10 W. R. 305.

The court has power, by virtue of the general discretionary powers conferred by Ord. LXV., to order that the costs of a petition for the payment out of the court, to a person absolutely entitled, of a fund paid into court by a company in respect of lands taken under the compulsory powers of a special act, be paid by the company, although the special act is prior to the Lands Clauses Consolidation Act, 1845, and contains no provision as to such costs. *Lee and Hemingway, In re*, 24 Ch. D. 669; 49 L. T. 155; 32 W. R. 226.

In proceedings under statutes it is the settled rule of the court that no costs can be awarded, except such as are authorised by the particular act. A proceeding under a statute is not a proceeding in equity. *St. Dunstan-in-the-West Schools, In re*, L. R. 12 Eq. 537; 19 W. R. 887.

—— **Effect of Judicature Act, 1890, s. 3.**]—Section 5 of the Judicature Act, 1890, confers a jurisdiction which did not previously exist, and gives the court a discretion as to the costs of payment out of court of money in a case where the special act, under which the money is paid in, is silent as to them. *Mills' Estate, In re* (34 Ch. D. 24) superseded. *Fisher, In re*, 63 L. J., Ch. 235; [1894] 1 Ch. 450; 7 R. 97; 70 L. T. 62; 42 W. R. 241—C. A.

Action to enforce Legal Right.]—Where an action is brought to enforce a legal right, such as an action to restrain the infringement of a very small part of the plaintiff's copyright, the court will not, as a matter of course, order the defendant to pay the costs of the action. *Cooper* v. *Whittingham* (15 Ch. D. 501), and *Upmann* v. *Forester* (24 Ch. D. 231), observed on. *Walter* v. *Steinkopff*, 61 L. J., Ch. 521; [1892] 3 Ch. 489; 67 L. T. 184; 40 W. R. 599.

When an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the court has no discretion to refuse him costs. *Cooper* v. *Whittingham*, 49 L. J., Ch. 752; 15 Ch. D. 501; 43 L. T. 16; 28 W. R. 720.

Defendants bought from E. at a cost of 17*s.* 6*d.*, a box of 500 cigarettes bearing a label which was a very close imitation of the registered trade mark used by the plaintiffs upon the boxes in which they sold the cigarettes made by them. The defendants bought the cigarettes under the belief that they were made by the plaintiffs. The plaintiffs served the defendants with a writ and notice of motion for an injunction to restrain them from infringing their trade mark or selling the cigarettes. The defendants at once returned to E. the greater part of the cigarettes, and, by their affidavit, submitted to abide by any order the court should make, but contended that they ought not to be made to pay the costs:—Held, that there ought to be no order as to costs. *Upmann* v. *Forester* (24 Ch. D. 231) discussed. *American Tobacco Co.* v. *Guest*, 61 L. J., Ch. 242; [1892] 1 Ch. 630; 66 L. T. 257; 40 W. R. 364.

The defendant purchased abroad for his own private use cigars consigned to him at the docks here in cases bearing a spurious brand purporting to be that of the plaintiffs; he was not aware that the brand was spurious, nor, except from seeing it on the invoice, that any such brand was in use. On the issue of the writ for an injunction to restrain the defendant from selling the cigars, he stated that he had no intention of selling them, and offered all the relief asked for, he also gave an undertaking to the same effect on motion for an injunction:—Held, that the defendant must pay all the costs of the action. *Upmann* v. *Forester*, 52 L. J., Ch. 946; 24 Ch. D. 231; 49 L. T. 122; 32 W. R. 28.

Writ issued without Notice.]—Where plaintiffs in an action for infringement of copyright issued their writ without notice, and the defendant, as soon as he understood the circumstances, tried his best to undo the injury caused by the infringement:—Held, that the defendant must submit to the injunction and pay the costs. *Wittmann* v. *Oppenheim*, 54 L. J., Ch. 56; 27 Ch. D. 260; 50 L. T. 713; 32 W. R. 767.

The fact that an action has been brought without a previous application to the defendant does not prevent the plaintiff from getting his costs of the action. *Goodhart* v. *Hyett*, 25 Ch. D. 182; 50 L. T. 95.

Court wrongly put in Motion.]—By the Bombay Civil Fund Act, 1882, jurisdiction was given to the Court of Appeal to determine questions arising between any subscriber to the Bombay Civil Fund and the Secretary of State for India as to any liability of the fund, nothing being said as to costs. P. took proceedings to enforce a claim against the fund, which the court held to be not made out:—Held, that however the case might have stood if the question had been whether the court could give P. the costs of a successful claim, the court had inherent jurisdiction to order him to pay the costs of wrongly putting the court in motion, there being nothing in the act to show that the legislature intended the court not to have such jurisdiction. *Pringle* v. *Secretary of State for India*, 58 L. J., Ch. 815; 40 Ch. D. 288; 60 L. T. 796—C. A.

Ex parte Application.]—No one can be ordered to pay the costs of an ex parte application. *Nokes* v. *Gibbon*, 26 L. J., Ch. 208; 3 Jur. (N.S.) 282; 5 W. R. 216.

An absent party cannot be ordered to pay costs upon an ex parte application. *Cast* v. *Poyser*, 26 L. J., Ch. 93, 353; 3 Jur. (N.S.) 38.

Discretion of Court—Delegation of.]—Where a court or judge is expressly given a discretion as to costs, the exercise of such discretion cannot be delegated. *Lambton* v. *Parkinson*, 35 W. R. 545.

A judge cannot delegate to a master the discretionary power of allowing costs on the higher or lower scale. *Corticene Floor Covering Co.* v. *Tull*, 27 W. R. 373—C. A.

Where a defence had been admitted, the judge, under Order XXVI. r. 1, ordered that all proceedings should be stayed, each party to bear his own costs, except such as the master found were occasioned by any proceedings unnecessarily taken by the plaintiff:—Held, no delegation of

the judge's discretion to the master. *Musman* v. *Boret*, 66 L. T. 171; 40 W. R. 352. Cp. *Leigh, In re, Rowcliffe* v. *Leigh*, 26 W. R. 729.

—— **"Proceedings in the High Court."**]—The term "the costs of and incident to all proceedings in the High Court" (Ord LV. 1875) means the costs of and incident to all proceedings that have actually come into the High Court. *Brandrath, In re*, 9 Ch. D. 618; 27 W. R. 281.

The court has no jurisdiction to order an unsuccessful applicant for registration of a trade mark to pay the costs incurred by the opponent before the comptroller. *Australian Wine Importers' Trade Mark, In re, Golden Fleece Trade Mark, In re*, 58 L. J., Ch 380: 41 Ch. D. 278; 60 L. T. 436; 37 W. R. 578—C. A.

—— **Double Costs.**]—Ord. LXV. r. 1, does not apply to costs which are given by a statute as a matter of right. Thus, in an action brought for anything done in pursuance of 8 & 9 Vict. c. 100, a successful defendant is entitled to double costs as a matter of right. *Hasker* v. *Wood*, 54 L. J., Q. B. 419; 33 W. R. 697—C. A.

—— **Administration Action by Residuary Legatee.**]—A married woman who was one of the executors of a testator and also tenant for life of the residue, filed a bill for administration of the estate. Upon the accounts being taken it turned out that the residuary estate was insufficient for payment of debts and costs, and that it would be necessary to resort to specifically bequeathed property. The vice-chancellor, on further consideration, refused to give the plaintiff any costs of the suit, and ordered the next friend to pay the costs of taking an account of what, if anything, was due from another of the executors on an account current between him and the testator. The plaintiff appealed:—Held, that as a residuary legatee or executor filing a bill for administration is entitled to costs out of the estate, unless some special grounds are shown for depriving him of them, the costs in question were not costs in the discretion of the court within the meaning of s. 49 of the Supreme Court of Judicature Act, 1873, and that an appeal would lie. *Farrow* v. *Austin*, 18 Ch. D. 58; 45 L. T. 227; 30 W. R. 50.

Ord. LXV. r. 1, of the Rules of the Supreme Court, 1883, directing that the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or a judge, applies, in the case of causes and matters pending on the 24th of October, 1883, when those rules came into operation, only to the costs of proceedings taken on and after that day; and the costs incurred in proceedings taken in such causes and matters before that day, although not adjudicated upon until afterwards, are not within that rule. In an action for administration by one of several residuary legatees, all the proceedings except those on subsequent further consideration were taken before Ord. LXV. r. 1, came into operation, though the costs were not adjudicated upon until the order on further consideration, which was made afterwards:—Held, that an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent, proceedings. *Farrow* v. *Austin* (18 Ch. D. 58) followed. *McClellan In re, McClellan* v. *McClellan*, 54 L. J., Ch. 659; 29 Ch. D. 495; 52 L. T. 741; 33 W. R. 888—C. A.

—— **Action dismissed for want of Prosecution.**]—The statutable right of a defendant to the costs of an action in the Chancery Division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Ord. XXXIII. r. 10, of the Chancery Consolidation Orders of 1860, was preserved by s. 4 of 42 & 43 Vict. c. 59, yet Ord. LXV. r. 1, of the rules of 1883, has changed such practice, so that the costs of a defendant where such action has been dismissed for want of prosecution are now in the discretion of the judge, and therefore his order as to such costs is by s. 49 of the Judicature Act, 1873, not subject to appeal. *Snelling* v. *Pulling*, 29 Ch. D. 85; 52 L. T. 335; 33 W. R. 449—C. A.

—— **Interpleader Issue.**]—A summons was taken out, after verdict, for the costs of an interpleader issue. The judge at chambers referred the summons to the judge before whom the trial took place; the latter judge made an order on the summons at Westminster:—Held, that he had jurisdiction to make such order, and no appeal would lie. *Hartmont* v. *Foster*, 51 L. J., Q. B. 12; 8 Q. B. D. 82; 45 L. T. 429; 30 W. R. 129—C. A.

—— **After Trial by Jury.**]—*See* infra, col. 690.

—— **Discovery—Viva Voce Examination.**]—Where, in consequence of the party interrogated answering insufficiently, an order was made by the master for his examination viva voce before a special examiner:—Held, that there was power under Ord. XXXI. r. 10, and Ord. LV. r. 1, or the general practice of the court to make it a term of the order that the costs of, and occasioned by, the application should be paid by the party interrogated "in any event." *Vicary* v. *G. N. Ry.*, 51 L. J., Q. B. 462; 9 Q. B. D. 168.

—— **Inspection of Property.**]—A judge at chambers, on making an order for the inspection of the defendant's property, has discretion to order the plaintiff to pay the costs. *Mitchell* v. *Darley Main Colliery Co.*, 52 L. J., Q. B. 394; 10 Q. B. D. 457; 31 W. R. 549.

—— **Action remitted to County Court for Trial.**]—An action was brought in the superior court and sent down for trial in the county court under 19 & 20 Vict, c. 108, s. 26, when the plaintiff obtained a verdict for 6*l.* 15*s.* above the amount of 15*l.* paid into court:—Held, that the county court had no jurisdiction over the costs, and had no power to certify for costs, but the Queen's Bench Division, in the exercise of their discretion, allowed the plaintiff his costs under Ord. LV. *Farmer* v. *May*, 50 L. J., Q. B. 295; 44 L. T. 148; 29 W. R. 612.

Where an action has been ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26, and has been so tried there, the High Court retains its power under Ord. LXV. r. 1, of dealing with the costs of the action, notwithstanding r. 4 of that order, and the absence in the registrar's certificate of any expression of opinion by the county court judge as provided

for by that rule. *Emeny* or *Emery* v. *Sandes*, 54 L. J., Q. B. 82; 14 Q. B. D. 6; 51 L. T. 641; 33 W. R. 187—C. A.

—— **Petition under Trustee Act.**]—Whether under the Judicature Acts and the Orders of 1883, Ord. LXV. r. 1, the court has jurisdiction to order a respondent to a petition under the Trustee Act, 1850, to pay costs, quære. *Knight's Will or Trusts, In re*, 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417—C. A. *S. C.*, cor. Pearson, J., 53 L. J., Ch. 223.

—— **Payment out of Fund in Court—Costs disallowed by Master.**]—Where a contributory of a company was ordered to pay a certain sum of money to the liquidator, the contributory took out a summons to stay execution pending an appeal, and a stay of execution was ordered upon the terms of his paying the money and 50*l.* for costs into court, no order being made as to the costs of the summons to stay. The appeal was dismissed with costs, but no reference was made as to the costs of the summons to stay, and the taxing-master disallowed the costs of that summons. On summons to review the taxation:—Held, that the contributory was ordered to pay the 50*l.* into court to satisfy such costs as the court should think he ought to pay, and that the costs of the summons to stay, being caused by the appeal, must be paid out of the 50*l.* in court, and that the court had jurisdiction at any time to make such order. *Brighton Livery Stables Co., In re*, 52 L. T. 745.

—— **Out of Fund — Costs of ascertaining Share.**]—By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The chief clerk made his general certificate, finding (inter alia) that two specified leaseholds belonging to the partnership were of no value. The plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into court, and Bacon, V.-C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the estate. The defendants appealed:—Held, that it was within the discretion of the court to order all costs reasonably incurred in ascertaining the sum to be paid out of the fund, and that an appeal would not lie. *Butcher* v. *Pooler*, 52 L. J., Ch. 950; 24 Ch. D. 273; 49 L. T. 573; 32 W. R. 305—C. A.

—— **Interim Investment.**]—Section 32 of the Settled Land Act, 1882, does not take away the absolute discretion of the court respecting costs conferred by Ord. LV. *Hanbury's Trusts, In re*, 31 W. R. 784.

—— **Winding-up of Company.**]—A bill of sale holder who claims the chattels of the company under his security and opposes the landlord's application in the winding-up for leave to realise his distress, may be ordered to pay all the costs of the application under Ord. LV. r. 1. *Carriage Co-operative Supply Association, In re, Clemence, Ex parte*, 48 L. T. 308.

—— **Caused by Mistake of Court.**]—The rule that costs are seldom, if ever, allowed where there has been a mistake of the master, is no longer applicable since the Judicature Act, 1873. *Sparrow* v. *Hill*, 7 Q. B. D. at p. 368.

Extra costs occasioned by a mistake of the master allowed to a creditor proving his debt against a lunatic's estate. *Buckle, In re*, 1 Russ. & M. 363.

The plaintiff held entitled, on motion, to have his bill dismissed without costs, and without prejudice to a new bill, as he had been misled by the act of the court. *Lister* v. *Leather*, 1 De G. & J. 361; 3 Jur. (N.S.) 433; 5 W. R. 666.

—— **Certiorari — "Civil Proceeding."**]—A rule for a certiorari to bring up and quash an order of justices made under s. 158 of the Public Health Act, 1875, is a "civil proceeding" on the crown side of the Queen's Bench Division within Ord. LXII. r. 2; and the costs are in the discretion of the court under Ord. LV. *Reg.* v. *Morris*, 31 W. R. 609.

—— **Habeas Corpus.**]—The court has jurisdiction, since the Judicature Act, 1890, to give costs to the successful party in proceedings for a writ of habeas corpus. *Reg.* v. *Jones*, 63 L. J., Q. B. 656; [1894] 2 Q. B. 382; 10 R. 287; 70 L. T. 845; 42 W. R. 607; 58 J. P. 733.

—— **Case stated by Sessions.**]—Where a case is stated by sessions upon appeal against a poor-rate, the proceeding is a civil proceeding on the crown side of the Queen's Bench Division, within the rules of 1880, Ord. LXII. r. 2, and the costs are in the discretion of the court under Ord. LV. *Clark* v. *Fisherton-Angar Overseers* or *Alderbury Union*, 50 L. J., M. C. 33; 6 Q. B. D. 139; 29 W. R. 334; 45 J. P. 358.

Ord. LVII. does not enable the court to give costs in criminal proceedings on the crown side of the Queen's Bench Division on appeal from sessions. So that where the appeal was from a conviction under the Weights and Measures Act, the court was unable to make any order as to costs. *Reg.* v. *Buxendale*, 50 L. J., M. C. 35, n.; 6 Q. B. D. 144, n.; 29 W. R. 335.

A successful appellant in a case stated by justices is entitled to his costs though the respondent does not appear to support the judgment of the justices. *Shepherd* v. *Folland*, 49 J. P. 165. S. P., *Greenbank* v. *Sanderson*, 49 J. P. 40.

A case having been stated by justices under 20 & 21 Vict. c. 43, and remitted to them for an amended statement, but not returned within the proper time, and therefore abandoned:—Held, that the court still had jurisdiction to order the appellant to pay the respondent's costs. *Crowther* v. *Boult*, 13 Q. B. D. 680; 32 W. R. 150; 49 J. P. 135.

A case having been stated under 20 & 21 Vict. c. 43, the case was lodged, but no notice was given to the respondent of the appeal:—Held, that though the appeal could not be heard, costs could be given against the appellant. *South Dublin Union Guardians* v. *Jones*, 12 L. R. Ir. 358.

And see JUSTICE OF THE PEACE.

—— **County Palatine Court—Particulars of Objections.**]—In an action in the court of the county palatine to restrain infringement of a patent, the defendants delivered particulars of objection. At the trial the judge held the patent invalid for an objection appearing on the face of it, and dismissed the action with costs, stating his opinion that the defendants ought to have the costs of the witnesses brought up to support their particulars of objection, though they had not been called, as the plaintiffs virtually had been nonsuited. On taxation the registrar disallowed these costs, but the vice-chancellor held that they must be allowed. The plaintiffs appealed:—Held, that neither Lord Cairns' Act (21 & 22 Vict. c. 27) nor Sir J. Rolt's Act (25 & 26 Vict. c. 42) made it obligatory on a court of equity to follow the rule as to costs of particulars of objections laid down by the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 43, and that the rule which applied to courts having no discretion as to costs ought not to be followed by analogy by a court which had discretion as to costs; that the vice-chancellor had therefore power to give these costs, and that they must be allowed. *Parnell* v. *Mort*, 29 Ch. D. 325; 53 L. T. 186; 33 W. R. 481—C. A.

New Rule of Court.]—On a fair question upon new orders on which there has been no decision, the parties, in point of costs, are entitled to indulgence. *Watts* v. *Penny*, 11 Beav. 435; 18 L. J., Ch. 150; 13 Jur. 578.

Order for Payment whether Condition Precedent.]—Where, after a demurrer, an order was made, that upon payment of costs the plaintiff should be at liberty to amend his declaration, and he delivered an amended declaration, but did not tender the amount of the costs, as ascertained by the master's allocatur:—Held, that an interlocutory judgment, signed by him for want of a plea, was irregular, as the payment of costs was a condition precedent to his right to amend. *Lery* v. *Drew*, 5 D. & L. 307; 2 B. C. Rep. 142; 12 Jur. 119.

When a nonsuit is set aside upon payment of costs, such payment is made a condition precedent to the setting aside the nonsuit; and without it the plaintiff cannot proceed to another trial. *Nichols* v. *Bozon*, 13 East, 185.

Certain issues having been tried, and verdicts found for the plaintiffs, the defendants moved for a new trial, upon which it was ordered that the plaintiff's costs of the trial should be taxed, and that, upon the defendants paying those costs, a new trial should be had:—Held, that the defendants were not compellable to pay the costs under the order, unless they thought fit to proceed to a new trial. *Lambert* v. *Fisher*, 7 Sim. 525.

"Full Costs"—What Costs allowable.]—The "full costs" to which a successful defendant is entitled under s. 26 of the Copyright Act, 1842, are the ordinary costs as between party and party, and not solicitor and client costs. *Avery* v. *Wood*, 61 L. J., Ch. 75; [1891] 3 Ch. 115; 65 L. T. 122; 39 W. R. 577—C. A.

The court knows no distinction between costs generally and full costs. *Irwin* v. *Reddish*, 1 D. & R. 413; 5 B. & Ald. 796.

The term full costs, which occurs in 17 Car. 2, c. 7, s. 3, has the same meaning as ordinary costs. *Jamieson* v. *Trevelyan*, 10 Ex. 748; 3 C. L. R. 702; 24 L. J., Ex. 74; 1 Jur. (N.S.) 334; 3 W. R. 172.

Full costs, in 4 Geo. 1, c. 5. mean all fair and reasonable costs, to the exclusion of disbursements of extra liberality or generosity on the part of the landlord. *Flattery* v. *Malone*, 1 Moll. 463.

Statute of Frauds.]—I disapprove of any suggestion that a defendant, who succeeds upon a plea of the Statute of Frauds, is to be regarded as an unmeritorious litigant, and that he is only reluctantly to be allowed his costs. If a plaintiff attempts to enforce a bargain which is either avoided or of which the enforcement is prohibited by the statute, I am not prepared in effect to put a penalty upon a successful defendant for insisting upon his statutory rights.—per Fitzgibbon, L. J. *Dyas* v. *Stafford*, 9 L. R., Ir. 530.

Costs ordered to stand over till Trial.]—Costs of applications ordered to stand over until trial, and costs reserved to be disposed of at the trial, should follow the event of the trial without any special directions. *Hodges* v. *Hodges*, 25 W. R. 162.

When the court orders a motion to stand till the hearing of the cause, it in effect reserves to itself the right of dealing differently with the costs of the motion and those of the cause. *Singer* v. *Audsley*, 41 L. J., Ch. 229; L. R. 13 Eq. 401; 26 L. T. 238; 20 W. R. 438.

Where interlocutory applications are ordered to stand to the trial, the costs are to be treated as costs in the action, and taxed accordingly, without special directions or mention in the judgment; but where such applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the judge. *British Natural Premium Provident Assoc.* v. *Bywater*, 66 L. J., Ch. 787; [1897] 2 Ch. 531; 77 L. T. 22; 46 W. R. 28.

When a motion in an action is adjourned or stands over until the trial of the action, at which judgment is obtained by one of the parties with costs against the other party, the costs of the motion are allowed to the successful party on taxation, without special direction in the judgment. *Gosnell* v. *Bishop*, 57 L. J., Ch. 642; 38 Ch. D. 385; 36 W. R. 505.

Application for Interim Injunction.] — An order made on notice and continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an interim injunction previously obtained on an ex parte application. *Blakey* v. *Hall*, 56 L. J., Ch. 568; 56 L. T. 400; 35 W. R. 592.

What may be considered on Questions of Costs.]—Answer, though not evidence in cause, may be read as to costs. *Howell* v. *George*, 1 Madd. 13; 15 R. R. 203.

The answer of a peer upon his protestation of honour may be read on the question of costs. *Dawson* v. *Ellis*, 1 Jac. and Walk. 524; 21 R. R. 227.

Although the amended bill is the pleading exclusively, and so far as regards the rights of the parties, the charges of the original bill, omitted in the amended bill, are as if they never existed; yet that does not extend to debar the court of the assistance to be derived from the matter ex-

punged, in determining quo animo the suit was instituted; and for that purpose the Lord Chancellor read from defendant's copy the passages of the original bill, and finding much groundless imputation against the defendant:—Held, the costs were properly given against the plaintiff, although he succeeded in getting a decree. *Fitzgerald* v. *O Flaherty*, 1 Moll. 347.

There being no issue joined between co-defendants, the answer of one cannot be read against the other, even as to costs, other than a suggestion on which court may direct inquiry before master. *Cheret* v. *Jones*, 6 Madd. 267.

The answer of a mortgagor cannot be read against a mortgagee on the subject of costs. *Wright* v. *Jones*, C. P. Coop. 493.

Semble, a correspondence "without prejudice" relating to winding up a suit, may be read to assist the court in deciding on the question of costs. *Woodward* v. *Eastern Counties Ry.*, 1 Jur. (N.S.) 899. Cp., *Walker* v. *Wilsher*, post col. 693.

Letters purporting to have been written by C., the wife of B., to G., after B.'s death, but not proved to have been received by G., containing strong assurances that G. was father of E., who was born five months after B.'s death, are not admissible as evidence of adultery even with a view to the costs of the suit, upon which, if admissible, they would have had a material bearing *Legge* v. *Edmonds*, 25 L. J., Ch. 125; 4 W. R. 71.

No evidence dehors deeds can be received in deciding on their effect: but on the question of costs, such evidence may be taken into consideration. *Stewart* v. *Stuart*, 1 L. J. (O.S.) Ch. 61.

Before Judicature Acts—Following the Result.]—In contentious cases the costs of the litigation should, as a general rule, follow the result of it. *Bartlett* v. *Wood*, 30 L. J., Ch. 614; 4 L. T. 692; 9 W. R. 817.

As a general rule, costs ought to follow the result of the suit. If the court departs from this rule some reason ought to be given for so doing. *Ferguson* v. *Wilson*, L. R. 2 Ch. 92; 12 Jur. (N.S.) 912; 15 W. R. 80.

In equity as well as at law, costs follow the justice of the demand. *Roberts* v. *Kuffin*, 2 Atk 113.

Where costs are in the discretion of the court they will follow the general rule of giving costs to the party succeeding; and there must be peculiar circumstances to restrain the application of the rule. *Barker* v. *Birch*, 1 D. & L. 816; 7 Scott (N.R.) 397.

Costs in equity in the discretion of the court, upon the circumstances, not following the event by a positive rule, as at law, though prima facie that is the course, and circumstances must be brought forward by the party who fails. *Vancouver* v. *Bliss*, 11 Ves. 458; 8 R. R. 207.

—— **Discretion.**]—Costs are entirely in discretion of court. *Bromley* v. *Holland*, 7 Ves. 28; 6 R. R. 58.

—— **Doubt and Difficulty.**]—Where there is great doubt in a question, costs will not follow the decree. *Dearden* v. *Byron* (*Lord*), 8 Price, 465.

According to the modern practice, the court, though it retains a discretion, generally acts on the rule that primâ facie the unsuccessful party is to be charged with the costs of the suit, and in the present case it gave costs against an unsuccessful plaintiff, though the case was one of great difficulty, arising out of a will and dependent on foreign law. Where under the circumstances of the case an unsuccessful plaintiff is to be charged with the costs of suit, the result is not altered by the additional fact that the institution of the suit was recommended by the master. *Nelson* (*Earl*) v. *Bridport* (*Lord*), 10 Beav. 305.

Legal Right insisted on.]—A defendant who insists upon his legal rights in a case in which the court considers he should not morally do so, will not be allowed his costs. *Landed Estates Investment Co.* v. *Harding*, 21 L. T. 384; 18 W. R. 35.

Relief not claimed.]—Relief being granted on a ground not set out in the pleadings, the court refused to give costs. *Leach* v. *Way*, 5 L. J., Ch. 100.

Public Policy.]—A third party assisting a person, in contemplation of bankruptcy, to withdraw property from his creditors, and who afterwards sets up a title in himself to the property against the assignees in a suit instituted by them, which defence fails, cannot claim to be reimbursed his costs out of a surplus of the bankrupt's estate arising from the sale of that property. Public policy requires that he should not derive any benefit from such a transaction. *Tratt*, *Ex parte*, 1 W. R. 116.

No costs given where both parties were engaged in manufacturing an article intended to be used to deceive and mislead the public. *Estcourt* v. *Estcourt Hop Essence Co.*, 44 L. J., Ch. 223; L. R. 10 Ch. 276; 32 L. T. 80; 23 W. R. 313.

A person who is particeps criminis is not entitled to the costs of setting aside bonds given for an illegal consideration. *Morgan* v. *Bruen*, Ll. & G. t. Sugd. 180.

Where bond set aside as against public policy, at suit of the particeps criminis, no costs are given; secus, where at suit of an innocent party. *Debenham* v. *Ox*, 1 Ves. sen. 277.

Suspicious Transaction.]—When a transaction of a suspicious nature in its commencement can only be sustained by subsequent acts of confirmation, the party so sustaining it must pay his own costs of the investigation into the circumstances. *De Montmorency* v. *Devereux* 7 Cl. & F. 188; West, 64: 2 Dr. & Wal. 410.

As an Indemnity.]—Costs are given by law only as an indemnity to the party who receives them. *Harold* v. *Smith*, 5 H. & N. 381; 29 L. J., Ex. 141; 6 Jur. (N.S.) 254; 2 L. T. 556; 8 W. R. 447.

Court not adjudicating on Subject Matter.]—The court does not deal with the question of costs where it does not adjudicate upon the subject matter of the suit. Therefore, where, upon a motion for an injunction to restrain a partner from dealing with the partnership assets, it was referred to arbitrators to take the accounts (that being the only question at issue), and the result was that a certain sum was due to the plaintiff:—Held, that the court, knowing nothing of the merits of the case, would make no order against the defendant in respect of the costs of the arbi-

tration and award. *Andrews* v. *Morgan*, 3 W. R. 145.

By original and supplemental bills, an agreement is made a rule of court, which determines all matters in difference in the suit, but reserves the question of costs. A petition dismissed, which prayed the direction of the court as to costs. The court enters into the question of costs only as incidental to its decision upon the merits of the cause. *Gibson* v. *Cranley* (*Lord*), 6 Madd. 365.

Where a railway company deviated from the limits allowed by their act, and injured plaintiff's house without giving him notice, upon which he applied for an injunction to restrain them from carrying on their works, both parties agreeing to abide by the decision of the Board of Trade, which sanctioned the deviation, each had to pay his own costs of the motion. *Pearce* v. *Wycombe Ry.*, 1 Eq. Rep. 332.

Bad Faith—Fraud.]—Small instances of bad faith in a plaintiff, where the defendant has an adequate remedy for such breaches of faith in his own hands, will not induce the court to dismiss a bill where the result would be to leave the plaintiff without any adequate remedy: but the court will mark its sense of the plaintiff's misconduct by disallowing all costs. *Holmes* v. *Eastern Counties Ry.*, 3 Jur. (N.S.) 737.

When a suit was instituted not for the bonâ fide purpose of obtaining the relief prayed but for a collateral and improper purpose, and the plaintiff failed to establish any right to the relief prayed, and the bill was dismissed, the decree was made with a declaration that the suit was improperly instituted, and directed the plaintiff not only to pay the costs but all charges and expenses properly incurred in the suit. *Simpson* v. *Malherbe*, 4 Giff. 707; 6 N. R. 245.

Where a plaintiff imputes personal fraud, which is not proved, it is a reason for awarding costs against him on a dismissal of his bill. *Langley* v. *Fisher*, 9 Beav. 90; 15 L. J., Ch. 73.

Dismissal without Costs—Grounds for.]—Bill dismissed without costs, where a false defence is tendered, which the plaintiff has been put to the cost of proving. *Field* v. *Churchill*, 4 Jur. 739.

Where a suit becomes nugatory by matters subsequent, the court, upon motion, has jurisdiction to dismiss it without costs. *Sutton Harbour Improvement Co.* v. *Hitchens*, 15 Beav. 161; 21 L. J., Ch. 568.

When a plaintiff fails in establishing a case for relief, the uncertain character of the evidence on which the case turns, and the setting up of unfounded claims by the defence, are grounds for dismissing the bill without costs. *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195; 19 W. R. 884.

Bill by purchaser, for specific performance, ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying. Order to dismiss without costs, it being against the principles of the court to order the defendant to pay the plaintiff his costs on such dismissal. *Lewis* v. *Loxham*, 3 Mer. 429. *See the notes there.*

—— **Reported Case afterwards Overruled.**]—If a bill is correctly filed on the authority of a reported case, there being no authorities in conflict with it, and the decision in the reported case is afterwards reversed, the plaintiff in the suit filed on its authority is entitled, on motion, to have the bill dismissed without costs. *Robinson* v. *Rosher*, 1 Y. & C. C. C. 7; 5 Jur. 1006.

Though a bill has been filed on the authority of a reported case, which is afterwards reversed, the court has not jurisdiction, on a motion, under the 82nd rule, to order that the bill shall be dismissed without costs. *Cronin* v. *Murphy*, 1 Ir. Ch. R. 233.

A suit having been instituted on the authority of a reported case, which was afterwards reversed, the court, after looking simply into the record, dismissed it without costs. *Sutton Harbour Improvement Co.* v. *Hitchens*, supra.

A decision, on the authority of which a suit had been instituted, being overruled, the plaintiff offered to dismiss his bill without costs:—Held, that this was no answer to a motion to dismiss for want of prosecution, and that the plaintiff must either proceed or have his bill dismissed on the usual terms. *Lancashire and Yorkshire Ry.* v. *Evans*, 14 Beav. 529.

B AFTER TRIAL BY JURY.

1. Successful Plaintiff's Costs Disallowed.

Power of Judge at Nisi Prius.]—At the trial of an action of tort the jury found for the plaintiff, and assessed the damages at 12*l.* The counsel for the defendant was about to apply for a direction to deprive the plaintiff of the costs, but, before he did so, the judge made an order to that effect. The plaintiff's counsel was present and objected to the order being made:—Held, that the order depriving the plaintiff of costs was lawfully made. *Collins* v. *Welch*, 49 L. J., C. P. 260; 5 C. P. D. 27; 41 L. T. 785; 28 W. R. 208—C. A.

By Grove and Lopes, JJ., that the judge might, under Ord. LV. (now Ord. LXV.) make the order without any application being made to him. *Ib.*

By Bramwell, Brett, and Cotton, L.JJ., that what occurred at the trial was equivalent to an application by the defendant, and to showing good cause why the order should be made. *Ib.*

At the trial of an action by a jury, the judge may, without any application having been made to him, order under Ord. LV. r. 1, that the costs shall not follow the event. *Turner* v. *Heyland*, 48 L. J., C. P. 535; 4 C. P. D. 432; 41 L. T. 556.

The plaintiffs, after a trial with a jury, recovered 5*l.* beyond 100*l.* paid into court. The judge immediately gave judgment for the plaintiffs, 105*l.* without costs. Counsel on both sides were present. No application was made, and no cause was shown. Counsel for the defendants intended to apply to deprive the plaintiffs of costs had not the judge anticipated him. The Exchequer Division rescinded the order:—Held, that the jurisdiction given by Ord. LV. to the judge or the court is an alternative and not an appellate jurisdiction, and that the circumstances of the case showed a substantial compliance with the requirements of Ord. LV. as to application at the trial. *Marsden* v. *Lancashire and Yorkshire Ry.* 50 L. J., Q. B. 318: 7 Q. B. D. 641; 44 L. T. 239; 29 W. R. 580—C. A.

Jurisdiction of Divisional Court.] — The divisional court has, under Ord. LV., an original jurisdiction to make an order to deprive a successful party of the costs of an action tried before a jury. *Myers* v. *Defries*, *Siddons* v. *Lawrence*, 48 L. J., Ex. 446; 4 Ex. D. 176; 40 L. T. 795; 27 W. R. 791—C. A.

Where in an action tried with a jury the plaintiff recovers a farthing damages, and no application or order as to costs is made at the trial, the divisional court has jurisdiction under Ord. LV. to entertain an application to deprive the plaintiff of costs. *Bowey* v. *Bell*, 48 L. J., Q. B. 161; 4 Q. B. D. 95; 39 L. T. 607; 27 W. R. 247. S. P. *Marsden* v. *Lancashire and Yorkshire Ry.*, supra.

Jurisdiction of Judge at Chambers.]—A judge at chambers has no power to make an order as to costs under Ord. LV.; nor to extend the time for making such order under Ord. LVII. r. 6, so as to enable the judge who tried the cause to make such order at any time after the trial. If no application has been made to the judge at the trial, the only way of obtaining such an order is by a substantive application to a divisional court. *Baker* v. *Oakes*, 46 L. J., Q. B. 246; 2 Q. B. D. 171; 35 L. T. 832; 25 W. R. 220—C. A.

Time for Application—Judge at Nisi Prius.] —In an action against a railway company for damages caused by their negligence tried by a judge with a jury, the plaintiff recovered 50*l*. The defendants having thereupon applied that the plaintiff should be deprived of costs under Ord. LXV. r. 1, of the rules of the Supreme Court, 1883, the judge refused to exercise his discretion, but after some weeks heard both sides and made an order depriving the plaintiff of costs:—Held, that the judge was not functus officio when he refused to exercise his discretion at the trial, that he had jurisdiction to make the order. *Huxley* v. *West London Ry.*, 58 L. J., Q. B. 305; 14 App. Cas. 26; 60 L. T. 642; 37 W. R. 625—H. L. (E.)

At the trial, at the assizes, of an action for damages in respect of injuries to the plaintiffs' vessel through the negligence of the defendants, the jury, at 5.10 p.m., on the 14th July, found a verdict for the defendants, and added that they "believed both parties to be in fault," and the associate then immediately entered in his book, kept for the purpose, a note that the jury had so found. No application with respect to costs was then made, and that being the last cause for trial, and the next day being the commission day for the assizes at York in another county, the court rose and the judge departed. Four days afterwards, on the 18th July, while the judge was sitting under the commission in the criminal court at York, the plaintiffs' counsel, having informed the defendants' counsel of his intention so to do, applied to the judge there, under Ord. LV. of the Judicature Act, for an order directing judgment to be entered for the defendants without costs, on the ground that, as the jury had in effect found negligence on both sides, each party ought to bear his own costs, which order the judge, after taking time to consider, made at York on the 21st July. Upon a rule to set that order aside and enter judgment for the defendants with costs, on the ground that the judge had no power to make it, as no application had been made "at the trial":—Held, that, as no application had been made either to the judge "at the trial," which was necessary to give him jurisdiction, or to a divisional court, which is the court mentioned in Ord. LV., and no application to enlarge the time, under Ord. LVII. r. 6, had been made to the judge, the provisions of Ord. LV. had not been complied with, and the order of the judge must be set aside, and the rule to enter judgment for the defendants be made absolute. *Tyne Alkali Co.* v. *Lawson*, 36 L. T. 100.

"At the trial" in Ord. LV. means at the time of the same sitting of the court at which the trial took place. *Ib.*

An action was tried at assizes before a jury, who gave a verdict for the defendant. The plaintiff's counsel an hour afterwards, at the rising of the court, applied under Ord. LV. of the Judicature Act, 1875, for an order to deprive the defendant of costs. The judge reserved his decision until the next morning, when he made the order asked for. The defendant's counsel had notice that the application would be made, and was in court when the judge made the order. —Held, that the application was made at the trial within Ord. LV. *Kynaston* v. *Mackinder*, 47 L. J., Q. B. 76; 37 L. T. 390—C. A.

—— **To Divisional Court.**]—Such application to a divisional court will only be entertained when it is made within a reasonable time after the trial. *Bowey* v. *Bell*, 48 L. J., Q. B. 161; 4 Q. B. D. 95; 39 L. T. 607; 27 W. R. 247.

"Good Cause"—What may be considered.]— The concluding words of Ord. LXV. r. 1 of the Rules of the Supreme Court, 1883, which give the judge or court a discretion as to costs "for good cause" in trials with a jury, embrace everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense. *Huxley* v. *West London Ry.*, 58 L. J., Q. B. 305; 14 App. Cas. 26; 60 L. T. 642; 37 W. R. 625—H. L. (E.)

When a plaintiff has supported an extravagant and extortionate claim by fraudulent statements and dishonest acts, and by evidence which the jury disbelieved, this constitutes "good cause" within the meaning of r. 1 of Ord. LXV. *Ib.*

To be "good cause" within that rule there must be facts showing that it would be more just not to allow the costs to follow the event, as for example, oppression or misconduct of either of the parties by which costs had been unnecessarily increased. The fact that the action is for the recovery of several closes of land, that the only defence is that the defendant is in possession, and that the verdict is for the plaintiff for some only of the closes claimed, does not by itself constitute "good cause" within Ord. LXV. r. 1, since the verdict in such a case is distributive, and the costs, if properly taxed, would be as on a finding by the jury on separate issues. *Jones* v. *Curling*, 53 L. J., Q. B. 373; 13 Q. B. D. 262; 50 L. T. 349; 32 W. R. 651—C. A.

If from all the facts proved before a judge and jury it appears that the action was brought or conducted oppressively by the plaintiff, that constitutes "good cause" within Ord. LXV. r. 1, so as to enable the judge to interfere, and not only deprive a successful plaintiff of his costs, but also to order that he shall pay the defendant's costs. *Williams* v. *Ward*, 55 L. J., Q. B. 566—C. A.

Where the plaintiff endeavours unjustly, oppressively, or unscrupulously, to fix upon the defendant a liability for which he must have known there was no foundation, there is good cause for depriving him of costs, although he recovers a substantial portion of his claim by the verdict of the jury. *Roberts* v. *Jones*, 60 L. J., Q. B. 441; [1891] 2 Q. B. 194.

Unjustifiable use by the plaintiff of his privilege of choosing his venue also constitutes good cause for dealing with the costs of the action, although the defendant has made no effort to change the venue. *Ib.*

Representations made by a defendant before action, leading the plaintiff to believe that he is entitled to the relief sought, may constitute good cause for depriving the defendant, though successful, of the costs of the action. *Buckley* v. *Irish Industrial Building Society*, 22 L. R., Ir. 579.

In exercising his discretion to deprive a successful party of his costs under Ord. LV., the judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action. He must, however, assume the truth of the facts found by the jury. *Harnett* v. *Vise*, 5 Ex. D. 307; 43 L. T. 645; 29 W. R. 7—C. A.

Where an action was tried at the assizes, and adjourned for further consideration, the plaintiff up to the time of the judgment being delivered insisted on an injunction. The result of thus insisting protracted the trial, and it was held that good cause had been shown why the costs of the action should not follow the event. *Matthews* v. *Jeffery*, 43 L. T. 796; 29 W. R. 282.

In an action for breach of contract the plaintiff claimed in respect of four separate items of special damage; the jury found in his favour as to one item, but in favour of the defendant as to the remainder. The judge ordered the plaintiff to pay the costs occasioned by the claim in respect of the items in which he had failed:—Held, that, though these items were not "issues" in the strict sense of the term, they were separate heads of claim involving a distinct class of evidence, and that it was not fair to the defendant to make him pay the costs of resisting them, and that, therefore, "good cause" for making the order existed. *Forster* v. *Farquhar*, 62 L. J., Q. B. 296; [1893] 1 Q. B. 564; 4 R. 346; 68 L. T. 308; 41 W. R. 425—C. A.

In an action for a libel published in a newspaper the plaintiff obtained a verdict for one shilling. The judge made an order depriving the plaintiff of costs. The libel consisted of hostile comments on a letter written by the plaintiff to another newspaper, and on certain correspondence arising therefrom. It appeared that the plaintiff's letter had been written at the instigation of persons who desired to raise a political controversy. The court thought that under the circumstances the bringing of the action was oppressive; and:—Held, that there was "good cause" for depriving the plaintiff of costs *O'Connor* v. "*Star*" *Newspaper Co.*, 4 R. 271; 68 L. T. 146—C. A.

Letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs. *Walker* v. *Wilsher*, 58 L. J., Q. B. 501; 23 Q. B. D. 335; 37 W. R. 723; 54 J. P. 213—C. A.

Where, in an action for seducing a woman thirty-five years of age, it was proved that she had readily consented, and that the parties were very poor, and the jury having awarded only 10*l.* damages, the judge who tried the case stated upon the face of his order the foregoing circumstances, and his own opinion that no greater amount of damages could have been reasonably given or expected, as "special cause," under s. 53 of the Irish Judicature Act, for depriving the plaintiff of his costs:—Held, that the facts did not constitute such "special cause," and that the plaintiff was entitled to his costs. *Wilson* v. *M'Mains*, 20 L. R., Ir. 582—C. A.

A judge has power, when the action is tried before a jury, to order a plaintiff who recovers a nominal sum, to pay the defendant's costs. *Harris* v. *Petherick*, 48 L. J., Q. B. 521; 4 Q. B. D. 611; 41 L. T. 146—C. A.

In an action to recover a sum of 85*l.*, and also a sum of 6*s.*, the plaintiff was nonsuited. A new trial having been ordered, at the second trial which took place before a jury, he failed as to his claim for 85*l.*, but proved his claim for 6*s.* The judge ordered that the plaintiff should pay the costs of both trials:—Held, that the order was right, and could not be set aside. *Ib.*

—— **Appeal from Order.**]—Where an action is tried with a jury, the judge before whom it is tried has no jurisdiction under Ord. LXV. r. 1, to make an order by which the costs will not follow the event unless there exist "good cause" within the meaning of that rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order. *Jones* v. *Curling*, 53 L. J., Q. B. 373; 13 Q. B. D. 262; 50 L. T. 349; 32 W. R. 651—C. A.

So long as the judge or court deal with considerations which constitute "good cause," the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they are acting within their jurisdiction, and their decisions are final and conclusive. On the other hand, if they give effect to considerations which do not constitute "good cause" within the meaning of the rule, they exceed the limits of their jurisdiction; and on that ground their decisions are not protected from review. *Jones* v. *Curling* (13 Q. B. D. 262), discussed. *Huxley* v. *West London Ry.*, 58 L. J., Q. B. 305; 14 App. Cas. 26; 60 L. T. 642; 37 W. R. 625—H. L. (E.)

If "good cause" exists the court will decline to consider whether the judge has exercised his discretion rightly or not. *Williams* v. *Ward*, 55 L. J., Q. B. 566—C. A.

In the absence of "good cause" a judge has no jurisdiction to make an order preventing costs from following the event. *Wight* v. *Shaw*, 19 Q. B. D. 396; 36 W. R. 408—C. A.

Where an action is tried with a jury, the exercise of the judge's jurisdiction as to costs under Ord. LXV. r. 1, was not intended by the legislature to be subject to any appeal. *Huxley* v. *West London Extension Ry.*, 55 L. J., Q. B. 506; 17 Q. B. D. 373.

2. Several Issues.

"Event"—Several Causes of Action.]—When in the same action the plaintiff obtains a verdict and judgment as to one cause of action, and the

defendant obtains a verdict and judgment as to other and distinct causes of action, the word "event" in Ord. LV. r. 1, is to be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or the court. Rule 62 of Rules of Hilary Term, 1853, is repealed by s. 33 of the Judicature Act, 1875. *Myers* v. *Defries*, 5 Ex D. 15; 41 L. T. 659; 28 W. R. 258. Affirmed 49 L. J., Ex. 266; 5 Ex. D. 180; 42 L. T. 137; 28 W. R. 406—C. A.

A plaintiff claiming an injunction in respect of three separate subjects of complaint, succeeded as to one but failed as to the remainder. By the order, taxation was directed to the costs of the defendant of so much of the action as had been dismissed, and of the plaintiff of the rest of the action, with a set-off of the costs of the plaintiff against those of the defendant. The taxing-master taxed the plaintiff's and the defendant's costs of the whole action, and allowed one third to the plaintiff and two-thirds to the defendant. Upon a summons by the plaintiff, to vary the certificate, by ordering each item to be considered separately, and according to the subject of complaint, in respect of which each item might turn out to have been incurred, to be paid by the plaintiff or the defendant, as the case may be.—Held, that the taxing-master had proceeded upon the usual principle, and that the certificate was correct. *Knight* v. *Pursell*, 49 L. J. Ch. 120; 11 Ch. D. 412; 41 L. T. 581; 28 W. R. 90.

Issues upon which Plaintiff has been Non-suited.]—In an action tried by a jury where the plaintiff succeeds upon some issues but is non-suited upon others, and no order is made as to costs, the defendant is entitled under Ord. LV. r. 1, to the costs of the issues upon which the plaintiff was nonsuited. *Abbott* v. *Andrews*, 51 L. J., Q. B. 641; 8 Q. B. D. 648; 30 W. R. 779.

3. Where Counterclaim set up.

Judgment, Form of—"Event."]—In an action tried with a jury, where the defendant counterclaims in respect of matters which could not be pleaded as set-off, and the plaintiff recovers a sum on his claim, and the defendant recovers on his counterclaim a sum exceeding that which the plaintiff recovers on his claim, the claim and counterclaim should, for the purpose of taxation of costs, be treated as separate and independent actions, and the costs in each taxed in favour of the successful party, subject to a deduction in respect of the costs of any issues on which he has not succeeded. In such a case it is immaterial, with respect to the taxation of costs, whether the judgment is drawn up in form for the plaintiff for the sum recovered on his claim, and for the defendant for the sum recovered on his counterclaim; or whether the judgment is given for the defendant for the balance under Ord. XXI. r. 17. *Shrapnel* v. *Laing*, 57 L. J., Q. B. 195; 20 Q. B. D. 334; 58 L. T. 705; 36 W. R. 297—C. A.

The plaintiff's claim being for the balance of the contract price of work done, after giving credit for money paid on account, the defendants by way of set-off and counterclaim claimed in respect of the inferiority and defective character of the work. The action being referred for trial to an official referee, he found by his report that a balance of 32*l.* 1*s.* 6*d.* remained due to the plaintiff on his claim in respect of the contract price of the work, and that 34*l.* 10*s.* 6*d.* was due to the defendants on their counterclaim:—Held, that the proper judgment on these findings was that the defendants do recover the balance of 1*l.* 12*s.*, and the costs of the action, on the ground, either that the inferiority of the work, though pleaded by way of counterclaim in form, in reality amounted to a defence, or that, even if the plaintiff were technically entitled by the findings to the costs of the action, the court ought to interfere under Ord. LV. r. 1, and give the costs to the defendants, who had substantially succeeded in the action. *Lowe* v. *Holme*, 52 L. J., Q. B. 270; 10 Q. B. D. 286; 31 W. R. 400.

Both Parties Successful—General Principles of Taxation.]—Semble, per Brett, L.J., that where there is a claim with issues on it and a counterclaim (which is not a set-off but is in the nature of a cross-action) with issues on it, and the plaintiff succeeds on the claim, and the defendant succeeds on such counterclaim, the taxation, if not otherwise ordered, should be by taxing the claim as if it and its issues were an action, and by taxing the counterclaim as if it and its issues were also an action, and the allocatur for costs should be given for the balance in favour of the party in whose favour is such balance; the master on such taxation dividing items which are common to both actions. *Barnes* v. *Bromley*, 50 L. J., Q. B. 465; 6 Q. B. D. 691; 44 L. T. 915; 29 W. R. 706—C. A.

—— **"Costs of the Cause."**]—The plaintiff claimed to recover commission due to him from the defendants on an agreement. The defendants denied the claim, and claimed by way of counterclaim 230*l.* 0*s.* 9*d.* for goods sold. The jury found a verdict for the plaintiff on the claim for 114*l.* 17*s.* 6*d.*, and a verdict for the defendants on the counterclaim for 230*l.* 0*s.* 9*d.* The judgment entered was "that the plaintiff recover against the defendants *l.* for his costs of suit," and "that the defendants recover against the plaintiff 115*l.* 3*s.* 3*d.* on the counterclaim and *l.* for their costs of the counterclaim":—Held, that on taxing the costs according to the judgment the plaintiff and not the defendants were entitled to the costs of the cause. *Ib.*

In an action a verdict was found for the plaintiff for 90*l.* on his claim, and for the defendant on his counterclaim for 75*l.* and 1*s.* damages for the detention of an account-book. The counterclaim was not in form for detinue of the book, and there was no finding as to its value. The judge ordered the book to be returned, and in order to insure its return he assessed its value at 150*l.* The book was returned soon after the trial. The associate's certificate was in these terms:—"The judge directed that judgment should be entered for the plaintiff for 75*l.*, and for the defendant for the return of the book or 150*l.* its value, and 1*s.* damages for the detention." The defendant thereupon claimed that he was entitled to the general costs of the action, having recovered a sum, or its equivalent, exceeding the sum recovered by the plaintiff:—Held, that the claim was wholly untenable, and that the plaintiff was entitled to the general costs of the action, and the defendant to the costs of those issues on which he had succeeded. *Hallinan* v. *Price*, 41 L. T. 627; 27 W. R. 490.

When the plaintiff's claim and the defendant's counterclaim have both been successful, the plaintiff, in the absence of any special directions to the contrary, is entitled to the general costs of the action, notwithstanding that the result of the litigation is in favour of the defendant. *Brown, In re, Ward* v. *Morse*, 52 L. J., Ch. 524 ; 23 Ch. D. 377 ; 49 L. T. 68 ; 31 W. R. 936—C. A.

There will be no apportionment of such costs as would have been duplicated had the counterclaim been the subject of an independent action, but the plaintiff is not to recover as costs of the action any costs fairly attributable to the counterclaim. *Ib.*

The plaintiffs claimed 49*l.* 12*s.* The defendants admitted the claim and counterclaimed for 75*l.* The judgment was for the plaintiffs on the claim, and for the defendants on the counterclaim for 40*l.* ; the plaintiffs to have the costs of their claim and the defendants to have the costs of their counterclaim :—Held, that the plaintiffs were entitled to the costs of the cause up to the time of delivery of the defence, and that the defendants were entitled to such costs after the delivery of the defence. *Bowker* v. *Kesteven*, 47 L. T. 545.

A plaintiff whose claim is reduced by a counterclaim being proved by the defendant, recovers judgment for the balance only, and the question of costs under the County Courts Act, 1867, s. 5, must be decided with reference to that balance. *Staples* v. *Young*, 2 Ex. D. 324 ; 25 W. R. 304. S. P., *Ryan* v. *Fraser*, 16 L. R., Ir. 253—C. A.

The provisions of the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, denying costs in an action in the High Court where a minimum is not recovered, do not apply to a defendant recovering on a counterclaim. *Blake* v. *Appleyard*, 47 L. J., Ex. 407 ; 3 Ex. D. 195 ; 26 W. R. 592.

The plaintiff claimed on a balance of account a sum of money exceeding 50*l.* The defendant pleaded a set-off, and also made a counterclaim for goods supplied to the amount of about 24*l.* The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from the defendant to the plaintiff on the claim 16*l.*, and from the plaintiff to the defendant on the counterclaim 23*l.*, and that the balance due from the plaintiff to the defendant was 7*l.* :—Held, that the defendant was entitled to his costs. *Chatfield* v. *Sedgwick*, 4 C. P. D. 459 ; 27 W. R. 790—C. A.

The plaintiff claimed a balance of 114*l.* 8*s.*, and the defendant established a counterclaim to the extent of 109*l.* 16*s.*, whereupon the judge directed the jury (as the result of their answers to certain questions submitted to them) to find a verdict for the plaintiff for the balance 4*l.* 12*s.*, and no order was made as to costs. The court refused to alter the associate's certificate of the findings of the jury for the purpose of assisting the defendant to obtain costs upon his counterclaim. *Staples* v. *Young* (supra) and *Blake* v. *Appleyard* (supra) considered. *Potter* v. *Chambers*, 48 L. J., C. P. 274 ; 4 C. P. D. 69 ; 39 L. T. 350 ; 27 W. R. 414.

Where an action of contract is commenced in the High Court of Justice for a sum exceeding 50*l.*, and the plaintiff establishes his claim to the amount, but in consequence of a counterclaim being decided in favour of the defendant, the plaintiff recovers judgment for a sum not exceeding 20*l.* he is not deprived of his costs by virtue of the County Courts Act, 1867, s. 5, extended to actions in the High Court by the Judicature Act, 1873, s. 67, for the relief sought by him could not, within the meaning of the latter section, have been given by a county court. *Potter* v. *Chambers*, 48 L. J., C. P. 274 ; 4 C. P. D. 457 ; 27 W. R. 414.

The plaintiffs claimed on a balance of account a sum of money exceeding 50*l.* The defendants denied their indebtedness, and pleaded by way of set-off and counterclaim that the plaintiffs were indebted to them for money advanced and money due for work done, and goods sold and delivered, and they claimed a balance on the accounts in their favour exceeding 50*l.* The cause was referred to an arbitrator, costs to abide the event. The arbitrator found that the defendants were indebted to the plaintiffs in a sum exceeding 50*l.*, and that the plaintiffs were indebted in like manner to the defendants in a sum exceeding 50*l.*, but that a balance was due to the plaintiffs on the whole account of 11*l.* 10*s.* 3*d.* :—Held, by Kelly, C. B., that the plaintiffs and the defendants were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county court ; and by Hawkins, J., contrary to his own opinion, but on the authority of *Potter* v. *Chambers* (4 C. P. D. 457, supra), that the plaintiffs were entitled to their general costs of action. *Neale* v. *Clarke*, 4 Ex. D. 286 ; 41 L. T. 438.

The plaintiffs sued for 40*l.* 7*s.* 9*d.* and interest for goods sold and delivered, for work, labour, and materials, and for making and delivering a steam-engine for the defendants. The defendants paid 8*l.* 11*s.* into court, pleaded that the work had been improperly done, and counterclaimed for loss of trade profits through defects in the engine supplied by the plaintiffs. The action and counterclaim were referred to a district registrar, the costs of cause and counterclaim to follow the event, the party in whose favour the award was made to be at liberty ten days after its service on the other party, to sign judgment for the sum found due and the costs to which he should be entitled under the order of reference and award, with costs of judgment. The arbitrator awarded a balance of 4*l.* in favour of the defendants, and the district registrar ordered judgment to be signed for the defendants for 5*l.* and the taxed costs of the action, counterclaim, and reference :—Held, that the district registrar had no authority to give the defendants the costs of the action, but that the defendants must pay the costs of proving the claim, and the plaintiffs must pay the costs of proving the counterclaim. *Cole* v. *Firth*, 40 L. T. 851.

Claim and Counterclaim both Dismissed.]—Where the plaintiff's claim and defendant's counterclaim are both dismissed with costs, the plaintiff is to pay to the defendant the general costs of the action, and the defendant is to pay to the plaintiff only the amount by which the costs have been increased by reason of the counterclaim. *Saner* v. *Bilton*, 48 L. J., Ch. 545 ; 11 Ch. D. 416 ; 40 L. T. 314 ; 27 W. R. 472.

The judge, at the trial of an action in which there was a claim and counterclaim, thinking both parties in the wrong, dismissed the action without costs, and also dismissed the counterclaim with costs, but ordered that if the costs of

the counterclaim should not amount to half the whole costs of the action the defendant should pay the difference to the plaintiff:—Held, that the order as to costs was irregular, inasmuch as after dismissing the action without costs, it imposed part of the costs of the action upon the defendant by way of penalty; but that in substance the order was within the discretion of the judge, as it amounted to dismissing the claim and counterclaim, and directing the defendant to pay half the whole costs of the action. *Willmott* v. *Barber*, 17 Ch. D. 772; 45 L. T. 229—C. A.

Where the plaintiff's claim and the defendant's counterclaim are both dismissed with costs, the plaintiff is to pay to the defendant the general costs of the action, and the defendant is to pay to the plaintiff only the amount by which the costs have been increased by reason of the counterclaim. *Saner* v. *Bilton* (11 Ch. D. 416), approved. *Mason* v. *Brentini*, 15 Ch. D. 287; 43 L. T. 557; 29 W. R. 126—C. A.

Where Counterclaim Successful.]—In an action for freight plaintiff claimed 51*l.*, and defendant counterclaimed 9*l.* 17*s.* 1*d.* for damage to the cargo, paying the remaining 41*l.* 2*s.* 11*d.* into court. The action was remitted to a county court under 19 & 20 Vict. c. 108, s. 26, and the registrar certified a verdict for the plaintiff for 16*s.*:—Held, that the court could order the certificate to be altered by distributing the findings on the issues, so as to enable defendants to be allowed the costs of their counterclaim. *Davidson* v. *Gray*, 5 Ex. D. 189, n.; 42 L. T. 834—C. A.

—— **Claim admitted on Pleadings.**]—The plaintiff claimed 78*l.* 15*s.* in respect of a quarter's rent of premises let furnished to the defendant. The defendant by his pleadings admitted the claim, but counterclaimed for a larger amount as damages in respect of the insanitary condition of the demised premises. The action was tried by a jury, who found for the defendant on the counterclaim with 17*l.* 16*s.* damages. The judge at the trial ordered that judgment should be entered for the plaintiffs for the amount of the claim with costs down to the date of the counterclaim, and that judgment should be entered for the defendant for 17*l.* 16*s.* on the counterclaim, with the costs of the counterclaim, and subsequent thereto, including the costs of the trial:—Held, that the effect of the judge's order as regards costs was to prevent him from following the "event," and that in the absence of "good cause" he had no jurisdiction to make such order. *Wight* v. *Shaw*, 19 Q. B. D. 396; 36 W. R. 408—C. A.

4. When New Trial Ordered.

Costs of First Trial.]—The plaintiff brought an action for three parcels carried by three ships belonging to the defendant, and which were lost during transit. As regards two of these parcels, a verdict was found for the plaintiff; as to the other, the defendant succeeded. The defendant subsequently applied for and obtained a new trial, the result of which was that he got an entire verdict:—Held, that as there had been no default on the part of the defendant, and the plaintiff had not exercised the power which he possessed of entering a nolle prosequi, or of intimating that he did not intend to pursue further the particular issue found against the defendant on the first trial, the defendant was entitled, under the circumstances, to recover the costs of the first trial, relating to the issue found in his favour. *Marcus* v. *General Steam Navigation Co.*, 35 L. T. 353—C. A.

Where a venire de novo was awarded, the party succeeding was only entitled to the costs of the second trial. *Luckbarrow* v. *Mason*, 6 Term Rep. 131.

If a venire de novo issued, the court had no power over the costs of the application for that writ. *Edwards* v. *Brown*, 1 D. P. C. 282; 1 C. & J. 354; 1 Tyr. 281.

—— **Party Deprived of Costs of Second Trial.**]—An order for a new trial provided that the costs of the first trial should abide the result of the second. The plaintiff at the second trial having been deprived of costs under s. 116 of the County Courts Act, 1888, is not entitled to any costs of the first trial. *Brotherton* v. *Metropolitan District Joint Committee*, [1894] 1 Q. B. 666; 9 R. 154; 70 L. T. 218; 42 W. R. 273—C. A.

—— **Following Event.**]—Where a plaintiff recovers a verdict, and a new trial is ordered on the ground of excessive damages, in which new trial the plaintiff again obtains a verdict in his favour, the second verdict is the "event," within Ord. LV. r. 1, which the costs of the whole action are to follow, including the costs of the abortive first trial. *Field* v. *G. N. Ry.*, 47 L. J., Q. B. 662; 3 Ex. D. 261; 39 L. T. 80; 26 W. R. 817.

When on the trial of an action a nonsuit is directed which is set aside and a new trial granted, and on the second trial the plaintiff has a verdict and judgment, the plaintiff is entitled to the costs of the first trial, and of the rule for a new trial as part of the costs which follow the event under the latter part of Ord. LV. *Creen* v. *Wright*, 46 L. J., C. P. 427; 2 C. P. D. 354; 36 L. T. 355; 25 W. R. 502—C. A.

Where, on the first trial of a cause, the plaintiff obtains a verdict, and a rule is afterwards made absolute for a new trial, the costs to abide the event, and the defendant succeeds on the second trial, neither party is entitled to the costs of the rule for a new trial. *Eccles* v. *Harper*, 14 M. & W. 248; 3 D. & L. 71; 14 L. J., Ex. 264.

When the court orders a new trial, the costs to abide the event, such event means the ultimate event of the cause; therefore, if the verdict on the second trial is set aside, and, on a third, the ultimate event is the same as at the first trial, the party succeeding at the last will be entitled to the costs of the first trial. *Meule* v. *Goddard*, 5 B. & Ald. 766.

When the costs of the former trial are to abide the event of a new trial, if the same party succeeds on the new trial, he has costs of both trials; if his opponent, he has only the costs of the new trial. *Sherlock* v. *Barned*, 8 Bing. 21; 1 M. & Scott, 58; 1 L. J., C. P. 11.

If costs are directed to abide the event, neither party has the costs of the first trial, if the event of the second is different from that of the first trial. *Canham* v. *Fisk*, 2 C. & J. 126; 2 Tyr. 155.

When a rule for a new trial is granted, "costs to abide the event of such trial," the "event" which is to decide the right to costs is the event of the dispute which was before the court at the time of discussing the rule, and which the parties go down to try. *Jones* v. *Williams*, 42 L. J., Q. B. 48; L. R. 8 Q. B. 280; 28 L. T. 122; 21 W. R. 390.

—— **Cause referred.**]—Where a cause is referred by order of nisi prius, and the award is afterwards set aside on the ground of the arbitrator not having adjudicated on all the matters referred, and the cause is tried again, the party ultimately succeeding is not entitled to the costs of the first trial. *Wood* v. *Duncan*, 5 M. & W. 87; 7 D. P. C. 344; 8 L. J., Ex. 224; 3 Jur. 582.

The arbitrators to whom a cause was referred at nisi prius were unable to decide, and they suffered the time for making their award to expire, upon which the plaintiff carried the cause down to a second trial, and obtained a verdict:—Held, that each party must pay his own costs upon the first trial. *Thomas* v. *Lewis*, 6 D. P. C. 395; W., W. & D. 67; 1 Jur. 104.

After verdict for the plaintiff, the defendant obtained a rule for a new trial, which was made absolute, no mention being made of costs. The parties then agreed to a reference, and the order of reference stipulated that the costs were to abide the event. The arbitrator having decided the cause in favour of the defendant:—Held, that he was not entitled to the costs of the trial. *Thomas* v. *Hawkes*, 9 M. & W. 53; 1 D. (N.S.) 346; 11 L. J., Ex. 54; 5 Jur. 1115.

A rule nisi for a new trial was obtained after a verdict for the defendant, and the cause was then referred, and the costs left in the discretion of the arbitrator. He awarded in favour of the plaintiff, and directed the defendant to pay the costs of the cause:—Held, that it meant such costs as the defendant would have been liable to pay, if, on a new trial, there had been a verdict for the plaintiff. *Rigby* v. *Okell*, 7 B. & C. 57; 5 L. J. (O.S.) K. B. 357; 31 R. R. 156.

—— **Case reserved.**]—Where, instead of proceeding on a new trial, the parties agreed to state the facts specially, as if in a case reserved at the trial, on which the postea was afterwards delivered to the plaintiff:—Held, that he was entitled to the costs of the first trial. *Robertson* v. *Liddell*, 10 East, 416.

Where a case is reserved, from the insufficient state of which it is necessary to send the cause down to a second trial, and nothing is said respecting the costs, the party succeeding on such second trial is not entitled to the costs of the first. *Hankey* v. *Smith*, 3 Term Rep. 507. S. P., *Smith* v. *Haile*, 6 Term Rep. 71.

—— **Cognovit.**]—In a like case, the defendant, without going to trial again, gave the plaintiff a cognovit:—Held, that the defendant was liable to pay the costs of the former trial. *Booth* v. *Atherton*, 6 Term Rep. 144. And see *Elvin* v. *Drummond*, 4 Bing. 415; 1 M. & P. 88; 6 L. J. (O.S.) C. P. 31.

—— **Three Trials.**]—After a venire de novo, awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury finds again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it is otherwise expressed in the rule granting the new trial. *Bird* v. *Appleton*, 1 East, 111; 8 Term Rep. 562; 5 R. R. 468.

When there were three verdicts, the first in favour of the plaintiff, the second in favour of the defendant by reason of a misdirection, and the third in favour of the defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the court allowed the defendant to take the costs of the first or second at his option, and the costs of the third. *Body* v. *Esdaile*, 3 Bing. 174; 10 Moore, 569; 3 L. J. (O.S.) C. P. 220.

—— **Jury discharged.**]—On the trial of a cause, the jury was unable to agree, and was in consequence discharged by the judge, without having given a verdict, and the associate indorsed the record as a remanet, and the cause being tried again the plaintiff had a verdict:—Held, that he was not entitled to the costs of the first trial. *Brown* v. *Clarke*, 12 M. & W. 25; 1 D. & L. 409; 13 L. J., Ex. 36; 7 Jur. 1043.

Where a jury, being unable to agree, is discharged with the consent of counsel, the party who obtains the verdict on the second trial is not entitled to the costs of the first trial. *Bostock* v. *North Staffordshire Ry.*, 18 Q. B. 777; 21 L. J., Q. B. 384; 16 Jur. 726.

So where the jury, being unable to agree upon their verdict, is discharged by the judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial. *Wall* v. *L. & S. W. Ry.*, 11 Ex. 696; 25 L. J., Ex. 93; 4 W. R. 262.

Where a jury was discharged by the judge, of his own authority, from finding a verdict, they being unable to agree, the ultimately successful party is not entitled to the costs of the first attempt at trial. *Waite* v. *Spurgin*, 4 D. P. C. 575.

—— **Insufficient or Perverse Verdict.**]—If a jury finds an insufficient verdict, upon which the court can give no judgment, and a new trial is granted, the party ultimately successful is not entitled to the costs of the former trial. *Worcestershire Canal Co.* v. *Trent and Mersey Navigation Co.*, 2 Marsh. 475; 17 R. R. 525.

A new trial after a perverse verdict of the jury is granted without costs; secus, after a mistaken or an erroneous verdict. *Howorth* v. *Samuel*, 1 Chit. 633, n.; 1 B. & Ald. 566. S. P., *Shillitoe* v. *Claridge*, 2 Chit. 426.

—— **Verdict against Weight of Evidence.**]—The 17 & 18 Vict. c. 125, s. 44, does not apply where a new trial is granted for no fault of the jury, but on fresh matter disclosed by affidavit. *Abbott* v. *Bult*, 1 Jur. (N.S.) 93.

A new trial was granted, on the ground of the verdict being against the weight of evidence, and was also moved on affidavits: the court directed the costs to abide the event, excepting those of the affidavits, which the party who succeeded on the rule ought to pay in any event. *Ib.*

When a new trial is granted on the ground that the verdict is against evidence, the party who succeeds on the second trial but fails on the first is not entitled to the costs of the first trial, without a special order of the court. *Evans* v. *Robinson*, 11 Ex. 40; 24 L. J., Ex. 212.

In an action for the wrongful dismissal of a clerk, with a count for wages, the plaintiff obtained a verdict on the first count, and, no claim being urged on the second count, the verdict on that was entered for the defendant. A rule for a new trial was afterwards granted, "the plaintiff's costs of and occasioned by the trial already had, and of and occasioned by this application, to abide the event of this cause." On the second trial the defendant obtained a verdict on the first count, and the plaintiff (who had then discovered that there had been a mistake in the calculation of the wages due to him at the time

of the dismissal) had a verdict on the second count:—Held, that the event contemplated by the rule being the event in respect of which the contest took place upon the first trial, the plaintiff was not entitled to the costs mentioned in the rule. *Dawson* v. *Harrison*, 11 C. B. (N.S.) 801; 31 L. J., C. P. 168; 5 L. T. 680; 10 W. R. 230.

Misdirection of Judge.]—A new trial was granted to the plaintiff without costs, when he had been improperly nonsuited. *Bunscall* v. *Hogg*, 3 Wils. 146.

Where a jury gave a general verdict for the defendant on three issues, having been misdirected on one, the court granted a new trial on payment of costs. *Lord* v. *Wardle*, 3 Bing. (N.C.) 680; 4 Scott, 402; 1 Jur. 382.

A new trial was granted without payment of costs, where the judge had misdirected the jury upon an important matter of fact. *Haine* v *Davey*, 6 N. & M. 356; 4 A. & E. 892; 2 H. & W. 30.

Where a mistaken verdict was given in consequence of the omission of the judge to draw the attention of the jury to a material feature in the case, the court imposed the terms of the payment of costs on the granting of a new trial, the judge not having been requested to enter into a fuller explanation. But the costs of a former trial, where the verdict was set aside for misdirection, and of an intermediate postponement, by making the cause a remanet, were to abide the event. *Gibbins* v. *Phillips*, 2 M. & Ry. 238; 8 B. & C. 437; 6 L. J. (O.S.) K. B. 371.

Rule Silent as to.]—If a new trial is granted on the ground that the verdict was imperfect, without any mention of costs in the rule, the costs of the first trial will not be allowed to the successful party, though he succeeds on the second. *Horsey* v. *Graham*, 23 L. T. 495.

Rule 54 of Hilary Term, 1853, applies only to cases where a new trial is granted upon the whole record. *Bower* v. *Hill*, 2 Scott, 540; 1 Hodges, 334; 5 D. P. C. 183.

A rule was made absolute for a new trial without any mention of costs in the rule:—Held, that the master was right in allowing the successful party all such costs of the first trial as were available for the second. *Lambert* v. *Lyddon*, 4 D. & L. 400; 2 B. C. Rep. 232; 16 L. J., Q. B. 34; 11 Jur. 44.

Where a rule is made absolute for a new trial, and no mention is made of the costs of the rule, neither party is entitled to them. *Eccles* v. *Harper*, 3 D. & L. 71; 14 M. & W. 248; 14 L. J., Ex. 264.

After verdict for the plaintiff a new trial was granted, on the ground of the reception of improper evidence. The defendant then withdrew his plea, and suffered judgment by default. The rule for a new trial was silent as to the costs of the first trial:—Held, that the plaintiff was not entitled to the costs of the first trial. *Peacock* v. *Harris*, 1 N. & P. 240; 5 A. & E. 449; 2 H. & W. 456; 6 L. J., K. B. 14.

Discharge of Rule.]—Where a rule nisi has been obtained for a new trial, or to enter a verdict for the defendant, unless the plaintiff consents to reduce the verdict, and the plaintiff does consent to reduce the verdict, and the rule is thereupon discharged, each party pays his own costs of the rule. *Thompson* v. *Bailey*, 4 Ex. 86; 7 D. & L. 234.

After verdict for a plaintiff, a rule nisi for a new trial or for arresting the judgment was obtained; the rule for a new trial was made absolute, the question of costs being reserved. After verdict for the plaintiff on the second trial, a rule nisi for a new trial, or for arresting the judgment was obtained, and afterwards discharged:—Held, that the plaintiff was entitled to the costs of the first trial. *Hunter* v. *Caldwell*, 10 Q. B. 83; 11 Jur. 1056.

A rule to discharge a rule for a new trial, on the ground that the party has neglected to pay costs, is, in the Court of Exchequer, a rule nisi, which makes itself absolute, unless cause be shown within a limited time. *Phillips* v. *Warren*, 3 D. & L. 301; 14 M. & W. 730; 15 L. J., Ex. 3; 9 Jur. 930.

Where in trespass there were several issues, one of them on a plea of liberum tenementum, and the judge improperly rejected evidence applicable to that issue only, the court discharged a rule for a new trial after a verdict for the defendant on several issues, on his consenting to the verdict being entered for the plaintiff on that issue; and gave no costs of the rule to either party. *Hughes* v. *Hughes*, 15 M. & W. 701.

When, upon a verdict being returned for the plaintiff, the defendant obtains a rule nisi for a new trial, which is afterwards discharged in consideration of the plaintiff consenting to a reduction of his damages, neither party pays to the other the costs of the rule. *Hussey* v. *Metropolitan Ry.*, 20 L. T. 612.

A rule was made absolute for a new trial on payment of costs by the plaintiff. The costs were taxed and demanded on the 4th of May. On the 8th, the defendant obtained a rule nisi to discharge that rule, unless the costs were paid before the fourth day of the ensuing term. The plaintiff having in the meantime paid the costs, the court discharged the rule, but ordered the plaintiff to pay the costs of the application. *Solly* v. *Langford*, 2 D. & L. 250.

Where a rule for a new trial upon payment of costs is granted, a rule to rescind that rule, upon the ground that the costs have not been paid, is, in the Common Pleas, a rule nisi only in the first instance. *Spear* v. *Ward*, 1 L., M. & P. 248.

Where a rule absolute for a new trial on payment of costs had been granted, but the costs were not paid within a reasonable time, the court made a rule absolute in the first instance for discharging the rule. *Champion* v. *Griffiths*, 1 D. (N.S.) 319; 5 Jur. 1182.

On Discontinuance.]—When the court granted a rule for a new trial on the application of the defendant, in a case where the plaintiff succeeded, and the latter applied to amend his declaration, but discontinued the action, not choosing to pay the costs of the former trial, as the condition of the amendment:—Held, that the defendant was not entitled to the costs of the trial, notwithstanding the discontinuance. *Gray* v. *Cox*, 8 D. & R. 220; 5 B. & C. 458.

Where after a verdict for a defendant, and a rule absolute for a new trial, the plaintiff discontinues the action, the defendant is entitled to the costs of the trial. *Sweeting* v. *Halse*, 4 M. & Ry. 545; 9 B. & C. 369; 7 L. J. (O.S.) K. B. 339.

Where a defendant had a verdict on one of two issues, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the latter issue, on the ground of misdirection, whereupon the plaintiff discontinued:—Held, that the defendant was not entitled to the costs of the trial. *Macclesfield (Earl)* v. *Bad-*

deley or *Bradley*, 7 M. & W. 570; 9 D. P. C. 312; 10 L. J., Ex. 182.

The defendants in replevin having obtained a verdict, a rule for a new trial was granted, on the ground that evidence had been improperly admitted. This rule was made absolute. The plaintiff gave a fresh notice of trial, but afterwards gave notice of discontinuance, and the cause was not re-tried. On the taxation, the costs of searches for documentary evidence (not including the evidence objected to), which had been made use of on the first trial, were allowed to the defendants, as well as the charge of drawing and copying the old briefs:—Held, that as these matters would have been available if the cause had been tried again, such costs were properly allowed. *Daniel* v. *Wilkin*, 8 Ex. 156; 22 L. J., Ex. 73.

Court Equally Divided.]—If the court is equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule. *Dansey* v. *Richardson*, 3 El. & Bl. 722; 2 C. L. R. 1467; 23 L. J., Q. B. 361; 18 Jur. 957.

Appeal from Decision.]—Where the Exchequer Chamber confirms, on appeal, the decision of the court below, as to granting, discharging, or making absolute a rule, the appellant is liable for the costs both of the appeal and of the proceedings below, but no costs will be given to either when the judgment below is reversed. *Barker* v. *Windle*, 6 El. & Bl. 675; 25 L. J., Q. B. 349; 2 Jur. (N.S.) 1069; 4 W. R. 603.

So where the exchequer chamber reverses, upon appeal, the decision of the court below as to granting, discharging, or making absolute a rule, the appellant is, as a general rule, entitled to such costs as he would have had if the decision in the court below had been in his favour, but not to the costs of the appeal. *Young* v. *Moeller*, 6 El. & Bl. 681.

Solicitor not on Roll.]—In granting a new trial, it is no ground for refusing to annex the condition of payment of costs by the party obtaining the rule, that the attorney of the adverse party was not on the roll when those costs were incurred. *Punter* v. *Grantley* (*Lord*), 3 Man. & G. 295; 3 Scott (N.R.) 647.

What Costs.]—Costs of opposing an unsuccessful application for a new trial are costs in the cause. *Eyre* v. *Thorpe*, 6 D. P. C. 768.

When a new trial is granted on payment of costs, such costs do not include the costs of summonses to obtain admissions, they being costs in the cause; nor do they include expenses of briefs, where the same will be used on the second trial. *Lord* v. *Wardle*, 5 Scott, 398; 6 D. P. C. 174.

If an attorney shows cause on his own behalf, against a rule for a new trial, or a stet processus, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the court; and if that application is not made when the rule is disposed of, the court will not afterwards amend the rule as to them. *Southee* v. *Terry*, 2 D. P. C. 522.

Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the master may allow fees on the second trial, with reference to those given on the first. *Wilkinson* v. *Malin*, 2 D. P. C. 65.

A plaintiff obtained a verdict, and a new trial was granted on account of the admission of improper evidence. The plaintiff drew up the rule for the new trial, and served it on the defendant, who informed the plaintiff that he would not avail himself of the rule. The court ordered that the postea should be delivered to the plaintiff, and that he should have his costs of the trial. But the court allowed neither party the costs of the rule for a new trial, or of the rule for giving the postea and costs to the plaintiff. *De Rutzen* v. *Lloyd*, 5 A. & E. 456; W. W. & D. 473; 2 N. & P. 213; 6 L. J., K. B. 223.

On the trial of a cause in which there were several issues, the plaintiff had a general verdict, leave being reserved to the defendant to move to enter a nonsuit, or a verdict for the defendant. A rule was obtained accordingly, and thereupon it was agreed, that the facts should be stated in a special case for the opinion of the court. On the argument of the case the court gave judgment for the defendant, and the verdict was accordingly entered for him, and this judgment was afterwards affirmed in the exchequer chamber:—Held, that he was entitled to the costs of the trial, and that although one of the issues was given up by him at the trial. *Tobin* v. *Crawford*, 10 M. & W. 602; 2 D. (N.S.) 541; 12 L. J., Ex. 77.

Where a rule nisi is granted for a new trial, the successful party is entitled to recover in costs his attorney's term fee, 1*l.* per term, until the giving of judgment. *Bourne* v. *Alcock*, 4 Q. B. 621.

—— **Shorthand Notes of Evidence.**]—It is competent to this court to make an order for the allowance, on taxation between party and party, of the expense of the shorthand notes of the evidence given at the trial, as part of the costs of a rule for a new trial on the ground that the verdict was against the weight of evidence, in a case where, from the nature and extent of the evidence, it is manifest that the matter could not have been properly disposed of without their aid. *Watson* v. *G. W. Ry.*, 50 L. J., Q. B. 302; 6 Q. B. D. 163; 29 W. R. 427.

The party who succeeds at a second trial will not be allowed on taxation the costs he has incurred for copies of a shorthand writer's notes of the evidence given at the former trial. *Crease* v. *Barrett*, 2 C. M. & R. 738; 1 Tyr. & G. 112.

On taxation of costs, the master declined to allow the costs incurred by the defendant at the second trial for shorthand writer's notes:—Held, that it was entirely within the discretion of the master to allow or disallow these items, and that it was not the practice of the court to interfere with that discretion, except in cases of gross abuse. *Marcus* v. *General Steam Navigation Co.*, 35 L. T. 353—C. A.

In taxing the costs of a motion for a new trial of an issue, the cost of copies of the shorthand writer's notes of the evidence taken on the former trial are in the discretion of the taxing master, regard being had to the nature of the issue, and the extent to which such copies, if at all, were necessary; but in no case will more than two copies be allowed. *Malins* v. *Price*, 1 Ph. 590; 9 Jur. 955.

—— **Shorthand Notes of Summing-up.**]—The costs of the shorthand-writer's notes of the

summing-up of a judge at the trial will, on applications for a new trial, only be allowed upon taxation in exceptional cases. *Andrews* v. *Mockford*, 65 L. J., Q. B. 302 ; [1896] 1 Q. B. 372 ; 73 L. T. 730—C. A.

C. HEARING FOR COSTS ALONE.

Trial of Cause on Non-payment.]—The defendant having satisfied the plaintiff's demand, the court refused to allow the action to be proceeded with for costs. *Tapp* v. *Tanner*, 20 L. J., Ch. 559.

After action brought, the plaintiff after receiving payment of his demands, may go on to a trial, if the costs then incurred are not tendered. *Lill* v. *Robinson*, Beat. 84.

When the demand of the plaintiff is submitted to, and the only question between the parties is the costs of the suit, the cause ought not to be proceeded in, but an application ought to be made to the court to prevent the expense of further proceeding. *Sivell* v. *Abraham*, 8 Beav. 598.

A cause will not be heard for costs alone. *Blackwood* v. *Gregg*, 1 Hay. & J. 310.

Court will not hear suit for settlement of costs only, even on mutual consent. *Roberts* v. *Roberts*, 1 Sim. & S. 39.

An order made on a party to a suit for payment of costs after taxation, with liberty to apply at the hearing for reimbursement, is intended to conclude all questions. He will not, therefore, having omitted to make any such application at the hearing, be allowed afterwards to open the question of costs, although at the time of the hearing no taxation had been made of the costs to which he was liable under the order. *Whalley* v. *Ramage*, 8 L. T. 499.

Whether it is regular to present a petition to come on with the cause on further directions, for the purpose of stating circumstances occurring since the filing of the bill, with a view only to the adjudication of the costs of suit, semble, not. *Tanner* v. *Dancey*, 9 Beav. 339.

Though the substantial object of a suit be attained previously to the hearing, yet either party has the right to prosecute the suit to a hearing, in order to determine the question of costs. *Morgan* v. *G. E. Ry.*, 2 N. R. 60.

A bill was filed in consequence of a claim to a fund made by a defendant. The defendant, in his answer, disclaimed all right to the fund, but stated certain facts, as the ground for his not being ordered to pay the costs of the suit. The plaintiffs entered into evidence by which they falsified those statements. The court held that they were justified in so doing, and ordered the defendant to pay the costs of the suit. *Deacon* v. *Deacon*, 7 Sim. 378.

Where a debt is paid by a defendant without any knowledge of an action commenced, this is no defence to the action at the trial. *Toms* v. *Powell*, 7 East, 536 ; 3 Smith, 554 ; 6 Esp. 40.

Where the plaintiff issued a writ and the defendant produced a receipt date the same day, the receipt is no defence to the action without proof that the payment was made before the writ was issued. *Godard* v. *Benjamin*, 3 Camp. 331.

An action must proceed till it is brought to its proper termination, or is stopped upon payment of costs. *Goodwin* v. *Cremer*, 18 Q. B. 760.

Motion—Proceeding to Trial for Costs.]—Where upon an interlocutory motion in an action the plaintiff obtains the relief which he seeks, he is bound to make an application to the defendant to have the costs disposed of on motion, and unless he does so is precluded from having the extra costs occasioned by going on to trial. But if the defendant refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided, the case cannot be so dealt with. *Sonnenschein* v. *Barnard*, 57 L. T. 712.

Where the right of a party to an order for which he has given notice of motion is intercepted by a step taken by his adversary, he is entitled to his costs ; but he should not bring on the motion, if the costs then incurred are tendered. *Newton* v. *Ricketts*, 11 Beav. 164.

The defendant served the plaintiff with notice of motion to dismiss for want of prosecution. Before the motion was made, the master, on an application to him, gave the plaintiff liberty to amend on payment of 10*s.* costs. The defendant, having brought on the motion for the purpose of obtaining the costs of the service of the notice, was held to be regular in his proceedings. *Findlay* v. *Lawrence*, 16 L. J., Ch. 333 ; 11 Jur. 705.

The plaintiff served a defendant with a notice of motion, under the 76th Order of May, 1845, but, before the motion was made, the defendant put in his answer :—Held, that the plaintiff had a right to bring on the motion for the purpose of obtaining the costs of it. *Spooner* v. *Payne*, 17 L. J., Ch. 130 ; 12 Jur. 642. See *Moody* v. *Hebberd*, 17 L. J., Ch. 24 ; 11 Jur. 941.

After Compromise of Suit.]—Parties compromised the subject-matter of the suit, without providing for the costs :—Held, that the cause could not be afterwards heard, for the purpose of determining the costs alone, and it was struck out of the paper. *Whalley* v. *Suffield* (*Lord*), 12 Beav. 402.

Where parties to a suit have compromised all matters in difference between them, the court will not entertain the suit for the mere purpose of determining the question of costs. *Nicholls* v. *Elford*, 5 Jur. (N.S.) 264.

A bill was filed for an account. In his answer the defendant, throwing on the plaintiff part of the blame of the circumstances which led to the institution of the suit, paid the amount due from him as agreed by the parties, and the plaintiff accepted the amount without prejudice to his right to the costs of the suit. Afterwards the plaintiff moved to stay all proceedings, and that the defendant might be ordered to pay the costs. The Vice-Chancellor (10 W. R. 368 ; 6 L. T. 185) made the order as prayed ; but, on appeal :—Held, that the question of costs would depend upon the merits of the case, the time for deciding which had not arrived, when the proceedings were ordered to be stayed : and the court, therefore, discharged the order of the Vice-Chancellor, but expressed a doubt whether the plaintiff's right to costs was wholly gone by reason of his agreement to settle the dispute. *Wilde* v. *Wilde*, 31 L. J., Ch. 558 ; 6 L. T. 275 ; 10 W. R. 503.

The rule that a court of equity will not entertain a suit merely for determining the question of costs applies only where there has been an actual settlement of the subject-matter of the suit before the commencement of litigation. *Griffin* v. *Brady*, 39 L. J., Ch. 136 ; 18 W. R. 130.

In a suit to compel the defendant to deliver

up certain deeds and execute certain conveyances, he having at last done what was required, and having been paid on the other hand a small part of his counter-demand:—Held (notwithstanding the general rule as to suits which have been compromised), that the plaintiffs were entitled to bring the suit to a hearing for the purpose of getting their costs, and decree against the defendant accordingly. *Ib.*

D. POWER OF COURT TO VARY ORDER.

In what Cases.]—The plaintiff's motion for an interim injunction to restrain a nuisance committed by the defendant was ordered to stand over till the trial of the action, no order being made as to costs. At the trial the judge awarded the plaintiff damages in lieu of an injunction, and ordered the defendant to pay the plaintiff's costs of action, the order reserving liberty to apply. The judgment as passed and entered was silent as to the costs on the previous motion. The taxing officer having refused to allow the costs of the motion without a special order of the judge:—Held, on motion, that the court might order the costs of the motion to be paid by the defendant. Semble, that all orders of the court carry in gremio liberty to apply. *Fritz* v. *Hobson*, 49 L. J., Ch. 735; 14 Ch. D. 542; 42 L. T. 677; 28 W. R. 722.

The direction in a decree that "any of the parties are to be at liberty to apply to the court as they shall be advised":—Held, not to extend to an application by the plaintiff to be allowed costs, as to which there was no express direction given by the decree. *Kendell* v. *Masters*, 2 De G. F. & J. 200.

After a decree passed, the court will not, on a petition, give the costs of the suit to a defendant, although a mere trustee, and as such entitled to them, if they had been asked for on hearing. *Colman* v. *Sarell*, 2 Cox, 206: 1 Ves. Jr. 50; 1 R. R. 83.

An order made upon notice for leave to the plaintiffs to amend their bill, giving security to the clerk of records and writs for the costs of the defendants of the suit already incurred, was varied ex parte by directing the costs of the defendants to be taxed and paid to them by the plaintiffs, reserving the question how they were ultimately to be borne, the variation not being such as could prejudice the absent defendants. *Hart* v. *Tulk*, 6 Hare, 611; 18 L. J., Ch. 162.

The question of costs not having been mentioned on the argument of the exceptions, the case cannot be reopened on that question. *Crossley* v. *Stewart*, 8 L. T. 269; 11 W. R. 636.

A testatrix bequeathed a mixed fund of pure personalty and money to arise from realty directed by her will to be sold, to A. for life, and then to a charity. In a suit to administer the estate, an order on further consideration was made, which directed the costs of suit and certain legacies to be paid out of four sums of cash in court, two of which arose from realty, and two from pure personalty, so far as they would extend, the deficiency to be raised out of a sum of stock in court which represented realty. There was no reservation of subsequent further consideration, nor of the question how the costs should ultimately be borne. The dividends on the residue of the fund were ordered to be paid to A. for life with liberty to apply. On A.'s death the testatrix's heir-at-law petitioned for the payment of the fund to him as being realty. The Attorney-General, for the charity, objected that the costs of administering the real estate ought to have been paid out of the proceeds of real estate, in which case there would have been left a substantial sum of pure personalty which the charity could take. The court below considered that the order on further consideration settled the question how the costs were to be borne, and ordered payment of the fund to the heir. The Attorney-General appealed:—Held, by Cotton and Bowen, L.JJ., that the cost of administering the realty ought to have been paid out of the proceeds of realty, and that as the order on further consideration contained no declaration as to the ultimate incidence of the costs, and did not indicate any intention to decide that question, the application of the sums of cash in payment of costs and legacies must be treated as directed for convenience without any intention to alter the rights of the parties, and that as the fund was still in hand, the court, although there was no express reservation of the ultimate incidence of the costs, ought now to set the matter right:—Held, by Fry, L.J., that an order on further consideration which directs payment of costs in a particular way, and does not reserve subsequent further consideration nor reserve the question how the costs are ultimately to be borne, ought to be treated as final. *Roper, In re, Taylor* v. *Bland*, 45 Ch. D. 126; 63 L. T. 434; 39 W. R. 101—C. A.

Power of Court of Appeal.]—*See* infra, col. 857.

Order at Chambers—Jurisdiction of Judge at Trial.]—Where on an application under Order XIV. the judge at chambers has made an order as to costs, the judge at the trial has no jurisdiction to interfere with the prior order. *Koosen* v. *Rose*, 76 L. T. 145; 45 W. R. 337—C. A.

E. PARTIES—PAYMENT TO OR BY.

1. General Principles.

Jurisdiction to order successful Party to pay other Party's Costs.]—The railway commissioners have no jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant. *Foster* v. *G. W. Ry.*, 51 L. J., Q. B. 233; 8 Q. B. D. 515; 46 L. T. 74; 30 W. R. 398—C. A.

By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The chief clerk made his general certificate, finding (inter alia) that two specified leaseholds belonging to the partnership were of no value. The plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into court, and Bacon, V.-C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the

estate. The defendants appealed:—Held, that the case did not come within the rule in *Foster* v. *G. W. Ry.* (8 Q. B. D. 25, 515); that the court cannot make a successful defendant pay the costs of a plaintiff who has wholly failed; but that it was within the discretion of the court to order all costs reasonably incurred in ascertaining the sum to be paid out of the fund, and that an appeal would not lie. *Butcher* v. *Pooler*, 52 L. J., Ch. 930; 24 Ch. D. 273; 49 L. T. 573—C. A.

Where an action is tried before a jury the judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs. *Harris* v. *Petherick*, 48 L. J., Q. B. 521: 4 Q. B. D. 611; 41 L. T. 146—C. A.

In an action for infringement of alleged copyright in the title of a novel, the defendant, before trial, discontinued the use of the title. At the trial the judge held that the plaintiff had established his claim to copyright, and that the defendant had invaded it, but he made no order except that the defendant should pay the costs of the action. The defendant appealed, contending that the plaintiff had no title and that the action ought to have been dismissed:—Held, that it is not within the discretion of the court to make a defendant pay the whole costs of an action if the plaintiff had no right to sue. *Dicks* v. *Yates*, 50 L. J., Ch. 809; 18 Ch. D. 76; 44 L. T. 660—C. A.

The court cannot make a defendant pay the costs of a plaintiff where the bill is dismissed. *Sutton Harbour Improvement Co.* v. *Hitchens*, 15 Beav. 161; 21 L. J., Ch. 568.

When a bill is dismissed the court cannot decree the costs to be paid by a defendant whose misconduct occasioned the suit. *Cochrane* v. *O'Brien*, 2 Jo. & Lat. 380; 8 Ir. Eq. R. 241.

Costs cannot be given to a defendant who sets up a defence that fails. *Fitzgerald* v. *O'Connell*, 6 Ir. Eq. R. 455; 1 Jo. & Lat. 134.

A defendant against whom a bill is dismissed cannot be made to pay costs, though the suit is caused solely by his misconduct. *Cochrane* v. *O'Brien*, 8 Ir. Eq. R. 241; 2 Jo. & Lat. 380.

Third Party—Jurisdiction to Order to Pay Plaintiff's Costs.]—The High Court has jurisdiction to order a third party to pay to an unsuccessful defendant the costs payable by such defendant to the plaintiff. The plaintiff let to the defendant a house for twenty-one years, with option to determine the lease at the end of seven or fourteen, by deed containing covenants by the defendant to repair and paint and leave in repair. The defendant, after having occupied for five years, sublet the house to H. for the remainder of the first seven years by a writing with a clause, that "the letting should be subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." At the end of the seven years, the defendant having determined the lease in the exercise of his option, the plaintiff claimed from the defendant, and the defendant claimed from H., the amount at which dilapidations had been assessed by the plaintiff's surveyor. H. declined to pay or to give the defendant an indemnity, or to take any responsibility in the matter. The plaintiff sued the defendant, who brought in H. as third party. The issues, as between the plaintiff and the defendant, and the defendant and H., were referred separately to an official referee, who reported that the sum claimed by the plaintiff was due from the defendant to the plaintiff, and that a similar sum was due from H. to the defendant. A divisional court, on adopting the second report, ordered H. to pay all costs as between the plaintiff and the defendant:—Held, by the court of appeal, that these were costs within the discretion of the high court, and therefore that this order was not appealable. *Hornby* v. *Cardwell*, 51 L. J., Q. B. 89; 8 Q. B. D. 329; 45 L. T. 781; 30 W. R. 263—C. A.

The court has power under Ord. XVI. r. 21, to order the third party brought into the action to pay to the plaintiff the costs occasioned by his defence. *Piller* v. *Roberts*, 21 Ch. D. 198; 46 L. T. 527; 30 W. R. 595.

—— **Jurisdiction to order Plaintiff to Pay Costs of Third and Fourth Parties.**]—In an action on an agreement to purchase certain lands, and which agreement contained a stipulation that the conveyance should contain a certain covenant as to rent, the defendant, having brought in the assigns as third parties, and the assigns having brought in, as fourth parties, persons who had covenants to indemnify the assigns against the rent:—Held, that there was no jurisdiction to order the plaintiff to pay the costs of the third and fourth parties, and that as there was no disputed question of fact relating to them, but only a question of liability as between the plaintiffs and defendants, there should be no order as to the costs of the third or fourth parties. *Witham* v. *Vane*, 44 L. T. 718—C. A. Reversing 28 W. R. 812.

A third party, who was under a contract to indemnify the defendant, obtained leave to appear at the trial, and appeared accordingly, and succeeded in his object of reducing the damages to a sum already paid into court by the defendant:—Held, that he was not entitled to costs against the plaintiff. *Williams* v. *S. E. Ry.*, 26 W. R. 352.

The court has complete jurisdiction over the costs of a third party brought in under Ord. XV. r. 18; and even where the order giving directions as to the mode in which the questions are to be tried, reserves all questions between the defendant and the third party, including the question of costs, the court may order the plaintiff to pay the costs of the third party. *Hanbury* v. *Upper Inny Drainage Board*, 12 L. R. Ir. 217.

—— **Defendant may be ordered to Pay Costs of Third Party.**]—There is a power to order a defendant to pay costs to a third party who appears in consequence of being served by the defendant with a notice under Ord. XVI. r. 18. *Yorkshire Waggon Co.* v. *Newport Coal Co.* (infra) explained. *Dawson* v. *Shepherd*, 49 L. J., Ex. 529; 42 L. T. 611; 28 W. R. 805—C. A.

There is no jurisdiction under the provisions of Ord. XVI. r. 21, to impose any terms with regard to the payment of the costs of a party brought in by notice under r. 18, upon the party bringing him in. *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 49 L. J., Q. B. 527; 5 Q. B. D. 268; 42 L. T. 367; 28 W. R. 505.

—— **Payment of Defendant's Costs by Third Party.**]—In an action by landlord against tenant for rent, the defendant brought a counter-claim against the plaintiff and third parties for illegal distress. The judge before whom the case was tried without a jury gave judgment for the

plaintiff on the claim and the counter-claim, but for the defendant against the third parties for 2*l.* 5*s.* "with such costs as the defendant would be entitled to by law":—Held, that as the case had been tried without a jury, the costs were by Ord. LXV. r. 1, in the discretion of the judge, and there having been no exercise of such discretion in favour of the defendant as against the third parties, the defendant was not "entitled by law" to costs. *Lewin* v. *Trimming*, 21 Q. B. D. 230; 59 L. T. 511; 37 W. R. 16.

Liability of Person not a Party.]—The court has not (as a rule) any power after verdict to compel a person not a party to the record to pay the taxed costs, even though he may be really the party interested in the decision of the suit. *Evans* v. *Rees*, 1 G. & D. 579; 1 D. (N.S.) 338; 2 Q. B. 334; 11 L. J., Q. B. 11; 5 Jur. 1060.

The court will not interfere to make a person who is not a party to the record pay the costs of the action, though he is the real party interested in the event of it. *Hayward* v. *Giffard*, 4 M. & W. 194; 6 D. P. C. 699; 7 L. J., Ex. 256.

A solicitor, who, in order to induce a plaintiff to go on with a suit, agrees to indemnify him against the costs, thereby makes the suit his own, and becomes liable to pay the costs of the defendant; and this notwithstanding that by the abatement of the suit by the death of the plaintiff before the hearing and the non-revivor by his executor, the remedy against the plaintiff's estate may be gone. *Fielden* v. *Northern Ry. of Buenos Ayres, Jones, In re*, 40 L. J., Ch. 113; L. R. 6 Ch. 497; 23 L. T. 655; 19 W. R. 361.

Where plaintiffs sue on behalf of themselves and others, the persons on whose behalf they sue are not liable to the costs of the suit. *Scott* v. *Pascall*, 15 Sim. 559; 11 Jur. 550. Affirmed, 2 Ph. 390; 11 Jur. 955.

Parties in the same interest with the plaintiff, not joining as co-plaintiffs, are not entitled to the costs of a suit, which as to their interests is successful. *England* v. *Downs*, 6 Beav. 279.

A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit, discharged of the expenses of it, although he might have been made a party without his authority. *Hall* v. *Laver*, 1 Hare, 571. Affirming 4 Y. & Coll. 218; 5 Jur. 241.

—— **In Ejectment.**]—In ejectment, the court has jurisdiction to order by rule the parties really conducting the defence to pay the costs of the plaintiff, though those parties are strangers to the record, and claim no interest in the property. *Hutchinson* v. *Greenwood*, 4 El. & Bl. 324; 3 C. L. R. 115; 24 L. J., Q. B. 2; 1 Jur. (N.S.) 329; 3 W. R. 105.

To entitle a plaintiff in ejectment to call upon parties who are strangers to the record to pay the costs, it must be clearly shown that the defence was conducted by them for their own benefit in the name of a pauper defendant; it is not enough to show that they are interested as equitable mortgagees of part of the premises, and that they have endeavoured to make terms with the plaintiff after judgment signed. *Anstey* v. *Edwards*, 16 C. B. 212.

In ejectment, the court will order the person for whose benefit, and at whose instance, the action is brought, though not a party to the record, to pay costs to a successful defendant. *Mobbs* v. *Vanderbrand*, 4 B. & S. 904; 33 L. J., Q. B. 177; 10 Jur. (N.S.) 745; 9 L. T. 760; 12 W. R. 405. S. P., *Dalbiac* v. *Delacourt*, 44 L. J., Ex. 129; L. R. 10 Ex. 210; 23 W. R. 632; *Thornton* v. *Wilkinson*, 9 Jur. (N.S.) 606; 8 L. T. 507; 11 W. R. 916.

Absent Party.]—The court has no authority to give costs against an absent party, upon an ex parte application. *Cast* v. *Poyser*, 26 L. J., Ch. 93, 353; 3 Jur. (N.S.) 38.

Costs against Third Persons on Certiorari.]—A party who attempts to carry on litigation under cover of the protection usually afforded to justices of the peace may be ordered to pay the costs. *Reg.* v. *Wheatley*, 34 W. R. 257.

Where Solicitor a Party.]—Where an action is brought against a solicitor, who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. *London Scottish Benefit Society* v. *Chorley*, 53 L. J., Q. B. 551; 13 Q. B. D. 872; 51 L. T. 100; 32 W. R. 781—C. A.

Where one of a body of mortgagees is a solicitor, and acts as such in enforcing the security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not. *Donaldson, In re*, 54 L. J., Ch. 151; 27 Ch. D. 544; 51 L. T. 622.

Where Solicitor one of Several Mortgagees.]—*See* MORTGAGE.

Where Solicitor an Executor or Trustee.]—*See* TRUST AND TRUSTEE.

Where Jurisdiction of Court Impeached.]—Where a county court judge appeared to a rule to show cause why he should not hear and determine an action remitted to him, and the rule was discharged; in an application for costs:—Held, that as it is not usual for a judge to be represented, unless the whole jurisdiction of his court is in question, he could not be allowed his costs. *Reg.* v. *Stonor*, 50 L. T. 99.

Where the whole jurisdiction of a court is called in question on an application for a prohibition, the judge is entitled to appear, to prevent the jurisdiction being lost, and will, if successful, be entitled in the Court of Appeal to his costs. *Dale's Case, Enraght's Case*, 50 L. J., Q. B. 234; 6 Q. B. D. 474; 43 L. T. 786; 45 J. P. 284—C. A. And see *Green, Ex parte*, 51 L. J., Q. B. at p. 36; 7 Q. B. D. 294; 44 L. T. 632—C. A., as to costs of Lord Penzance and of the Vice-Chancellor of the Duchy of Lancaster.

A judge is entitled to appear when it is attempted to obtain a prohibition to his court, and the superior court cannot refuse to allow his costs if successful. *Combe* v. *De la Bere*, 22 Ch. D. 348; 48 L. T. 303—C. A.

Rule, that a party who merely supports the decision of a competent jurisdiction is never called on to pay the costs of so doing. *Att.-Gen.* v. *London Corporation*, 2 Mac. & G. 247; 2 Hall & Tw. 1; 19 L. J., Ch. 314; 14 Jur. 205.

Liability of Public Officer to pay.]—Where the registrar of trade marks, by the direction of the commissioners of patents, refused to register a trade mark:—Held, that the court of appeal had no jurisdiction to give costs against the registrar

when the latter unsuccessfully appeals. *Rotherham's Trade Mark, In re*, 49 L. J., Ch. 511 ; 14 Ch. D. 585 : 43 L. T. 1—C. A.

Where a court of inquiry into a shipping casualty suspended a master's certificate on the invitation of the board of trade, the court of appeal ordered the board of trade to pay the costs of the appeal. *The Arizona*, 49 L. J., P. 54 ; 5 P. D. 123 ; 42 L. T. 505 ; 28 W. R. 704—C. A.

The court has no jurisdiction to make the comptroller pay the costs of a successful application to register a trade mark, though it will not order the applicant to pay the comptroller's costs. *Leaf's Trade Mark, In re*, 55 L. J., Ch. 740 ; 33 Ch. D. 477 ; 55 L. T. 254 ; 35 W. R. 99.

2. SEVERAL PARTIES.

Joinder of Plaintiffs—Some successful.]—Two plaintiffs joined in one action, claiming for separate and distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one plaintiff, and against the other, and entered judgment accordingly. On an application to review taxation of costs :—Held, that the successful plaintiff was entitled to recover from the defendant the whole of his general costs of the action, and the defendant was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff. *Gort (Viscount)* v. *Rowney*, 55 L. J., Q. B. 541 ; 17 Q. B. D. 625 ; 54 L. T. 817 ; 34 W. R. 696—C. A.

Two owners of distinct properties joined in a suit to restrain a nuisance. The court considered that a sufficient case of nuisance had in the case of the first plaintiff not been made out, but in the case of the second plaintiff had been made out. A decree was made for an injunction so far as regarded the second plaintiff, and for the defendant to pay him his costs ; the bill as regarded the first plaintiff to be dismissed, and the costs occasioned by the addition of the first plaintiff to be deducted from the costs so to be paid by the defendant. *Umfreville* v. *Johnson*, 44 L. J., Ch. 752 ; L. R. 10 Ch. 580 ; 23 W. R. 844.

—— **Liability.**]—Each co-plaintiff is liable severally for all defendant's costs of the suit, and there is no apportionment of the costs as between the co-plaintiffs and the defendant, apportionment being only in respect of funds ; but a co-plaintiff may, in the progress of the cause, protect himself from further costs, by a proper application to the court. *Poole* v. *Franks*, 1 Moll. 78.

Defendants appearing Separately—Separate Sets of Costs.]—Two sets of defendants joined in delivering a defence, and appeared by the same solicitor, but were represented by separate counsel at the trial, when the action was dismissed with costs. The taxing-master allowed one set of costs only in respect of counsel, on the ground that the difference in the defences was not sufficiently material to justify appearance by separate counsel :—Held, on motion to vary the certificate, that the question was not one for the discretion of the taxing-master ; and the court being of opinion that the defendants had in fact different cases by way of defence, remitted the certificate to the taxing-master on the ground that the defendants were justified in appearing by separate counsel. *Ager* v. *Blacklock*, 56 L. T. 890.

One of two defendants (after appearing and pleading jointly), two days before the trial, obtained an order to appoint a new attorney for himself. On taxation the master allowed him separate costs of the trial. The defendant had reasonable grounds for changing his attorney. The court refused to interfere with the master's discretion. *Rolfe* v. *Johnson*, 6 Man. & G. 759 ; 7 Scott (N.R.) 496.

The court allowed two sets of costs of an abandoned motion to A. and B., who were sheriffs of London and also sheriffs of Middlesex, and had been served with the notice of motion in each capacity. *Von Bolton* v. *Cruden*, 21 W. R. 356.

Two sets of defendants having put in separate answers, on the taxation of their costs the master refused to allow more than one set :—Held, that there was no appeal. *Beattie* v. *Ebury (Lord)*, 43 L. J., Ch. 80 ; 29 L. T. 419 ; 22 W. R. 68.

A. and B., two surveyors in partnership, who were employed as a firm with respect to the matters in question in the suit, were made defendants for the purpose of discovery only. The bill also prayed that "the defendants might pay the costs of the suit." They put in separate answers, and appeared by separate counsel at the hearing. Prior to the hearing they had dissolved partnership. At the hearing a decree was taken by consent (as between the plaintiffs and the principal defendants) as to the matters in question in the suit, and it was admitted that A. and B. were entitled to their costs :—Held, that they were only entitled to one set of costs between them, as they were not justified in severing in their defence. *Bull* v. *West London School Board*, 34 L. T. 674.

Two defendants pleading separately, and being represented by different counsel, although by the same attorney, are entitled to present, for taxation, separate bills of costs on the rule. *Newton* v. *Boodle*, 4 C. B. 359.

So, in an action on the case against many defendants, where one suffers judgment by default, and a verdict is entered for the others, those for whom the verdict is entered are entitled to their costs. *Price* v. *Harris*, 2 D. P. C. 804 ; 10 Bing. 557 ; 4 M. & Scott, 474 ; 3 L. J., C. P. 188.

Where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge. *Nunny* v. *Kenrick*, 2 D. P. C. 334.

Where separate defences were unnecessarily but bonâ fide delivered by the same solicitor for different defendants, the costs of one defence only were allowed. *De Burgh* v. *Chichester*, Ir. R. 4 Eq. 623 ; 19 W. R. 221.

A solicitor who acts for two defendants in the same interest should employ one set of counsel for both, although he act directly for one and as agent for the solicitors of the other. *Walters* v. *Webb*, 39 L. J., Ch. 414 ; L. R. 9 Eq. 83 ; 21 L. T. 657 ; 18 W. R. 86.

Where some defendants demurred to some counts, and the other defendants went to issue upon them, and all the defendants went to issue upon the other counts, and those defendants who demurred got judgment upon the demurrer before the issues were tried :—Held, that they

were not entitled to have their costs taxed upon that judgment, under 8 & 9 Will. 3, c. 11. *Forbes* v. *Gregory*, 1 D. P. C. 679 ; 1 C. & M. 435 ; 3 Tyr. 385.

Where in trespass two defendants pleaded not guilty, and separate justifications, and one obtained a general verdict, and the other a verdict on his justification only :—Held, that the latter was not entitled to any costs on the issue found for him. *Holroyd* v. *Breare*, 4 B. & Ald. 700.

If defendants in a suit for renewal file separate answers where their defence is the same, the court will not make the usual decree, giving the defendants their costs, but will disallow the costs of separate proceedings. *Hamilton* v. *Patten*, 1 Ir. Eq. R. 341.

Where, apparently for the purpose of accumulating costs, several similar answers of vexatious length were put in on behalf of a number of formal defendants, who appeared to have acted upon an understanding with the plaintiffs, and under the directions of the same solicitor—on motion of the principal defendant, that further proceedings should be stayed, &c , it was referred to the master to ascertain the amount due to the plaintiffs, and to tax their costs of proceeding against the principal defendant only, but not the costs of proceeding against the other defendants ; and it was further ordered, that the principal defendant should pay, &c., he so undertaking, within ten days after the report ; and that the cause should be stayed in the meantime ; and the plaintiffs should not be allowed their costs of appearing on this motion. *Bateman* v. *Bateman*, 2 Ir. Eq. R. 296.

Where several are made defendants in respect of a joint fiduciary character only, or some having a beneficial interest unconnected and not conflicting with their duty, separate costs will not be allowed ; but if, from personal interest or other cause, it becomes impossible for them to answer with prudence together, they will be allowed. *Gaunt* v. *Taylor*, 2 Beav. 346 ; 7 L. J., Ch. 2 ; 4 Jur. 166.

The same solicitor put in and set down for hearing two pleas for want of parties, for two several defendants, and they were both allowed ; the plaintiff was ordered to pay the costs of one of su h pleas only. *Tarbuck* v. *Woodcock*, 3 Beav. 289.

The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the court might direct, and defended separately : —Held, they were entitled to two sets of costs. *Aldridge* v. *Westbrook*, 4 Beav. 212.

The separate appointees of portions of an entire charge (and not those claiming partial or sub-interests in portions of it) are entitled to separate costs as defendants in a suit relating to the estate charged. *Hoops* v. *Kingston* (*Lord*). 11 Ir. Eq. R. 471.

Where husband and wife, who were living apart, had put in separate answers, and appeared by different solicitors, separate costs were allowed, there being no evidence in the cause of the grounds of their separation. *Barry* v. *Woodham*, 1 Y. & Coll. 538 ; 5 L. J., Ex. Eq. 20.

Husband and wife entitled in the wife's right to a share of residue, were living apart, and they defended separately :—Held, entitled to only one set of costs. *Garey* v. *Whittingham*, 5 Beav. 268 ; 11 L. J., Ch. 334 ; 6 Jur. 545.

A party entitled to a share of the residue became bankrupt : — Held, that he and his assignees were entitled to one set of costs between them. *Ib.*

Where several defendants retain the same solicitor, each of them can only be charged with his proportion of the general costs of proceedings taken on behalf of all. *Ford*, *Ex parte*, *Colquhoun*, *In re*, 5 De G. M. & G. 35 ; 2 Eq. Rep. 304 ; 23 L. J., Ch. 515 ; 2 W. R. 286.

Where several persons of one class are represented by separate counsel, there will be only one set of costs allowed for each class. *Stevenson* v. *Abington*, 6 L. T. 345.

Where a country solicitor is a defendant, it is competent to him to act as solicitor for his co-defendant, and employ his town agent to be his own solicitor, and two distinct sets of costs may thus be charged against the plaintiff. *Bainbrigge* v. *Moss*, 3 Kay & J. 62 ; 3 Jur. (N.S.) 107.

Two defendants, taking the same line of defence, but entitled to sever in defence, allowed the costs of separate counsel. *Ib.*

An original bill asked separate relief against one of the defendants, who therefore put in a separate defence. The bill was afterwards amended, and that relief was struck out :— Held, that the defendant was justified in continuing a separate defence, and was entitled to his costs on that footing. *Shaw* v. *Johnson*, 1 Dr. & Sm. 412 ; 30 L. J., Ch. 646 ; 4 L. T. 461 ; 9 W. R. 629.

The court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests, as regards their opposition to the claim of the plaintiff, are identical. *Remnant* v. *Hood*, 27 Beav. 613.

Therefore the bill being dismissed with costs, each of such persons gets his separate costs ; but a trustee and his cestui que trust get but one set of costs between them ; and so the person entitled to a share, and all his incumbrancers, have but one set of costs, which is payable to the first incumbrancer. *Ib.*

Co-trustees, being made defendants in a suit, may sever in their defence, where relief is sought against the one in a matter with which the other has nothing to do. *Pince* v. *Beattie*, 9 Jur. (N.S.) 1119 ; 9 L. T. 315 ; 11 W. R. 979.

The rule that where a joint fiduciary character exists, a joint defence should be always adopted, is too general. It does not apply where the joint parties are liable to account, and incur responsibility. *Reade* v. *Sparkes*, 1 Moll. 8.

Where the bills was dismissed with costs, the court referred to the master to inquire whether it was necessary for parties, trustees, and the cestui que trust, appearing by the same solicitor, to file separate answers. *Woods* v. *Woods*, 5 Hare, 229.

—— **Delegation of Authority.**]—An action to set aside a sale of a life interest to the defendants on the ground of fraud was dismissed by the House of Lords with costs (11 App. Cas. 232), and their lordships directed that the taxing-master should consider whether any of the defendants who appeared separately had sufficient reason for severing in their defences, and if and in so far as it should appear they had not, the taxing-master was to allow only one set of costs, or only as many sets of costs as he should think right. The taxing-master allowed a separate set of costs to each of the six defendants, they having all appeared separately :—Held, that the House of Lords had delegated the decision of the question as to how many sets of costs should be

allowed to the taxing-master, and, unless it was shown that he had not exercised his discretion, his decision could not be appealed from. *Boswell* v. *Coaks*, 36 Ch. D. 444; 58 L. T. 97; 36 W. R. 209—C. A.

—— **Separate Taxations.**]—Where there are several defendants who defend separately, and obtain a verdict generally, the costs of all need not be taxed at the same time. *Brueford* v. *Griffin*, 20 L. J., Ex. 287.

In an action against several defendants, who had pleaded, the plaintiff obtained an order to strike out the names of some of the defendants on payment of costs, the defendants whose names remained having liberty to plead de novo. The master allowed the defendants whose names remained the costs of the day only. The defendants subsequently pleaded, paying money into court, which was accepted; and the master taxed the plaintiff his costs, not allowing him the costs incurred subsequently to the former pleas:—Held, that the successive taxations by the master were right, and that the defendants were further entitled to the costs of the former pleas. *Jackson* v. *Nunn*, 3 G. & D. 543; 4 Q. B. 209; 7 Jur. 846.

Judgments against some Defendants.]—Three defendants, being sued for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness, who was called for one of them separately; that one being acquitted, the master taxed him 40*s.* costs only:—Held, that he was entitled to recover from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants. *Griffiths* v. *Kynaston*, 2 Tyr. 757.

Where there are several defendants, and a verdict passes against some and for others, the latter are entitled to their aliquot proportion of the whole costs incurred, and not merely to 40*s.* each. *Griffith* v. *Jones*, 4 D. P. C. 159; 2 C. M. & R. 333; 1 Gale, 254; 5 Tyr. 1092; 5 L. J., Ex. 267.

When two defendants in trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon one issue, and the other fails upon all the issues, the successful defendant is entitled not only to his separate costs of the issue on which he has succeeded, but to an aliquot part of the joint costs, unless the master is satisfied that, by reason of special circumstances, less ought to be allowed. *Gambrill* v. *Fulmouth (Earl)*, 5 A. & E. 403; 2 H. & W. 287; 6 N. & M. 859; 5 L. J., K. B. 253.

The defendants in such a case having appeared by separate attorneys and counsel, but the attorneys being members of the same firm, and the briefs and evidence substantially the same, the master taxed the costs as if the parties had appeared by the same attorney:—Held, that the taxation in that respect could not be disturbed. *Ib.*

In an action of trespass against two defendants, they pleaded by different attorneys, but appeared by the same counsel, and a verdict was found for one, and against the other:—Held, that the defendant who obtained a verdict was only entitled to half the costs of trial, counsel's fees, &c. *Bartholomew* v. *Stevens*, 7 D. P. C. 808; 5 M. & W. 387; 5 L. J., Ex. 250; 3 Jur. 753.

Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all other issues, the plaintiff is entitled to the balance only of the costs, after deduction of all the costs of all the defendants. *Starling* v. *Cozens* or *Cousins*, 3 D. P. C. 782; 2 C. M. & R. 445; 1 Gale, 159; 5 Tyr. 823; 4 L. J., Ex. 223.

Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs. *Ib.*

—— **Set-off of Costs.**]—In trespass, four defendants pleaded separate pleas by the same attorney; one, the general issue and a justification, upon both of which he was found guilty; another, similar pleas, but was only found guilty on the general issue; and the two others, the general issue only, upon which they were acquitted:—Held, that the costs payable to the three last might be set-off against the costs which the plaintiff was entitled to recover from the first. *Lee* v. *Kendall*, 5 N. & M. 310; 3 A. & E. 707; 1 H. & W. 316; 5 L. J., K. B. 19.

Where, in trespass, there were three defendants, who appeared by the same attorney, and pleaded jointly, and at the trial one of them was acquitted:—Held, that the defendants' attorney was entitled to have one-third of his general bill of costs against the three set-off against the amount of the plaintiff's bill: and unless there were some special circumstances in the cases, the master was bound to adopt this principle of taxation. *Norman* v. *Climenson*, 1 D. (N.S.) 718; 4 Scott (N.R.) 735; 4 Man. & G. 243; 11 L. J., C. P. 191. Cp. cases, post, col. 842.

Bill dismissed—Some Defendants' Costs only.]—When a bill was dismissed without costs as against the principal defendant, the costs of the defendants who in their official capacity had been made parties were ordered to be paid by the plaintiff. *Eglin* v. *Dryden*, 18 L. T. 549; 16 W. R. 837.

Judgment against Defendants—Costs of Separate Pleading.]—In an action of tort against two defendants they pleaded jointly payment into court only. The plaintiff replied, denying the sufficiency of the payment. One of the defendants then obtained leave to amend his defence, and added an alternative separate defence, denying any liability to the plaintiff. At the trial a verdict was found against both defendants for an amount beyond the sum paid into court, and judgment was entered for the plaintiff for that amount, with costs to be taxed:—Held, by Lord Esher, M.R., affirming the judgment of the Queen's Bench Division, that the defendant who delivered the separate defence was alone liable for the costs occasioned to the plaintiff by and in consequence of the separate pleading, and that the other defendant was not liable for those costs. By Fry, L.J., dissenting, that both defendants were jointly and severally liable for all the costs of the action. *Stumm* or *Shumm* v. *Dixon*, 58 L. J., Q. B. 183; 22 Q. B. D. 529; 60 L. T. 560; 37 W. R. 457; 53 J. P. 500—C. A.

In a suit for account of tithes, the court, in decreeing an account and payment, may apportion the costs, where the defendants have several defences. But where there is a common defence,

the costs must be paid by the defendants generally. *Esdaile* v. *Peacock*, 1 Johns. 216.

—— **In Ejectment.**]—Three ejectments brought against a landlord and his two tenants were consolidated, the ejectment against one tenant (a pauper) to abide the event of the other, on the plaintiff obtaining judgment the landlord was ordered to pay the costs. *Thrustout* d. *Jones* v. *Shenton*, 10 B. & C. 110.

Where one defendant has appeared separately and limited his defence to part of the lands claimed he is liable for the whole costs unless he has confessed the claimant's title. *Johnson* v. *Mills*. 37 L. J., C. P. 57 ; L. R. 3 C. P. 22 ; 17 L. T. 215 ; 16 W. R. 132.

Payment to one Defendant not Payment to other.]—Where judgment against two defendants in a joint action of contract against both is set aside, at the instance of the defendant A. only, for irregularity, with costs (there being no rule to plead), and the costs are paid to the other defendant B., such payment is no answer to the demand of A. upon the allocatur. *Showler* v. *Stoakes*. 2 D. & L. 2 ; 13 L. J., Q. B. 230 ; 8 Jur. 449.

Co-Defendant's Costs paid by Defendant direct and not by Plaintiff.]—In cases where, under the old practice in Chancery, the court would have ordered the plaintiff to pay the costs of one defendant and have them over against another defendant, an order will now be made at once for one defendant to pay them to the other. *Rudow* v. *Great Britain Mutual Life Assurance Society*, 50 L. J., Ch. 504 ; 17 Ch. D. 600 ; 44 L. T. 688 ; 29 W. R. 585—C. A.

A decree for specific performance of a contract having been made against two defendants in a suit which had been rendered necessary chiefly by the misconduct of one of them :—Held, that as between the two defendants the costs ordered to be paid by both of them to the plaintiff ought to be borne by the defendant T., and that the other defendant should have liberty to apply in chambers as to the payment to him by T. of such costs. *Wilson* v. *Thomson*, 44 L. J., Ch. 527 ; L. R. 20 Eq. 459 ; 23 W. R. 744.

Defendants, who by persisting in an unfounded defence, have caused the suit to be proceeded with may be decreed to pay the costs of their co-defendants and of the plaintiff, so far as the suit was properly constituted. *Glynn* v. *Locke*, 2 Con. & L. 21 ; 3 Dr. & War. 11 ; 5 Ir. Eq. R. 61.

Costs against Individual Members of Corporation.]—The corporation of Dublin desired to change the name of a street ; in an action by householders for an injunction to restrain the corporation from effecting the change :—Held, that the corporation were not empowered to alter the name where such alteration would be injurious to the householders, and costs were awarded against certain members of the corporation who had taken an active part in passing the resolution to effect the intended change, and who had been named special defendants in the action. *Anderson* v. *Dublin Corporation*, 15 L. R., Ir. 410.

Body against whom prohibition sought—Two Sets of Costs.]—The Local Government Board moved to discharge a conditional order for a prohibition obtained against them by the Kingstown commissioners to prohibit them from conducting an inquiry as to the propriety of making certain provisional orders. The Dublin corporation had presented a memorial on which the inquiry was founded, praying that the board would order certain local acts to be amended :—Held, that as the board had no power to do what the corporation asked, as they were acting in a quasi legislative capacity, and prohibition would not lie against them ; and as they were justified in coming before the court to obtain a decision as to their powers, costs must be granted them against both the corporation and the commissioners. *Kingstown Commissioners, Ex parte, Local Government Board, In re*, 16 L. R, Ir. 150.

Joinder of Parties for the purpose of Costs.]—A vestry incorporated under the Metropolis Management Act, 1855, having resolved to incur certain unauthorised expenditure, an action for an injunction was commenced by the attorney-general, at the relation of a ratepayer, against the vestry and the movers and seconders of the resolution passed by the vestry, and some of their supporters. On motion on which the individual defendants were unrepresented, the vestry consented to a perpetual injunction without costs, and the plaintiffs then moved for judgment against the individual defendants in default of pleadings, and asked that they might be ordered to pay the costs of the action. The statement of claim did not ask for costs against the vestry : —Held, that it was irregular to make the individual members of the vestry defendants for the sole purpose of making them pay costs, and that as no costs were asked against the vestry there was no necessity for an indemnity to the vestry from costs occasioned to it by the individual defendants having led the vestry astray and that the action must therefore be dismissed as against the individual defendants, but without costs on either side. *Att.-Gen.* v. *Bermondsey Vestry*, 51 L. J., Ch. 848 ; 46 L. T. 852 ; 30 W. R. 872. Affirmed, 52 L. J., Ch. 567 ; 23 Ch. D. 60 ; 48 L. T. 445 ; 31 W. R. 463 ; 47 J. P. 153—C. A.

3. Contribution between Co-Defendants.

How Obtained.]—Where co-defendants are decreed to pay costs of an action, one co-defendant cannot, by an independent proceeding, obtain contribution in respect of such costs against the other. *Middleweek* v. *Dearsly*, 50 L. J., Ch. 777 ; 18 Ch. D. 236 ; 45 L. T. 404 ; 30 W. R. 45.

The costs of all parties liable to make a contribution should be added together and borne by them in proportion to the shares in which they are bound to contribute. *Moye* v. *Sparrow*, 22 L. T. 154 ; 18 W. R. 400.

Where two defendants were sued for tithes, and one made default, the court decreed the whole costs against the other, and left him to get the contribution as he could. *Lloyd* v. *Mackworth*, Bunb. 138.

Where one of several co-defendants in a tithe cause, wherein a general decree for costs had been made, survived the rest, the court refused to order the costs to be apportioned so as to relieve the survivor from the whole of them. *Michel* v. *Bullen*, 6 Price, 87.

Under a joint order for costs, one party

absconded, and was never served; a proceeding against the other good. *Bishop, Ex parte*, 8 Ves. 333.

In what cases.]—Where the same solicitor acts for executor, and the other co-defendants, the estate will be charged in respect of the executor's costs, only with that proportion of the sum due to the solicitor from his clients which the executor, as between himself and the co-defendants, ought to bear. *Harmer* v. *Harris*, 1 Russ. 155; 25 R. R. 20.

Where a bill was filed by a judgment creditor against three persons as devisees of certain lands, liable to the judgment debt:—Held, that one of the defendants, who had paid his portion of the debt before the filing of the bill, was entitled to his costs, as against his co-defendants, by whose default the suit was rendered necessary. *Hales* v. *Kirby*, 1 Ir. Eq. R. 116.

One of the several cestuis que trustent of a fund charged upon land, filed a bill against the owners of the estate, the other cestuis que trustent, and the trustees (who had refused to act), to raise its amount, and for payment thereof to the persons entitled:—Held, that the suit being for the benefit of all the cestuis que trustent they were bound to contribute, in proportion to their shares, to the difference between the taxed costs between party and party, and the plaintiff's costs of suit, taxed as if he were the trustee of the fund. *Bagge* v. ——, 3 Ir. Eq. R. 494.

Persons being churchwardens, overseers, and trustees of the poor, directed, in consequence of a resolution of the vestry, a prosecution to be instituted against certain persons accused of having concurred in the misapplication of parochial moneys. One of them, having been compelled to pay the bill of costs of the attorney employed in the prosecution, is entitled to contribution from the others. *Wrightson* v. *Masterman*, 5 L. J. (o.s.) Ch. 14.

Where a decree has been had against several defendants with costs, and one of them has been compelled to pay the whole costs, the court will, by consent, decree contribution between the co-defendants on motion in the same suit. *Pitt* v. *Bonner*, 1 Y. & Coll. C. C. 670; 6 Jur. 636.

In a suit for the recovery of tithe composition, there was a decree for the plaintiff, with costs The plaintiff levied the full amount of the costs off one of the defendants:—Held, that the defendant was entitled to contribution from his co-defendants; and that the court would compel payment of such contribution by summary order. *Staples* v. *Smith*, 6 Ir. Eq. R. 211.

Semble, one of the co-defendants having died after the costs were taxed, the other co-defendants were not bound to contribute in a greater proportion than if he were living. *Ib.*

A decree against several for payment of costs is joint and several, but the costs given by it are in the nature of a debt, and therefore there must be contribution between the parties liable. *Dublin (Archbishop)* v. *Trimleston (Lord)*, 13 Ir. Eq. R. 98.

In a suit where the plaintiff and defendants are members of a club, the plaintiff cannot be made to contribute to the defendants' costs. *Harvey* v. *Beckwith*, 4 N. R. 258.

4. Want of Parties.

When the hearing of an action is adjourned in order to allow parties to be added, the party who applies for the adjournment must pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day. *Lydall* v. *Martinson*, 5 Ch. D. 780; 37 L. T. 69; 25 W. R. 866.

Objection for want of parties not being taken till hearing, defendant generally does not get costs; but where the defect of parties was very gross and obvious, plaintiff was ordered to pay the costs of the day. *Keating* v. *Keating*, 1 Moll 218.

Cause on hearing ordered to stand over for want of parties; defendant not allowed costs of day because answer did not state objection. *Mitchell* v. *Bailey*, 3 Madd. 61.

Where a respondent takes a formal objection to a petition for want of parties, and the petition is for that cause ordered to stand over, the costs of the day are in the discretion of the court. *Thompson, Ex parte, Ecroyd, In re*, 3 Deac. & C. 612; 1 Mont. & Ayr. 312, 324.

Where a cause is ordered to stand over for want of parties, the plaintiff, it seems, is bound to pay the costs of the day. *Hill* v. *Airwan*, Jac. 163.

When at hearing of cause, objection is taken for want of parties, court should order cause to stand over, with liberty to amend bill by adding parties; plaintiff paying costs. *Green* v. *Poole*, 5 Bro. P. C. 504.

Where a defect of parties, not suggested by the answer nor insisted upon by the defendants at the hearing, rendered it necessary that the cause should stand over for the purpose of amending the record by adding parties, the defendants were held entitled to the costs of the day. *Att.-Gen.* v. *Hill*, 3 Myl. & C. 247. S. P., *Lowry* v. *Fulton*, 9 Sim. 104; 7 L. J., Ch. 158.

Objection for want of parties not being taken till hearing, defendant does not get his costs. *Court* v. *Jeffery*, 1 Sim. & S. 106.

Where a cause was ordered to stand over for want of parties, with liberty to amend, the defendants, not having taken the objection by their answer, were refused the costs of the day. *Wilson* v. *Broughton*, 7 L. J., Ch. 120.

Defendants admitted by their answer that all persons interested were parties to the suit, and at the hearing objected for want of parties, and the objection prevailed:—Held, that having misled the plaintiff, they ought to pay him the costs of the day. *Price* v. *Berrington*, 2 Beav. 285.

Where the court sees that a suit cannot effectually be brought to a hearing without certain parties, it will visit the costs arising from the defect of parties upon the party by whom the defect was occasioned, whether the objection for want of parties be taken by the answer or not. *Bailey* v. *Dennett*, 3 Y. & Coll. 459; 3 Jur. 844.

Where a defect of parties appears upon the bill, costs of the day will be allowed to the defendant, at the hearing, although he has not taken the objection by his answer. *Furze* v. *Sharwood*, 5 Myl. & C. 96.

Objection for want of parties raised by answer, and those parties added to the suit by amended bill, but not served, being out of the jurisdiction. On objection taken at the hearing:—Objection allowed, and costs of the day given, on the ground that the objection was raised by the answer, and the old practice in that respect remained unaltered. *Moodie* v. *Bannister*, 1 Eq. Rep. 180; 17 Jur. 520; 1 W. R. 405.

Where an objection for want of parties is not taken by answer or affidavit, the costs of the day will not be allowed, although such objection is taken successfully at the hearing. *Cox* v. *Stephens*, 2 N. R. 506; 9 Jur. (N.S.) 1144; 8 L. T. 721; 11 W. R. 929.

When it is plain on the face of the bill that a suit is defective for want of parties, a defendant raising the objection at the hearing is entitled to the costs of the day, although he may not have taken the objection by his answer. *Rowsell* v. *Morris*, 43 L. J., Ch. 97; L. R. 17 Eq. 20; 29 L. T. 446; 22 W. R. 67.

5. Misjoinder of Parties.

Defendants.]—Where one or two defendants in an action of contract is struck out of the record at the trial, and the plaintiff obtains a verdict against the other, the ordinar course of taxation is, to tax the whole costs of the action on each side, and deduct from the plaintiff's costs a moiety of the costs of the defence; by analogy to the old rule in the case of the acquittal of one of two defendants in an action of tort. *Redway* v. *Webber*, 13 C. B. (N.S.) 254; 32 L. J., C. P. 84; 7 L. T. 385.

Extra costs occasioned by an infant being made a defendant, who ought to have been made a plaintiff, not allowed. *Hosking* v. *Nicholls*, 1 Y. & Coll. C. C. 478; 11 L. J., Ch. 230; 6 Jur. 386.

The judge having at the trial substituted for the defendant on the record the name of the person really intended to be sued, and directed a verdict to be entered for the plaintiff against him; the court refused to order a verdict to be entered for the defendant named originally on the record, for the purpose of enabling him to get costs, there being suspicion of collusion. *Podmore* v. *Schmidt*, 17 C. B. (N.S.) 725.

Plaintiff decreed to pay the costs of a certificated bankrupt who had been made a defendant to the suit. *Pannell* v. *Hurley*, 2 Coll. 241.

Plaintiff decreed to pay, out of a fund recovered from persons who had acquired it by a breach of trust, the extra cost occasioned by making a party a defendant instead of a co-plaintiff to a bill of revivor. *Ib.*

Plaintiffs—Time for Objection.—The proper time for objecting to unnecessary parties is at the first hearing. If the defendant, the mortgagor, neglects to do so then, he must pay the costs of such parties. *Webb* v. *Blessington* (*Lord*), 1 Moll. 74.

—— **Indemnity—Solicitor.**]—When cause at issue one plaintiff applied to have name struck out of bill, on ground that he knew not of its insertion, defendant objected, he being only plaintiff of ability to pay costs. Objection good, and application refused; but solicitor, who inserted plaintiff's name, ordered to indemnify him. *Fitterton* v. *Osborne*, Dick. 350.

Although the name of one of the plaintiffs was made use of without his authority, yet he must remain liable to the costs of the suit, and must recover from the solicitor any expense he may be put to on that account. *Dundas* v. *Dutens*, 2 Cox, 236. S. P., *Stuckey*, *Ex parte*, id. 283.

A bill being dismissed with costs, a person who was made a co-plaintiff, without his authority or knowledge, is liable for the costs to the defendant, but is entitled to be indemnified by the solicitor. *Wade* v. *Stanley*, 1 Jac. & Walk. 674.

A person named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trusts, is entitled to his costs as between solicitor and client. *Sherratt* v. *Bentley*, 1 Russ. & M. 655.

Costs of application by married women not a party in the cause in her own name, given against the solicitor serving the notice. *Betagh* v. *Burke*, 2 Moll. 384. *See now* Order XVI. r. 11.

Solicitor acting without Authority.]—*See* Practice (Parties)—Solicitor.

6. In Particular Cases.

Trustee in Bankruptcy.]—*See* Bankruptcy.

Solicitor.]—*See* Solicitor.

Third Parties.]—*See* Practice.

Executors.]—*See* Executor and Administrator.

Infants.]—*See* Infant.

Liquidator.]—*See* Company.

Married Women.]—*See* Husband and Wife.

Witnesses.]—*See* Evidence.

Mortgages.]—*See* Mortgage.

Attorney-General.]—*See* Crown.

Crown.]—*See* Crown.

Sheriff.]—*See* Sheriff.

Trustees.]—*See* Trust and Trustee.

In Formâ Pauperis.]—*See* Practice (Parties).

F. Several Issues.

1. Since Judicature Acts.

See Ord. LXV. r. 2.

"Event" to be read Distributively.]—When in the same action the plaintiff obtains a verdict and judgment as to one cause of action, and the defendant obtains a verdict and judgment as to other and distinct causes of action, the word "event" in Ord. LV. r. 1, is to be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or the court. Rule 62 of Rules of Hilary Term, 1853, is repealed by s. 33 of the Judicature Act, 1875. *Myers* v. *Defries*, 49 L. J., Ex. 266; 5 Ex. D. 180; 42 L. T. 137; 28 W. R. 406—C. A.

Where, in an action for the recovery of land, the plaintiff has succeeded as to certain definite closes, and the defendant has succeeded as to other closes, although there was only one demise, the verdict is to be entered distributively, and the case treated as if there were separate issues. The plaintiff therefore will get the general costs of the action and the costs of the issues found for him, and the defendant the costs of those issues on which he was successful. *Jones* v. *Curling*, 53 L. J., Q. B. 373; 13 Q. B. D. 262; 50 L. T. 349; 32 W. R. 651—C. A.

Plaintiff succeeding on part of Claim—Apportionment of Costs.]—In an action to recover the price of work done in and about a house the plaintiff claimed for three distinct items of work and recovered a sum of 37*l.* in respect of one of the items. An order was thereupon made "that the plaintiff recover against the defendant such costs as one of the masters may find that he has rightly incurred in recovering the above amount to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded to be also taxed:"—Held, that upon the true construction of the order the plaintiff was entitled upon taxation to be allowed the general costs of the cause, excluding only such costs as were applicable exclusively to the two items on which he failed, and that the defendants were entitled to be allowed such costs only as were incurred exclusively with respect to the two items on which their defence was successful. *Sparrow* v. *Hill*, 50 L. J., Q. B. 675; 8 Q. B. D. 479; 44 L. T. 917; 29 W. R. 705—C. A.

—— **Chancery Division.**]—The practice in the taxing-master's office with regard to the apportionment of the costs of an action in the chancery division, where each party is partially successful at the trial, is settled according to the form of order in *Knight* v. *Purssell* (49 L. J., Ch. 120). *Jenkins* v. *Jackson*, 60 L. J., Ch. 206; [1891] 1 Ch. 89; 63 L. T. 688; 39 W. R. 242—C. A.

A plaintiff claiming an injunction in respect of three separate subjects of complaint, succeeded as to one, but failed as to the remainder. By the order, taxation was directed to the costs of the defendant of so much of the action as had been dismissed, and of the plaintiff of the rest of the action, with a set-off of the costs of the plaintiff against those of the defendant. The taxing-master taxed the plaintiff's and the defendant's costs of the whole action and allowed one-third to the plaintiff and two-thirds to the defendant. Upon a summons by the plaintiff, to vary the certificate, by ordering each item to be considered separately, and according to the subject of complaint, in respect of which each item might turn out to have been incurred, to be paid by the plaintiff or the defendant, as the case may be:—Held, that the taxing-master had proceeded upon the usual principle, and that the certificate was correct. *Knight* v. *Purssell*, 49 L. J., Ch. 120; 41 L. T. 581; 28 W. R. 90.

Issues on which Plaintiff Nonsuited.]—In an action tried by a jury where the plaintiff succeeds upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled under Ord. LV. r. 1, to the costs of the issues upon which the plaintiff was nonsuited. *Abbott* v. *Andrews*, 51 L. J., Q. B. 641; 8 Q. B. D. 648; 30 W. R. 779.

When Counterclaim set up.]—In an action brought for a liquidated demand of 25*l.* for work and labour, the defendant pleaded a cross-liquidated demand as a counterclaim, and the jury found for the plaintiff on the statement of claim for 22*l.* 8*s.* 6*d.*, and for the defendant on the counterclaim of 9*l.* 13*s.*, and the judge at the trial directed judgment to be entered for the plaintiff for 12*l.* 15*s.* 6*d.*, with his costs. The taxing-master allowed the defendant full costs, and on motion to review his taxation, the exchequer division declared the plaintiff entitled to his full costs, and directed judgment to be entered that the plaintiff do recover from the defendant 22*l.* 8*s.* 6*d.* in respect of the cause of action in the statement of claim, with costs, and that the defendant do recover from the plaintiff 9*l.* 13*s.* in respect of the cause of action in the counterclaim, with costs; that the said sums and costs so recovered should be set-off, and the party in whose favour there should be a balance should recover from the other such balance:—Held, that one judgment should be entered for the plaintiff for 12*l.* 15*s.* 6*d.*, and that the plaintiff having recovered less than 20*l.* was entitled to no costs. In such a case a true set-off is not deprived of its real character of a defence by being described and pleaded as a counterclaim. *Ryan* v. *Fraser*, 16 L. R. Ir. 353—C. A.

See also ante, col. 695.

Defendant withdrawing Defence.]—Where one of two defendants to an action of ejectment withdrew his defence, and was ordered, as one of the terms on which such withdrawal was permitted, to pay to the plaintiffs their costs of the action "so far as they were occasioned by the defendant's defence" down to the date of the application to withdraw:—Held, that the effect of the order (the terms of which followed the language of the Common Law Procedure Act, 1852, s. 205, and were practically identical with that of Judicature Act, Ord XXIII. r. 1) was to relieve the withdrawing defendant from the general costs of the action, and to make him liable only for the additional or increased costs, over and above the general costs, occasioned by such defendant having defended the action. *Real and Personal Advance Co.* v. *McCarthy*, 18 Ch. D. 362; 45 L. T. 116; 30 W. R. 481.

Reference—"Costs to abide Events"—Each Party in part Successful.]—A plaintiff having claimed for goods sold and delivered, and for commission, and the defendants having counterclaimed for moneys collected by the plaintiff on the defendants' account and for work and labour, the action was referred to an arbitrator under an order of reference whereby "the costs of the cause, and the costs of the reference and award, shall abide the event." The arbitrator found the issues on the claim in favour of the plaintiff, and awarded him a sum of money in respect thereof, and found the issues on the counterclaim in favour of the defendants, and awarded to them a sum of money in respect thereof. After deducting the sum found for the plaintiff from the sum found for the defendants, a balance of 97*l.* was due to the defendants:—Held, that the word "event" in the order of reference must be construed distributively, and that judgment must be entered for the defendants, who were entitled to the costs of the action, reference, and award, but that the plaintiff was entitled to the costs of the issues found in his favour. *Baines* v. *Bromley* (6 Q. B. D. 691) explained. *Lund* v. *Campbell*, 54 L. J., Q. B. 281; 14 Q. B. D. 821; 53 L. T. 900; 33 W. R. 510—C. A.

In an action the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into court in satisfaction of the plaintiff's claim. This sum the plaintiff did not accept. The cause was referred, the costs of the cause, reference, and award to abide the event. The arbitrator found

all the issues, except one as to special damage, in favour of the plaintiff; and he also found that the money paid into court was enough to satisfy the plaintiff's claim in respect of the subject-matters of the action:—Held, that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiff was entitled to the costs of the issues on which he had succeeded, for that the costs ought in such a case to be taxed in the same manner as though the action had been tried out in the ordinary course of law. *Goutard* v. *Carr*, 53 L. J., Q. B. 55; 32 W. R. 242—C. A.

Where an action is referred to an arbitrator, "the costs of the said cause, of the reference, and of the award to abide the event," and the plaintiff is successful on his claim, and the defendant on his counter claim, the amount recovered by the plaintiff exceeding the amount recovered by the defendant on his counter claim, the defendant is entitled to the costs of the issues on which he is successful, notwithstanding that the subject-matter of the claim and counterclaim is the same. *Pearson* v. *Ripley*, 50 L. T. 629; 32 W. R. 463.

On a reference to arbitration, the costs "to abide the event," the word "event" means the event of the whole action, and where the plaintiff is substantially successful in the action he is entitled to the general costs of the action, and the defendant only to the costs of those issues on which he has been successful, notwithstanding that on the reference the defendant has recovered more upon his counterclaim than the plaintiff on his claim, and that the success of the plaintiff on the whole action is due to the defendant having paid money into court prior to the reference. *Waring* v. *Pearman*, 50 L. T. 633; 32 W. R. 429.

An action and all matters in difference were referred, the costs of the cause, reference, and award to abide the event:—Held, that the word "event" must be construed distributively; and that upon an award by the arbitrator deciding in the plaintiff's favour upon the claim, but in the defendant's favour upon a matter in difference not raised in the action, the plaintiff was entitled to the costs of the action and the defendant to the costs of the matter on which he had succeeded. *Hawke* v. *Brear*, 54 L. J., Q. B. 315; 14 Q. B. D. 841; 52 L. T. 432; 33 W. R. 613.

The appellants brought an action against the respondent in which their statement of claim concluded for a lump sum as unliquidated damages. The cause was referred upon the terms that the award of the arbitrators should be "for a sum certain for the plaintiffs, or an award for the defendant as the arbitrators may find," with liberty "to enter the said award as the verdict in this cause, and to sign final judgment therein"; costs to follow the verdict and be taxed in the ordinary way. The arbitrators awarded to the plaintiffs an amount less than one-quarter of that claimed in the statement of claim, and a verdict was entered for the sum so found due:—Held, that, even apart from the terms of the reference to arbitration, the court had no power to direct a verdict to be entered for the defendant for the difference between the amount claimed by the plaintiffs and the amount awarded by the arbitrators, and the costs to be taxed on the footing that the defendant had succeeded as to parts of the claim. *O'Rourke* v. *Railways Commissioner*, 59 L. J., P. C. 72; 15 App. Cas. 371; 63 L. T. 66—P. C.

—— **Plaintiff recovering less than £20.**]—In an action of contract the defendant counterclaimed. By the award of a special referee it was found that the plaintiffs were entitled on their claim to 13*l.* 12*s.* 6*d.*, and that the defendant was entitled on the counterclaim to 63*l.* 8*s.* 6*d.*:—Held, that by reason of the provision of s. 5 of the County Courts Act, 1867, the plaintiffs were not entitled to the costs of the issues found for them on the claim. *Lund* v. *Campbell* (supra), distinguished. *Ahrbecker* or *Ahrbecket* v. *Frost*, 55 L. J., Q. B. 477; 17 Q. B. D. 606; 55 L. T. 264; 34 W. R. 789. *And see also* post, cols. 814, et seq.

2. Before Judicature Acts.

Verdict entered Distributively.]—Where, in an action for disturbance of a ferry, the plaintiff alleged in his declaration that he was possessed of an ancient ferry for passengers and goods to and from A., from and to B., and the defendant pleaded not possessed, and a traverse of the ancient and entire right of ferry, and the jury found that there was a ferry from A. to B. only:—Held, that the verdict might be entered distributively for the plaintiff for so much as was proved at the trial. *Giles* v. *Groves*, 6 D. & L. 146; 12 Q. B. 721; 17 L. J., Q. B. 323; 12 Jur. 1084.

In an action for conversion of goods, the verdict may, on the general issue, and a plea of not possessed, be entered distributively; and when a verdict has been taken for the plaintiff, subject to a point reserved, on which the defendant has leave to move to enter the verdict, or to reduce the amount of damages, and the court, on the hearing of the rule, determines in favour of the plaintiff, except as to a portion of the goods claimed, distinguishable whether as fixtures or otherwise, this is equivalent to a direction that the verdict should be entered for the defendant for such portion, and not merely that the damages shall be reduced by the value of such goods, and the costs will follow such entry of the verdict, as on a distributive issue. *Freshney* v. *Wells*, 26 L. J., Ex. 228.

When a cause is taken down to trial, while demurrers are pending, and at the trial there is a verdict for the plaintiff subject to leave to enter it for the defendant, and the court holds the counts bad, and also directs the verdict to be entered for the defendant on these counts, the plaintiff is not entitled to the general costs of the trial on those counts, save as to particular issues on which he has really succeeded in point of proof. *Oxenham* v. *Smith*, 10 W. R. 649.

Action for money had and received in respect of sums paid under protest on the admission of the plaintiff to copyhold premises, alleged to be charged in excess. The particulars of demand consisted of eleven items, amounting in all to 17*l.* 1*s.* On a case reserved, it appeared that the plaintiff insisted that the principle on which the fees were charged was faulty, of which opinion was the court in some instances, but not all; and the court directed that the master should reduce the charges by allowing only a quantum meruit in respect to the greater part of the charges. On one item, 3*s.* for proclamations, the master allowed the whole charge; on three items he disallowed the charge altogether, and

in all the others made a reduction. The whole reduction of the charges amounted to 9*l.* 1*s.* 4*d.*:—Held, that the defendant was entitled to have the verdict entered distributively, viz.: as to 9*l.* 1*s.* 4*d.* for the plaintiff; and as to the residue, 7*l.* 19*s.* 8*d.* for the defendant, and that each party was to be allowed his costs in respect of so much as he had succeeded upon. *Traherne* v. *Gardner*, 8 El. & Bl. 161; 26 L. J., Q. B. 259; 3 Jur. (N.S.) 1100; 5 W. R. 817.

If a plea contains several substantial defences (so that it might have been divided into so many separate pleas), then any one of those defences being proved, the defendant succeeds on the issue of that plea, but has the costs only of so much of the plea as is found for him, and the plaintiff has no costs in respect of the rest of the plea. *Reynolds* v. *Harris*, 3 C. B. (N.S.) 267; 28 L. J., C. P. 26; 5 Jur. (N.S.) 365.

The defendant's costs in such case include the expense of evidence applicable to the part of the plea found for him, though it may also be applicable to the residue of the plea. *Ib.*

Apart from costs in the cause, costs are only given by the 15 & 16 Vict. c. 76, s. 75, to a party who succeeds upon an issue raised on the record. *Ib.*

Where a plea is pleaded to the whole declaration, which includes two separate claims, and the defendant succeeds as to the first claim, but fails as to the second, and a verdict is entered distributively, the costs of the issues are to be taxed as though the plea had been originally separated into two, each pleaded to the parts respectively. *Davis* v. *Thomas*, 5 Jur. (N.S.) 709.

When a declaration contains a count for slander with other counts, and the jury finds a general verdict for the plaintiff, with 40*s.* damages, the verdict must be apportioned between the different counts, and the plaintiff is only entitled to recover so much for costs as the damages, which are apportioned to the count for slander, amount to. *Burton* v. *Low*, 16 L. T. 385; 15 W. R. 791.

A declaration alleged that the plaintiff obtained judgment and execution against B., and the defendant, as sheriff, arrested him but allowed him to escape. Pleas—first, not guilty; and, secondly, that B. produced to the sheriff's officer a certificate of the registration of a deed between B. and his creditors, whereupon the officer discharged B. Issue joined, and demurrer to the second plea; and replication, that the cause of action against B., in respect of which judgment was recovered, first accrued after the registration of the deed, and the plaintiff was not a creditor of B., bound by the deed. Issue joined on the replication, and demurrer. Judgment was given on the demurrers, that the second plea was bad in substance and the replication good. A verdict was afterwards found for the plaintiff on not guilty, the jury assessing the damages at the amount of the judgment debt; and the court afterwards, on the facts, directed the verdict on the replication to the second plea to be entered for the defendant:—Held, that the defendant was entitled to the postea, and to have the judgment entered for him; for that it was immaterial that the second plea appeared on the record as bad, as the replication and verdict cured the defect, and showed that the defendant had succeeded on the merits. *Dignam* v. *Baily*, 10 B. & S. 891; 40 L. J., Q. B. 68; L. R. 6 Q. B. 47; 23 L. T. 706; 19 W. R. 325—Ex. Ch.

To a count upon a marine policy of insurance upon a submarine telegraph cable, alleging a total loss, the defendant pleaded that the subject-matter of the insurance was not, nor was any part thereof, during the risk covered by the policy, lost by the perils insured against. The plaintiff, at the trial, sought to recover on the policy for the depreciation in the value of his interest in the cable consequent upon the failure of the scheme (the cable never having been successfully laid), and also for the value of 373 miles of cable, which were admitted to have been lost by the perils insured against; and had a verdict in respect of the lost portion of the cable only:—Held, that in such case the count must be regarded as containing two distinct allegations, one in respect of a total and the other in respect of a partial loss; and the plea as applicable to either; and that the issue raised was therefore a divisible one, on which the verdict should be entered distributively, so as to entitle each party to costs proportioned to his success in the action. *Paterson* v. *Harris*, 2 B. & S. 814; 31 L. J., Q. B. 277; 9 Jur. (N.S.) 173; 6 L. T 576; 10 W. R. 757.

Plaintiff Nonsuited.]—A defendant in case of a nonsuit was entitled to costs, under 23 Hen. 8, c. 15, although he may not have had a verdict in his favour on every part of the record. *Elderton* v. *Emmens*, 5 D. & L. 680; 17 L. J., C. P. 277; 12 Jur. 728.

Cases before C. L. P. Act of 1852.]—Action for work and labour. Pleas (except as to 60*l.*), never indebted, payment and set-off; and as to 60*l.*, payment into court. Issue having been joined on all the pleas, the first was found for the plaintiff, and the other two for the defendant:—Held, that the plaintiff (the defendant being entitled to the costs of the cause) was not entitled to his costs as a witness, unless his evidence was confined exclusively to the issue found for him; and that if he was called to prove that a greater debt once existed than the payment and set-off covered, his evidence was not so confined. *Clothier* v. *Gann*, 13 C. B. 220; 22 L. J., C. P. 98; 17 Jur. 736.

A declaration contained three counts, to the first and third of which the defendant demurred, paying 25*s.* into court on the second, and pleading to the fourth. The plaintiff joined in demurrer, took out the 25*s.* in satisfaction as to the second count, and joined issue on the plea to the fourth count. At the trial there was a verdict for the defendant on the fourth count, and a contingent assessment of damages for the plaintiff on the demurrer to the first and third counts; and the plaintiff afterwards obtained judgment on the demurrer:—Held, that the defendant having succeeded upon the only issue of fact, was entitled to the costs of the trial, deducting the costs which the plaintiff would have been entitled to upon a writ of enquiry as to the first and third counts. *Smith* v. *Hartley*, 11 C. B. 678.

Where several pleas are pleaded, and one of them, which amounts to an answer to the whole action, is found for the defendant, and others for the plaintiff, the latter is entitled to the costs of the issues found for him, including a portion of the briefs and counsel's fees. *Hazlewood* v. *Back*, 9 M. & W. 1; 1 D. (N.S.) 94; 11 L. J., Ex. 89; 6 Jur. 107.

Action for false imprisonment. Pleas, not guilty and a justification under a ca. sa. Repli-

cation, a breaking open of an outer door; rejoinder thereupon. Verdict for the defendant on the first, and for the plaintiff on the second issue:—Held, that the defendant was entitled to the general costs of the cause. *Newton* v. *Holford*, 2 D. & L. 826; 1 C. B. 141; 14 L. J., C. P. 145.

Where a defendant pleaded the general issue, and several special pleas, which were involved in the general issue, and the defendant succeeded on the general issue, but the special pleas were found for the plaintiff, the general issue is to be construed distributively, for the purpose of the taxation of costs; and the defendant is not to be allowed the costs on so much of the general issue as is involved in the special pleas found for the plaintiff, but such last-mentioned costs are to be allowed to the plaintiff. *Nicholson* v. *Dyson*, 1 D. & L. 276; 11 M. & W. 545; 12 L. J., Ex. 336.

In trover for waggons, wheelbarrows, iron rails, &c., a verdict was given for the plaintiff for 1.850*l.*, but afterwards, on the argument of a special case, was reduced by consent to 600*l.*, and the following rule was drawn up: "It is ordered, by consent, that the verdict found for the plaintiff on the trial of this cause be reduced to 600*l.*, and that, as to the residue of the claim, the verdict be entered for the defendant":—Held, that this was the proper course, the issue being divisible, and that the plaintiff was not entitled to have the verdict entered generally for him; but the defendant was entitled to a verdict and his costs, as to so much of the cause of action on which he had succeeded. *Williams* v. *G. W. Ry.*, 8 M. & W. 856; 1 D. (N.S.) 16; 10 L. J., Ex. 472.

Action for selling a vessel under a misrepresentation that it was fit to be placed in class A. in the register at Lloyd's. Pleas, not guilty; and a traverse of the unfitness The jury found a verdict for the defendant on the first issue, and for the plaintiff on the second:—Held, that the master correctly taxed the costs in disallowing to the defendant the costs of the witnesses called by him to prove the second issue, and in allowing to the plaintiff the costs of the witnesses called by him for that purpose; although it might have been otherwise if the general issue only had been pleaded. *Daniel* v. *Barry*, 3 G. & D. 277; 4 Q. B. 59; 12 L. J., Q. B. 113; 7 Jur. 41.

Where a plaintiff succeeded upon the issue of never indebted, but the defendant upon the plea of set-off:—Held, that the plaintiff was not entitled to the costs of a witness whose evidence was material to prove the issue found for the defendant, as well as that found for the plaintiff. *Freeman* v. *Rosher*, 18 L. J., Q. B. 105; 13 Jur. 427.

A party succeeding on an issue which entitles him to the postea and the general costs of the cause, is entitled to the costs of all witnesses attending to prove that issue, whether their evidence applies to any other issue or not. But the opposite party is entitled only to the costs of such witnesses as attend solely to prove the issue on which he succeeds; and if they also attend to prove an issue on which he fails, he is not entitled to any costs in respect of them. *Welby* v. *Brown*, 5 D. & L. 746; 1 Ex. 770.

Where the general issue is pleaded to a declaration containing several counts, it tenders a distinct issue upon each count; and the defendant is entitled to the costs of those counts found for him. *Cox* v. *Thomason*, 2 C. & J. 498; 1 D. P. C. 572; 2 Tyr. 411; 1 L. J., Ex. 187.

"Costs of issue" include costs of the trial of them. *Eyre* v. *Thorpe*, 6 D. P. C. 768.

The defendant is entitled to the costs of all issues found for him, although they exceed the costs of those found for the plaintiff. *Milner* v. *Graham*, 2 D. P. C. 422.

And if a verdict is found for the plaintiff on some counts, and for the defendant on others, the defendant is entitled to have the costs of those counts which are found for him deducted from the general costs in the cause. *Knight* v. *Brown*, 2 M. & Scott, 797; 9 Bing. 643; 1 D. P. C. 730.

If a defendant pleads the general issue and several special pleas, and the jury finds for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas. *Hart* v. *Cutbush*, 2 D. P. C. 456.

Trespass. Pleas, not guilty, and son assault demesne; the defendant having a verdict on the latter plea, and the plaintiff on the former, the defendant is not entitled to the costs of the issue on the former. *Mullins* v. *Scott*, 5 Bing. (N.C.) 423; 8 L. J., C. P. 220.

The rule does not apply to paupers; and the costs of such of the opposite parties, who have got verdicts, cannot be deducted from the plaintiff's costs of the cause. *Guggenheim* v. *Lane*, 4 D. P. C. 482; 1 M. & W. 136; 1 Gale, 343; 1 Tyr. & G. 216.

When there are several issues, some of which are abandoned at the trial, the plaintiff is entitled only to the costs of those parts of such briefs, and such of the witnesses as were necessary for the issues on which he succeeded. *Ib.*

Where, in an action for libel, on the general issue, the jury found for the plaintiff, and also found as a fact, that a great part of the declaration did not apply specifically to the plaintiff, though there were innendoes, by which it was endeavoured to connect him with the matter complained of:—Held, that the defendant was entitled to the costs of that part. *Prudhomme* v. *Frazier*, 4 N. & M. 512; 2 A. & E. 645; 1 H. & W. 5; 4 L. J., K. B. 87.

Where some issues are found for the plaintiff, and some for the defendant, the latter will be entitled to the costs of the witnesses who are called exclusively in support of the issues found for him, but not of those who are also examined to disprove the issues found for the plaintiff. *Crowther* v. *Elwell*, 4 M. & W. 71; 6 D. P. C. 697; 1 H. & H. 187; 7 L. J., Ex. 251; 2 Jur. 760.

In an action of libel, in which there was a plea of not guilty, which was found for the defendant, and a special plea, in support of which no evidence was given, but which was found for the plaintiff:—Held, that the plaintiff was entitled to the postea, for the purpose of having his costs on the second issue. *Empson* v. *Fairfax*, 8 A. & E. 296; 3 N. & P. 385; 1 W. W. & H. 353; 2 Jur. 441. See *Spencer* v. *Hanerton*, 4 A. & E. 413; 6 N. & M. 22; 1 H. & W. 700.

Where, in trespass, the jury found for the defendant upon a plea which went to the whole cause of action, and the judge thereupon discharged them as to the other issues:—Held, that the defendant was not entitled to the costs of the pleadings or witnesses in respect of the issues upon which no verdict was given. *Vallance* v. *Evans*, 2 D. P. C. 118; 1 C. & M. 856; 3 Tyr. 863; 2 L. J., Ex. 272. S. P., *Butler* v. *Hobson*, 5 Scott, 824.

Before the issue was made up, the cause was referred, the costs of the cause were to abide the event of the award. The arbitrator found that the plaintiff had sustained damage to a certain amount upon one of the breaches of covenant specified in his particulars; and as to the rest, that he had no cause of action against the defendant:—Held, that the defendant was entitled under r. 74 H. T., 2 Will. 4, to the costs of those issues that were found for him, notwithstanding the cause was not in strictness at issue. *Daubuz* v. *Rickman*, 1 Scott, 564; 4 D. P. C. 129; 1 Hodges, 75.

A party entitled to the costs of the pleadings on any issue found for him, is entitled to all other expenses incidental to those pleadings, as briefs, witnesses, &c. *Bird* or *Bond* v. *Higginson*, 6 N. & M. 799; 5 A. & E. 83; 2 H. & W. 278; 6 L. J., K. B. 262.

If the issues found for the defendant, taken together, form an answer to the whole of the declaration, the defendant is entitled to the general costs of the cause; although some issues may have been found for the plaintiff, and damages assessed on them. *Probert* v. *Phillips*, 5 D. P. C. 473; 2 M. & W. 40; 2 Gale, 235; 6 L. J., Ex. 10.

So also where the defendant succeeds on one issue, which goes to the whole cause of action. *Bayley* v. *Long*, 5 D. P. C. 616; 3 Bing. (N.C.) 781; 4 Scott, 481; 6 L. J., C. P. 191; 1 Jur. 310. S. P., *Smith* v. *Brown*, 5 D. P. C. 736; 3 Hodges, 144.

Trespass. Justification under a right of way to carry water and goods. As to the water, verdict for the defendant; as to the goods, verdict for the plaintiff:—Held, that the defendant had substantially succeeded, and was entitled to the general costs in the cause. *Knight* v. *Woore*, 3 Bing. (N.C.) 534; 4 Scott, 360; 5 D. P. C. 487; 3 Hodges, 1; 6 L. J., C. P. 135; 1 Jur. 84.

Held, also, that he was entitled to the costs of a witness who spoke as to the water, notwithstanding he spoke also as to the goods. *Ib.*

A declaration alleged that the plaintiff caused to be shipped on board a vessel of the defendant's certain wares and merchandises, to be safely and securely carried by the defendant from Buenos Ayres to Liverpool, and then to be delivered to the plaintiff. Breach, that he did not safely or securely carry the wares and merchandises, but that, through their improper stowage and negligence, the same were broken and damaged. The defendant pleaded, that he did not promise; and that the wares and merchandises were not broken or damaged by the improper stowage or negligence. The jury found for the plaintiff on the first issue, and for the defendant on the second, except as to one cask of grease, which had been injured by a cask of tallow falling upon it, and they gave the plaintiff 12*l.* damages:—Held, that this finding amounted to a general verdict for the plaintiff, the second issue not being divisible; and that the defendant was not entitled to costs in respect of that part of the issue found for him. *Anderson* v. *Chapman*, 7 D. P. C. 822; 5 M. & W. 483; 9 L. J., Ex. 9; 3 Jur. 1154.

In Chancery.]—Apportionment of costs where the plaintiff partly succeeds and partly fails. *Bankart* v. *Tennant*, 39 L. J., Ch. 809; L. R. 10 Eq. 141; 23 L. T. 137; 18 W. R. 639.

Costs were allowed to plaintiffs, though they failed in a great part of their claim. *Hill* v. *South Staffordshire Ry.* 43 L. J., Ch. 556; L. R. 18 Eq. 154.

When there is upon the face of a bill that which will give a right to relief in equity, that right will not be affected by the circumstances that there are also in the bill allegations of personal fraud, which might give a farther or a different right to relief, if they were proved. If they are not proved the proper course is to dismiss, with costs, so much of the bill as is founded on them, but not to dismiss the bill itself. *Thompson* v. *Eastwood*, 2 App. Cas. 215. *See also* post. col. 788.

When different demands arise in a cause, the costs should be arranged as the equities between the parties require. *Shine* v. *Gough*, 2 Ball & B. 34.

A suit was instituted for the administration of an estate, and to charge an executor with interest on balances retained in his hands; the decree directed a taxation of the costs of so much of the suit as sought to charge interest:—Held, that this comprised, not only the excess of costs incurred by the question of interest, but also an apportionment of the general costs of the suit. Mode of taxation of a bill of costs where an apportionment is directed. *Heighington* v. *Grant*, 1 Beav. 228; 9 L. J., Ch. 142. And see *S. C.*, 10 L. J., Ch. 12; 11 L. J., Ch. 171; 4 Jur. 1052.

The defendants will be allowed the costs of that part of the bill which they disprove; though substantially the bill may be maintained. *Metcalf* v. ——, 4 Jur. 716.

Where there are several issues, and some are found for plaintiff, and others for defendant, the parties will be allowed costs on issues found in their favour, and must pay in those against them. *Prevost* v. *Benett*, 2 Price, 272.

An information related to two objects; one failed; and the decree dismissed so much of the information as related to it, without costs, and ordered the defendant to pay the informant his costs of the suit:—Held, that the taxing-master was wrong in apportioning the general costs of suit between the two objects. *Att.-Gen.* v. *Carrington* (*Lord*), 6 Beav. 454; 12 L. J., Ch. 453.

The court of exchequer will not apportion the costs as between plaintiff and defendant, in a suit where the plaintiff succeeds in one only of several points put in issue by the bill; but will give the plaintiff the general costs of the suit, deducting only his additional costs by the claims which he fails to establish; and the defendant will only be entitled to the additional costs he is put to by the introduction of such unsuccessful claims. *Jesus College* v. *King*, 3 Y. & Coll. 662; 9 L. J., Ex. Eq. 15; 4 Jur. 120.

When a plaintiff in his bill alleges a case which he proves, and upon which he is entitled to relief, and also alleges other matters which he fails to prove, if the case alleged and proved can be separated from the other matters alleged and not proved, the bill will not be dismissed, but the plaintiff will obtain a decree giving him the relief to which he is entitled, and only that part of his bill which relates to the matters alleged and not proved will be dismissed with costs. *Parker* v. *MacKenna*, 44 L. J., Ch. 425; L. R. 10 Ch. 96; 31 L. T. 739; 23 W. R. 271.

Several defendants entitled to a fund in equal shares; and long enquiries being necessary as to one share only, the costs were apportioned. *Basevi* v. *Serra*, 14 Ves. 313.

A party, in possession under a title derived under a tenant for life and equitable incumbrancer, having set up the Statute of Limitations as a defence against the claim of a devisee

of the reversion, was decreed to pay so much of the costs of the cause as was incurred by the defence, so far as it rested on the Statute of Limitations, and to abide his own costs of the remainder of the suit up to the hearing. *Incorporated Society for Protestant Schools* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

A bill was filed for two distinct objects. The decree ordered that the plaintiff's bill, so far as it related to one of the objects, should stand dismissed with costs, and, after granting the relief sought in respect of the other object, ordered that "the costs of the plaintiff of this suit, up to and including the hearing, other than such costs as have been occasioned by so much of the bill as is hereby dismissed, be taxed," &c.:—Held, that the defendant was entitled to an apportionment of the general costs. *Proud* v. *Bates*, 35 L. J., Ch. 341; 14 L. T. 14; 14 W. R. 306.

The plaintiffs were order to pay to the defendant so much of the costs "as had been occasioned" by one object of the suit, and a decree was made with costs as to the other objects. The taxing-master considered the suit to be for two objects, and allowed the plaintiff one-half only of the general costs common to both:—Held, that he was right. *Hardy* v. *Hull*, 17 Beav. 355.

Of the two objects of a bill, one succeeded and the other failed. The costs not being easily separable, a decree was made without costs on either side. *Rochdale Canal Co.* v. *King*, 16 Beav. 630; 22 L. J., Ch. 604; 17 Jur. 1001. And see *Hardingham* v. *Thomas*, 2 W. R. 547.

A plaintiff though successful, ordered to pay all costs occasioned by unsustained charges on the bill. *Blest* v. *Brown*, 4 De G. F. & J. 367; 8 Jur. (N.S.) 602; 6 L. T. 620; 10 W. R. 569.

B., a second mortgagee, filed a bill for redemption and foreclosure against F., who held the first and third mortgages on the property. F., by his answer, disputed B.'s security by denying the consideration, and filed a cross bill for foreclosure impeaching that security. By the decree made in both suits, F.'s bill was dismissed with costs, so far as it sought to set aside B.'s security, and F. was ordered to pay the costs of the first suit, "so far as the same have been increased by the answer of F. impeaching the validity of the security of B." The master held that the costs incurred by B. in proving the consideration, and consequent thereon, were the increase of costs in the first suit which F. was to pay, and that the expense of the hearing must be apportioned according to the number of folios, and that the costs of the second suit must be apportioned. B. objected to this taxation, and contended that he ought to be allowed all his costs except such as would have been incurred if the suits had been ordinary redemption and foreclosure suits heard as short causes, and that F. ought to have all his costs disallowed, except such as would in that case have been incurred, the difference being attributable to F.'s impeaching B.'s security:—Held, that the master had proceeded on a correct principle. *Begbie* v. *Fenwick*, L. R. 6 Ch. 869; 25 L. T. 441; 20 W. R. 67.

Separation of the costs occasioned by a defence founded on a statement of fact disproved by the evidence. *Bower* v. *Cooper*, 2 Hare, 408; 11 L. J., Ch. 287; 6 Jur. 681.

In defence to a suit for specific performance by a purchaser, the vendor set up inadequacy of consideration and intoxication. An inquiry was directed as to the former part of the defence; and the defendant having failed to prove the latter part, the plaintiff was declared entitled to so much of the costs as had been occasioned by it. *Ib.*

Bill to enforce forfeiture for a second marriage by the defendant, and for an inquiry as to the marriage, wholly fails on the plaintiff's own evidence, it appearing that there was no second marriage, although there was marital cohabitation:—Held, that the plaintiff must pay the costs of the suit, notwithstanding the immoral conduct of the defendant, and notwithstanding that the bill prayed for the appointment of new trustees, which relief was granted. *Preece* v. *Seale*, 3 Jur. (N.S.) 711.

G. IN PARTICULAR CASES.

Administration Actions.] — *See* EXECUTOR AND ADMINISTRATOR.

Admiralty Cases.]—*See* SHIPPING.

Arbitrations.]—*See* ARBITRATION.

Bankruptcy Cases.]—*See* BANKRUPTCY.

Cases stated by Justices.]—*See* JUSTICE OF THE PEACE.

Certiorari.]—*See* CROWN OFFICE.

Charity Cases.]—*See* CHARITY.

Confession of Defence.]—*See* PRACTICE.

County Court Cases.]—*See* COUNTY COURT.

Court Fees.]—*See* PRACTICE.

Criminal Cases.]—*See* CRIMINAL LAW.

Damages, when recoverable as.] — *See* DAMAGES.

Discontinuance of Action.]—*See* PRACTICE.

Divorce Cases.]—*See* HUSBAND AND WIFE.

Habeas Corpus.]—*See* CROWN OFFICE.

Inferior Courts.]—*See* COURT.

Informations.]—*See* CROWN OFFICE.

Lands Clauses Act.]—*See* LANDS CLAUSES ACT.

Libel Actions.]—*See* DEFAMATION.

Mortgage Proceedings.]—*See* MORTGAGE.

New Trial.]—*See* supra, col. 699.

Of Appeal.]—*See* APPEAL.

Partition Actions.]—*See* PARTITION.

Partnership Cases.]—*See* PARTNERSHIP.

Patent Cases.]—*See* PATENT.

Payment into Court.]—*See* PRACTICE.

Probate Cases.]—*See* WILL.

Prohibition.]—*See* CROWN OFFICE.

Quo Warranto.]—*See* CROWN OFFICE.

Revenue Cases]—*See* REVENUE

Staying Proceedings on Non-payment]—*See* PRACTICE (STAYING PROCEEDINGS)

Winding-up of Companies]—*See* COMPANY

Witnesses]—*See* EVIDENCE

See also further, SPECIFIC TITLES

H TAXATION OF COSTS

1 BETWEEN PARTY AND PARTY

a Practice.

1 *Generally*

In what Cases]—When costs are given against a party he must pay the costs of his antagonist when taxed as between party and party *Ashwood* v *Lyons*, 1 Hog 116

—— **Nominal Party**]—A railway company made a defendant in order to ascertain the amount of shares belonging to a testator's estate will only have party and party costs on being dismissed *De Combe* v *De Combe*, 3 Jur (N S) 712

Where a company is made a defendant to a bill by a plaintiff claiming an incumbrance on shares of a shareholder, also made defendant, the company is entitled to costs as between party and party from the plaintiff, and to the difference between such costs and costs as between solicitor and client out of the fund *Chartered Mercantile Bank of India* v *De Jonge* 9 L T 678

A person named a trustee in a deed, who declines to accept the office is in the situation of any other defendant against whom a bill is dismissed and can only have his costs as between party and party *Norway* v *Norway*, 2 Myl & K 278, 3 L J, Ch 111, 163

Taxation ex parte]—If a defendant in an action on a foreign judgment, which ordered costs to be paid neglected to appear to tax the costs the plaintiff might tax the costs ex parte *Sadler* v *Robins* 1 Camp 253

Payment of Debt within four days from Service of Writ]—Where a defendant, within four days from the service pays the amount of the debt indorsed on the writ, he is entitled to have the costs taxed though he pays less than the amount of the costs demanded by the indorsement *Hunter* v *Russell*, 6 Scott (N R) 627, 5 Man & G 601, 12 L J, C P 272

A plaintiff having issued a writ indorsed with the amount of the debt and a sum for costs, after four days from service accepted from the defendant payment of the full amount indorsed, without any agreement as to taxation of costs —Held that, the plaintiff having waived payment within the four days required by Ord III r 7, the defendant was entitled to tax the bill under that rule *Hoole* v *Earnshaw*, 39 L T 409—C A See also *Holding* v *Sturchfield*, 7 Man & G 957, *Young* v *Crompton*, 2 D & L 557, 10 Jur 248

Directions to Master]—The court will not, on the application of the plaintiff or the defendant, give any directions to the master as to the taxation of costs *Merrick* v *Wakley*, 5 Jur 987

The court refused a motion for special direction to master requiring him to deduct, in his taxation of costs of the parties the costs which he should allow to defendant from those which he should allow to plaintiff (who had become insolvent) after decree had been passed and acted upon *Rumney* v *Beale*, 10 Price, 113

A motion for the taxation of a solicitor's bill, with special directions to disallow the costs of certain proceedings alleged to have been improperly taken by the solicitor, or with a qualification that the tax was to be of the costs of such proceedings only as had been properly incurred, refused as such objections may be taken advantage of under the common order for a taxation *Wiggins* v *Pippin*, 2 Beav 403 See *S C*, 3 Jur 721

The court ought not be called upon to give directions to the master how to tax the master ought to announce the principle on which he taxes and then the court may be called on to review his taxation *Eccles* v *Blackburn Corporation*, 30 L J, Ex 358

Informal Proceedings]—Under a general order of taxation, the master will, without any special direction exercise a discretion as to taxing the costs of informal proceedings *Clayton* v *Meadows* 2 Hare, 26

Delivery of Bill of Costs]—Where a plaintiff in ejectment obtained judgment, and issued and executed a writ of possession and the defendant was about to take the benefit of the Insolvent Debtors Act and required to have the plaintiff's bill of costs in the action taxed in order to insert the amount in his schedule, a judge has power to make an order calling on the plaintiff to deliver his bill of costs in order to be taxed *Baker* v *Saunders*, 7 C B (N S) 858 29 L J, C P 158 6 Jur (N S) 637, 1 L T 403, 8 W R 190

Where decree orders defendant to retain his costs when taxed, out of the balance in his hands and pay the residue into court, if the defendant delays to get costs taxed, plaintiff must move that he may bring his bill of costs to be taxed within limited time, and not that he may pay in the whole balance *Newsome* v. *Shearman*, 2 Sim & S 95

Order that Shorthand Note be taken]—A taxing master, a chief clerk or even a judge, has no jurisdiction to order shorthand notes of the evidence to be taken, but where, in a case of a lengthy and complicated nature, the taxing-master had suggested that a shorthand note of the evidence before him should be taken, and the parties had acceded to that suggestion and had acted upon it, and each side had employed a separate shorthand writer, the court held that under the special circumstances of the case, the taxing master was right in directing the unsuccessful party to pay one half of the costs of the shorthand notes. *Hilleary and Taylor, In re*, 56 L J, Ch 758, 36 Ch. D 262, 56 L. T. 867, 35 W R 705—C A.

Where Solicitor in Custody]—A solicitor being in custody under an attachment, the court granted a writ of habeas corpus directed to the marshal to bring him before the taxing-master,

to enable him to attend the taxation of bills of costs *Walsh* v *Wilson*, 2 Ir Ch R 79

Jurisdiction]—An order directing an inquiry what is due to a party for costs but not containing a direction to tax them does not preclude the taxing officer from not allowing him any costs *Simmons* v *Storer*, 49 L J Ch 121, 14 Ch D 154 42 L T 201 28 W R 408

A decree directed a reference to the master to tax the defendant's bill of costs and a reference to the master in ordinary to take an account of all the dealings and transactions between the plaintiff and the defendants By a subsequent order made on a motion it was directed that notwithstanding the decree both references should go to the taxing master —Held first that the order was erroneous as varying the decree in such a manner in which it could not be varied upon motion without consent *King* v *Savery*, 8 De G M & G 311, 2 Jur (N S) 431 4 W R 471

Held secondly that matters unconnected with bills of costs could not under the 9th Order of the 20th October 1842, be referred to the taxing master *Ib*

—— **Discretion—"Other Circumstances"**]—Upon the taxation in an administration action of an administrator's bills of costs as between solicitor and client the registrar is entitled in the exercise of his discretion to take into consideration the fact of the insolvency of the estate as one of the 'other circumstances' in the case referred to by Order L A r 20 of the County Court Rules 1889 *Pain* v *Boulton*, 65 L J, Q B 530, [1896] 2 Q B 301, 75 L T 102, 45 W R 48

—— **Costs incurred Abroad**]—A bill was dismissed with costs Considerable costs had been incurred by the examination and cross-examination of witnesses in Australia under a commission —Held, that the master must have regard to the rules of taxation there but the court refused to refer the taxation of that bill to the proper officer in Australia *Wentworth* v *Lloyd*, 34 Beav 455, 13 L T 226, 13 W R 486

—— **Amount fixed**]—The defendant having succeeded in two interlocutory applications, with costs to be paid to him by the plaintiff the costs were measured by the court pursuant to the 159th General Order The bill was afterwards dismissed for want of prosecution, and upon taxation the master, notwithstanding the award of the sum for costs, taxed the defendant's costs of the two applications to sums greater than those awarded —Held, that the sum awarded by the court was final and conclusive, and that the master was not authorised to tax those costs *Woodley* v *Woodley*, 7 Ir Eq R 77

—— **Time for**]—An order, directing the costs of the suit to be taxed, warrants a taxation up to the time of the master's making his report Semble *Clutton* v *Pardon*, Turn & R 304, 24 R R 68

—— **On Compromise**]—Parties agreed to compromise a suit, and that the costs, charges, and expenses, as between solicitor and client, should be paid out of the fund —Held, that the taxing-master ought to treat the suit as properly constituted, and ought not, in the taxation, to consider whether defendants, having interests similar to the plaintiffs, should have been made co-plaintiffs, and, secondly, that if any of the parties entering into the compromise intended to challenge the propriety of the constitution of the suit, they ought to have distinctly stated, and have provided for it in the agreement. *Lucas* v *Peacock*, 5 Beav 1

Mistake in Addition]—It is not the duty of the solicitor of a party entitled to costs to add up upon oath, the items in the bill of costs as certified by the taxing officer, but if he takes it upon himself to make the addition in the absence of the solicitor of the opposite party, his client will be liable for the consequences of any mistake he may make *Kelly* v *O Beirne*, 16 W R. 172

When Unnecessary]—Taxation of costs is not necessary upon a cognovit *Clothier* v *Ess*, 3 M & Scott, 216

Staying Taxation pending Appeal] — *See* APPEAL

Judgment Ambiguous — Procedure]—Where there is an ambiguity in the terms of a judgment with respect to costs, and the master in consequence refuses to tax the costs of one of the parties, the proper course is to apply for a direction to the judge who tried the cause and not to appeal against the master's decision *Abbott* v *Andrews* 51 L J, Q B 641, 8 Q B D. 648, 30 W R 779

Taxation not a Condition precedent to Right of Action for Costs]—*See* post, col 849

Notice to Tax—When Necessary]—No notice to tax is necessary when a defendant appears in person and gives a cognovit which is good, though there is no declaration *Clarke* v *Jones*, 3 D P C 277 5 P, *Clothier* v *Ess*, 3 M & Scott, 216

Where at the instance of one of several joint defendants the taxation of the plaintiff's costs is deferred, notice of taxation on another day is not necessary *Perry* v *Turner*, 1 D P C 300, 2 C & J 89 2 Tyr 128, 1 L J, Ex 13

Where costs need not be taxed it is unnecessary to give the one day's notice *Griffiths* v. *Liversidge* 2 D P C 143

A defendant, against whom the bill has been dismissed with costs to be paid by the plaintiff, and received by the plaintiff out of the estate to be administered in the cause, is not bound to serve the parties interested in the estate with a warrant to attend the taxation, but may proceed with the taxation, serving the plaintiff only with the warrant *Lander* v *Ingersoll*, 6 Hare, 73

—— **Sufficiency of**]—A notice to attend taxation at Westminster during term, is good *Blake* v *Warren*, 6 M & W 151, 8 D P C 173, 9 L J, Ex 136, 4 Jur 27

It is unnecessary to give a 24 hours' notice of taxing costs *Edmonds* v *Cates*, 1 H & H 190, 4 M & W 66, 6 D P C 667, 2 Jur. 496

Notice of taxation given before 9 o'clock P M. of one day for the day following at 12 is one day's notice within the meaning of the rule of court *Ib*

A notice of taxation dated the 23rd of Feb-

ruary, to attend the following day, left at the office of the plaintiff's attorney, between seven and eight o'clock of the evening of the 24th, is a sufficient notice. *Grant* v. *Mackenzie*, 5 D. & L. 129; 1 Ex. 12; 16 L. J., Ex. 255.

—— **Date Insensible.**]—Where, in a notice of taxation, the date is insensible, it will take effect from the day of delivery. *Ib.*

—— **Omission to Give.**]—The omission to give notice of taxation is not such an irregularity as entitles the party to whom it has been given to set aside the judgment. *Ilderton* v. *Sill*, 2 C. B. 249; 15 L. J., C. P. 1; 9 Jur. 948.

But where judgment was signed for want of a plea, and the costs were taxed without giving such notice, the court, on an affidavit of merits, set aside the judgment, and execution issued upon it, without costs. *Ib.*

It is no ground for setting aside a judgment that it has been signed without notice of taxation of costs; but the opposite party might have the taxation reviewed. *Field* v. *Partridge*, 7 Ex. 689; 21 L. J., Ex. 269; 16 Jur. 413.

If it is agreed between the attorneys of the parties that a particular person should tax the costs, it is no answer to an action for such costs that the defendant's attorney had no notice to attend the taxation, if he did not object when he was first apprised of its having taken place in his absence. *Watson* v. *Murrel*, 1 Car. & P. 307; 28 R. R. 779.

—— **Other Points.**]—Where, on account of the pressure of business, a cause was entered in the list of motions for new trials on the fourth day of term, and the plaintiff signed judgment and gave notice of taxation, whereupon the defendant gave notice that the cause stood in the list to be moved:—Held, that the practice being to sign judgment before notice of taxation, the defendant ought to have given notice before, and must pay the costs of signing judgment. *Emblin* v. *Dartnell*, 1 D. & L. 1010; 13 L. J., Ex. 255.

The rule of a court is imperative, unless waived by the other party. *Wilkins* v. *Perkins*, 5 D. P. C. 461; 2 M. & W. 315; Mur. & H. 46; 6 L. J., Ex. 77; 1 Jur. 168.

A judgment on demurrer is not within the rule of court which requires a copy of the bill of costs and affidavit of increase to be delivered to the opposite party at the time of the service of the notice of taxation. *Taylor* v. *Murray*, 6 D. P. C. 80; 3 M. & W. 141; Mur. & H. 349; 7 L. J., Ex. 53.

Taxing costs and signing final judgment are contemporaneous. *Pierce* v. *Derry*, 4 Q. B. 635; 3 G. & D. 477; 12 L. J., Q. B. 277; 7 Jur. 552.

—— **Costs of Service.**]—Reasonable costs of serving a notice of taxation will be allowed, and if the defendant resides in the country, and has not employed an attorney, an attorney in the country may be employed to serve him with a notice of taxation. *Thorp* v. *Wordy*, 2 C. & J. 488; 1 D. P. C. 576; 2 Tyr. 489.

Affidavit of Increase—Contents.]—A copy of the affidavit of increase must contain a copy of the jurat also. *Wheldall* v. *Eastern Counties Ry.*, 2 D. & L. 246; 13 M. & W. 9; 13 L. J., Ex. 258; 8 Jur. 859.

On an objection to a solicitor's charge for journeys, his affidavit that they "were necessarily and properly taken for the benefit of the trust estates," was, in the absence of evidence to the contrary, held sufficient. *Maw* v. *Pearson*, 3 N. R. 99.

—— **Delivery of Copy.**] — An omission to comply with the rule requiring a copy of the bill of costs and affidavit of increase to be delivered to the opposite party at the time of the service of notice of taxation is no ground for setting aside the judgment and execution, but only of reviewing the taxation. *Taylor* v. *Murray*, 6 D. P. C. 80; 3 M. & W. 141; M. & H. 349; 7 L. J., Ex. 53. S. P., *Field* v. *Partridge*, 7 Ex. 689; 21 L. J., Ex. 269; 16 Jur. 413.

The rule of court is not complied with by one day's previous delivery of the copy of an affidavit of increase, not sworn until the day of taxation. *Todd* v. *Fellingham*, 8 D. P. C. 373; 4 Jur. 682.

—— **Sums not Paid.**]—Where it was alleged that certain sums sworn to in an affidavit of increase had not been paid, the court directed the taxation to be reviewed. *Pembray* v. *Jones*, 11 Jur. 589.

The witnesses in a cause should be actually paid before an affidavit of increase is made; and if the practice is not followed in this respect, the court will order the sums sworn to have been paid and allowed by the master to be refunded. *Trent* v. *Harrison*, 2 D. & L. 941; 14 L. J., Q. B. 210; 9 Jur. 873.

An affidavit of increase ought not to state that the expenses charged for witnesses have been paid to them, unless they have been actually paid at the time when it is made; the fact of the money due to a witness for his attendance having been set off against expenses incurred by the successful party in conveying him to the assize town, and keeping him there, is insufficient. *Cross* v. *Durrell*, 29 L. J., Ex. 473; 6 Jur. (N.S.) 638; 3 L. T. 87; 8 W. R. 630.

An attorney who, in his affidavit of increase, represents that he has paid money to witnesses in the cause, when he has not, in fact, paid it (though he may have taken steps for so doing), or who without proper grounds makes statements tending to heighten the costs payable, with intent to favour such witnesses or to oppress the opposite party, commits an offence for which, on a timely application, he may be punished by the court. *Doe* d. *Mence* v. *Hadley*, 17 Q. B. 571.

A fine of 100*l.* and suspension from practice for three years imposed upon an attorney for having made a false affidavit of increase. *Mant, In re*, 5 L. T. 254; 10 W. R. 13.

—— **Practice in Chancery Division.**]—Where one of the parties to an action in the Chancery Division has been ordered to pay costs, the common law practice of requiring in all cases from the party to whom the costs are to be paid an affidavit of increase, proving that payments said to have been made have in fact been made, that witnesses were material, how many days they were in attendance, &c., will not be followed, but the party ordered to pay costs will only be entitled to call for such an affidavit in cases in which the taxing-master has required it to supply information of which he is not in possession. *Smith* v. *Day*, 50 L. J., Ch. 333; 16 Ch. D. 726; 44 L. T. 217; 29 W. R. 424.

Several Taxations.]—In trover, the plea of not guilty was found for the defendant, and the other issues for the plaintiff. The defendant signed judgment and taxed his costs, which were paid. The court refused to set aside an order, which the plaintiff obtained nearly a year afterwards, to tax the costs upon the issues found in his favour. *Watson* v. *Boyes*, 2 D. & L. 663; 13 M. & W. 635; 14 L. J., Ex. 116.

Costs of increase form no integral part of the suit, as they are awarded by the court in consequence of the damages recovered by the plaintiff, and form the subject of a distinct and separate adjudication. *Taylor* v. *Wilkinson*, 5 N. & M. 189; 1 H. & W. 451.

Costs of Taxation.]—A defendant paid within four days the amount of debt and costs indorsed upon the writ, but afterwards had the costs taxed. Upon taxation two items, amounting to less than one-sixth of the whole amount, were taxed off. An order was afterwards made by a master of the court sitting at chambers for payment of the costs of taxation by the defendant. Upon the hearing of the summons no objection on the part of the defendant was made to the payment of the costs of taxation, on the ground of the nature of the items so charged and taxed off. The defendant having moved to rescind the order:—Held, that though there was a discretion in the court to allow or disallow the costs of taxation to the plaintiff, the court would not rescind the order on the ground that the items taxed off were such as the plaintiff's attorney must have known to be not allowable, no objection having been made before the master on that ground. *Carpenter* v. *Calvert*, 17 L. T. 578.

The costs of the plaintiff and of the several parties to the cause having been ordered to be paid out of the fund, and a puisne creditor not a party, but whose demand had been decreed to be paid, having obtained leave to attend the taxation of the costs:—Held, that he was entitled to the costs of reading over the bills of costs of the several parties to the cause. *Phillips* v. *Page*, Hay. & J. 819.

In chambers, the defendants interested in taking accounts were represented by some of their number. L., one of the defendants excluded from attending at chambers, claimed a right to attend the taxation of costs; but the master refused to recognise his attendances, and disallowed all his charges for the same. On appeal, the court declined to interfere with the discretion which the master had exercised in the matter, and ordered L. to pay to the parties served with the motion a sum for costs. *Stahlschmidt* v. *Lett*, 7 Jur. (N.S.) 1271; 9 W. R. 830.

ii. *The Allocatur.*

Alterations in — Power to Make.]—Where there is an error in the deductions made on the taxation of costs, and the allocatur is made in ignorance of such, the party affected by such error is not at liberty to make an alteration in order to set it right, the proper course being to apply to a judge or the master. *Levy* v. *Drew*, 5 D. & L. 307; 2 B. C. Rep. 142; 12 Jur. 119.

Part Taxed by another Officer.]—A writ of summons having issued, proceedings in bankruptcy were taken against the defendant, under 12 & 13 Vict. c. 106, s. 78, and the commissioner made an order under s. 85 that the costs of such proceedings should abide the event of the action. Afterwards a judge's order was made for staying proceedings, on payment of debt and costs. The master in the Exchequer taxed the costs of the action, and gave his allocatur for their amount, together with the debt; and the other costs having been taxed by the officer in bankruptcy, the master added the two sums together, and judgment was signed for the whole:—Held, that the proceedings were regular, as the costs in bankruptcy, when taxed by the master in bankruptcy, became part of the judgment of the Exchequer. *Webb* v. *Hewlett*, 6 Ex. 107; 2 L. M. & P. 4; 20 L. J., Ex. 134.

Order for Payment of Costs.]—A rule for taxation of costs, and the allocatur, do not amount to a rule or an order whereby money is payable, within the 1 & 2 Vict. c. 110, s. 18, so as to operate as a judgment. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635.

Under 1 & 2 Vict. c. 110, s. 18, an order for payment of costs operates only as against purchasers, mortgagees and creditors from the registration of the certificate of taxation. *Hargrave* v. *Hargrave*, 23 Beav. 484.

To Whom belonging.]—An allocatur is the property of the person in whose favour it is made. *Doe* d. *King* v. *Robinson*, 2 D. P. C. 503.

iii. *Review of Taxation.*

Objection in Writing.]—An application by a party to a judge under Ord. LXV. r. 27, sub-rule 41, for an order for a review of taxation of a bill of costs as to any item or part of an item contained therein, cannot be entertained unless the party applying has first carried in an objection in writing under sub-rule 39 with respect to each such item or part of an item. *Stronsberg* v. *Sanders*, 38 W. R. 117—C. A.

Where a party in objecting to the taxation of his bill took various objections which were overruled by the taxing-master:—Held, that on a summons to vary the certificate he could not raise any points not set forth in his written objections. *Nation, In re, Nation* v. *Hamilton*, 57 L. T. 648.

When a party carries in an objection in writing to the certificate of a taxing-master under Rules of Court, 1875 (Costs), Ord. VII. r. 30, he is only bound to state the items to which he objects, not the reasons of his objection. *Simmons* v. *Storer*, 49 L. J., Ch. 121; 14 Ch. D. 154; 42 L. T. 291; 28 W. R. 408.

—— **Privilege of Solicitor.**]—No action lies against a solicitor for defamatory words contained in written objections lodged by him upon taxation of another solicitor's bill of costs. *Pedley* v. *Morris*, 61 L. J., Q. B. 21; 65 L. T. 526; 40 W. R. 42.

Applicant not Party to Order.]—A person who is not a party to the making of an order for the taxation of costs, and who desires that the taxation under the order may be reviewed, ought not to apply by motion to review the taxing-master's certificate, but ought to apply to have the order for taxation set aside. *Charlton* v. *Charlton*, 31 W. R. 237.

Application not made till after Allocatur.]—An application to review the taxation of costs ought not to be made before the master has made his allocatur, as he has not, until doing so, finally decided what costs he will allow. *Sellman* v. *Boorn*, 8 M. & W. 552; 1 D. (N.S.) 11; 10 L. J., Ex. 433; 5 Jur. 846.

To what Court.]—Semble, that a question as to the taxation of costs will not in general be entertained at chambers. *Smith* v. *Harnor*, 3 C. B. (N.S.) 829.

All applications to review taxation where the master clearly was in error should be made at chambers in the first instance. *Levett* v. *Rothwell*, 27 L. J., Ex. 6. *See* Ord. LXV. r. 27, sub-r. 41.

Jurisdiction to Review, in what Cases.]—A master taxing costs in proceedings not in the court, by direction of a private act of parliament, is not necessarily subject to the control and revision of the court. *Wraithby, In re*, 35 L. J., Ex. 60; L. R. 1 Ex. 54; 11 Jur. (N.S.) 954; 13 L. T. 440; 14 W. R. 143; 4 H. & C. 74.

The court has no jurisdiction to review the taxation of a master of the court made under the Lands Clauses Act, 1845, s. 52. *Owen* v. *L. & N. W. Ry.*, 37 L. J., Q. B. 35; L. R. 3 Q. B. 54; 17 L. T. 210; 16 W. R. 125; 7 B. & S. 758.

A taxation of sheriff's costs and charges by a master of the supreme court under the general order of 31st August, 1888, is not the subject of review under Ord. LXV. r. 27 (39–41). *Townend* v. *Yorkshire (Sheriff)*, 59 L. J., Q. B. 156; 24 Q. B. D. 621; 62 L. T. 402; 38 W. R. 381; 54 J. P. 598.

A taxing-master at common law referred certain items in a bill of costs to one of the chancery taxing masters. On an application for an order that the chancery master might be directed to review his finding:—Held, that it was not within the jurisdiction of the court to make an order as to anything which was not before it. *Lett, Ex parte, Parry, In re*, 5 L. T. 416; 10 W. R. 6.

When a superior court of record has jurisdiction to make upon motion an order or a certificate for costs, such order is binding and conclusive, and the master's taxation for such costs cannot be impugned except by a suggestion of error in fact upon the record that no order or certificate was made by the court. *Scott* v. *Bennett*, L. R. 5 H. L. 234; 20 W. R. 686.

Second Application on Facts known at first.]—The court having refused an application to direct the master to tax the plaintiff's costs, a second application, differing in form, but in substance the same, was made two terms after, upon grounds which might have been laid before the court on the first occasion; and it was therefore refused. *Leggo* v. *Young*, 17 C. B. 549; 25 L. J., C. P. 176.

Second Application after Review.]—Where the master had been directed to review his taxation as to the disallowance, as between attorney and client, of the expenses of the plaintiff's attorney for attending at the trial (in London), and he had reconsidered the matter, and again disallowed the charge, considering that it had not been sufficiently sustained, the court refused a rule, directing him again to review his taxation. *Pobjoy* v. *Rich*, 27 L. J., Ex. 10.

When Ordered—Discretion.]—The court will rarely interfere to review a taxation upon a matter of discretion only. *Wakefield* v. *Brown*, 43 L. J., C. P. 222; L. R. 9 C. P. 410; 30 L. T. 428.

But where, through some mistaken construction, the master has not exercised his discretion in the allowance of items under any head of costs, erroneously conceiving that he was not entitled to do so, the court will direct him to review his taxation, in order to exercise his discretion. So, if he errs in principle, or departs from a positive rule. *Reg.* v. *L. C. & D. Ry.*, 12 Jur. (N.S.) 230.

—— **Number of Counsel.**]—In an action to recover a large sum a verdict having been found for the defendant, and a new trial directed on payment of costs, the master, on taxing the defendant's costs, disallowed the briefs and fees to the junior counsel, and the consultation fees (on the ground that the briefs disclosed no witnesses for the defence), and also the journeys and attendance of the defendant's attorney (from Bath):—The court directed a review of the taxation, on an affidavit showing that the circumstances of the case justified the employment of two counsel, and the attendance of the attorney from the country. *Maddison* v. *Bacon*, 1 Arn. 487; 5 Bing. (N.C.) 246; 7 Scott, 207; 3 Jur. 248.

—— **Mistake.**]—Two solicitors, A. and B., dissolved partnership, and it was agreed that B. should be entitled to half the profits of a suit instituted by them. After some time an order was made, by consent of both, for the taxation of the costs down to the date. Some of the costs had, unknown to B., been already taxed, and received by A.:—Held, under the circumstances, that the order comprised all such costs; and the previous costs having been omitted in the master's certificate, the court, upon a petition to review the taxation, referred the matter back to the master. *Greenwood* v. *Churchill*, 14 Beav. 160.

—— **Unnecessary Proceedings.**]—A creditor's administration action was ordered to be stayed on payment by the applicant, the executrix and residuary legatee, of the debt and the costs of the action. Before the master, the executrix objected to items in the plaintiff's bill of costs, alleging, as to some of them, that they had been incurred in taking unnecessary and improper proceedings in the action. The master refused to inquire into the truth of these allegations, and taxed the costs without reference to them:—Held, that, under r. 18 of the Additional Rules of Court, 1875, the master ought to have considered the plaintiff's objections, and that there must be a new taxation. *Baines* v. *Wormsley*, 47 L. J., Ch. 844; 39 L. T. 85; 27 W. R. 36.

If a solicitor negligently or ignorantly takes some unnecessary proceeding, it is the duty of the master to disallow the charge made in respect of such proceeding. *Alsop* v. *Oxford (Lord)*, 1 Myl. & K. 564; 2 L. J., Ch. 174.

The taxing-master disallowed a general objection to a bill of costs as not properly chargeable under a trust deed, on the ground that the words of the trust deed covered all expenses incurred by the trustee in the proper matters of the trust, and that the majority of the items of costs were incurred with the plaintiff's consent, and some

admitted by the plaintiff's bill. The master also disallowed an objection to particular items, as having been "unnecessarily and improperly incurred," on the ground that such costs had been proved before him to have been properly incurred:—Held, that the above answers were sufficient. *Maw* v. *Pearson*, 3 N. R. 99.

The court will not inquire into the propriety of the master's decision in a case in which he has disallowed certain costs between party and party, as being unnecessarily incurred, and where the attorney subsequently sues his client for the same costs, which are again, on taxation, disallowed. *Williams* v. *Nicholas*, 1 D. (N.S.) 840; 6 Jur. 838.

—— **False Affidavits.**]—The master having been induced by false affidavits to allow a large sum, as the fees and expenses to commissioners named in a commission for the examination of witnesses, which it was suggested had not been paid; the court referred it back to the master, to inquire, by such means as he should think fit, what sums had actually been paid, and to review the taxation if necessary. *Barnes* v. *Attwood*, 5 C. B. 164.

—— **Solicitor not on Roll.**]—Where, after the taxation of the costs of one of the parties of the cause, it appeared that the name of the individual who had acted as his attorney in the action was not upon the roll of attorneys, the court refused a rule to review the taxation, although some of the items allowed by the master were charges for attendances by such pretended attorney. *Coles* v. *Hayman*, 8 Jur. 495.

—— **Amount.**]—The court will not order a taxation to be reviewed where the amount alleged to have been improperly allowed is less than 40s. *Newton* v. *Boodle*, 4 C. B. 359.

—— **Objection not taken before Master.**]—The court will not grant a review of taxation upon a ground which was not specifically presented before the master. *Hore* v. *Saxl*, 17 C. B. 599; 25 L. J., C. P. 181. S. P., *Pook* v. *Burrows*, 2 D. (N.S.) 378; 7 Jur. 87; *Mortimer*, *In re*, Ir. R. 4 Eq. 96; 18 W. R. 367.

—— **Error in Calculation.**]—The court will order a review of a taxation where the master has clearly made an error of calculation, or in the construction of an order, as to the allocation of costs between the parties. *Levett* v. *Rothwell*, 27 L. J., Ex. 6.

Where the master has made a manifest mistake in calculation, or has erroneously allowed or disallowed any item on some supposed rule which does not apply, the court will correct his decision. *Knight* v. *Gravesend Ry.*, 27 L. J., Ex. 8.

—— **Error in Principle.**]—The court will not interfere with the taxation of costs, except to correct some error of principle into which the master may have fallen. *Burton* v. *Burton*, 29 L. J., Ex. 291. S. P., *Mortimer*, *In re*, Ir. R. 4 Eq. 96; 18 W. R. 367.

The court will not ordinarily interfere with the taxation of costs by the registrar unless his decision is shown to have been erroneous in principle. *The Neera*, 5 P. D. 118; 42 L. T. 743; 28 W. R. 816.

The court will not review a master's taxation of costs unless he has been wrong in principle. *Darley* v. *Nicholson*, 1 Con. & L. 391; 2 Dr. & War. 86.

On general exception to report on taxation, referring to a schedule, court will hear exception on principle only. *Christy*, *Ex parte*, *Barrow*, *In re*, 3 Mont. & Ayr. 102; 2 Deac. 129; 6 L. J., Bk. 68.

Exceptions do not lie to master's report as to costs, nor can there be a re-taxation as to quantum. Irregularity in proceedings, or master acting on mistaken principle, will induce court to interfere. *Fenton* v. *Crickett*, 3 Madd. 496.

The master's decision on questions of taxation is final, as to matters of fact and amount of charges, and is only reviewed by the court when the master acts upon a mistaken principle. *Alsop* v. *Oxford* (*Lord*), 1 Myl. & K. 564; 2 L. J., Ch. 174.

In appeals respecting costs the court entertains not only questions whether a principle of taxation was correct or not, but also whether a given principle was applicable or not to the particular items. *Newby* v. *Drew*, 12 Ir. Eq. R. 24.

—— **Quantum.**]—The court will not interfere where an objection is made to the quantum allowed by the master, in his taxation of a solicitor's bill. *Stocken* v. *Dawson*, 5 L. J., Ch. 123.

Hearing of Application.]—Upon a rule to rescind an order for a review of the master's taxation, it being objected that neither the rule nor the affidavits upon which it was drawn up disclosed what the taxation was, the court in the exercise of their discretion, under the 17 & 18 Vict. c. 125, s. 16, and, without imposing any terms, ordered the allocatur to be produced for their inspection. *Ashcroft* v. *Foulkes*, 18 C. B. 261; 25 L. J., C. P. 202; 2 Jur. (N.S.) 449; 4 W. R. 457.

On a rule to review a taxation, on the ground of a supposed mistake on the part of the master, it is not competent to the party showing cause to point out counter mistakes to balance the former. *Smith*, *In re*, 2 D. & L. 376; 13 M. & W. 477; 8 Jur. 1143.

Costs, when Allowed.]—Where a party applies for a review of the taxation of costs, and the taxation is referred back to the master, he is not entitled to the costs of the rule upon which the review is sought for and obtained. *Parsons* v. *Pitcher*, 6 D. P. C. 600; 6 Scott, 298.

Costs of a rule for reviewing a taxation are not given where the mistake is with the master. *Ward* v. *Bell*, 2 D. P. C. 76.

No costs are allowed upon a rule made absolute to review the master's taxation. *Miller* v. *Thomson*, 4 Man. & G. 260; 11 L. J., C. P. 224.

The costs of an unsuccessful motion to review the master's taxation do not necessarily follow the general costs of the cause. *Bartholomew* v. *Carter*, 4 Man. & G. 612; 5 Scott (N.R.) 498.

Where the question as to such taxation involved the construction of a difficult statute, the court discharged the rule to review without costs. *Ib.*

A petition to review a taxation was successful, but the petitioner, not having taken proper steps to satisfy the taxing master when the matter was in his office, was ordered to pay the costs.

Sturge v. *Dimsdale*, 9 Beav. 170; 15 L. J., Ch. 124; 10 Jur. 277.

Where exceptions are taken to the master's certificate of the taxation of costs, on the ground that he has not charged the solicitor with all the moneys received by him with which he ought to have been charged, and such exceptions are allowed, and the master directed to review his report, in that respect the court does not give the exceptant the costs of such proceedings, on the ground that they are necessary to correct a mistake, or misapprehension of the master. *Wright* v. *Southwood*, 1 Y. & J. 527.

b. What Costs Allowed.

i. *Counsel's Fees.*

a. Number of Counsel.

General Rule.]—The general rule that, for the purposes of taxation as between party and party, only two counsel can be allowed as against an adverse party, will not be departed from except under very special circumstances. *Att.-Gen.* v. *Munro*, 1 Mac. & G. 231.

The general rule is, that the costs of two counsel only are allowed upon a taxation between party and party, the taxing-master's certifying the fact of one counsel being brought specially from another court is not a ground for allowing an extra number. *Smith* v. *Effingham* (*Earl*), 10 Beav. 378; 16 L. J., Ch. 297; 11 Jur. 444.

Where the taxing-master had refused to allow the briefs of more than two counsel, on the taxation of costs between party and party, the master having exercised his discretion by looking into the circumstances of the case, and not having relied wholly on the general rule, the court refused to disturb the certificate. *Midland Ry.* v. *Brown*, 10 Hare (App.) xliv.; 22 L. J., Ch. 1092; 17 Jur. 969.

The number of counsel to be allowed is in the (almost uncontrolled) discretion of the master. *Lockstone* v. *L. B. & S. C. Ry.*, 12 C. B. (N.S.) 243.

The master allowed, in the costs of the motion for a new trial, the fee paid to the counsel who led at the trial, and disallowed that paid to the junior counsel:—Held, that, as the leader could not be heard in banc, the fee to him was improperly allowed; and that the fee to the junior, for taking notes, was improperly disallowed. *Stewart* v. *Steele*, 5 Scott (N.R.) 517; 4 Man. & G. 669.

The plaintiff had instructed two queen's counsel and a junior to oppose an application for leave to amend on the part of H., one of the defendants, and the other defendants were represented by a junior counsel and supported the plaintiff. The court in ordering H. to pay the costs of the application, allowed the costs of only one counsel on behalf of the plaintiff, and 40*s.* costs to the other defendants. *Cargill* v. *Bower*, 46 L. J., Ch. 175: 4 Ch. D. 78; 35 L. T. 621; 25 W. R. 221.

Where a point of law is involved in a cause, two counsel are not an unreasonable number, and the master ought to allow the costs of both, although at the trial it was agreed to turn the facts into a special case. *Grindall* v. *Goodman*, 5 D. P. C. 378; W. W. & D. 70; 1 Jur. 55.

In an action to recover 1,000*l.*, involving the character of the parties, a new trial having been granted to the plaintiff on the payment of the costs, and the master having disallowed costs on brief for a second counsel, upon the ground that there were no witnesses in the defendant's brief, the court directed a review of the taxation. *Maddison* v. *Bacon*, 5 Bing. (N.C.) 246; 7 Scott, 207; 1 Arn. 487; 3 Jur. 248.

Where nominal damages (exceeding the limit within which the judge's certificate for costs is required) are recovered in an action involving a question of title, the amount recovered cannot be taken as the measure of the importance of the action. The costs of second senior counsel allowed. *McBride* v. *McBride*, [1894] 2 Ir. R. 76.

A fee given to senior counsel to plead, the cause was not heard on the day set down. At the next hearing the counsel was from home and another senior was feed. An appeal from the taxing-master allowing both fees was dismissed. *Kidd* v. *Young*, 1 W. R. 214.

The fact of a petition being unopposed is not of itself a sufficient reason for the disallowance of the costs of two counsel. Costs of two counsel, upon a petition of a retiring trustee for a reference to appoint a new trustee, and of a petition to confirm the master's report, allowed under the circumstances. *Sturge* v. *Dimsdale*, 9 Beav. 170; 15 L. J., Ch. 124; 10 Jur. 277.

Briefs to two counsel, on an unopposed motion made by a trustee, to pay money into court, allowed, upon appeal from the decision of the taxing-master. *Stephens* v. *Newborough* (*Lord*), 11 Beav. 403; 17 L. J., Ch. 332; 12 Jur. 319.

The plaintiff's solicitor employed a queen's counsel and a junior to oppose a motion for further time to answer. The court held that he was justified in so doing, and ordered the taxing-master, who had disallowed the fees of the junior counsel, to review his taxation. *Cooke* v. *Turner*, 12 Sim. 649.

If the petition is of a special nature a fee to a second counsel on the hearing will be allowed. *Ellis. Ex parte*, *Musgrove*, *In re*, 3 Mont. D. & D. 600.

Whether the costs of two counsel retained on behalf of parties having liberty to attend the proceedings, and being in the same interest as the plaintiff, ought to be allowed or not is a question for the discretion of the taxing-master. *Webb's Estate*, *In re*, 28 L. T. 726; 21 W. R. 745.

The mere fact of such parties appearing by the same solicitor as the plaintiff is no good reason why they ought to be allowed the costs of a junior counsel only. *Ib.*

The costs of employing two queen's counsel for the plaintiff at the hearing allowed; the second queen's counsel having drawn the bill when he was without the bar. *Carter* v. *Barnard*, 16 Sim. 157; 17 L. J., Ch. 278; 12 Jur. 322.

Two Juniors.]—The fees of two junior counsel engaged in settling defendant's answer will not be allowed. *Davis* v. *Dysart* (*Earl*), 21 Beav. 124; 25 L. J., Ch. 122; 1 Jur. (N.S.) 1153; 4 W. R. 41. Affirmed, 8 De G. M. & G. 33; 25 L. J., Ch. 322; 2 Jur. (N.S.) 219; 4 W. R. 268.

Only one junior counsel allowed as between party and party, except by special leave of the court. *Ib.*

Costs of two junior counsel allowed. *North Eastern Ry.* v. *Jackson*, 22 W. R. 629.

Three Counsel.]—The rule that charges will

not be allowed for employing more than two counsel will only be departed from in exceptional circumstances, and in determining whether such circumstances exist the amount of interest which the successful party has in maintaining the suit may be taken into consideration. *Smith* v. *Buller*, 45 L. J., Ch. 69 ; L. R. 19 Eq. 473 ; 31 L. T. 873 ; 23 W. R. 332.

The general rule that, upon taxation of costs as between party and party, the briefs of more than two counsel shall not be allowed, is not inflexible. *Pearce* v. *Lindsay*, 1 De G. F. & J. 573 ; 8 W. R. 383.

Circumstances under which the costs of a third counsel will be allowed. *Betts* v. *Clifford*, 1 John. & H. 74.

Parties employing more than two counsel in equity do so at their own risk ; the costs will not be allowed unless directed by the court. *Davis* v. *Dysart (Earl)*, 21 Beav. 124 ; 25 L. J., Ch. 122 ; 1 Jur. (N.S.) 1153 ; 4 W. R. 41. Affirmed, 8 De G. M. & G. 33 ; 25 L. J., Ch. 322 ; 2 Jur. (N.S.) 219 ; 4 W. R. 268.

The costs of a third counsel of the common law bar disallowed in equity. *Flockton* v. *Peake*, 4 N. R. 456 ; 12 W. R. 1023.

A defendant in an action upon a policy of insurance, obtained a rule for a new trial on the payment of the costs of and occasioned by the former trial. The master allowed three counsel : —Held, a proper exercise of discretion. *Stewart* v. *Steele*, 5 Scott (N.R.) 517 ; 4 Man. & G. 669.

An arrangement by which a Q. C. retained for one of the defendants for the hearing of an appeal has been transferred to the co-defendants to argue the case for them as leading counsel, does not justify the allowance of three counsel on party and party taxation, although only four counsel were employed between the two sets of defendants, and the hearing of the appeal occupied several days. *Merchant Banking Co.* v. *Maud*, 44 L. J., Ch. 581 ; L. R. 20 Eq. 452 ; 32 L. T. 794 ; 23 W. R. 788.

—— **Evidence Voluminous.**]—In an action for running down a vessel, the plaintiff succeeded. There were eighteen witnesses and the trial lasted four hours. The master allowed three counsel, with fees of 25, 20, and 15 guineas. Review of taxation refused. *General Steam Navigation Co.* v. *Mann*, 2 W. R. 154.

Where evidence was voluminous, and required careful consideration, the costs of a third counsel were allowed. *Wentworth* v. *Lloyd*, 35 L. J., Ch. 642 ; L. R. 2 Eq. 607 ; 12 Jur. (N.S.) 581 ; 14 L. T. 751.

—— **Case of Difficulty.**]—A plaintiff may be allowed for fees to three counsel in a cause of difficulty. *Morris* v. *Hunt*, 1 Chit. 544.

In a case of considerable complication, in which charges of fraud were made against the defendant, judgment having been given for him with costs, he was allowed the costs of employing three counsel, though the master had only allowed the costs of two. *Kirkwood* v. *Webster*, 47 L. J., Ch. 880 ; 9 Ch. D. 239 ; 26 W. R. 812.

Where costs are awarded upon an application to the Railway and Canal Commissioners, the costs of more than two counsel will not be allowed on taxation between party and party, unless the case involves extraordinary complication and difficulty, and is one in which a reasonable and prudent man, acting with ordinary prudence, would not go into court without three counsel. In applying this latter test, the chance of counsel being absent should not be taken into consideration ; but it should be assumed that all the counsel employed can attend throughout the hearing. The rule laid down by Fry, J., in *Kirkwood* v. *Webster* (9 Ch. D. 239) explained. *Glamorgan County Council* v. *G. W. Ry.*, 64 L. J., Q. B. 138 ; [1895] 1 Q. B. 21 ; 71 L. T. 736 ; 9 Ry. & Can. Traff. Cas. 1 ; 59 J. P. 182.

B., a second mortgagee, filed a bill for redemption and foreclosure against F., who held the first and third mortgages on the property. F., by his answer, disputed B.'s security by denying the consideration, and filed a cross-bill for foreclosure impeaching that security. By the decree made in both suits, F.'s bill was dismissed with costs, so far as it sought to set aside B.'s security, and F. was ordered to pay the costs of the first suit, "so far as the same have been increased by the answer of F. impeaching the validity of the security of B." The master held that the costs incurred by B. in proving the consideration, and consequent thereon, were the increase of costs in the first suit which F. was to pay, and that the expense of the hearing must be apportioned according to the number of folios, and that the costs of the second suit must be apportioned. He allowed the costs of three counsel in the second suit on account of the complexity of the case. B. objected to this taxation, and contended that he ought to be allowed all his costs except such as would have been incurred if the suits had been ordinary redemption and foreclosure suits heard as short causes, and that F. ought to have all his costs disallowed, except such as would in that case have been incurred, the difference being attributable to F.'s impeaching B.'s security :—Held, that the master had proceeded on a correct principle. *Bigbie* v. *Fenwick*, L. R. 6 Ch. 869 ; 25 L. T. 441 ; 20 W. R. 67.

Held, also, that so much of B.'s bill as was directed to anticipating the objection taken by F.'s answer ought to be dealt with as occasioned by the objection taken in the answer, and that in the other suit regard ought to have been had in taxation to the circumstance that the complexity which justified the allowance of three counsel was owing to B.'s security being impeached. *Ib.*

—— **Questions of Importance.**]—In an action to recover 20*l.* the defendant, who pleaded fraud, obtained a verdict. The taxing-master allowed the costs of three counsel upon a motion to set aside the verdict and enter judgment for the plaintiffs, or for a new trial, certifying that he did so having regard to the nature of the case, and the complicated and important questions involved :—Held, that the taxing-master's discretion should not be interfered with. *Aaron's Reef* v. *Twiss*, [1894] 2 Ir. R. 242. S. P., *L. C. & D. Ry.* v. *S. E. Ry.*, 60 L. T. 753.

Although two counsel only are heard in the Court of Appeal, the costs of three counsel in that court should be allowed on taxation between party and party where the difficulty and importance of the case render it proper to retain them, particularly in cases where three counsel had been allowed on taxation between party and party in the court below. *Robb* v. *Connor*, Ir. R. 9 Eq. 373.

—— **Amount claimed.**]—A collision occurred between the P. and the M., in consequence of

which the P. also collided with the D., doing damage to the latter to the extent of 2,700*l.* The P. and the D. commenced actions against the M.; but the D. stood by until the P.'s action was decided. Three counsel were employed in the action on behalf of the D. :—Held, that, considering the amount of the damage, the allowance of the costs of three counsel was not unreasonable. *The Mammoth*, 53 L. J., P. 70; 9 P. D. 126; 51 L. T. 459; 33 W. R. 172; 5 Asp. M. C. 289.

—— **Length of Hearing.**]—A bill having been dismissed with costs, after a hearing of fourteen days' duration, in a suit in which nineteen individuals and two companies—who had to a great extent a common case—were defendants, and some of them had justifiably answered separately, and had severally appeared by three counsel, two only of whom were heard for each defendant or set of defendants; the court refused, in the instance of an individual defendant, to review the taxation whereby the costs of the third counsel were disallowed by the taxing-master as between party and party. *Haslam* v. *O'Connor*, Ir. R. 6 Eq. 615. S. P., *Merchant Banking Co.* v. *Maud*, supra.

—— **Third Counsel after Transfer.**]—The action, after a motion for an injunction had been heard before Malins, V.-C., was transferred for hearing to Fry, J.; the defendant therefore retained a third counsel. The taxing-master allowed his costs :—Held, that the costs of such counsel could not be allowed on account of the transfer, and that the weight of the case did not justify such allowance. *Mason* v. *Brentini*, 42 L. T. 726.

—— **Third and additional Counsel on Appeal.**]—On the hearing of an action in the Chancery Division, the plaintiff was represented by four counsel, the defendants by two only. Judgment was then given for the defendants. The plaintiff having given notice of appeal, the defendants retained another counsel, and were represented by him and their former counsel at the hearing of the appeal, which was dismissed with costs. The taxing officer disallowed the fees paid to the additional counsel :—Held, that the case was one in which the court ought not to interfere with the taxing-officer's discretion. *Wegmann* v. *Corcoran*, 41 L. T. 792.

—— **Junior appointed a Queen's Counsel.**]—The mere fact of a junior counsel in a cause having been appointed a Q. C. is not a sufficient reason for allowing the costs of briefs to three counsel. *Mem.* L. R. 10 Ch. 540.

When a junior counsel who has prepared the pleadings for a party to a cause is called within the bar before the hearing, and after a leader has been retained, then, if the case is of such a description as to make the retaining a leader at that stage of the cause proper, the costs of three counsel at the hearing ought to be allowed. *Cousens* v. *Cousens*, 41 L. J., Ch. 166; L. R. 7 Ch. 48; 25 L. T. 719; 20 W. R. 48.

The costs of three counsel allowed where the junior who had drawn the pleadings was called within the bar before the hearing of the cause. *Ib.*

It is not a matter of course to allow the costs of three counsel in such a case. They ought to be allowed only where the matter is of such a nature that, according to the ordinary practice of litigants, it would have been proper in the first instance to give a retainer to a queen's counsel. *Ib.*

But when a leader has been employed in a suit but not retained, the costs of employing him as third counsel at the hearing will not be allowed as between party and party, although the junior counsel who drew the pleadings has before the hearing been called within the bar. *Betts* v. *Cleaver*, 41 L. J., Ch. 663; L. R. 7 Ch. 513; 27 L. T. 85; 20 W. R. 732.

The costs of more than two counsel disallowed in taxation between party and party, notwithstanding the third counsel was retained after the counsel by whom the pleadings had been drawn had been called within the bar. *Green* v. *Briggs*, 7 Hare, 279; 17 L. J., Ch. 323.

Costs of a brief to a second queen's counsel on the hearing of the cause allowed, he having before he had been called within the bar been the junior counsel in the cause. *Horsley* v. *Cox*, 38 L. J., Ch. 678; L. R. 7 Eq. 461; 20 L. T. 473; 17 W. R. 603.

Before the trial of an action the junior counsel for the plaintiff was called within the bar; at the trial, which lasted eight days, three counsel were engaged, viz. a leading queen's counsel who had formerly been junior in the case, and a junior. The judge decided in the plaintiff's favour. The taxing-master disallowed the fees of the leading queen's counsel :—Held, that the taxing-master had exercised his discretion rightly, as the case was not one in which it was essentially necessary for the purpose of doing justice between the parties that the plaintiff should employ three counsel. *Parish* v. *Poole*, 34 W. R. 365.

The junior counsel who had advised throughout the proceedings taken by a claimant against a company in liquidation, in respect of its breach of contract to purchase his business, having been called within the bar within the hearing of the claim and after a leader had been retained :—Held, that having regard to the length and complication of the case and evidence, the costs of a third counsel as junior counsel at the hearing ought to be allowed. *Laffitte & Co., In re, Laffitte's claim*, 44 L. J., Ch. 633; L. R. 20 Eq. 650; 33 L. T. 91; 24 W. R. 7

Railway and Canal Commission.]—Where costs are awarded upon an application to the Railway and Canal Commissioners, the costs of more than two counsel will not be allowed on taxation between party and party, unless the case involves extraordinary complication and difficulty, and is one in which a reasonable and prudent man, acting with ordinary prudence, would not go into court without three counsel. In applying this latter test, the chance of counsel being absent should not be taken into consideration; but it should be assumed that all the counsel employed can attend throughout the hearing. The rule laid down by Fry, J., in *Kirkwood* v. *Webster* (9 Ch. D. 239), explained. *Glamorgan County Council* v. *G. W. Ry.*, 64 L. J., Q. B. 138; [1895] 1 Q. B. 21; 71 L. T. 736; 59 J. P. 182; 9 Ry. & Can. Traff. Cas. 1.

In Arbitrations.]—In cases referred, the rule has been not to allow, on taxation, costs of more than one counsel on each side attending the reference; therefore the court refused to make absolute a rule for the master to review his

taxation, allowing only for one counsel, although the case was one of considerable complication. *Hawkins* v. *Rigby*, 8 C. B. (N.S.) 271 ; 29 L. J., C. P. 228 ; 6 Jur. (N.S.) 1208 ; 2 L. T. 243.

There is no universal rule that in an arbitration the fees of one counsel only can be allowed. *Orient Steam Navigation Co.* v. *Ocean Marine Insurance Co.*, 35 W. R. 771.

Writs of Inquiry.]—On taxation of costs on a writ of inquiry, the master should allow only for one counsel, unless in the exercise of his discretion on all the circumstances of the case, including the amount in dispute, he is satisfied that there was more to do in the case than could reasonably be imposed on one counsel only. Reg. Gen., T. T. 1870, June 14. Q. B., Ex. & C. P. ; 22 L. T. 652, n.

Before the promulgation of this rule, there was no inflexible rule as to the number of counsel allowed on taxation. The master had a discretion in the matter, and the court did not interfere with the exercise of that discretion except in extraordinary and glaring cases. *Frost* v. *L. B. & S. C. Ry.*, 39 L. J., Ex. 54 ; L. R. 5 Ex. 201 ; 21 L. T. 757 ; 18 W. R. 351. S. P., *Jacobs* v. *L. B. & S. C. Ry.*, 22 L. T. 651.

Commissions to take Evidence.]—Though the increased expenses occasioned by sending out counsel to act as commissioner in taking evidence abroad will not generally be allowed, yet it may be allowable under the circumstances of a particular case ; and if the master has used his discretion the court will not interfere unless it sees he is clearly wrong. *Yglesias* v. *Royal Exchange Assurance Corporation*, 39 L. J., C. P. 173 ; L. R. 5 C. P. 141 ; 22 L. T. 269 ; 18 W. R. 381.

On the execution of a commission for the examination of witnesses at Calcutta, in a case of much complication and importance, the master, on taxation of the defendant's costs, disallowed the expenses incurred on his behalf in legal assistance to the commissioners in conducting the viva voce examination of the several witnesses, although the order for the commission provided that "the costs of the order, and of the examination, interrogatories, cross-interrogatories and office copies thereof, and all other costs incidental thereto, should be costs in the cause" :—The court refused to interfere with the master's discretion. *Potter* v. *Rankin*, 38 L. J., C. P. 130 ; L. R. 4 C. P. 76 ; 19 L. T. 383.

To entitle a successful party to the costs of the attendance of counsel on a commission to examine witnesses abroad, it must be shewn that the attendance of counsel was necessary for the conduct of the commission. *Le Coeq* v. *S. E. Ry.*, 6 B. & S. 415; 14 L. T. 401; 14 W. R. 619.

The costs of more than one counsel attending the examination of witnesses before an examiner will not be allowed. *Hallows* v. *Fernie*, 17 L. T. 347 ; 16 W. R. 175.

In Chambers.]—Before the 120th Order of May, 1845, the expense of attending the master by counsel was not allowed between party and party, except on reference for scandal. *Green* v. *Briggs*, infra.

The costs of counsel in chambers are always understood as being allowed, unless the contrary is expressed. *Greville* v. *Greville*, 27 Beav. 596. *See* now Ord. LXV. r. 27, sub-r. 16.

b. What Fees Allowed.

Retainers.]—In taxation between party and party, it is not the practice to allow the common retaining fee to counsel. *Green* v. *Briggs*, 7 Hare, 279 ; 19 L. J., Ch. 294. *See* now Ord. LXV. r. 27 (44).

Special retainer disallowed in the taxation of costs between party and party. *Smith* v. *Effingham* (*Earl*), 10 Beav. 378 ; 16 L. J., Ch. 297 ; 11 Jur. 444.

In taxing the costs of a suit which were to be paid by the defendant a special retainer paid by the plaintiff to the attorney-general, who did not usually practise in the court of chancery, was allowed, although there were no special circumstances which rendered the employing the attorney-general necessary. *Nichols* v. *Haslam*, 15 Sim. 49 ; 9 Jur. 649.

According to the ordinary practice of the Admiralty Court, retainer fees for both the leading and junior counsel are allowed on taxation. *The Neera*, 5 P. D. 118 ; 12 L. T. 743 ; 28 W. R. 816.

Conferences and Consultations.]—The master refused to allow counsel's fees for consultation on a demurrer and costs of a conference concerning special admissions, which saved the necessity of a commission :—Held, that these matters were within the master's discretion, and that he had exercised that discretion properly. *Kidston* v. *Empire Marine Insurance Co.*, 16 L. T. 286.

In an action a defendant justified under a distress for a fee-farm rent, deducing his title so far back as the reign of Charles II. After issue joined, the plaintiff discontinued :—Held, that the defendant was not entitled to the costs of consultations. *Davis* v. *Hatton*, 8 D. P. C. 164 ; 4 Jur. 28.

The master is not at liberty to disallow a charge for a conference, where the solicitor has thought one necessary and paid the counsel's fee, except where a number of conferences has been charged for on the same point. *Braund, In re*, 39 L. J., Ch. 384.

The court refused to allow the fees paid on a second consultation held pending the hearing of the appeal. *Weymann* v. *Corcoran*, 41 L. T. 792.

A fee for a conference with counsel allowed, as the solicitor had thereby spared counsel much trouble and been able to give him a more moderate fee on his brief than would otherwise have been the case. *Ernest* v. *Partridge*, 2 N. R. 232 ; 8 L. T. 655 ; 11 W. R. 715.

In the absence of sufficient reason, only one consultation ought to be allowed under the 120th Ord. of May, 1845 ; and the taxing-master's certifying the fact of one counsel being brought specially from another court is not a ground for an extra number. *Smith* v. *Effingham* (*Earl*), 10 Beav. 378 ; 16 L. J., Ch. 297 ; 11 Jur. 444.

On taxation of costs, a charge for consulting counsel previously to presenting the petition, if the petition is one of a special nature, ought to be allowed. *Ellis, Ex parte, Musgrove, In re*, 3 Mont. D. & D. 600.

When the master has disallowed the fees paid to counsel for a consultation previously to the argument of a rule, the court will not interfere with his decision unless satisfied that he has erroneously exercised his discretion. *Smith* v. *Baker*, 28 L. T. 669.

Where no fee is paid to counsel on a consulta-

tion, no charge can be allowed to the solicitor for his attendance. *Catlin, In re*, 18 Beav. 516.

Where, by arrangement, exceptions to an answer were heard with the cause, a charge for consultation between counsel on the exceptions, as distinct from the consultation on the hearing of the cause, was allowed. *Davis* v. *Dysart (Earl)*, 8 De G. M. & G. 33; 25 L. J., Ch. 322; 2 Jur. (N.S.) 219; 4 W. R. 268.

A charge for copies only of those parts of the interrogatories, the answers to which were excepted to, can be allowed for the purposes of the consultation on the exceptions, as distinct from the copies made for the purpose of preparing the answer; for which latter purpose, also, only one copy to one junior counsel can be allowed. *Ib.*

—— **Amount.**]—The amount of fees to be allowed for consultations is in the discretion of the taxing-officer, who is not bound to inquire into the length of each consultation and the occasion on which it is held, but who may reasonably take into consideration the number of the consultations which he allows. *Railway Commissioners* v. *O'Rourke*, 65 L. J., P. C. 84; [1896] A. C. 594; 75 L. T. 84—P. C.

Opinions.]—The costs of procuring the advice of counsel prior to the institution of a motion are not taxable as party and party costs of the motion; such costs are "preliminary to" not costs "of" the motion. *Lynch* v. *Macan*, 26 L. R., Ir. 385.

The costs of procuring the advice of counsel to institute a motion to attach a person for contempt of court are not taxable against such person as party and party costs. *Lynch* v. *Macan*, 26 L. R., Ir. 388.

The costs of a case for opinion on evidence will be allowed on taxation as between party and party, though no answer has been filed. *Fry* v. *James*, Ir. R. 4 Eq. 255. Contra, *Freeman* v. *Springham*, 14 C. B. (N.S.) 197; 32 L. J., C. P. 249; 8 L. T. 428; 11 W. R. 701.

In the course of the cause the opinion of a strange counsel was taken, and the taxing-master allowed only the costs of a short case such as might have been laid before a counsel acquainted with the cause. The court refused to interfere with this discretion, considering it doubtful if, in strictness, the case should have been allowed at all. *Newby* v. *Drew*, 12 Ir. Eq. R. 24.

Pleadings.]—The taxing officer has discretionary power to allow, as between party and party, fees to counsel on (a) settlement on writ of summons, (b) settlement of reply, though the latter is simply a joinder of issue on the preceding pleading. *Tisdall* v. *Richardson*, 20 L. R., Ir. 190.

On the taxation of a plaintiff's bill of costs (in a suit in which a bill for the production of title deeds had been dismissed), the master allowed charges for the settlement of the answer by the defendant's junior equity counsel, and by his conveyancing council, who was familiar with the defendant's title, and also allowed a charge for an abstract of title laid before the junior equity council for the purpose of preparing the answer, but which abstract did not appear to have been prepared entirely for that purpose:—Held, that these allowances ought not to have been made. *Davis* v. *Dysart (Earl)*, 8 De G. M. & G. 33; 25 L. J., Ch. 322; 2 Jur. (N.S.) 219; 4 W. R. 268.

Costs of a conveyancing counsel employed to assist in the preparation of an answer disallowed. *Ib.*

Fees to two junior counsel (one of them being a conveyancer only) to settle the answer cannot be allowed as between party and party, unless by special order of the court. *Ib.*

A charge for abbreviating the answer, estimating it at its total length, including schedules, is proper, and to be allowed on a taxation between party and party. *Ib.*

Instructions.]—In instructing counsel to prepare pleadings, &c., a solicitor is bound to send only copies of deeds, and not the original deeds, which act would be a violation of his duty to his client. The costs of such copies will be allowed on taxation. *Beamish's Trusts, In re*, 19 W. R. 740.

The costs of a letter of instructions, for the guidance and direction of the commissioners, sent with the commission, were disallowed by the master, but subsequently allowed by the court. *Mann* v. *Harbord*, 39 L. J., Ex. 27; L. R. 5 Ex. 17; 21 L. T. 641; 18 W. R. 146.

Settling Affidavits.]—In an exceptional case, a fee to senior counsel for settling interrogatories and affidavits may be allowed. *Jessop* v. *Cusack*, 25 L. R., Ir. 244.

Rule 17 of 4th Consolidated Order, empowering the master to consider whether he will allow an affidavit to be settled by counsel, does not take the question of the costs of the affidavit out of the discretion of the court. *Davies* v. *Marshall*, 1 Dr. & Sm. 564; 7 Jur. (N.S.) 639; 9 W. R. 756.

Costs of settling affidavit (which was an echo of the bill) by counsel allowed. *Ib.*

Particulars of Breaches.]—In a patent suit in which the plaintiffs, after the briefs were delivered but before the hearing, took the common order dismissing their bill, with costs:—Held, on taxation of the costs, notwithstanding the judge had not certified what particulars had been proved, that the defendants were entitled to allowances in respect of drawing and settling by counsel particulars of breaches. *Batley* v. *Kynoch*, 44 L. J., Ch. 565.

On Briefs.]—In fixing the remuneration of counsel and solicitor and the number of counsel employed, the amount of the money-issue involved and the commercial importance of the case are properly taken into consideration. *L. C. & D. Ry.* v. *S. E. Ry.*, 60 L. T. 753.

—— **Separate Proceedings by same Solicitor.**]—Where the same solicitor is employed by different persons to conduct proceedings for the same or a similar purpose, he is entitled to such costs as would have been allowed in either action if he had not been engaged in the other, except as regards attendances or other matters which might have been done at the same time in both actions; and if the same counsel appear in both actions they ought in each action to have such fees as if they had not been instructed in the other. *Metropolitan Coal Consumers' Association, In re, Grieb's Case*, 59 L. J., Ch. 532; 45 Ch. D. 606; 62 L. T. 561; 38 W. R. 462. *See also* ante, col. 715.

—— **Amount allowed.**]—When, after briefs

had been delivered, the plaintiff's counsel desired to be furnished with a tabulated statement of some of the facts, and the master on taxing his costs as between party and party, in the exercise of his discretion having allowed additional fees to counsel on the delivery of such tabulated statement, a judge ordered the master to review the taxation, and to disallow such additional fees, on the ground that it was not competent to the master to allow such fees where no new matter had been furnished, the court held that the judge had acted on an erroneous principle, and set aside such order. *Wakefield* v. *Brown*, 43 L. J., C. P. 222; L. R. 9 C. P. 410; 30 L. T. 428.

The charge to be allowed for counsel's fees for cross-examination will not ordinarily exceed 5*l.* 5*s.* a day after the first, for which a larger fee may be allowed in heavy cases; and where the case is long and complicated, as much as 7*l.* 7*s.* a day may be allowed for the subsequent days. *Smith* v. *Buller*, 45 L. J., Ch. 69; L. R. 19 Eq. 473; 31 L. T. 873; 23 W. R. 332.

In estimating the amount of fees to counsel, the taxing-master should always have regard to the difficulty and complication of the questions of law and fact involved in the case and the importance of the result of it to the parties. *Robb* v. *Connor*, Ir. R. 9 Eq. 373.

The fees bonâ fide paid by a solicitor to counsel and fairly required by the magnitude or complication of the cause ought not to be reduced, but should be allowed on taxation between party and party. *Ib.*

The master having reduced counsel's fees, on taxation between party and party, not because the amount was excessive, but because the fee had been increased at the instance of the counsel, the court referred it back to the master to review his taxation as to those items. *O'Brien* v. *Cantwell*, 12 Ir. Ch. R. 221.

It would be illegal for the bar, as a body, to fix a minimum fee for any particular class of business; but any individual member of the bar may decline to take a fee less than a certain amount. *Ib.*

The master, in taxation between party and party, should only allow the usual and accustomed fee payable on each particular class of business, though a larger fee had been paid to counsel. *Ib.*

One of several defendants appealed, substantially, from the whole decree, and the appeal was dismissed with costs:—Held, on taxation, that the same fees on the plaintiff's briefs which had been allowed on the original hearing ought to be allowed on the appeal. *Sturgis* v. *Morse*, 26 Beav. 562.

Held, also, that the length of the interval between the two hearings ought not to vary the amount. *Ib.*

In an action for damage by collision, where the damage to one vessel amounted to 20,000*l.*, and to the other vessel to 2,000*l.*, three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively seventy-five guineas, fifty guineas, and thirty guineas, and the registrar on taxation reduced these fees to sixty guineas, forty guineas, and twenty-seven guineas. The court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. *The City of Lucknow*, 51 L. T. 907; 5 Asp. M. C. 340. See *General Steam Navigation Co.* v. *Mann*, 2 W. R. 154.

—— **Master's Discretion.**]—The amount to be allowed for fees to counsel is in the (almost uncontrolled) discretion of the master. *Lockstone* v. *L. B. & S. C. Ry.*, 12 C. B. (N.S.) 243.

The master refused to allow a larger fee to a junior counsel than a nominal one to take notes:—Held, that this was within the master's discretion, and that he had exercised that discretion properly. *Kidston* v. *Empire Marine Insurance Co.*, 16 L. T. 286.

On an appeal, the taxingofficer allowed for the defendants' two original counsel the same fees as he had been allowed in the court below:—Held, that the court ought not to interfere with the taxing officer's discretion. *Wegmann* v. *Corcoran*, 41 L. T. 792.

The court will not interfere with the discretion of the master as to the amount allowed for counsel's fees and refreshers upon a petition against a municipal election, unless it be manifest that he has failed to exercise it in a reasonable manner. *Hargreaves* v. *Scott*, 4 C. P. D. 21; 40 L. T. 35; 27 W. R. 323.

The court will not interfere with the discretion of the taxing-master as to the quantum of fees to counsel. *Att.-Gen.* v. *Carrington* (*Lord*), 6 Beav. 454; 12 L. J., Ch. 453.

The court will not entertain an application to review the certificate of the master as to the amount of fees to be allowed to counsel. *Parkinson* v. *Hanbury*, 11 Jur. (N.S.) 474; 12 L. T. 624; 13 W. R. 1056.

The Court of Appeal will not interfere with the discretion of the taxing-master as to the amount of counsel's fees. *Cousens* v. *Cousens*, 41 L. J., Ch. 166; L. R. 7 Ch. 48; 25 L. T. 719; 20 W. R. 48.

The taxing-master's decision as to the amount of counsel's fees will not be interfered with unless a gross mistake is made. *Brown* v. *Sewell*, 16 Ch. D. 517; 44 L. T. 41; 29 W. R. 295.

The rule that the decision of the master is final as to the proper charge for business done, does not apply to counsel's fees on the hearing of an appeal, on the ground that the judge of the court below is better able to decide the question of quantum. *Gilbert* v. *Guignon*, 21 W. R. 745.

Term Refreshers.]—Certain refreshers were paid for four terms antecedently to that in which the briefs were delivered; these refreshers were disallowed by the master: the court granted a rule to show cause why the master should not review his taxation. *Craven* v. *Sanderson*, 2 Jur. 374.

Refresher fees to counsel are allowable only when the cause is so circumstanced as that it may be called on, and are therefore not allowable when a cause has been ordered to stand over to await the decision of a court of error in another cause involving the same question, and therefore cannot by possibility come on. *Hughes* v. *Birkenhead Improvement Commissioners*, 16 L. T. 350.

Refresher Fees — Discretion.]—Under Ord. LXV. r. 27 (48), the taxing-master has a discretion in the special circumstances of the case to disallow refresher fees. *Smith* v. *Wills*, 53 L. T. 386; 34 W. R. 30. See *Hargreaves* v. *Scott*, supra.

—— **Clear Day.**]—The trial of an action with witnesses occupied four whole days and about

three hours on a fifth day. Subsequently, at the request of the judge, the action was re-heard and evidence given on one point, when the previous judgment was adhered to; this further hearing occupied substantially the whole day. The taxing-master allowed refreshers for the second, third, fourth, and fifth days, but refused to allow refreshers for the re-hearing on the ground that the case had occupied less than five hours on the fifth day:—Held, that the taxing-master ought to have allowed refreshers for the sixth day, and that Ord. LXV. r. 27, sub-r. 48, did not prevent him from doing so. *Boswell* v. *Coaks*, 35 W. R. 711. Affirmed, 36 Ch. D. 444; 58 L. T. 97—C. A.

When a trial has occupied less than five hours on the first day, but on the second day the five hours are completed and a further period is occupied on that day before the case is concluded, a "clear day" begins after the expiration of the five hours, and refresher fees may be allowed in respect of the further period of work done on the second day, under Ord. LXV. r. 27, sub-r. 48. *Walker* v. *Crystal Palace Gas Co.* ([1891] 2 Q. B. 300) not followed. *The Courier* ([1891] P. 355) and *Collins* v. *Worley* (60 L. T. 748) approved. *O'Hara* v. *Elliott*, 62 L. J., Q. B. 317; [1893] 1 Q. B. 362; 5 R. 205; 68 L. T. 166; 41 W. R. 248.

The taxing officer may allow a refresher fee to counsel where the trial of an action, heard on vivâ voce evidence, has been substantially prolonged beyond five hours, although less than five hours may have been occupied on the first day of the hearing. *The Courier*, 61 L. J., P. 11; [1891] P. 355; 66 L. T. 386; 40 W. R. 336; 7 Asp. M. C. 157; 55 J. P. 793.

A trial extended over parts of two days, lasting altogether about five and a quarter hours; it occupied less than five hours on each day. Upon taxation of costs as between party and party, the master disallowed a refresher fee to the successful party's counsel in respect of the second day:—Held, that a right to a refresher fee could only arise where the trial had lasted a "clear day" beyond the first five hours, whether "clear day" meant a separate day of the week, or only an additional period of five hours, and that therefore the master was right. *Walker* v. *Crystal Palace Gas Co.*, 60 L. J., Q. B. 781; [1891] 2 Q. B. 300; 65 L. T. 86: 39 W. R. 716.

The taxing-master, in calculating the five hours referred to in Ord. LXV. r. 27, sub-r. 48, is not to deduct the time occupied by the usual midday adjournment of the court. *Collins* v. *Worley*, 60 L. T. 748.

—— **Argument in Court of Appeal.**]—An action was tried before a judge without a jury, and the verdict and judgment were for the plaintiffs. The defendants appealed to the Court of Appeal, in which court the argument lasted for four days, and the Court of Appeal reversed the decision of the judge, and gave judgment for the defendants with costs. On taxation of the costs of the arguments in the Court of Appeal the master refused to allow certain refresher fees to the defendants' counsel in respect of three of the days occupied in arguing in the Court of Appeal, on the ground that he had no jurisdiction to allow them, as Ord. LXV. r. 27, sub-r. 48, provided for the allowance of refreshers only when a trial was had with vivâ voce evidence. The defendant appealed:—Held, that the master had a discretion, and such arguments were included in the work performed within sub-r. 30 of the same order, and that the matter ought to go back to him to allow the refresher fees if he saw fit to do so. *Svendsen* v. *Wallace*, 55 L. J., Q. B. 65; 16 Q. B. D. 27; 53 L. T. 565; 34 W. R. 151.

Where the hearing of an appeal from the Chancery Division occupies more than one day, the taxing-master has a discretion to allow additional fees to counsel, in the shape of a daily allowance or otherwise, though no vivâ voce evidence has been adduced before the Court of Appeal, such fees not being treated as refreshers in the sense in which refreshers are dealt with on taxation as fixed sums, but as an allowance by way of addition to the original fees, on the ground that such fees have by miscalculation been fixed too low. This discretion, however, is to be exercised with jealousy, since there is not in such a case the same difficulty in fixing the proper fee at first as there is in cases where oral evidence is adduced, the probability of a case lasting long in argument being a matter which ought to be taken into account at the time of delivering the brief. *Svendsen* v. *Wallace* (16 Q. B. D. 27) explained. *Easton* v. *London Joint Stock Bank*, 57 L. J., Ch. 329; 38 Ch. D. 25; 58 L. T. 364; 36 W. R. 375—C. A.

—— **Previous Practice.**]—Where a master had refused to allow the refresher usual for a queen's counsel:—Held, that this was within his discretion, and that he had exercised that discretion properly. *Kidston* v. *Empire Marine Insurance Co.*, 16 L. T. 286. See *Hargreaves* v. *Scott*, supra.

In the Court of Common Pleas the rule as to the allowance of fees as refreshers, on taxation of costs, is the same as in the Queen's Bench and Exchequer, viz. that such fees when proper may be allowed. *Lawrie* v. *Wilson*, 44 L. J., C. P. 87; L. R. 10 C. P. 152; 31 L. T. 688; 23 W. R. 139.

The costs of proceedings in court in the course of which several witnesses were examined vivâ voce, and which involved the question whether a certain person was legitimate, were ordered to be taxed upon the common-law scale, so as to give the equity counsel refreshers for every day after the first day of the hearing as in the case of counsel of the common-law bar. *Hill* v. *Hibbit*, 41 L. J., Ch. 703; L. R. 14 Eq. 221; 27 L. T. 334.

On a summons to review the master's certificate, in a suit where all the evidence was written, for disallowing refreshers to counsel in some cases and allowing them in others:—Held, that there is a discretion to allow refreshers where, from the nature of the case, the period of time occupied in the hearing, and the amount of fee originally given with the brief, it appears reasonable to allow further fees, and that the quantum of fees to be allowed is entirely a matter of discretion for the master. *Smith* v. *Daniell*, 34 L. T. 899. S. P., *Oakley* v. *Glanpool Slate Co.*, 1 N. R. 356.

The rule of the common-law courts as to refreshers applies to the hearing of heavy suits in chancery, whether on written or vivâ voce evidence; but the brief fee may fairly be taken to cover two days, after which refreshers should be allowed. *Smith* v. *Buller*, 45 L. J., Ch. 69; L. R. 19 Eq. 473; 31 L. T. 873; 23 W. R. 332.

In taxing the costs of an action in the Chancery Division tried on oral evidence, the taxing-master should follow the rule in the Common Law Divisions of allowing refreshers

to counsel for every day occupied by a trial beyond one day's time; but where the action is tried on affidavit evidence no refreshers should be allowed. The amount of the refreshers lies in the discretion of the taxing-master, and depends on the fee originally marked on the brief and the nature of the case. The rule in *Smith* v. *Buller* (supra), that the criterion for allowing refreshers is the length of the time occupied by the trial, irrespective of the mode in which the evidence has been taken, dissented from. *Harrison* v. *Wearing*, 48 L. J., Ch. 365; 11 Ch. D. 206; 41 L. T. 376; 27 W. R. 526.

The taxing officer having disallowed refresher fees to counsel, in a case where the hearing commenced in the afternoon of one day, and was concluded at noon of the next, but the time occupied was less than one day's time, the court refused to interfere with his discretion. *The Neera*, 5 P. D. 118; 42 L. T. 703; 28 W. R. 816.

When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial occupied in the whole more than one day's sitting, i.e. six hours. *Brown* v. *Sewell*, 16 Ch. D. 517; 44 L. T. 41; 29 W. R. 295—C. A.

c. Clerks' Fees.

Fees to counsel's clerks are mere gratuities, for which they have no legal demand, and this court has no jurisdiction in respect of such fees as against the clerks. The sum allowed for clerks' fees does not limit the sum which may be spontaneously given, but it does limit the sum which the solicitor can safely pay without the special direction or permission of the client. The Regulation of the 5th November, 1840, (Ordines Can. 157), is not a general order of the court, giving the clerks a legal demand for the fees therein mentioned, but a mere intimation of the opinion of the equity judges that they may be properly allowed in taxation. *Cotton, Ex parte*, 9 Beav. 107; 10 Jur. 84.

d. Receipt.

The taxing-master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge on taxation. *Beavan, In re*, 5 De G. M. & G. 40; 22 L. J., Ch. 536; 2 W. R. 229.

Payment in respect of counsel's fees should specify the cause, and each particular fee. Payments, except for stated and specific fees for particular matters of business done or to be done, disapproved of. *Smith, In re*, 4 Beav. 309.

ii. *Briefs.*

Counsel's Fees on.]—*See* supra.

After Notice of Trial.]—A plaintiff is not in any case entitled to the costs of preparing for trial, such as instructions for brief, drawing and copying briefs and documents, and advising on evidence, until after notice of trial; and that even though the defendant has obtained repeated orders for time to plead, extending down to five or six days before the commission day, and is under terms to take short notice of trial, or such notice as the plaintiff can give. *Freeman* v. *Springham*, 14 C. B. (N.S.) 197; 32 L. J., C. P. 249; 8 L. T. 428; 11 W. R. 701.

Where issue has been joined, but the plaintiff has had leave to add a fresh count, the pleadings to which are not concluded when the action is settled, it is not so clear that the ordinary rule of not allowing costs of briefs, &c., before final joinder of issue does not apply, that the court will interfere to review the master's taxation disallowing those costs: at all events, if he has not merely acted on the rule, but has also exercised his discretion on the whole case. *Knight* v. *Gravesend Ry.*, 27 L. J., Ex. 8.

The defendant's costs of "preparing for trial" cannot be allowed where a plaintiff discontinues before notice of trial, even though liberty had been reserved to the plaintiff under a judge's order to set down the cause for trial before issue joined and a special jury had been struck. *Curtis* v. *Platt*, 16 C. B. (N.S.) 465; 33 L. J., C. P. 253; 10 Jur. (N.S.) 823; 10 L. T. 383.

As a general rule, the costs of preparing briefs for trial cannot be allowed on taxation as between party and party before notice of trial is served. *Cordner* v. *Guedalla*, 29 L. R., Ir. 81.

When a consent to judgment is given by a defendant the day after service upon him of notice of trial, the plaintiff is not entitled to the costs of preparing briefs, etc. incurred before service of the notice of trial. *Meldon* v. *Lawless*, 18 W. R. 761.

An order for re-hearing was discharged with costs, but in the meantime, the cause had been set down, and briefs delivered:—Held, that the costs thereof could not be included in the order, and could only be given on a re-hearing, or upon special application. *Davenport* v. *Stafford*, 9 Beav. 106.

Brief of pleading prepared for counsel after publication and before the cause had been set down, and which became useless in consequence of a compromise before hearing, disallowed on taxation as between solicitor and client. *Friend* v. *Solly*, 10 Beav. 329; 11 Jur. 958.

Brief of pleadings made before the case was at issue, disallowed. *Pender, In re*, 10 Beav. 390.

The plaintiff's solicitor is entitled to give out briefs and fees to counsel upon the same day that he sets down the cause to be heard pro confesso. *Ivie* v. *Gahan*, 9 Ir. Eq. R. 223.

Where an injunction or receiver is prayed by the bill, the defendants, who are interested in resisting the motion, are entitled to the costs of two briefs on the filing of their answers; but the plaintiff is not entitled to the costs of briefs unless he has moved or served a bonâ fide notice of motion, or unless some act has been done by the defendant after the briefs were bonâ fide made which rendered the notice of motion unnecessary. The bill prayed an injunction, and, upon the coming in of the answer, the solicitor prepared two briefs for the injunction motion. The suit was compromised before the briefs were given out or notice of motion served:—Held, that the plaintiff was not entitled to the costs of the briefs against the defendant. *Broadbent* v. *Hughes*, 10 Ir. Eq. R. 65.

In taxation between party and party, costs of counsels' fees on brief to fix a day for the hearing disallowed. *Clarke* v. *Malpas*, 1 N. R. 221.

Documents contained.]—A demurrer having been allowed with costs, the costs of preparing "observations" to counsel's briefs, including marginal notes and an index to the bill, which was very long, disallowed. *Ernest* v. *Partridge*, 2 N. R. 232; 8 L. T. 655; 11 W. R. 715.

Costs of drawing observations for counsel, when the cause stood over, allowed. *Davies* v. *Marshall*, 1 Dr. & Sm. 564 ; 7 Jur. (N.S.) 639 ; 9 W. R. 756.

In a bill of costs taken in before the master for taxation, one charge under the title of "observations," of considerable amount, was for copies of certain charters, accompanying briefs to counsel:—Held, that the master was right in allowing the charge. *Skinners' Co.* v. *Irish Society*, 1 Jur. 37.

As a general rule, it is improper to introduce, into counsel's briefs, both the original and amended bills. *Higgins* v. *Bateman*, 2 Dr. & War. 70.

In an action against a railway company for an injury resulting from the negligence of the company's servants, the court directed that the costs of copying into the plaintiff's briefs the evidence given at an inquest held upon the bodies of other persons who had been killed on the same occasion should be disallowed. *Lockstone* v. *L. B. & S. C. Ry.*, 12 C. B. (N.S.) 243.

When one party, by his pleading, puts in issue documents which the other may reasonably expect will be read in evidence, and he accordingly has them briefed to his counsel, the master ought, in the exercise of his discretion, having regard to the probable materiality and relevancy of those documents to the case as pleaded, to allow the costs of the briefs containing them, if he considers that the party was justified in having them briefed, even though they were not read in the evidence at the hearing. *Haslam* v. *O'Connor*, Ir. R. 6 Eq. 615.

In preparing briefs for the hearing, copies of deeds should not be made up into the brief, but should be kept for the use of the court if necessary. The deeds should be briefed independently of such copies. *Beamish's Trusts, In re*, 19 W. R. 740.

The entry upon the decree, of documents as read at the hearing, does not, upon taxation of costs between party and party, exclude the master's discretion as to disallowing the charges for briefing them to counsel. *Murphy* v. *Nolan*, Ir. R. 7 Eq. 498.

A cause having been made a remanet, a correspondence took place between the respective attorneys, with a view to reference, which failed :—Held, that the master exercised a proper discretion in disallowing copies of this correspondence as part of the briefs, in taxing the costs of the cause. *Pilgrim* v. *Southampton and Dorchester Ry.*, 8 C. B. 25. See *Budgett* v. *Budgett*, post, col. 773.

The costs of briefing the proceedings in an action in which a question similar to that in issue was involved disallowed as between party and party. *Thompson* v. *Moore*, 25 L. R. Ir. 98.

Diagrams annexed to the margin of copies of the evidence supplied to counsel, illustrative of the subject-matter in dispute, although convenient are not necessary, and the extra costs occasioned thereby will not be allowed in taxation as between party and party. *Smith* v. *Buller*, 45 L. J., Ch. 69 ; L. R. 19 Eq. 473 ; 31 L. T. 873 ; 23 W. R. 332.

The court allowed the costs of copies of the transcript of the shorthand writer's notes of the judgment below furnished to the defendants, two original counsel. *Wegmann* v. *Corcoran*, 41 L. T. 792.

Under the common order of the Court of Appeal giving the costs of the appeal, and of the shorthand writer's notes of the evidence and of the judgment in the court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3*d*. per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3*d*. per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each judge of the Court of Appeal. *Singer Manufacturing Co.* v. *Loog*, 52 L. J., Ch. 288 ; 49 L. T. 484 ; 31 W. R. 392.

Master's Discretion.]—The master having, on a taxation as between party and party, allowed 105*l*. as instructions for brief, though the witnesses were not very numerous, or the brief very long, the court declined to interfere with his discretion, the questions involved in the trial being complicated and difficult. *Beaufort (Duke)* v. *Ashburnham (Lord)*, 13 C. B. (N.S.) 598 ; 32 L. J., C. P. 97 ; 9 Jur. (N.S.) 822 ; 7 L. T. 710 ; 11 W. R. 267.

Several Actions.]—Where, in actions on a policy of insurance against several, the attorney had only made out a full brief in one cause, and short statements in the others, but the master allowed for the full briefs in all, the court made a rule for him to review his taxation. *Martineau* v. *Barnes*, 1 Tidd's Prac. 666.

Two plaintiffs brought separate actions, and recovered damages against the same defendant, in respect of a distinct inquiry sustained by each of them from the same cause. The same attorney was employed by both plaintiffs, and the briefs in each case were to a certain extent similar. The master, in taxing the plaintiff's costs, treated those portions of the briefs in each action which were similar as a brief and a draft brief, and taxed the costs accordingly. He then added together the costs of such brief and of the draft, and allowed half the aggregate amount to each plaintiff:—Held, that the taxation was wrong, it not being the duty of the master to take into consideration that the same attorney was employed by two parties, unless the actions had been consolidated. *Mucklow* v. *Whitehead*, 9 Ex. 384 ; 2 C. L. R. 553 ; 23 L. J., Ex. 97 ; 2 W. R. 172.

A solicitor is entitled to charge for fully instructing every counsel employed at the hearing. Therefore when A. and B. had a common interest in one question at the hearing, and A. only was interested in another question, and the taxing-master disallowed the charges for so much of the briefs to A.'s counsel as related to the former question, the taxation was sent back to be reviewed. *Newby* v. *Drew*, 12 Ir. Eq. R. 24.

Abandoned Motion or Discontinuance of Action.]—On an abandoned motion, or on the discontinuance of an action, the costs of all work in preparing, briefing or otherwise, relating to affidavits or pleadings, are allowed, provided, in the opinion of the taxing-master, such work has not been prematurely done. *Harrison* v. *Leutner*, 50 L. J., Ch. 264 ; 16 Ch. D. 559 ; 44 L. T. 331 ; 29 W. R. 393.

Further Brief.]—There is no rule which on the taxation of costs as between party and party forbids the allowance of a further fee to counsel on the occasion of delivering a further brief, although such further brief contains no new

matter, but only a new arrangement in a more compendious form of matter which was in the first brief. *Wakefield* v. *Brown*, 43 L. J., C. P. 222; L. R. 9 C. P. 410; 30 L. T. 428.

Costs of supplemental briefs on petition allowed, where made necessary by opposition of respondents, after expressing their intention not to oppose petition. *Stephens* v. *Newborough (Lord)*, 11 Beav. 403; 17 L. J., Ch. 332; 12 Jur. 319.

Counsel's Fees on.]—*See* supra.

iii. *For Letters before Writ.*

Where a debt is paid before action, a plaintiff cannot recover the costs of his attorney's application. *Caine* v. *Coulson*, 1 H. & C. 764; 32 L. J., Ex. 97; 7 L. T. 636; 11 W. R. 239.

An attorney of a creditor retained to demand a debt has no right to insist on payment of any costs of his letter demanding the debt, previously to issuing a writ of summons. *Holman* v. *Stephens*, 6 Jur. (N.S.) 124.

A solicitor will not be allowed, on taxation of costs, to charge for more than one letter before action under any circumstances. *Capel* v. *Staines*, 2 M. & W. 850; 5 D. P. C. 770; M. & H. 265; 6 L. J., Ex. 212; 1 Jur. 740. See also *Morrison* v. *Summers*, 1 D. P. C. 325; 1 B. & Ad. 559; 9 L. J. (O.S.) K. B. 13; and *Williams* v. *Barnett*, 16 L. T. 672.

iv. *Writ of Summons.*

Sum Accepted less than that Indorsed.]—Where a sum of money less than the amount of the debt and costs indorsed on a writ of summons has been paid and accepted within four days of the service, the defendant is not entitled to have the costs taxed, unless it distinctly appears that the deduction was from the debt, and not from the costs, or that it was acknowledged on the part of the plaintiff that there was a mistake in the amount of the debt indorsed. *Young* v. *Crompton*, 2 D. & L. 557; 10 Jur. 248.

Right to Tax.]—A plaintiff issued a writ of summons indorsed for 7*l.* 7*s.* debt, and 2*l.* costs. The defendant within the four days tendered the 9*l.* 7*s.*, and the plaintiff's attorney offered to take off 2*s.* 6*d.* from the costs, as being too much. The defendant's attorney insisted on his right to a taxation, and took out a summons accordingly, which was dismissed, with costs, on the ground of there being a dispute as to the sum actually paid for costs. The court set aside the judge's order, as the defendant had at all events a right to have the 1*l.* 17*s.* 6*d.* taxed. *Hunter* v. *Russell*, 5 Man. & G. 601; 6 Scott (N.R.) 627; 12 L. J., C. P. 272.

Debt accepted after Four Days.]—The debt and costs indorsed on a writ of summons were received by a clerk of the plaintiff's attorney after the four days:—Held, that the attorney not having offered to return the money, was not entitled to go on with the action for the recovery of further costs. *Holding* v. *Sturchfield*, 7 Man. & G. 957. See also *Hoole* v. *Earnshaw*, 39 L. T. 409—C. A.

Service out of Jurisdiction.]—A defendant being out of the jurisdiction, and personally served with a writ of summons, is liable to the expense attending such service or reasonable efforts to serve him, and the question as to the amount must be raised before the master on taxation of costs, with the proper materials for that purpose. *White* v. *Brett*, 28 L. J., Ex. 32.

Costs of Two Writs.]—In the taxation of costs, the master is justified in allowing the expenses of two writs issued in one action against the defendant into two counties, where it was doubtful in which county he was to be found. *Morris* v. *Hunt*, 1 Chit. 544.

v. *Notices of Action.*

Costs of—When Allowed.]—A railway company was bound by acts of parliament to charge all persons sending goods by it at equal rates. In an action to recover the difference between the sums charged the plaintiff, and those charged by the company to other persons for the conveyance of goods, it was held that the charges so made must be considered as something done under the act by which they were incorporated, and consequently they were entitled to notice of action, and therefore that the master was right in allowing the plaintiff the costs of a notice of action. The court refused to entertain an objection to the amount of the costs of the notice of action so allowed, as that objection had not been taken before the master. *Kent* v. *G. W. Ry.*, 4 Railw. Cas. 699; 4 D. & L. 481; 3 C. B. 714; 16 L. J., C. P. 72.

In an action by a carrier against a railway company to recover back exorbitant and unequal charges made upon him for the conveyance of goods, and which action was at the trial referred, the company's act of incorporation requiring that they should have a notice of action, the plaintiff at great labour and expense prepared and delivered a notice, accompanied by voluminous accounts of the several packages upon which the overcharges were alleged to have been made, together with the dates and other particulars. The master having allowed the plaintiff 100*l.* for the preparation of the notice and the accompanying accounts, and 17*l.* for one fair copy only, the court on the plaintiff's motion refused to order a review of the taxation, on the ground that the allowance for preparing the notice was inadequate, and that two fair copies should have been allowed; and afterwards, upon the company's motion, the court directed a review on the ground that the sum of 100*l.* was an excessive allowance, inasmuch as this was an expense necessarily incurred by the plaintiff in preparing himself to bring the action. *Edwards* v. *G. W. Ry.*, 12 C. B. 419.

vi. *On Removal from Inferior Courts.*

Ord. LXV. r. 3.

A defendant having removed from a county court, by certiorari, under 19 & 20 Vict. c. 108, s. 38, a plaint for a claim not exceeding 5*l.*, the plaintiff is not bound to follow the action into the superior court; and the defendant, after notice to the plaintiff to declare, is not entitled to sign judgment, and he cannot obtain from the plaintiff the costs of removing the plaint. *Garton* v. *G. W. Ry.*, 1 E. & E. 258; 28 L. J., Q. B. 103; 5 Jur. (N.S.) 595; 7 W. R. 63.

The court has no power where an action has been removed from an inferior court by certiorari, to order that the defendant shall have his costs, under 12 & 13 Vict. c. 106, s. 86, which enables the court so to order, where satisfied that before action the plaintiff made an affidavit of debt under the defendant's bankruptcy in an

unreasonable amount, and has recovered less. *Woodall* v. *Voight*, 6 H. & N. 153; 30 L. J., Ex. 31; 6 Jur. (N.S.) 1162; 3 L. T. 334; 9 W. R. 57.

The directions to the masters, of H. T., 1853, do not apply to an action commenced in a county court, and removed by a certiorari to a superior court; a plaintiff in such a case therefore is entitled to costs on the higher scale, though he recovers less than 20*l*. *Perry* v. *Bennett*, 14 C. B. (N.S.) 402; 33 L. J., C. P. 45.

vii. *Costs in the Cause.*

What are.]—Costs in the cause mean the costs of all interlocutory proceedings which are not otherwise provided for. *Pugh* v. *Kerr*, infra.

The costs of proceedings before the attorney-general for obtaining his fiat to an information and bill are costs in the cause. *Att.-Gen.* v. *Halifax Corporation*, 41 L. J., Ch. 100; L. R. 12 Eq. 262; 24 L. T. 655.

A cause having been set down for trial, the defendant obtained a rule to change the venue on payment of the costs incurred. Thereupon the plaintiff withdrew the record; but the defendant not having paid the costs, he again set down the cause, and tried it:—Held, that the costs relating to the abortive attempt at trial were not costs in the cause. *Pugh* v. *Kerr*, 8 D. P. C. 218; 6 M. & W. 17; 9 L. J., Ex. 255; 4 Jur. 152.

On an appeal to a judge, from an order of a master, if the judge makes no order about the costs, they will not be costs in the cause, and, therefore, the party finally successful in the cause will not be entitled to them. *Mann* v. *Harbord*, 39 L. J., Ex. 27; L. R. 5 Ex. 17; 21 L. T. 436.

By an order made for facilitating the entry of causes for trial in Lancashire, causes for trial at Liverpool were allowed to be entered provisionally at the office of the acting prothonotary and associate at Preston previously to the commission day at Liverpool. The plaintiff entered his cause provisionally at Preston, and afterwards, and before the commission day at Liverpool, an order was made by a judge at chambers for a commission to examine witnesses on the part of the defendants, and for staying the trial till the summer assizes. The cause was provisionally entered for trial at the summer assizes, but the defendants withdrew their pleas before the commission day. On a subsequent taxation of the costs of the c use for the plaintiff, he was held to be entitled to the costs of so provisionally entering the cause. *Ib.*

A suit was instituted by a person claiming a legal title to land, praying discovery and a delivery up of the title deeds against a person who had the deeds, and merely claimed to hold them as a stakeholder for the person who had the legal title. The bill in that suit also prayed an account against the defendant as agent of the plaintiff. The defendant had not acted in that capacity. The deeds having been brought into court on an interlocutory motion, and another suit having been subsequently instituted, in which the questions as to the title to the lands could be decided, the plaintiff in the first suit offered the defendant to consent that the deeds in court should be transferred to the second suit, and the first dismissed with costs. The defendant having declined to consent, and put the plaintiff upon the terms to bring the first suit to a hearing:—Held, the defendant not objecting to the retention of the deeds in court, that the defendant was entitled to the costs of the suit generally, and not merely to those incurred up to the service of the notice of consent. *Whittingham* v. *Cusack*, Ir. R. 7 Eq. 159—C. A.

Where a plaintiff obtains a verdict and the defendant afterwards obtains a rule for a nonsuit or a new trial, and upon cause shown it is ordered by consent that the damages be reduced, but that, on payment of such reduced damages and the taxed costs of the cause, the verdict be vacated, and a stet processus entered, the plaintiff is entitled to the costs of opposing the rule as costs in the cause. *Delisser* v. *Towne*, 1 Q. B. 333; 4 P. & D. 644.

In trover a verdict was taken for the plaintiff to the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of nisi prius, to ascertain the amount of deterioration, which amount, with the costs of the cause, was to be paid to the plaintiff:—Held, that the expenses of witnesses attending the arbitrator were costs in the cause. *Tregoning* v. *Attenborough*, 7 Bing. 733; 5 M. & P. 453; 1 D. P. C. 225.

Where a rule was obtained for referring back to an arbitrator a cause at nisi prius, with directions to him to reduce the damages, or enter a verdict for the defendant, and on which rule the court gave judgment that the verdict ought to be reduced:—Held, that the costs of this rule were properly taxed as costs in the cause. *Goodall* v. *Ray*, 1 H. & W. 333; 4 D. P. C. 1.

Where a defendant entered into an agreement with the plaintiff in writing, but not stamped, and the plaintiff's attorney engrossed a copy thereof, and before action tendered the same, properly stamped, to the defendant, which he refused to sign; the court directed the master to include the costs of stamping the agreement in the costs of the action. *Bowen* v. *Pitman*, 2 Esp. 728.

The plaintiff's costs of obtaining an order for the investment of money are costs in the cause. *Brennan* v. *Nolan*, 1 Hog. 130.

When on an interlocutory application the costs are reserved to the hearing, and the bill is afterwards dismissed, with costs, for want of prosecution, the costs of such interlocutory application cannot be obtained. It is therefore sometimes useful, upon interlocutory applications, for the defendant to ask that the costs may be reserved to the hearing or further order, or else that they may be made the costs in the cause. *Rumbold* v. *Forteath*, 4 Jur. (N.S.) 608.

The plaintiff obtained an order to set aside the appearance of a minor, and that the minor should appear and answer by the officer. The uncle of the minor afterwards obtained an order to set aside the first order, and that the minor should be at liberty to appear and answer by him as his guardian:—Held, that he was not bound to pay the costs in the first order, but that they were costs in the cause. *Wallen* v. *Barry*, 6 Ir. Eq. R. 124.

Cause a Remanet.]—In an action of trespass, the defendant pleaded four pleas, upon which issues were joined. The cause was entered for trial at the assizes, and made a remanet. He afterwards obtained an order to amend one of the pleas, and the cause was tried at a subsequent assizes, when a verdict was found for him on the amended plea (which covered the whole cause of action), and for the plaintiff on the other pleas:—Held, that the plaintiff was entitled to the costs

of the remanet. *Waller* v. *Blacklock* or *Warner*, 4 D. & L. 4; 15 M. & W. 715; 15 L. J., Ex. 333; 10 Jur. 716.

The costs occasioned by the cause being a remanet are costs in the cause, not taxable, as costs of the trial, on a rule for a new trial on payment of costs. *Bentley* v. *Carver*, 2 C. B. 817; 15 L. J., C. P. 173.

Costs are allowed when a cause goes off and remains to be tried for want of jurors. *Sparrow* v. *Turner*, 2 Wils. 366.

After verdict, the party succeeding is entitled to the costs incurred at a former assizes, when the cause, from press of business, was made a remanet. *Standen* v. *Hall*, 1 Ld. Ken. 338.

viii. *Copies.*

Necessary or Proper.]—An order had been made by the Court of Appeal on the application of the defendants directing part of an affidavit to be struck out as scandalous and giving the defendants the costs of the application. Among the items in the bill of costs of the defendants were charges for four copies of the pleadings, one for the use of counsel and three for the use of the judges of the Court of Appeal. The taxing master, without entering into the consideration of the question whether the copies were necessary for the purpose of the application, disallowed them on the ground that it was the general rule not to allow the costs of copies of pleadings on an interlocutory application:—Held, that no such general rule as was alleged to exist in the taxing master's office could be sustained; that it was the duty of the taxing master, under the Rules of the Supreme Court (Costs), r. 26, to consider in each case whether the copies were "necessary or proper for the attainment of justice," and that as the copies in the present case were necessary for the hearing of the application, the costs of them must be allowed. *Warner* v. *Mosses*, 51 L. J., Ch. 86; 19 Ch. D. 72; 45 L. T. 359.

Copy Correspondence.]—The costs of a proper copy of the correspondence for the use of the judge and counsel should be allowed on taxation, where the merits of the case turn on the correspondence. *Budgett* v. *Budgett*, 64 L. J., Ch. 209; [1895] 1 Ch. 202; 13 R. 1; 71 L. T. 632; 43 W. R. 167.

—— **Accidental Destruction.**]—The papers in the suit were accidentally burnt in the offices of the relator's solicitor, and new copies became necessary for the hearing of the cause. A decree was afterwards pronounced against the defendant, with costs as between party and party:—Held, that the extra costs occasioned by the accident ought not to be borne by the defendant. *Att.-Gen.* v. *Kerr*, 3 Beav. 425; 10 L. J., Ch. 177; 5 Jur. 863.

—— **Whole or Part.**]—In allowing the costs of attested copies, it is discretionary with the taxing master whether he will allow for the copy of the whole or a part only of a document. *Clanmorris* v. *Mahon*, 10 Ir. Eq. R. 144.

—— **Provided for the Court.**]—The costs of copies of deeds or documents not actually read at the hearing, but furnished by the parties to the court, are not allowed where they are personal costs, and do not come out of a fund. *Bozon* v. *Williams*, 3 Y. & J. 378.

The costs of all copies of documents, which are required by the judge for his assistance in hearing the cause, are costs in the cause. *Small* v. *Attwood*, 1 Y. & Coll. 53; 4 L. J., Ex. Eq. 1.

—— **Pleadings.**]—Where any of the plaintiffs in a suit live in the country, close copies of the answer will be allowed, and the costs of them will be costs in the cause. *Ib.*

If upon a motion by the plaintiff, grounded upon the defendant's answer, documents therein shortly stated have been read from copies in which they are set out at length; an order dismissing the motion with costs, will not entitle the defendant to the costs of such copies. *Skinners' Co.* v. *Irish Society*, 1 Myl. & C. 162.

On a summary application by injunction, the court will direct the costs of a written bill to be allowed, unless it is shown that such additional expense has not been incurred bonâ fide. *Elt* v. *Islington Burial Board*, 2 Eq. Rep. 1089; 2 W. R. 584.

An order for taxation of costs having been made in a suit, in which three copies in writing of the bill had been served, and the master, in the absence of any special direction in the decree, having refused to allow the costs of these:—Held, that the omission to ask for them at the hearing being by inadvertence, the costs of these bills might be allowed; but the costs of the motion refused, it arising out of the negligence of the party himself. *Hewitt* v. *White*, 12 Jur. (N.S.) 46; 13 L. T. 787; 14 W. R. 220.

—— **Conferences with and Instructions to Counsel.**]—*See* supra.

Prints of Record in another Action.]—A collision occurred between the P. and the M., in consequence of which the P. also collided with the D. The P. and the D. commenced actions against the M.; but the D. stood by until the P.'s action was decided. In the P.'s action the M. was found alone to blame. Prints of the evidence taken in the P.'s action were obtained by the solicitors for the D. from the solicitors for the P., and were used in the action by the D. against the M.:—Held, that the solicitors for the D. were entitled to charge the defendants 3*d.* per folio for the prints of the record. *The Mammoth*, 53 L. J., P. 70; 9 P. D. 126; 51 L. T. 459; 33 W. R. 172; 5 Asp. M. C. 289.

—— **Evidence.**] — The appellants from an order on a claim in a winding up gave notice to read a mass of affidavits made in the winding up but not used on the hearing below. The respondent objected to their being admitted, but took copies. The court of appeal confined the argument in the first instance to a question not affected by these affidavits, and being against the appellants on that question, dismissed the appeal with costs, so that the question as to the admissibility of the affidavits was not decided. The respondent applied to have the affidavits entered in the order, as otherwise he would not be able to get the costs of having taken copies:—Held, that the application could not be granted, and that the respondent ought not to have taken copies unless and until the court held the evidence admissible, in which case it would have given him time to enable him to meet it. *Brampton and Longdown Ry., In re, Shaw's claim*, L. R. 10 Ch. 186; 33 L. T. 5; 23 W. R. 813.

A deposition of a witness, taken in the court of

bankruptcy for one purpose, and filed, may be used against him as an admission in any other proceeding in the matter of the same bankruptcy. *Hall, Ex parte, Cooper, In re*, 51 L. J., Ch. 556; 19 Ch. D. 580; 46 L. T. 549.

But when a party to an application in the court of bankruptcy gives notice to his opponent of his intention to use as evidence on the hearing of the application a deposition which is on the file, though it was originally taken for another purpose, he ought not to serve his opponent with a copy of it, and if he does so, he will not, though successful on the application, be allowed the costs of the copy thus served. *Ib.*

Semble, per curiam. With regard to the costs of the copies of the deposition which were supplied for the use of the respondent's counsel, we think that in the present case those costs should be allowed. It must not be supposed that we should in all cases allow such costs, we might in some cases allow only the costs of making extracts. *Ib.*

—— **Shorthand Notes.**] — *See* APPEAL — EVIDENCE.

—— **Interrogatories.**]—A charge for copies only of those parts of the interrogatories, the answers to which were excepted to, can be allowed for the purposes of the consultation on the exceptions, as distinct from the copies made for the purpose of preparing the answer; for which latter purpose, also only one copy to one junior counsel can be allowed. *Davis* v. *Dysart (Earl)*, 8 De G. M. & G. 33; 25 L. J., Ch. 322; 2 Jur. (N.S.) 219; 4 W. R. 268.

—— **Where same Solicitor.**]—It would appear to be the settled practice, that where the same solicitor acts for both the plaintiff and the defendant in a cause, not to allow copies to be taken by one party of documents brought into chambers by the other. *Sharp* v. *Wright*, L. R. 1 Eq. 631; 14 L. T. 246; 14 W. R. 552.

A firm of solicitors acting for a number of sets of persons (five in all) interested in moneys secured upon mortgage, on the mortgage being paid off, in their bill of costs charged the executors of the mortgagor with the costs of five copies of the draft deed of transfer, and the taxing-master having disallowed the charge for four such copies:—Held, that the taxing-master was right in allowing the costs of only one copy. *Wade and Thomas, In re*, 50 L. J., Ch. 601; 17 Ch. D. 348; 44 L. T. 599; 29 W. R. 625.

Where the same solicitor is employed by different persons to conduct proceedings for the same or a similar purpose, he is entitled to such costs as would have been allowed in either action if he had not been engaged in the other, except as regards attendances or other matters which might have been done at the same time in both actions. *Metropolitan Coal Consumers' Association, In re, Grieb's case*, 59 L. J., Ch. 532; 45 Ch. D. 606; 62 L. T. 561; 38 W. R. 462.

—— **Charge for.**]—A defendant's solicitor, who himself furnishes copies of documents which the plaintiff has a right to take under the 15 & 16 Vict. c. 86, ss. 18, 20, will not be permitted to charge for them at the rate of 4*d.* per folio, but will be allowed only stationer's charges actually incurred. *Kennedy* v. *George, Honnor, In re*, 6 W. R. 218.

The sums paid for office copies of answers at 4*d.* per folio, and for ordinary printed copies at ½*d.* per folio, are payable to the defendant, and when received by his solicitor must be applied in reduction of the cost of printing the answer. *Att.-Gen.* v. *Etheridge*, 32 L. J., Ch. 706; 9 L. T. 314; 11 W. R. 927.

A solicitor is not entitled to charge at the rate of fourpence per folio for documents existing in print prior to the institution of a suit, though the documents may have been properly used for the purposes of the suit. *Underwood* v. *Secretary of State for India*, 19 L. T. 270; 16 W. R. 926.

Under the common order of the court of appeal giving the costs of the appeal, and of the shorthand writer's notes of the evidence and of the judgment in the court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3*d.* per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3*d.* per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each judge of the court of appeal. *Singer Manufacturing Co.* v. *Loog*, 52 L. J., Ch. 288; 49 L. T. 484; 31 W. R. 392.

ix. *Perusals.*

When allowed.] — The costs of perusals of exhibits to affidavits are not allowed on taxation under the Rules of Court, August, 1875 (Costs), Ord. VI., without a special direction to the taxing-master, who by the form of order has liberty to allow a special charge for perusal and consideration of the exhibits, the amount of such charge, if any, to be in his discretion. *De Rosaz, In re, Rymer* v. *De Rosaz*, 53 L. J., Ch. 448; 24 Ch. D. 684; 49 L. T. 133.

Where depositions have been taken abroad, a reasonable allowance should be made to the solicitor in England for perusing them. *Wentworth* v. *Lloyd*, 33 L. J., Ch. 642; L. R. 2 Eq. 607; 12 Jur. (N.S.) 581; 14 L. T. 751.

A demurrer to the whole bill having been allowed with costs:—Held, that the solicitor for the defendant was not entitled to fees for perusing interrogatories (so as to render the plaintiff liable to the costs of a double defence by demurrer and answer), for drawing an index and marginal notes to the bill (which are of extraordinary length and complication), for the assistance of counsel, or for drawing observations for counsel's brief to argue the demurrer. *Ernest* v. *Partridge*, 2 N. R 232; 8 L. T. 655; 11 W. R. 715.

A similar affidavit was filed by a plaintiff in each of several suits. The solicitor for the defendants took an office copy of the affidavit in one suit only, and examined at the record office the affidavits in the other suits:—Held, that he was not entitled to charge for perusing the affidavits in the other suits. *Betts* v. *Cleaver*, 41 L. J., Ch. 663; L. R. 7 Ch. 513; 27 L. T. 85; 20 W. R. 732.

x. *Attendances.*

Country Solicitor at Trial.]—In taxing costs between party and party a charge for the attendance of the country solicitor at the hearing in London is discretionary. Where in admiralty cases the attendance of the country solicitor, who has taken the examination of the witnesses and managed the proceedings up to the trial, is necessary for the proper conduct of the case, his charges for such attendance ought to be allowed.

The Soto, 62 L. J., P. 17; [1893] P. 73; 1 R. 579; 69 L. T. 231; 41 W. R. 479; 7 Asp. M. C. 335.

Costs of attendance of the country solicitor in a country cause, where witnesses were cross-examined in court, disallowed in a taxation between party and party. *Clark* v. *Malpas*, 31 Beav. 554; 1 N. R. 221; 32 L. J., Ch 313; 9 Jur. (N.S.) 612; 7 L. T. 659; 11 W. R. 251.

When on the trial of a cause in London, the country as well as the London attorney attends, the rule that the costs of the attendance of the country attorney will not be allowed is not inflexible, but the master should decide in the exercise of his discretion, whether, under all the circumstances of the case, such attendance was necessary. *Bell* v. *Aithin*, 37 L. J., C. P. 168; L. R. 3 C. P. 320; 18 L. T. 363; 16 W. R. 704. S. P., *Parsloe* v. *Foy*, 2 D. P. C. 181; *Archer* v. *Marsh*, 7 D. P. C. 541.

The master, on taxation of the defendant's costs in an action on a policy, where the questions to be tried were admitted to be extremely difficult and complicated, having declined to allow the expenses of the attendance at the trial in London, and on a motion, of the managing clerk of the defendant's attorney, who had had the entire management of the cause, the court refused to interfere. *Potter* v. *Rankin*, 38 L. J., C. P. 130; L. R. 4 C. P. 76; 19 L. T. 383.

The plaintiff having brought an action for 1,000*l.* involving the character of the parties, review of taxation granted where the taxing-master had disallowed the attendance of the defendant's solicitor in London. *Maddison* v. *Bacon*, 5 Bing. (N. C.) 246; 7 Scott, 207; 1 Arn. 487.

On Motion.]—Only one fee is allowed to a solicitor for attendance on a motion. *Doolan* v. *Tebeaudo*, 2 Jones, 314.

Where a motion to dismiss stood over for a space of time, including fifty-three motion days, the defendant's solicitor being unable to swear that he actually attended in court upon such motion days, the taxing-master allowed him costs for ten attendances only, and the vice-chancellor on petition confirmed this order *Hollocombe* v. *Hollocombe*, 17 Jur. 362; 1 W. R 160.

On Commission.]—Costs of solicitor attending execution of commission abroad. *Hamond* v. *Wordsworth*, Dick. 381.

The costs of a London attorney attending the execution of a commission for the examination of witnesses in the country, may, under special circumstances, be allowed on taxation of costs between party and party. *Howell* v. *Tyler*, 2 Y. & Coll. C. C. 284; 12 L. J., Ch. 223; 7 Jur 525.

Undertaking to Appear.]—Costs of attending the defendant's solicitor for undertaking to appear were allowed. *Davies* v. *Marshall*, 1 Dr. & Sm. 564; 7 Jur. (N.S.) 669; 9 W. R. 756.

At Chambers.]—Where one solicitor attends in chambers for two parties in different interests the costs of one attendance only will be allowed. *Brown* v. *Gellatly*, 16 L. T. 553; 15 W. R. 887.

At Consultation.]—Where no fee is paid to counsel on a consultation, no charge can be allowed to the solicitor for his attendance. *Catlin, In re*, 18 Beav. 516.

Of Solicitor and Clerk at Examination.]—The attendance of a solicitor's clerk in addition to the solicitor himself, on cross-examination before the examiner, is unnecessary and unusual, and the costs of such attendance will be disallowed in taxation. *Smith* v. *Buller*, 45 L. J., Ch. 69; L. R. 19 Eq. 473; 31 L. T. 873; 23 W. R. 332.

On Accountant Examining Books.]—An accountant having been employed, by desire of the arbitrator, to examine the accounts of one of the parties at their counting-house, by which means much time and expense were saved, and the attorney of the other party having attended these investigations at the counting-house, the master, in taxing the latter party's costs, disallowed the charges for such attendances: the court made absolute a rule for the master to review the taxation in this respect. *Hawkins* v. *Rigby*, 8 C. B. (N.S.) 271; 29 L. J., C. P. 228; 6 Jur. (N.S.) 1208.

On Filing Affidavits.]—Only one 6*s.* 8*d.* is allowed for filing several affidavits at the same time; if filed at different times, even on the same day, it depends on the circumstances what attendances are allowed. *Christy, Ex parte, Barrow, In re*, 2 Mont. & Ayr. 95; 2 Deac. 119; 6 L. J., Bk. 68.

xi. *Improper, Vexatious, or Unnecessary Proceedings.*

See Order LXV. r. 27, sub-r. 20.

Infringement of Patent—Particulars of Objections.]—Where in a patent action the defendant pleaded no infringement of the plaintiff's patent, and that it was invalid, and delivered particulars of objections to the validity of the patent, and the action was dismissed on the ground of no infringement, and the question of the validity of the patent was not considered by the court, the disallowance by the taxing-master of the defendant's costs of his particulars of objections to the validity of the patent, on the ground that there was no certificate that the particulars were reasonable and proper as required by the Patents, Designs, and Trade Marks Act, 1883, s. 29, sub-s. 6, is not such a disallowance of the costs under Ord. LXV. r. 27, sub-r. 20, as to give the taxing-master jurisdiction to deal with the costs occasioned to the plaintiff by these particulars In such a case the plaintiff ought, if he desires to raise the point, to ask the judge to direct the taxing-master to see whether, by reason of any proceedings which have been improperly, vexatiously, or unnecessarily taken by the defendant, he has been put to extra costs, and to tax these costs and to allow them. *Garrard* v. *Edge*, 59 L. J., Ch. 379; 44 Ch. D. 224; 62 L. T. 510; 38 W. R. 455—C. A.

Vexatious Proceedings.]—Where costs are vexatiously and improperly incurred by a successful party, and can be clearly distinguished from the rest, the court will make a provision for them; otherwise they must be left to the master. *Farrow* v. *Rees*, 4 Beav. 25.

The master, to whom it was referred, reported the proceedings under a commission for examination of witnesses irregular; on exceptions, the

court thought them regular, and allowed the exceptions, and the party who succeeded had his costs of the application. Order for costs discharged because the plaintiff's was not a vexatious proceeding, but in the master's opinion, well founded; and the rule is not to give costs but where no just ground appears for the proceeding. *Anon.*, 3 Atk. 235.

Mortgagee, on bill to redeem, insisted heir-at-law was living. Master twice reported him dead, and exceptions were twice taken thereto, and issue at law was directed, by which he was also found to be dead. Mortgagee not to pay costs of issue, as it was not vexatious, so long as court thought necessary to direct issue. *Wilson* v. *Metcalf*, 3 Madd. 45; 18 R. R. 193.

Plaintiff's father died intestate; the mother administered; forty years after the father's death, the son, who had accepted a legacy under the mother's will equal to two-thirds of what his father left, brings a bill against the mother's executor to account for the father's personal estate come to her hands. Bill dismissed with costs, to deter others from such frivolous suits. *Huet* v. *Fletcher*, 1 Atk. 467.

In a frivolous suit, costs given to neither side. *Clark* v. *May*, 16 Beav. 273; 22 L. J., Ch. 302; 1 W. R. 69.

Where defendant will not admit a general right, but puts plaintiff to proof of it, he shall pay costs of suit. *Trinity House* v. *Ryall*, 2 Bro. P. C. 389.

Although there is no rule that in every instance in which a defendant takes several grounds of defence, one tenable and successful, the rest doubtful or invalid, that circumstance ought to avail the plaintiff on the subject of costs, yet where, upon the evidence, the plaintiff's case failed absolutely and wholly as a case for equitable relief, but the defendant had in the suit endeavoured to support claims without any just foundation, and had vexatiously disputed the legal title of the plaintiff:—Held, that the bill ought to be dismissed without costs. *Clowes* v. *Beak*, 2 De G. M. & G. 731.

A debtor who, not being satisfied as to the title of his creditor, compels him to bring an action to prove it, is liable to pay the costs *Matthew* v. *Northern Assurance Co.*, 47 L. J., Ch. 562; 9 Ch. D. 80; 38 L. T. 468; 27 W. R. 51.

When a plaintiff fails in establishing a case for relief, the uncertain character of the evidence on which the case turns, and the setting up of unfounded claims by the defence, are grounds for dismissing the bill without costs. *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195; 19 W. R. 884.

Costs not always to follow the event of the cause, as where, though money was found due to the defendant upon account, yet it appearing to be much less than had been claimed by the defendant's answer; in that case the defendant was allowed no costs. *Att.-Gen.* v. *Brewers' Co.*, 1 P. W. 376.

If lands have been sold under a decree, and judgment creditors, knowing that they have no chance of the fund reaching them, render it necessary to file a supplemental bill against them, they will not get their costs in that suit; and semble, they will be obliged to pay the costs occasioned by such vexatious conduct. *Jarrett* v. *Berwingham*, Sau. & Sc. 419. And see *S. C.*, 1 Ir. Eq. R. 417.

When a multiplicity of actions has been brought where the custom might have been tried in one, it is such a vexation that the plaintiff in equity shall have the costs both in law and equity. *Coddington* v. *England*, 2 Atk. 167.

Under an Act of Parliament, a corporation took lands for public purposes. The act empowered the court to order the costs, charges, and expenses of re-investing the compensation-money to be paid by the corporation. On a fourth application to re-invest the residue, amounting to 63*l.*:—Held, that the proceeding was not so vexatious as to disentitle the party to the costs. *Merchant Taylors Co., In re*, 10 Beav. 485.

Irrelevance—Misconduct—Scandal.]—Where a petition contained personal and irrelevant charges against the respondent, the husband of the petitioner, the next friend was ordered to pay so much of the costs on both sides as were properly occasioned by the introduction of such charges into the petition. *Wills' Trust, In re*, 3 N. R. 107.

When charges of misconduct are introduced into a bill, and are denied by the answer and then withdrawn, the court will, at the hearing, make an order for payment by the plaintiff of all the costs occasioned by such unfounded charges, without any special application for the purpose. *Finch* v. *Westrope*, 40 L. J. Ch. 441; L. R. 12 Eq. 24; 24 L. T. 412; 19 W. R 672.

Where a bill contains scandalous imputations on the character of the defendant, the defendant will not subject himself to the payment of costs by answering such imputations, although he objects at the same time to the introduction of the matter so answered on the ground of irregularity in point of pleading. *Wray* v. *Hutchinson*, 2 Myl & K. 235; 3 L. J., Ch. 62.

Prolixity and Unnecessary Matter.]—Additional costs of long amendments, granted. *Rowe* v. *Stuart*, Dick. 58.

Where the bill prayed a sale, and account and payment of prior contemporaneous incumbrances, and a prior elegit creditor had put in an answer of unreasonable length, the court directed that the remembrancer should, in taxing the costs, have regard to the length of the answer. *O'Brien* v. *O'Brien*, Jon. & C. 193.

In a suit for tithe composition, all the defendants appeared by the same attorney, and such of them as were tenants from year to year answered the bill separately at length. The court, upon motion, permitted the plaintiff to dismiss his bill against those defendants, upon payment of costs; and directed the officer, in taxing the costs, to disallow the costs of any answer, or part of any answer, which should appear to have been improperly and unnecessarily filed. *Armstrong* v. *Bannon*, 2 Jones, 538.

Where the bill was dismissed with costs, the court referred it to the master to inquire what parts of a cross-bill were of unnecessary length, and the costs thereby occasioned. *Woods* v. *Woods*, 5 Hare, 229.

Where, in an unopposed petition, unnecessary statements were introduced, the court directed the taxing master, on taxing the costs, to have reference to such statements. *Hyder* v. *Coleman*, 21 L. J., Ch. 592.

Where a petition was presented to the court of vexatious length, the court directed the master, in taxing the costs, to have regard to the length

of the petition. *Canning* v. *Bell*, 13 L. J., Ch. 304.

The plaintiff, in a supplemental bill, set out at considerable length the statement of the original bill:—Held, that he ought to pay the costs of any unnecessary statements, to be determined by the master. *Horsley* v. *Fawcett*, 11 Beav. 565.

The costs of an unnecessarily long petition will be limited to ten guineas. *Bourne* v. *Buckton*, 36 L. J., Ch. 792.

Impertinent Matter.]—The court will, on the hearing of a cause, decide the question whether the pleadings contain any impertinent matter, and will order a direction to be inserted in the decree, that the taxing master, in taxing the costs, shall have regard to the matter so decided to be impertinent. *Stephens* v. *Lawrie*, 12 L. J., Ch. 71.

Vexatious Pleading.]—Where, in a foreclosure suit, a defendant, who had answered, and who had been called upon to answer the amended bill, stated in his further answer, that, having regard to his former answer, it was unnecessary and vexatious to call upon him to answer the amended bill; and that the costs of such answer ought, without reference to the result of the suit, to be paid by the plaintiff; the court ordered such costs to be taxed and paid by the plaintiff, and not to be allowed to him as part of his costs *Cocks* v. *Stanley*, 4 Jur. (N.S.) 942; 6 W. R. 45.

Where no objection had been taken by another defendant, required under similar circumstances to put in a further answer, the court refused to make any order. *Ib.*

Where bill had been amended three times, and the two last were by the negligence or error of plaintiff, the defendant was allowed extra costs of those latter amendments. *Watts* v. *Manning*, 1 Sim. & S. 421.

Special direction to taxing master to see whether matter had been properly introduced by amendment, and to charge the plaintiff therewith. *Burchell* v. *Giles*, 11 Beav. 34

Directions given to the master, that in taxing the costs he should, under r. 9, Order XL., strike off such parts of the costs as might have been occasioned by an improper mode of framing the pleadings and the affidavits on both sides. *Hanslip* v. *Kitton*, 8 Jur. (N.S.) 835.

Trustee who had not acted, putting in a full answer, disallowed the costs of such vexatious answer, and order made at the hearing to tax him with the costs only of such an answer as would have been necessary and proper. *Martin* v. *Persse*, 1 Moll. 146.

Plaintiff filing bill, and after answer amending bill, so as to make case quite reverse, ordered that he pay costs of original bill, and parts of answer set forth by reason of that bill, and costs of the motions as a vexatious proceeding. *Mavor* v. *Dry*, 2 Sim. & S. 113.

A bill was filed for a foreclosure of a mortgage, and for a transfer of a sum of stock. On the answer being filed, disclosures were made which rendered it advisable to amend the bill by striking out all that related to the mortgage, and thereby nearly one-half of the bill, and answer was rendered useless; the court, however, refused to order, on motion, the plaintiff to pay the defendant's costs occasioned by the amendment, as it appeared that the amendment was made under the advice of counsel, and not for the purpose of vexation or oppression. *Monck* v. *Tankerville (Earl)*, 10 Sim. 284; 8 L. J., Ch. 368; 3 Jur. 1167.

A plaintiff having by an amended bill abandoned part of the relief prayed by his original bill, the court referred it to the Master, upon motion by the defendant, to tax the additional costs which had been occasioned by so much of the plaintiff's claim as had been so abandoned, and ordered the costs when taxed to be paid by the plaintiff. *Strickland* v. *Strickland*, 3 Beav. 242; 9 L. J., Ch. 392.

If a defendant disclaims generally, and the plaintiff replies to her answer, and serves her with a subpœna to rejoin, she is entitled to have costs against him for the vexation. *Williams* v. *Longfellow*, 3 Atk. 582.

Unnecessary Proceedings.]—As a general rule, the costs of the cause should follow the result of the cause; but an exception will be made where a party has established his object by means of an unnecessary degree of litigation. *Millington* v. *Fox*, 3 Myl. & C. 338.

Where plaintiff not only failed to establish his case by evidence, but also encumbered the suit with an unnecessary multitude of witnesses, and with a body of very irrelevant depositions, he must pay the cost of the depositions, although the bill, not being vexatious, was dismissed without costs, as to the rest of the cause. *Moore* v. *M'Kay*, Beat. 282.

Plaintiffs filing unnecessary affidavits ordered to pay the defendants' costs occasioned thereby. *Att.-Gen.* v. *Halifax Corporation*, 18 W. R. 37.

A wrongdoer cannot be heard to complain that in proceedings hurriedly taken to stop the wrong the plaintiff has not accurately stated his title, and in such a case the defendant will not be relieved from the payment of the extra costs occasioned by the plaintiff's mistake as to his title. *Att.-Gen.* v. *Tomline*, 5 Ch D. 750; 36 L. T. 684; 25 W. R. 802.

When a defendant on motion for an injunction gives an undertaking and agrees to pay all costs, the plaintiff will not obtain the costs of going on to trial. *Hudson* v. *Bennett*, 12 Jur. (N.S.) 519; 14 L. T. 698; 14 W. R. 911.

Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken by him to enforce a judgment in the Exchequer Division, the taxing-master to whom the bill of costs was referred disallowed the costs of certain abortive garnishee summonses. On a summons to review the taxation:—Held, that the taxing-master was not precluded by the form of order from disallowing any costs that he thought proper, and that, under Rules of Court, 1875 (Costs), Ord. VI. r. 26, he was bound to do so; also that the costs in question were properly disallowed. *Simmons* v. *Storer*, 49 L. J., Ch. 121; 14 Ch D. 154; 42 L. T. 291; 28 W. R. 408.

Where the bill was dismissed with costs, the court referred it to the master to inquire what parts of a cross bill were of unnecessary length, and the costs thereby occasioned. *Woods* v. *Woods*, 5 Hare, 229.

One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the court. The statement of claim alleged that the surviving trustee had committed a breach of trust, and asked to have new trustees appointed in the place of him and a deceased trustee. The settlement contained a power to

appoint new trustees, exercisable by the tenants for life. The plaintiff's income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, and it was admitted that there was no ground for his removal:—Held, that the plaintiff was entitled to judgment for the execution of the trusts, but that, the action being unnecessary, he must pay the costs of it up to and including the trial. *Fane* v. *Fane*, 13 Ch. D. 228; 41 L. T. 551; 28 W. R. 348.

A motion was made for leave to take evidence in a suit by affidavit. It was opposed by the defendants, who were trustees, and the court held that they were entitled to have the evidence taken vivâ voce, but reserved the costs of the motion. On the cause coming on for hearing no witnesses were called, and no reason was given for insisting upon the evidence being taken vivâ voce:—Held, that the costs of the motion must be paid by the defendants, the trustees, who had perversely, unreasonably, and unjustly refused to adopt the cheaper and more familiar mode of taking evidence. *Patterson* v. *Wooler*, 45 L. J., Ch. 274; 2 Ch. D. 586; 24 W. R. 455.

Costs refused to a plaintiff, who, having in his hands a sum of money belonging to an infant, institutes a suit to have that sum secured for the infant, though there was a trustee of a settlement, to whom it might have been paid. *Ellis* v. *Ellis*, 1 Russ. 368.

In a suit to recover the amount of a lost bill of exchange, the loss of the bill being proved at the hearing, the defendant, if he disputes the sufficiency of an indemnity which has been offered to him, and the master finds in favour of the indemnity, will be ordered to pay the costs subsequent to the original hearing. *Macartney* v. *Graham*, 2 Russ. & M. 353.

In a suit for the delivery up of deeds in the defendant's possession, and upon which he claimed a lien, it was referred to the master to ascertain the amount of the defendant's lien. The master stated to the parties the amount which he intended to report, whereupon the plaintiff offered to pay that sum to the defendant, together with his costs of suit up to that time. The defendant refused the offer, but did not except to the report afterwards made by the master in accordance with his statement:—Held, on motion at the hearing on further directions, that the defendant ought to have accepted the plaintiff's offer; that the litigation afterwards was useless; and that each party should pay his own costs. *Sentance* v. *Porter*, 7 Hare, 426; 18 L. J., Ch. 448; 13 Jur. 980.

A railway company having entered into possession of certain lands required for their works after notice by the landowner that they were not to enter until payment of the purchase money, an injunction was granted against their retaining possession. They afterwards entered into a long correspondence, "without prejudice." Ultimately they paid the purchase and compensation money into court, and then moved only to dissolve the injunction. The plaintiff wished, on that motion, that all proceedings might be stayed, and to go into the general question, but the defendants refused. Thereupon the plaintiff moved to that effect:—Held, on the hearing of this latter motion, that the defendants ought to pay all the costs of the suit, including the costs of this motion. *Woodward* v. *Eastern Counties Ry.*, 1 Jur. (N.S.) 829.

Where a matter is within the knowledge of a plaintiff, and by not stating such matter correctly great expenses incurred, the plaintiff must pay all the expenses thereby incurred. *Field* v. *Donoughmore* (*Lord*), 1 Dr. & War. 227.

Costs given against a party who, by his want of caution in settling an estate without giving notice that it was subject to a prior demand, rendered a suit by the prior incumbrancer necessary to establish his rights. *Wise* v. *Wise*, 2 Jo. & Lat. 403.

Where costs of an injunction suit are increased by an allegation in the bill which is untrue, the court will direct such increased costs to be paid by the plaintiff, although he substantially establishes his case. *Pierce* v. *Franks*, 10 Jur. 25.

More Expensive Procedure than Necessary.]—An action was commenced in the chancery division claiming relief which might have been given on a summary proceeding in the probate division:—Held, that although the plaintiff was entitled to the relief claimed, no costs should be allowed on either side. *Blackett* v. *Blackett*, 51 L. T. 427.

—— **Motion or Summons.**]—In an action to restrain the publication of a trade circular, the defendants by their defence offered to submit to a perpetual injunction (in the terms of an interim injunction which had been previously granted), "to be obtained on a summons issued for that purpose." The plaintiffs set the action down for trial on motion for judgment on the admissions in the pleadings, and delivered to the defendants a copy of minutes of the proposed judgment, which was identical with the judgment to which the defendants had offered to submit:—Held, that, under the circumstances, the plaintiffs ought to have proceeded by summons in chambers, and that, consequently, they would only be allowed the costs which they would have properly incurred if they had proceeded by summons. *London Steam Dyeing Co.* v. *Digby*, 57 L. J., Ch. 505; 58 L. T. 724; 36 W. R. 497. S. P., *Allen* v. *Oakey*, 62 L. T. 724. *See also* PRACTICE.

—— **Two Proceedings.**]—Where a defendant admits by his answers the possession of documents and a balance of money, it is irregular to move for the production of the former, and payment into court of the latter, by two separate motions; they ought to be included in one. In this case, the court ordered the plaintiff to pay the extra costs occasioned by this irregular proceeding. *Hawke* v. *Kent*, 3 Beav. 288; 10 L. J., Ch. 30.

Where an order is moved for, which might and ought to have been procured to be made as part of another order obtained on a previous motion, the party will not get his costs of the second motion, although he succeed. *Darley* v. *Nicholson*, 2 Dr. & W. 86; 1 Con. & L. 207.

Costs of one of two suits only allowed where the court considered that one suit only was necessary. *Bensusan* v. *Nehemias*, 4 De G. & Sm. 381.

—— **Petition or Bill.**]—Where a plaintiff, by the present practice of the court, may obtain that relief by petition for which a supplemental bill was formerly necessary, and prefers the latter

course, the supplemental bill is not demurrable; but the proceeding will be taken into consideration on the question of costs. *Davies* v. *Williams*, 1 Sim. 5; 4 L. J. (O.S.) Ch. 210.

A plaintiff having filed a bill for the appointment of new trustees in a case in which it might be done by petition, was ordered to pay all the costs. *Thomas* v. *Walker*, 18 Beav. 521.

Where subsequent incumbrances were discovered by the answers to a bill for foreclosure, and a necessary defendant was abroad, the court declined to make the plaintiff pay the extra costs of proceeding by bill instead of claim. *Holford* v. *Yate*, 1 W. R. 504.

—— **Petition or Summons.**]—On a petition for a vesting order to convey the interests of certain persons entitled to property about to be sold under an order in a foreclosure suit, the court, while granting the order, held that the application ought to have been made in chambers, and directed that all extra costs should be paid by the petitioners. *Clark* v. *Ward*, 14 W. R. 241; 13 L. T. 624.

If an application be made by special motion, for what is properly obtainable on a petition or motion of course, the order will still be made on payment of costs. *Kelsey* v. *Larkin*, 3 Jur. 767.

And see cases sub tit. LANDS CLAUSES ACT and PRACTICE (Funds in Court).

—— **Where Demurrer possible.**]—A question raised by claim, which involved a litigation extending over four years, which might have been raised by bill and demurrer. The court, holding the costs to have been improperly incurred, refused the plaintiff his costs. *Marshall* v. *Bremner*, 2 Sm. & G. 237.

A contributory of a company in voluntary liquidation presented a petition for a compulsory winding-up or supervision order, and for the removal of the liquidators, on the ground (chiefly) that the liquidators, who had been directors, had immediately before the winding-up taken a vote, allowing the solicitors of the company, who were also directors, but not liquidators, 1,500*l.* for their bill of 1,650*l.*, 960*l.* being payable only by the promoters of the company, and that the vote was improperly carried. The petition also contained various allegations tending to show that the solicitors had a preponderating influence in the company. Affidavits were filed opposing the petition and denying the charges of improper conduct. The debts of the company had been all paid, and nothing remained but to divide a small balance amongst the contributories, who were less than twenty in number:—Held, that as the petition was in effect demurrable, evidence to oppose it was unnecessary, and the respondents were disallowed the costs of such evidence. *Star and Garter, In re*, 42 L. J., Ch. 374; 28 L. T. 258.

When a defendant does not demur but puts in an answer to a demurrable bill, the court will not in all cases refuse to allow him the costs so occasioned, but may, in its discretion, refuse him his costs if it thinks the question in the suit ought to have been raised by demurrer. *Bush* v. *Trowbridge Waterworks Co.*, 44 L. J., Ch. 645; L. R. 10 Ch. 459; 33 L. T. 137; 23 W. R. 641.

Costs incurred in an inquiry into a matter of fact, where the question in the cause might have been first decided by demurrer, directed to be borne as to each party by themselves. *Shaw* v. *Lawless*, 5 Cl. & F. 129.

When the point in contest was sufficiently raised by the bill, the court gave no costs to a successful defendant, who brought the cause to a hearing instead of demurring. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722.

A bill being dismissed by reason of an objection which might have been taken by demurrer, the defendant was only allowed costs as of a demurrer. *Godfrey* v. *Tucker*, 3 N. R. 20; 33 L. J., Ch. 559; 9 Jur. (N.S.) 1188; 9 L. T. 359; 12 W. R. 33.

When a defendant to a suit does not demur, but at the hearing takes the same objection as would have been taken by the demurrer if he had demurred, and succeeds in the objection, he is entitled to the whole of his costs of the suit. *Pearce* v. *Watts*, L. R. 20 Eq. 492; 23 W. R. 771.

Allegations in bill, which prevented the case being determined on demurrer failing on the evidence, ground for costs against the plaintiffs on dismissal of bill. *Lind* v. *Isle of Wight Ferry Co.*, 1 N. R. 13.

Improper Conduct.]—Where a suit was in part rendered necessary by the conduct of the defendants, costs separated, part to be paid by each party. *Powell* v. *South Wales Ry.*, 1 Jur. (N.S.) 773.

It was agreed that judgment against A. for 60*l.* to be paid by instalments should be signed, but not entered up nor published, in any way, by B., the creditor; 50*l.* in cash was offered to B., by A.'s solicitor, but declined. Shortly afterwards B. announced his intention of putting up his judgment for sale by auction. A. thereupon filed a bill and obtained an injunction, restraining the threatened sale and advertisement. B. offered before appearing to give an undertaking, but insisted that the costs should be paid by A.:—Held, that B. by his conduct had forced A. to carry on the suit to a hearing, and must pay the whole costs up to the hearing. *Jamieson* v. *Teague*, 3 Jur. (N.S.) 1206.

Where a plaintiff, by taking an inquiry which turns out to be useless, throws the matter into chambers and thus causes expense, he is guilty of improper conduct, and may be compelled to pay costs. *Ormston, In re, Goldring* v. *Lancaster*, 59 L. T. 594—C. A.

A defendant endeavouring to get the plaintiff to come to an agreement with him, to take a very small sum of money in satisfaction of all his interest in the estate, is a reason for making him pay costs of suit. *Avery* v. *Osborne*, Barnard. 349.

A successful plaintiff not allowed costs where his bill contained an unproved imputation on the defendant. *Fitzgerald* v. *O'Connell*, 1 Jo. & Lat. 134; 6 Ir. Eq. R. 455.

A defendant succeeding was not allowed his costs of a suit concerning 18*l.* where he had refused a reference. *Lawes* v. *Gibson*, 35 L. J., Ch. 148; L. R. 1 Eq. 135; 13 L. T. 316.

On reforming a lease no costs were given to the plaintiff, the lessor, because the suit had been occasioned by his error in not having the lease properly prepared. *Murray* v. *Parker*, 19 Beav. 305.

A creditor being decreed to reconvey on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to

the payment of money into court. *Cranstown (Lord)* v. *Johnston*, 5 Ves. 277; 3 R. R. 80.

A plaintiff, in 1850, was, by W. and B. (who were partners as bankers), induced, on untrue and false representations made to him as to the state of their affairs, to enter into partnership with them. The banking business was at that time in an extremely critical, if not insolvent, position, but it was carried on for four years after the plaintiff became partner therein. After the business was, in 1854, transferred to another bank, the plaintiff discovered that the statements made to him were incorrect and untrue; and on bill for that purpose, the court decreed that the contract of 1850 must be set aside, and that accounts and inquiries, as prayed, must be taken and made. The costs of the plaintiff were not allowed, in consequence of his conduct not being free from blame, and in consequence of his case having been greatly overstated in the bill. *Rawlings* v. *Wickham*, 4 Jur. (N.S.) 990. But see *S. C.* on appeal, 28 L. J., Ch. 188; 5 Jur. (N.S.) 278; 7 W. R. 145.

The right to an injunction ordinarily carries with it the right to costs; but if a plaintiff asks for the costs, and for something more than he is entitled to, he will lose the costs he might otherwise have received. *Moet* v. *Couston*, 33 Beav. 578; 10 Jur. (N.S.) 1012; 10 L. T. 395.

Where a plaintiff makes a too extensive claim, the defendant, if he resists the entire claim, must pay costs up to the hearing. *Jeffryes* v. *Agra and Masterman's Bank*, 35 L. J., Ch. 686; L. R. 2 Eq. 674.

Notwithstanding the rule that the court will not go into the merits of a case until the hearing, the court will at any time look at the conduct of the parties to the cause with the view to costs, or to an interlocutory application. *Lister* v. *Leather*, 3 Jur. (N.S.) 433.

It is the duty of solicitors to have the original documents in court at the hearing: and if this is not done, the party in whose custody they are is liable to be deprived of his costs. *Gallimore* v. *Gill*, 4 W. R. 773.

Plaintiff may apply for costs when defendant gives unnecessary trouble in carrying a decree into execution. *Scarborough* v. *Burton*, 2 Atk. 111.

Defendant in suit for renewal may have so misconducted himself as to be made to pay the costs, but not having acted dishonestly, was held entitled to the usual terms. *Wallace* v. *Patten*, 1 Ir. Eq. R. 338.

Costs were given to the plaintiff in a cause on account of the misconduct of the defendant in the progress of the suit. *Scott* v. *Roose*, 1 L. & T. 54; 3 Ir. Eq. R. 170.

A promise by a party to make no opposition to an application intended to be made by another is not of itself a sufficient ground for refusing him the costs of his appearance. *Bamford* v. *Watts*, 2 Beav. 201.

Defendants admitted by their answer that all persons interested were parties to the suit, and at the hearing objected for want of parties, and the objection prevailed:—Held, that having misled the plaintiff, they ought to pay him the costs of the day. *Price* v. *Berrington*, 2 Beav. 285.

A married woman, living apart from her husband, and by whose misconduct the suit had been rendered necessary, and who herself had shown an indisposition to assist the plaintiff:—Held, not entitled to her costs. *Times* v. *Negus*, 3 Y. & Coll. 90.

A party refusing to obey an order, which being technically defective, could not be enforced, without stating his objection, not allowed his costs upon a motion to carry the order into effect. *Richards* v. *Dudley*, 2 Jur. 464.

Plaintiff procured the usual order for defendants to produce certain deeds within particular time, but did not take the usual steps to enforce it, on account of the defendants submitting to perform the order. Subsequently, the defendants not having produced a particular deed, plaintiff gave notice of motion to produce the same, and for defendants to pay the costs of the application. Defendants immediately produced the deed, but refused to pay the costs of the application:—Held, upon motion by plaintiff for defendants to pay the costs, that plaintiff was entitled to the costs of the motion, made necessary by the non-compliance of defendants with the order, although the plaintiff had not taken the regular steps to enforce it. *Maw* v. *Marsden*, 4 Jur. 1079.

Where a suit has been rendered necessary by the conduct of one of the parties in not carrying an agreement into effect, he will not be fixed with the costs of that suit unless it is shown that all requisite and proper steps were taken by the other parties to the agreement, and that the party sought to be charged had notice of their intent to institute the suit, and to seek to fix him with the costs of it. *Harwood* v. *Burstall*, 16 Jur. 770.

Refusal to refer to arbitration in pursuance of an agreement is not of itself a sufficient reason for refusing costs to a successful party. *Lees* v. *Laforest*, 14 Beav. 250.

Semble, that an assignee of a bankrupt partner, who, by giving notice to the debtors to the partnership, prevents the payment of the debts to the solvent partner, who is answerable for the partnership debts, and thus gives occasion to a suit by the solvent partner, is liable to the costs of the suit. *Freeland* v. *Stansfield*, 2 Sm. & G. 479; 23 L. J., Ch. 923; 1 Jur. (N.S.) 8; 2 W. R. 575.

Parties are not justified, by remaining passive, to prevent the rightful owners obtaining possession of their property, but if called on to do an act involving no risk or responsibility, which is necessary to enable the true owner to obtain his property, they are bound to do it. If, therefore, their refusal renders an application to the court necessary, they will be made to pay the costs. *Primrose, In re*, 23 Beav. 590.

A defendant setting up an improper defence ordered to pay the costs of his defence. *Jones* v. *Farrell*, 1 De G. & J. 208; 3 Jur. (N.S.) 751.

Costs were refused to a defendant who, though successful, had deliberately done that which by his contract (which he sought to set aside) he had engaged not to do. *Allsopp* v. *Wheatcroft*, 42 L. J., Ch. 12; L. R. 15 Eq. 59; 27 L. T. 372; 21 W. R. 162.

xii. *Fraud Proved or Alleged.*

When Proved.]—Where a husband had by imposition induced his wife to transfer part of her separate property to him, on a bill by her against him for a specific performance of an agreement before marriage, he was made to pay costs on account of the fraud. *Lampert* v. *Lampert*, 1 Ves. J. 21.

A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount

of the purchase-money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of same for his sister if C. approved of it; B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter. with a remark that it was "a great price." During the period of this negotiation between A. and B, A. entered into a contract with D. for the sale of the same premises, and although notice of the agreement between A. and B. was given to D., actually conveyed the premises to D.:—Held, that D., having had notice of the agreement between A. and B., the conveyance to him must be considered fraudulent, and should be delivered up to be cancelled, and that the conduct of A. being very fraudulent, the costs of B. should in the first place be paid out of the funds lodged by him in the hands of C. *Field* v. *Boland*, 1 Dr. & Wal. 37.

The owner of some leasehold tenements, being persuaded by a conveyancer that other parties were entitled to part of the estate, entered into an agreement by which the estate was to be sold, and all these parties were to share in the purchase-money, and 40*l.* was to be paid to the conveyancer. The court being of opinion that the agreement had been obtained by fraud, misrepresentation, and pressure, ordered it to be delivered up to be cancelled, with costs as against the conveyancer. *Brent* v. *Brent*, 10 L. J., Ch. 84.

Alleged but not Proved.]—Where a charge of fraud fails, the party making it without ground ought to pay the costs. *New Brunswick and Canada Ry.* v. *Conybeare*, 9 H. L. Cas. 711; 31 L. J., Ch. 297; 6 L. T. 109; 10 W. R. 305.

A charge of fraud not made out will be visited with costs. *Standish* v. *Whitwell*, 14 W. R. 512.

Costs are always given against any party appearing on a petition, who endeavours to support a case of fraud; whether the costs are prayed, or not. *Taylor, Ex parte*, 4 Deac. & C. 125; 2 Mont. & Ayr. 36; 4 L. J., Bk. 4.

In Bill.]—There is no rule more general with respect to costs, than that bill claiming on the ground of fraud, the decree, or the order of dismission, shall in either event be with costs; and therefore a bill, although suggested by the House of Lords, filed by a party who had succeeded originally, being dismissed, costs were on that ground awarded against plaintiff. *Scott* v. *Dunbar*, 1 Moll. 442.

In a suit by some members of a company, on behalf of the company, to rescind a purchase of mines, on the ground of fraudulent representations made by the vendor, one of the plaintiffs, who had acted as agent for his partners, was, by amendment, made a defendant, and collusion between him and the vendor was charged in the bill, but not proved. It was held that it was not consistent with the rules or practice of equity, to fix the vendor with his costs after the charge of collusion failed of proof, his acts (he being acquitted from that charge) affecting the interests of the company as much as if he had continued a plaintiff. *Attwood* v. *Small*, 6 Cl. & F. 232. Reversing *Small* v. *Attwood*, Younge, 407.

Where plaintiffs, whose remedy was by action for goods sold and delivered, filed a bill, alleging fraud, and upon the faith of this allegation obtained an injunction to restrain the defendant from parting with the goods, and the allegation of fraud was afterwards disproved, the court ordered the plaintiffs to pay the whole of the costs of the suit, although the injunction was dissolved upon the defendant paying the price of the goods. *Straker* v. *Ewing*, 34 Beav. 147; 11 Jur. (N.S.) 127; 11 L. T. 588; 13 W. R. 286.

A suit was instituted to set aside a charge on a reversion, and a cross-suit to establish it. It being set aside for inadequacy of consideration merely, and a decree for redemption being made, the grantor was ordered to pay the costs of charges of fraud which had not been substantiated; but no costs were given as to the remainder of the first suit. The cross-suit was dismissed with costs. *Bromley* v. *Smith*, 26 Beav. 644.

On a bill charging fraud and imposition against a defendant, which was reasonably made out, costs will be given to the plaintiff, notwithstanding overstatements and exaggerations in the bill in the plaintiff's own favour. *Thomas* v. *Lloyd*, 3 Jur. (N.S.) 288.

Where a bill was filed by a married woman by her next friend against a trustee, in which charges of improper conduct and neglect of duty were made, but which were destitute of truth, it was held that the bill must be dismissed, with costs, to be paid by the next friend. *Ibberson* v. *Warth*, 1 Jur. (N.S.) 440; 3 W. R. 230.

Where fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs. *Chapman* v. *Chapman*, L. R. 9 Eq. 276; 22 L. T. 145; 18 W. R. 533.

Where a bill was filed to set aside a residuary bequest, on the ground that the object and intention of the testator was to defeat the Statute of Mortmain:—Held, that there was not sufficient evidence to support the case; and the bill, charging but not sustaining fraud and misconduct, was dismissed, with costs. *Lomax* v. *Ripley*, 24 L. J., Ch. 254; 3 Eq. R. 301; 1 Jur. (N.S.) 272; 3 W. R. 269.

Where a bill showed that there was a right to relief, it will not be dismissed where charges of fraud have not been proved. The proper course is to dismiss with costs so much of the bill as is founded on them. *Thompson* v. *Eastwood*, 2 App. Cas. 215.

A bill contained charges of fraud which were neither supported nor repelled by evidence; but inasmuch as the costs were not increased by such charges:—Held, that the costs of the suit ought not to be affected thereby. *Staniland* v. *Willott*, 3 Macn. & G. 664.

A bill contained allegations of great fraud against trustees, which all failed. The trustees were removed, but not, however, on the ground of misconduct:—Held, that they were entitled to the costs of the whole suit. *Passingham* v. *Sherborn*, 9 Beav. 424.

Numerous and extensive charges of fraud against the defendants having been introduced into the bill by amendment, but not supported by evidence, the costs whereof would have to be paid by the plaintiff, the court made a decree against the defendants, without giving any costs on either side. *Cullingworth* v. *Loyd*, 2 Beav. 385; 9 L. J., Ch. 218; 4 Jur. 284.

Solicitors against whom charges of fraud had been made which were unsubstantiated, and against whom the bill was dismissed:—Held, not entitled to their costs, on the ground that, by the

position in which they had placed themselves, they had exposed themselves to an investigation which had not unreasonably been instituted. *Fyler* v. *Fyler*, 3 Beav. 550; 5 Jur. 187.

Where a plaintiff, having a clear ground for relief against proceedings at law, set up by amendment a further independent ground for the same relief, founded on suggestions of misrepresentations which failed on the evidence:—Held, that though the decree was in his favour, he must pay the costs of that part of the case on which he failed. *Pledge* v. *Buss*, 1 Johns. 663; 6 Jur. (N.S.) 695.

A plaintiff having introduced into his amended bill allegations of fraud against a defendant, which the evidence failed to support:—Held, that though entitled to the relief prayed, he must pay the defendant all the costs of that part of the bill containing such allegations, and the evidence taken thereunder. *Blest* v. *Brown*, 4 De G. F. & J. 367; 10 W. R. 569.

When charges of misconduct are introduced into a bill, and are denied by the answer, and then withdrawn, the court will, at the hearing, make an order for payment by the plaintiff of all the costs occasioned by such unfounded charges, without any special application for the purpose. *Finch* v. *Westrope*, 40 L. J., Ch. 441; L. R. 12 Eq. 24; 24 L. T. 412; 19 W. R. 672.

If a cross bill be filed bonâ fide by the defendant to the original suit, against whom the original bill is dismissed with costs, the costs of it will usually follow the decree in the original suit, notwithstanding charges of fraud are alleged in it which are not sustained. *Flight* v. *Robinson*, 16 L. J., Ch. 178.

A plaintiff, by his original bill, sought to set aside a deed, on the ground of fraud. After answer was filed, he amended his bill by striking out from it all the previous allegations of fraud, and prayed to be allowed to take a benefit under the deed. The court ordered him to pay the costs of the original bill. *Kernot* v. *Critchley*, 17 L. T. 134.

—— **Scale of Costs.**]—A plaintiff, in a bill to enforce against the defendant an alleged agreement for the compromise of claims of the plaintiff against the defendant in respect of accounts, charged the defendant with various frauds in respect of the accounts, such alleged frauds being the ground of the claims included in the compromise. The plaintiff having failed in proving the agreement, and his bill being dismissed with costs, he was ordered to pay the defendant's costs so far as they had been increased by the irrelevant charges of fraud as between solicitor and client. *Forester* v. *Read*, L. R. 6 Ch. 40; 24 L. T. 79; 19 W. R. 114.

The plaintiff in this action claimed relief on the ground of alleged fraudulent misrepresentations in the prospectus of a company, and upon the action being dismissed with costs, the taxing-master allowed costs upon the higher scale. Before trial the plaintiff took out a certificate that the lower scale of fees was applicable to the case. The amount that the plaintiff claimed to recover was 40*l*., paid by him in respect of shares of the company; he also claimed costs and damages and an indemnity:—Held, on adjourned summons to review the taxation and vary the certificate of the taxing-master, that the case did not come within the definitions of cases under Ord. VI. r. 1 of the Rules of August, 1875, and that fraud being alleged, the court would exercise its discretion under r. 3 of the same order, and allow costs on the higher scale. *Harrison* v. *Leutner*, 52 L. J., Ch. 927; 24 Ch. D. 594; 49 L. T. 91; 31 W. R. 837.

The fact of the issue of fraud being raised is not a sufficient reason for ordering the costs to be taxed on the higher scale. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208.

In Defence.]—A defendant who by his answer had raised charges of forgery and fraud against the plaintiff, which were negatived by the verdict of a jury, was ordered to pay the costs of the plaintiff, although the latter had persisted, until his examination in court upon the trial, in false statements. so as to give the defendant reasonable grounds for suspicion, and for trying the question. *Theyer* v. *Tombs*, 12 W. R. 512.

Where a person who was a necessary party to a conveyance, though he had no beneficial interest in the property, refused to execute the deed of conveyance, and, in his answer to a bill filed against him to compel the execution of the deed, set up as the ground of his refusal a case of fraud in the plaintiff, which he did not attempt to support by any evidence at the hearing:—Held, that this was not a case for an inquiry as to the alleged fraud, and that the defendant must pay the costs of the suit. *Times* v. *Negus*, 3 Y. & Coll. 90.

Although, as a rule, costs are decreed at the hearing against a party making charges of fraud and misconduct which he fails in proving. yet, when such charges are made by way of defence, and the plaintiff is out of the jurisdiction, and the evidence raises the presumption that the plaintiff will not recover anything by his suit, the court reserved the question of costs until after the accounts should be taken. *Warrin* v. *Thomas*, 2 W. R. 442.

An heir at law of a testator brought an action of ejectment against the devisee, and failed. In a subsequent suit by the devisee against a purchaser, to enforce specific performance, the court, on the ground that the will was open to suspicion, directed the devisee to substantiate the will against the heir. The devisee thereupon filed his bill against the heir, asking a decree establishing the will. The heir, by answer, set up as a defence, incompetency in the testator, and fraud and undue influence, and went into evidence in support of this defence. At the hearing an action of ejectment by the plaintiff against the defendant was, on the defendant electing such action instead of an issue, directed to be tried at law. At the trial the devisee called witnesses, but the defendant called none, and a verdict was given for the plaintiff. On the cause coming on upon further direction, the court established the will without costs as regarded the general result of the suit and the action of ejectment, but with costs to be paid by the defendant of so much of the suit as was caused by the issues raised of fraud and improper practice by the devisee. *Grove* v. *Young*, 5 De G. & Sm. 38; 21 L. J., Ch. 95; 15 Jur. 1099.

xiii. *Offers to Settle and Tender.*

Offers to Settle—Costs.]—On the 12th June, 1886, one of the defendants' travellers received an order from Nutting, of Lavender Hill, for sixty dozen cardboard boxes, with labels bearing the words "Browne's Satin Polish for ladies' and children's boots and shoes, travelling bags, trunks,

&c., manufactured by Browne, of Lavender Hill." On the 6th July, 1886, the plaintiff, the owner of a registered trade mark, 14,127, bearing the words "Browne's Satin Polish," issued a writ to restrain the infringement of his trade mark. On the 7th July, 1886, the defendants offered to compensate the plaintiff without the necessity of legal proceedings, and to destroy the labels, and comply with any reasonable request of the plaintiff. On the 16th July the plaintiff moved for an injunction :—Held, that, notwithstanding the defendants' offer, the motion was not an unnecessary proceeding, and the defendants must pay the costs caused by what they had done. *Fennessy* v. *Day*, 55 L. T. 161.

Defendants bought from E., at a cost of 17*s.* 6*d.*, a box of 500 cigarettes bearing a label which was a very close imitation of the registered trade mark used by the plaintiffs upon the boxes in which they sold the cigarettes made by them. The defendants bought the cigarettes under the belief that they were made by the plaintiffs. The plaintiffs served the defendants with a writ and notice of motion for an injunction to restrain them from infringing their trade mark or selling the cigarettes. The defendants at once returned to E. the greater part of the cigarettes, and, by their affidavit, submitted to abide by any order the court should make, but contended that they ought not to be made to pay costs :—Held, that there ought to be no order as to costs. *Upmann* v. *Forester* (24 Ch. D. 231) discussed. *American Tobacco Co.* v. *Guest*, 61 L. J., Ch. 212 ; [1892] 1 Ch. 630 ; 66 L. T. 257 ; 40 W. R. 364.

Where a defendant, having rendered himself liable to be sued, and being sued offers to submit to all the relief to which the plaintiff is entitled, the court will not give the plaintiff his costs of the subsequent prosecution of the suit. *Colburn* v. *Simms*, 2 Hare, 543 ; 12 L. J., Ch. 388 ; 7 Jur. 1104.

An offer made after litigation has commenced, if it is to have the effect of avoiding the payment of costs by an unsuccessful party, must amount in substance to an offer of everything which the court eventually holds the successful party entitled to. *Birmingham and District Land Co.* v. *L. & N.-W. Ry.*, 57 L. J., Ch. 121 ; 36 Ch. D. 650 ; 57 L. T. 185 ; 36 W. R. 414.

In an action to restrain the infringement of a patent a defendant, on being served with the writ, offered to undertake not to infringe, to give the other relief claimed by the writ, and to pay the plaintiff's costs. Notwithstanding this offer the plaintiff delivered a statement of claim and particulars of breaches. The defendant then delivered a defence ; and the plaintiff moved for judgment in the terms of the statement of claim : —Held, that the plaintiff ought to have accepted the undertaking offered ; and, on the defendant's giving the undertaking, the court declined to grant an injunction, giving to the plaintiff costs down to the date of the offer and the costs of the day's appearance, and to the defendant the other costs subsequent to the offer. *Jenkins* v. *Hope*, 65 L. J., Ch. 249 ; [1896] 1 Ch. 278 ; 73 L. T. 705 ; 44 W. R. 358.

The defendant having satisfied the demand for which the suit was instituted, the court refused to allow it to be proceeded with for the costs ; but upon the terms of an agreement, to which the plaintiff had consented, but which the defendant had not strictly observed, ordered the defendant to pay the costs of the plaintiff out of pocket in the suit and on this notice of motion. *Tapp* v. *Tanner*, 20 L. J., Ch. 559.

A defendant having, pendente lite, offered to pay all that was ultimately found due from him, the plaintiff was ordered to pay all the subsequent costs of suit. *Remnant* v. *Hood*, 27 Beav. 74.

In a suit in which the plaintiffs ultimately succeeded, an offer had been made by the defendants to submit to a decree, on the basis of each party paying their own costs, which was simply refused :—Held, that each party must pay the costs subsequently to the offer, for it was open to the plaintiffs to propose to vary the terms offered by adding a provision for the payment of costs by the defendants. *Kensington (Lord)* v. *Metropolitan Ry.*, 14 L. T. 580 ; 14 W. R. 754.

A successful plaintiff will not be deprived of his costs because, in negotiations antecedent to the suit, he had been offered all that could be obtained by the suit—except in cases of bad faith, or where the negotiations amounted to a binding release from the cause of suit. *Edelsten* v. *Edelsten*, 1 N. R. 300.

If an agent does not render his account within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken, and it will not be any excuse for him that he offered to pay on account a gross sum, which it turns out would have covered all that was due from him. *Collyer* v. *Dudley*, Turn. & R. 421.

A plaintiff who was only entitled to an injunction and costs insisted also on an account. The defendant offered to submit to the injunction without costs. The plaintiff having brought his cause to a hearing, the court held both parties in the wrong, and gave no costs to either side. *Moet* v. *Couston*, 33 Beav. 578 ; 4 N. R. 86 ; 10 Jur. (N.S.) 1012 ; 10 L. T. 395.

If the plaintiff has harshly refused to settle amicably, the court will consider that conduct on the question of costs ; and such oppressive conduct being alleged, and some proof offered, it was generally referred to the master to report the circumstances of an offer of payment of a sum less than the full sum claimed, and of the rejection of such offer. *Armstrong* v. *Blake*, 1 Moll. 178.

Where defendant in tithe cause submits to part of plaintiff's demand, the court will, on motion for that purpose on part of defendant, refer it to master in any stage of proceeding to ascertain what is due, and to tax costs, the defendant undertaking to pay the amount without prejudice to any other question in the cause. *Lowe* v. *Firkins*, 11 Price, 453.

If a defendant offers the plaintiff an injunction on fair and reasonable terms, and his offer is not accepted, and the plaintiff moves for the injunction, and those terms are imposed, the plaintiff must pay the defendant the costs of the motion. *Butler* v. *Gore*, 2 Hog. 103.

Where a defendant submits to all the plaintiff's demands, but neglects or refuses to pay his costs, an application should be made to the court to stay proceedings, and to determine the question of costs. *Nicholls* v. *Elford*, 5 Jur. (N.S.) 264.

Before instituting a suit to set aside the sale of a reversion, the plaintiff offered very nearly the same terms that were afterwards imposed by the decree :—Held, that the defendants, who had refused these terms, must pay the costs properly incurred up to the hearing. *Nesbitt* v. *Berridge*, 1 N. R. 345.

Where in a suit the defendants were originally in the wrong, but, pendente lite, placed them-

selves in the right:—Held, that the plaintiff must pay the costs subsequently incurred. *Flower* v. *Muspratt*, 6 N. R. 351.

Land belonging to a land society was sold, and underlet in building plots, there being a covenant restraining the use of any building as a tavern, hotel, or public-house. A tenant of an underlessee opened one of the houses as a public-house in ignorance of the covenant, and on a bill being filed for an injunction and an interim order being obtained, immediately submitted and closed the house, giving public notice by a printed placard. The bill was filed against all the under-lessees as well as against the publican, and the plaintiff having filed interrogatories, and taken out a summons to produce documents, one of the defendants put in an answer, and others filed affidavits. On motion for the injunction all the defendants, except the publican, appeared by two counsel:—Bill dismissed as against the under-lessees with costs, except the costs of the answer and affidavits, and a decree made against the publican without costs. *Knox* v. *Green*, 17 L. T. 282.

A plaintiff complained of works intended to be executed by the defendants, churchwardens of his parish, which he alleged in the way in which it was proposed to execute them, constituted a nuisance. Much negotiation took place, in the course of which the defendants showed a continued acquiescence in the suggestions made by the plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the defendants, in order to avoid litigation, passed a resolution at a vestry, at which the plaintiff was present, that the works should be wholly abandoned. After that the plaintiff brought on his motion:—Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused with costs. *Woodman* v. *Robinson*, 2 Sim. (N.S.) 204.

The solicitors of a defendant wrote to the plaintiff's solicitors that they were prepared to advise the defendant to settle on certain terms:—Held, that this was not such an offer as would free the defendant from liability to subsequent costs of the action, inasmuch as he might have refused to follow the advice of his solicitors. *Trotter* v. *Maclean*, 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244.

One of the defendants to an action for the recovery of land was allowed to withdraw his defence after the action had been in the paper for trial, but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw. And, the defendant having offered in chambers what the court considered proper terms, the plaintiffs were ordered to pay the costs of an adjournment of the summons into court. *Real and Personal Advance Co.* v. *McCarthy*, 49 L. J., Ch. 615; 14 Ch. D. 188; 42 L. T. 48; 28 W. R. 418.

The plaintiff's motion for an interim injunction to restrain a nuisance committed by the defendant was ordered to stand over till the trial of the action, no order being made as to costs. At the trial the judge awarded the plaintiff damages in lieu of an injunction, and ordered the defendant to pay the plaintiff's costs of action, the order reserving liberty to apply. The judgment as passed and entered was silent as to the costs on the previous motion. The taxing officer having refused to allow the costs of the motion without a special order of the judge:—Held, on motion, that the court might order the costs of the motion to be paid by the defendant, and that the plaintiff having written to the defendant giving him an opportunity of avoiding further litigation, of which the defendant had not availed himself, the costs of the present application must be paid by the defendant. *Fritz* v. *Hobson*, 49 L. J., Ch. 735; 14 Ch. D. 542; 42 L. T. 677; 28 W. R. 722.

A suit was instituted by a person claiming a legal title to land, praying discovery and a delivery up of the title deeds against a person who had the deeds, and merely claimed to hold them as a stakeholder for whoever had the legal title. The bill in that suit also prayed an account against the defendant as agent of the plaintiff. The defendant had not acted in that capacity. The deeds having been brought into court on an interlocutory motion, and another suit having been subsequently instituted, in which the questions as to the title to the lands could be decided, the plaintiff in the first suit offered the defendant to consent that the deeds in court should be transferred to the second suit, and the first dismissed with costs: the defendant having declined to consent, and put the plaintiff upon the terms to bring the first suit to a hearing:—Held, the defendant not objecting to the retention of the deeds in court, that the defendant was entitled to the costs of the suit generally, and not merely to those incurred up to the service of the notice of consent. *Whittingham* v. *Cusack*, Ir. R. 7 Eq. 159.

Tender.]—Tender must be very express and formal to prevent costs. *Gammon* v. *Stone*, 1 Ves. 339.

If to a bill for tithe, defendant does not show a previous tender, or make one by his answer, plaintiff shall have an account; if the tender be only by answer, defendant shall account with costs, but if made before, he shall save his costs. *Anon.*, Bunb. 28.

That a tender may be made after answer. See *Exeter (Bishop)* v. *Trenchard*, Bunb. 47.

Where defendant in a tithe cause sets up a modus, and is desirous of protecting himself from costs, he should move for an order that plaintiff accept sums admitted due by answer, or proceed at peril of costs; and court will notice the tender by minute. The motion may be made without notice or payment of money into court. *Davis* v. *Moseley*, 9 Price, 211.

Answer stating tender before bill filed, but not proved, will not save costs. *Milnes* v. *Davison*, 3 Madd. 374.

In a suit for various articles of tithes, the defendant offered to pay into court the value of all but one article, with costs:—Held, he must pay costs incurred by claim of whole of them. *Worral* v. *Miller*, 3 Anstr. 632.

Bill for tithes, modus set up as defence; motion by defendant, to pay up arrears of modus, with costs up to time, refused; but plaintiff proceeding and then abandoning suit, costs after

tender allowed to defendant. *Bristol (Dean)* v. *Donnesthorpe*, 1 Anstr. 272.

Tender of Debt after Issue of Writ.]—A defendant cannot escape paying the cost of a writ of summons by tendering the amount sued for without costs before service, but after issue of the writ. *O'Malley* v. *Kilmallock Union*, 22 L. R. Ir. 326.

See Ord. XXII. r. 3.

Offer to pay Costs.]—If a defendant desires to avoid the payment of costs at the trial of an action should he be held to be unsuccessful, any offer he may have previously made with regard to the payment of costs must have been of substantially the whole of the costs which the court finds the plaintiff to be entitled to at the trial. Short of that the offer may be evidence of good faith; but it is not such an offer as to interfere with the ordinary course with respect to costs. *Schlesinger* v. *Turner*, 63 L. T. 764.

After an action brought, the plaintiff, receiving payment of his demands, may go on to a trial, if the costs then incurred are not tendered. But equity acts on a more discretionary rule than a court of law: if the sum received by the plaintiff had satisfied the whole purpose of the suit, he ought to apprise the defendant that he would proceed for his costs, unless they were also paid. Under decrees for specific performance, the vendee considered as entitled to his costs, up to the time when the vendor evidences a good title: when that is done, the vendee is bound to declare that he is satisfied, and will accept the title if the vendor will pay his costs up to that time; if he omit to do so, the court will fix all the subsequent costs on him. *Lill* v. *Robinson*, Beat. 84.

On a bill for the assignment of dower, a defendant, who had disputed the plaintiff's title, and only admitted it after the filing of the bill, and then without tendering costs, was ordered to pay the costs up to the hearing. *Harris* v. *Harris*, 1 N. R. 43; 7 L. J. 411; 11 W. R. 62.

Where the plaintiff is entitled to have an injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time. *Fradella* v. *Weller*, 2 Russ. & M. 247. S. P., *McAndrew* v. *Barsett*, 10 Jur. (N.S.) 492; 10 L. T. 65; *Burgess* v. *Hill*, 26 Beav. 244; 28 L. J., Ch. 356; 5 Jur. (N.S.) 233; 7 W. R. 158; *Burgess* v. *Hateley*, 26 Beav. 249.

Where, after notice of a motion to dismiss for want of prosecution, the defendant filed a replication:—Held, that the plaintiff, not having tendered the defendant the costs of the notice, must pay the costs of the motion. *Att.-Gen.* v. *Cooper*, 9 Sim. 379; 8 L. J., Ch. 19; 2 Jur. 917. Cp. *cases* supra, cols. 792—796.

—— **Irregularity.**]—Notwithstanding an offer has been made to pay all the expenses which the party has been put to by the irregularity in issuing an attachment, he has a right to have the judgment of the court on the question of its irregularity, and is, therefore, entitled to the costs of the motion for setting it aside. *Frowd* v. *Lawrence*, 1 Jac. & Walk. 655.

xiv. *Effect of Delay.*

Reference to Taxing-master to Inquire.]—Where very considerable delay had occurred in proceedings under a decree in an administration suit which, in the opinion of the court, ought to be accounted for, the court, in exercise of the powers afforded by Ord. LXV. r. 11 of the Rules of Court, 1883, ordered that, in the taxation of the costs, the matter be referred specially to the taxing-master, and he be directed to inquire into the cause of the delay, to make such disallowance of costs in respect thereof as he might think fit, and to call upon the solicitors engaged in the conduct of the case to show cause why that disallowance should not be made. *Furness* v. *Davis*, 51 L. T. 854; 33 W. R. 320.

An action was begun on the 19th April, 1882, by a person who had bought a share in an estate for 55*l.*, asking that the trusts of the will of a testator might be carried into execution, and his real and personal estate administered by the court, and that all proper accounts and inquiries might be taken and made, and directions given. No allegation was made in it of any kind of misconduct on the part of the trustees. The claim showed that the widow of the testator, who by the will was tenant for life of all the real and personal estate, was still living; there was no doubt as to who were the persons ultimately entitled. On the 17th March, 1883, the usual judgment for administration was pronounced, and numerous accounts and inquiries were ordered to be taken and made. One inquiry, as to certain investments, was not asked by the pleadings, or indeed until after the hearing on further consideration. On the 23rd August, 1887, the chief clerk filed his certificate. The court of first instance held, that no benefit having resulted to the estate from the action, and the action being an idle and vexatious proceeding, the plaintiff was not entitled to his costs out of the estate; that the plaintiff must pay all the costs of the action since Ord. LXV. r. 1 of the Rules of Court came into operation on the 24th October, 1883. The costs would be taxed, and the taxing-master should have regard to Ord. LXV. r. 11, to see what costs (if any) had been fruitless, or had been occasioned by this delay. On appeal from so much of the order as related to costs incurred before the Rules of 1883 came into operation:—Held, that though the general delay could not be attributed to the plaintiff, he had, by taking the inquiry as to investments, and thus throwing the matter into chambers and causing expense, been guilty of such improper conduct as gave the judge a discretion to make him pay the costs, and that with this discretion the court would not interfere. *Ormston, In re, Goldring* v. *Lancaster*, 59 L. T. 594—C. A. Affirming 36 W. R. 216.

Powers of Judge.]—The powers given by Ord. LXV. r. 11, of disallowing costs improperly incurred, or rendered fruitless by undue delay, may be exercised by the judge of his own motion without any request from any of the parties. *Brown* v. *Burdett*, 37 Ch. D. 207; 58 L. T. 571; 36 W. R. 225—C. A.

Payment of Costs out of Fund.]—The rule extends to cases where in the ordinary course the costs are paid out of a fund, and is not confined to disallowing costs as between the solicitor and his client who has to pay them. *Ib.*

The court will not permit the costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of an estate under its care. The amount of costs

allowed by a taxing-master as between the client and his solicitor is not conclusive of the amount which the court will allow out of the estate. *Brown* v. *Burdett*, 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533—C. A.

An administration action, which was commenced in May, 1875, came on in November, 1887, upon second further consideration. The judge finding that the costs would probably amount to nearly the whole value of the estate, and believing that there had been unreasonable delay in the conduct of the proceedings, directed the taxing-master, under Ord. LXV. r. 11, to inquire and report as to the delay and the costs occasioned thereby. The taxing-master reported that there had been great delay in the suit caused by the conduct of the solicitor for the plaintiff, and disallowed considerable sums from the costs as between the various solicitors and their clients. The judge ordered that only a portion of the costs allowed by the taxing-master to the several parties, including the costs of the plaintiff, who was a trustee, should be paid out of the estate; and the Court of Appeal affirmed this decision. *Ib.*

Omission to procure Investment of Purchase-money.]—An order was obtained by the solicitor for the plaintiff that the purchaser of property, sold under an order of the court in an action, should pay his purchase-money into court, and that the money when paid in should be invested in consols. The plaintiff had the conduct of the sale. The money was paid into court by the purchaser, but the plaintiff's solicitor omitted to leave with the paymaster the necessary request for its investment, and consequently the investment was not made. On the further consideration of the action it was ordered that the balance of the purchase-money, after the payment of certain costs, should be paid to the receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the receiver, and he then discovered that the purchase-money had not been invested. He took out a summons, asking that the plaintiff's solicitor might be ordered to pay to him the amount of interest lost by the non-investment of the purchase-money:—Held, that the solicitor, as the officer of the court having the conduct of the sale, was responsible not only to his client but to the court for the due discharge of his duty, and that he must make good to the person entitled the loss of interest, but that he was entitled to a set-off in respect of a gain which had resulted from a fall in the price of consols between the time when the investment ought to have been made and the date of the order on further consideration, and that this liability could be enforced by summons in the action. The solicitor was ordered to pay the costs of the summons, though on allowing the set-off, it appeared that the amount to be paid by the solicitor would be only 5*l.* 8*s.* 6*d.* *Batten* v. *Wedgwood Coal and Iron Co.*, 55 L. J., Ch. 396; 31 Ch. D. 346: 54 L. T. 245; 34 W. R. 228.

Appeal from Order.]—An order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally is not within the Judicature Act, 1873, s. 49, and therefore is subject to appeal without leave. *Bradford, In re*, 53 L. J., Q. B. 65; 15 Q. B. D. 635; 50 L. T. 170; 32 W. R. 238—C. A.

xv. *Gross Sums for Costs.*

Ord. LXV. r. 23.

In what Cases.]—A contingent legacy to an infant was paid into court by the executor of the will of the testatrix under the Legacy Duty Act. A summons was then taken out by the guardian of the infant, asking that the income of the legacy might be paid to him until the infant should attain twenty-one. An originating summons was also taken out by the next of kin of the testatrix, claiming the income during the minority of the infant on the ground that it was undisposed of by the will. The two summonses were heard together before the judge in chambers, when he decided that the income until the infant should attain twenty-one was undisposed of, and that the next of kin were entitled to it. The executor's solicitor asked that his cost of attendance, amounting to about 13*l.*, might be allowed out of the income. The judge considered the attendance of the executor's solicitor unnecessary, and declined to allow more than a fixed sum for costs, to be determined by the chief clerk. The chief clerk, without attempting to tax the bill, but acting upon what the judge had said, allowed the sum of three guineas. The matter was again referred to the judge, who confirmed the order of the chief clerk. A motion was accordingly made to vary that order:—Held, that r. 23 of Ord. LXV. of the Rules of Court, 1883, seemed to apply to the case; but that, in any event, the court had power in such a case as the present to limit the amount of costs to be allowed. *Walters, In re, Moore* v. *Bemrose*, 58 L. T. 101.

The court will not, under the 123rd Order of May, 1845, fix the amount of costs to be paid in respect of an abandoned motion, except where the parties are poor and anxious to put an end to the matter. *London & Blackwall Ry.* v. *Limehouse Board of Works*, 26 L. J., Ch. 164.

A sum certain given for costs where of small amount. *Wilding* v. *Wilding*, 4 Bro. C. C. 100.

Where notice of motion is irregularly given before the Master of the Rolls, in a Vice-Chancellor's cause, this court has jurisdiction to award costs, and two counsel having been instructed by the respondents in such a case, 42*s.* costs were summarily given. *Yearsley* v. *Yearsley*, 19 Beav. 1.

Claimants to Fund in Court.]—Three guineas is a proper sum to allow to each successful claimant to a fund in court for the costs of establishing his claim. *Waterton* v. *Burt*, 39 L. J., Ch. 425; 18 W. R. 683.

xvi. *Where Several Issues.*—*See* supra, F.

xvii. *Where Several Parties.*—*See* supra, E. 2.

xviii. *In other Cases.*

Agency Charges—Firms of Solicitors having Common Members.]—Agency charges for work done by a London firm of solicitors as agents for a country firm—two partners out of three in each firm being the same—were disallowed on taxation:—Held, that it having been the practice of the chancery taxing-masters for forty or fifty years not to treat cases of two firms having certain partners in common as agency cases at all, the court could not overrule the practice,

and the charges were properly disallowed. *Borough Commercial and Building Society, In re*, 63 L. J., Ch. 365; [1894] 1 Ch. 289; 7 R. 75; 70 L. T. 51; 42 W. R. 161—C. A.

Abstracts.]—Where an abstract of title which was used in the preparation of a defendant's answer had been prepared mainly, if not entirely, before the commencement of the suit, and there was no evidence before the court to show what part, if any, had been prepared since the institution of the suit:—Held, that in taxation as between party and party the costs of preparing such abstract could not be allowed. *Davis* v. *Dysart* (*Earl*), 8 De G. M. & G. 33; 25 L. J., Ch. 322; 2 Jur. (N.S.) 219; 4 W. R. 268.

Appearance—Several Defendants.]—A solicitor is entitled to charge 6*s.* 8*d.* for every one of three defendants to a bill for whom he enters appearances, although he may enter the appearances for all the defendants at the same time; and the scale of fees contained in the 5th General Order of the 23rd October, 1852, as to entering appearances, is not to be confined to appearances to summonses. *Morratt* v. *Walton*, 23 L. J., Ch. 1003; 18 Jur. 563; 2 W. R. 599.

Withdrawal of Defence of one Defendant.]—Where one of two defendants to an action of ejectment withdrew his defence, and was ordered as one of the terms on which such withdrawal was permitted, to pay to the plaintiffs their costs of the action "so far as they were occasioned by the defendant's defence" down to the date of the application to withdraw:—Held, that the effect of the order (the terms of which followed the language of the Common Law Procedure Act, 1852, s. 205, and were practically identical with that of Ord. XXIII. r. 1) was to relieve the withdrawing defendant from the general costs of the action, and to make him liable only for the additional or increased costs, over and above the general costs, occasioned by such defendant having defended the action. *Real and Personal Advance Co.* v. *McCarthy*, 18 Ch. D. 362; 45 L. T. 116; 30 W. R. 481—C. A.

Staying Proceedings.]—When a defendant obtains the ordinary order to stay proceedings upon payment of costs, it is the duty of the master when taxing such costs to consider and determine questions raised by the defendant as to the necessity or propriety of proceedings for which charges are made in the bills of costs. *Wormsley, In re. Baines* v. *Wormsley*, 47 L. J., Ch. 844; 39 L. T. 85; 27 W. R. 36.

Abandoned Motion.]—On an abandoned motion, or on the discontinuance of an action, the costs of all work in preparing, briefing, or otherwise, relating to affidavits or pleadings, are allowed, provided, in the opinion of the taxing-master, such work has not been prematurely done. *Harrison* v. *Leutner*, 50 L. J., Ch. 264; 16 Ch. D. 559; 44 L. T. 331; 29 W. R. 393.

Discontinuance of Action.]—By Ord. LXV. r. 27, special allowances in respect of (sub-r. 9) "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence," shall apply to all taxations in the Supreme Court:—Held, that under this rule a master had a discretion to allow charges and expenses properly incurred by the defendant in procuring evidence where the plaintiff, having given no notice of trial, subsequently discontinued the action. *Windham* v. *Bainton*, 57 L. J., Q. B. 519; 21 Q. B. D. 199; 36 W. R. 832. *See* preceding case.

In an action on a marine insurance policy, owing to the plaintiff's delay in complying with an order for production of papers, the defendant did not plead until a year after declaration. Meanwhile, to save expense, the defendant examined witnesses before the master, under 1 Will. 4, c. 22, s. 4. The defendant pleaded unseaworthiness, &c., and paid 25*l.* into court on the money counts for the premium. The plaintiff took the money out of court, and joined issue on the other pleas, but afterwards discontinued:—Held, that the defendant was entitled to the costs of the witnesses examined before the master, as incurred before instructions for plea, within Reg. Gen. H. T. 1853, r. 12. *Previte* v. *Adelaide Fire and Marine Insurance Co.*, 32 L. T. 768. *And see* PRACTICE (DISCONTINUANCE).

Rehearing.]—The costs of rehearings are not carried by the words "costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation. *Agabeg* v. *Hartwell*, 5 Beav. 271.

Of New Trial.]—*See* supra, col. 699.

Parties having Liberty to attend Proceedings.]—Mere liberty to attend the proceedings under an administration judgment does not entitle the parties having the liberty to the costs of their attendance in chambers as a matter of course. In order to entitle such parties to such costs, the order giving the liberty to attend should expressly provide that they are to be entitled thereto. *Day* v. *Batty*, 21 Ch. D. 830.

Inspection of Documents.]—As between party and party, no costs can be allowed in respect of notices to inspect documents, or of attendance for the purpose of inspecting documents, at the office of the solicitor to whose client the documents belong. The discretion given to the taxing-master by Ord. LXV. r. 27 (17)—repeated from Rules of Supreme Court, 1875 (Costs), schedule, r. 15—only applies to taxation of costs as between solicitor and client. *Wicksteed* v. *Biggs*, 34 L. J., Ch. 967; 52 L. T. 428.

Decrees and Minutes.]—Where the court has pronounced an order, but no minutes of it have been drawn up, the solicitor is, nevertheless, entitled to his costs of the minutes, as if they had been actually drawn up. *Gould* v. *Drummett*, 35 L. J., Ch. 794; L. R. 2 Eq. 609; 12 Jur. (N.S.) 614; 14 L. T. 881; 14 W. R. 1008.

Costs of inrolling decree disallowed on taxation between party and party. *Clark* v. *Malpas*, 31 Beav. 554; 1 N. R. 221; 32 L. J., Ch. 313; 9 Jur. (N.S.) 612; 7 L. T. 659; 11 W. R. 251.

Where Defendant sets up Counterclaim.]—*See* ante, col. 695.

Change of Venue—Taxation as if in former Place of Trial.]—A plaintiff opposed a change of the venue from London to Newcastle, but undertook to tax, if successful, as if tried in Northumberland. The cause was in the paper six days, and was tried on the fifth and sixth

days, when the plaintiff had a verdict. On taxation, the master allowed only two days' attendance of the plaintiff's attorney and witnesses, considering that their detention would not have exceeded that space of time if the cause had been tried at Newcastle. He also refused to allow the estimated cost of a journey from London to Newcastle of two witnesses (residents of South Shields) who happened to be near London at the time of the trial. He further disallowed detention money to witnesses whose ordinary place of abode was Newcastle or the neighbourhood, upon the presumption that they would probably have been at home at the assize time:—Held, that these were matters for the master's discretion, and that he had not so plainly and obviously erred as to induce the court to interfere. *Clarke* v. *Tyne Improvement Commissioners*, 37 L. J., C. P. 110; L. R. 3 C. P. 230; 17 L. T. 509.

Term Fees.]—Term fee allowed where the only proceeding was leaving copy of decree and bill of costs before the master. *Davies* v. *Marshall*, 1 Dr. & Sm. 564; 7 Jur. (N.S.) 669; 9 W. R. 756.

On a reference A. and B. had a common interest in one question, and A. a separate interest in another. On the former the master directed one charge to be filed for both. During the proceedings on it the taxing-master allowed only one term fee to the solicitor, who acted for both A. and B.:—Held, that he was right in disallowing the second, and the taxation was affirmed. *Newby* v. *Drew*, 12 Ir. Eq. R. 24.

c. Scale of Taxation.

i. *Higher or Lower Scale.*

Ord. LXV. r. 9.

Pending Proceedings.]—Ord. LXV. r. 9, does not apply to an action pending at the commencement of the new rules; and, according to the former practice, the question whether costs shall be allowed on the higher or the lower scale is a matter for the taxing-master. *Edgington* v. *Fitzmaurice*, 32 W. R. 848.

Power cannot be Delegated.]—A judge has no power to delegate to a master the discretionary authority given him by the Rules of the Supreme Court (Costs), Ord. VI. r. 3 [repealed], with reference to allowing costs on the higher or lower scale. *Cortvene Floor Covering Co.* v. *Tull*, 27 W. R. 373—C. A.

Appeal from Decision.]—An appeal will lie from a decision by a judge under Rules of the Supreme Court (Costs), August, 1875, Ord. VI. r. 3 [repealed], as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion, the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208. S. P., *Paine* v. *Chisholm*, 60 L. J., Q. B. 413; [1891] 1 Q. B. 531; 39 W. R. 353—C. A.

Action in Common Law Division.]—Semble, that Ord. VI. r. 3, of the Rules of the Supreme Court (Costs) [repealed], allowing costs upon the "higher scale," is not limited to costs in actions brought in the Chancery Division of the High Court, but gives the Common Law Divisions a discretionary power to order costs to be taxed upon the higher scale, even though the cause of action involves no equitable element. *Norfolk (Duke)* v. *Arbuthnot*, 50 L. J., Q. B. 384; 6 Q. B. D. 279; 29 W. R. 337.

Amount at Stake.]—The court will not allow costs on the "higher scale" unless special circumstances of urgency or difficulty are shown. The amount at stake in an action is not of itself a sufficient reason for such allowance. *The Horace*, 53 L. J., P. 64; 9 P. D. 86; 50 L. T. 595; 32 W. R. 755; 5 Asp., M. C. 218.

On a petition for the appointment of new trustees, the amount of the fund alone does not constitute a "special ground arising out of the nature and importance or the difficulty or urgency of the case" for ordering costs on the higher scale within Ord. LXV. r. 9. *Spettigue's Trusts, In re*, 32 W. R. 385.

The allowance of the higher scale of fees does not depend upon the amount to be recovered, but upon the questions raised in the suit, and whether the suit is one which affects the entire property involved. *Grimes* v. *Harrison*, 27 Beav. 198; 28 L. J., Ch. 828; 5 Jur. (N.S.) 972.

Scientific Evidence—Plans.]—In an action against a port authority for damage to a ship owing to the alleged improper condition of the bed of the harbour, where a number of scientific witnesses were called to speak to the condition of the harbour and the strength of the ship, and several plans were used for such purpose, the court, having given judgment for the plaintiffs, made an order for costs on the higher scale. *The Robin*, [1892] P. 95; 67 L. T. 298; 7 Asp., M. C. 194.

Costs on the higher scale should be allowed in patent cases where scientific witnesses are necessarily called. *Ellington* v. *Clark*, 58 L. T. 818—C. A.

Intricacy.]—Where the nature and intricacy of a case render it necessary, costs on the higher scale may be allowed. *Farrar* v. *Farrars*, 59 L. T. 619.

Manner in which Case Conducted.]—In considering whether the costs of a cause shall be awarded upon the higher scale, the court will have regard to the importance of the questions in issue in the action, and also as to the manner in which the case has been prepared and conducted at the trial. *Davies* v. *Davies*, 56 L. J., Ch. 481; 36 Ch. D. 359; 56 L. T. 401; 35 W. R. 697.

Although a case as presented to the court may not be of special "difficulty" within the meaning of Ord. LXV. r. 9, leave will be given to the taxing-master to tax all or any part of the costs on the higher scale, if it appears on such taxation that the difficulty was removed by the expenditure of time, money, and learned industry. *Fraser* v. *Brescia Steam Tramways Co.*, 56 L. T. 771.

Special Knowledge—Skill and Labour.]—Where a case is one requiring special knowledge on the part of those concerned in it, it is one of those exceptional cases in which costs on the higher scale ought to be allowed. *Moseley* v. *Victoria Rubber Co.*, 57 L. T. 142.

An action for the recovery of large estates, the statement of claim in which set up a case of

concealed fraud to avoid the operation of the Statute of Limitations, was dismissed without costs. The taxing-master, in taxing the costs of the plaintiff as between the solicitor and a person who had guaranteed their payment, taxed them on the lower scale, as coming within Ord. VI. r. 1 [repealed], and the Vice-Chancellor affirmed his decision:—Held, that the fact of the issue of fraud being raised was not a sufficient reason for directing the costs to be taxed on the higher scale, but that, to take the case out of the general rule that the costs of an action for the recovery of land are to be taxed on the lower scale, the solicitor must show that the case was one requiring extra skill or labour. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208.

Witnesses examined in Court—Long Arguments.]—Costs should be allowed on the higher scale whenever witnesses are properly brought into court and a good deal of time is necessarily occupied in the argument. *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 55 L. J., Ch. 383; 31 Ch. D. 328; 54 L. T. 242; 34 W. R. 437.

Trial lasting a Long Time.]—In an action brought against directors of a building society to make good losses arising from advances made by them and from paying rents, royalties, and expenses after taking possession of the property upon which money had been advanced, the trial lasted ten days; the court refused an application for costs on the higher scale, but allowed the costs of the shorthand notes of the evidence. *Sheffield Building Society* v. *Aizlewood*, 59 L. J., Ch. 34; 62 L. T. 678.

Importance and Difficulty.]—An action for the establishment of a right of great pecuniary value, and involving difficult questions of fact and law, was heard at great length on five days, and judgment was given in favour of the plaintiff. The principal defendant appealed. The appeal was argued on four days and judgment reserved. Ultimately the decision was reversed, and the action dismissed with costs:—Held, that, although the case was important and difficult, the court could not say that there were special grounds arising out of its importance and difficulty which would warrant giving costs on the higher scale. *Williamson* v. *North Staffordshire Ry.*, 55 L. J., Ch. 938; 32 Ch. D. 399; 55 L. T. 452—C. A.

In a summons under the Settled Land Act, 1882, to obtain the direction of the court as to sale of certain settled estates and the disposal of the purchase-money, the court, on account of the difficulty of the case, allowed the costs of the application on the higher scale. *Chaytor's Settled Estate Act, In re*, 25 Ch. D. 651; 50 L. T. 88; 32 W. R. 517. See also *Davies* v. *Davies*, and *The Horace*, supra.

An action to recover damages (more than 3,000*l.*) for an alleged fraudulent misrepresentation upon the sale of a public-house was tried with a special jury, the trial lasting five days. The misrepresentation relied upon was that the "legitimate takings" of the house were represented by the vendor to be 500*l.* per week, whereas the takings-book shown to the purchaser was concocted, and the takings were not legitimate, but were brought about by giving overmeasure to the customers and a quality of liquor superior to that which was usual in the trade. About thirty witnesses, chiefly customers at the public-house before and since the sale, were called. The jury found a verdict for the defendant, and the judge gave judgment for him, with costs on the higher scale:—Held, that there were no special grounds arising out of the nature and importance or the difficulty of the case to warrant giving costs on the higher scale. *Paine* v. *Chisholm*, 60 L. J., Q. B. 413; [1891] 1 Q. B. 531; 39 W. R. 353—C. A.

Where Fraud alleged.]—The plaintiff in this action claimed relief on the ground of alleged fraudulent misrepresentations in the prospectus of a company, and upon the action being dismissed with costs the taxing-master allowed costs upon the higher scale. Before trial the plaintiff took out a certificate that the lower scale of fees was applicable to the case. The amount that the plaintiff claimed to recover was 40*l.*, paid by him in respect of shares of the company; he also claimed costs and damages and an indemnity:—Held, on adjourned summons to review the taxation and vary the certificate of the taxing-master, that the case did not come within the definitions of cases under Ord. VI. r. 1, of the Rules of August, 1875 [repealed], and that fraud being alleged, the court would exercise its discretion under r. 3 of the same order, and allow costs on the higher scale. *Harrison* v. *Leutner*, 52 L. J., Ch. 927; 24 Ch. D. 594; 49 L. T. 91; 31 W. R. 837. See *Terrell, In re*, supra.

No Difference of Fact.]—In an action to restrain the erection of buildings in which the plaintiff failed, the court refused to order the costs to be taxed on the higher scale, as there was no substantial difference of fact between the parties. *Att.-Gen.* v. *Edwards*, [1891] 1 Ch. 194.

Imitation of Trade Name.]—The plaintiffs in an action to restrain the defendants from using a trade name were ordered to pay costs on the higher scale. *Turton* v. *Turton*, 42 Ch. D. 128; 61 L. T. 571; 38 W. R. 22—C. A.

Infringement of Patent.] — Costs on the higher scale were allowed in an action for an alleged infringement of patent. *Van Gelder* v. *Sowerby Bridge Flour Society*, 59 L. J., Ch. 292; 44 Ch. D. 374; 62 L. T. 105.

Salvage Action.]—Salvage services were rendered by the steamship G. to the steamship R. and her cargo under a towage agreement which made no reference to cargo. Salvage was awarded in respect of ship and freight, but in a second salvage action in personam against the owners to recover salvage for services to the cargo:—Held, that there was no liability on the owners to pay salvage for the cargo, but that costs on the higher scale could not be awarded them, as there were no exceptional circumstances in the case. *Cardiff Steamship Co.* v. *Barwick*, 53 L. T. 56; 5 Asp., M. C. 473.

Injunction.]—In the case of an interlocutory injunction, the court refused to make an order that the costs should be allowed on the higher scale, though an important question was raised. *Grafton* v. *Watson*, 51 L. T. 141—C. A.

A submission to a perpetual injunction with costs by a defendant in an action for the infringement of a trade-mark does not afford a

special ground upon which the court will direct taxation of the costs upon the higher scale under the provisions of Ord. LXV. r. 9. *Hudson* v. *Osgerby*, 50 L. T. 323; 32 W. R. 566.

An injunction was granted restraining a district board of works from erecting posts by the side of public footpaths so as to interfere with the due enjoyment of the plaintiff's market, but costs on the higher scale were refused. *Horner* v. *Whitechapel Board of Works*, 54 L. J., Ch. 148.

—— **"Injury to Property"—Trespass.**]—In Ord. VI. r. 2, of the Rules of the Supreme Court (Costs) [repealed], the "injury to property" must be a substantial physical injury, and does not include a trespass upon land without injury to the soil, though of a permanent character and committed in the assertion of title. *Chapman* v. *Midland Ry.* (5 Q. B. D. 167, 431) discussed. *Goodhand* v. *Lysaught*, 10 Q. B. D. 71. Affirming 52 L. J., Q. B. 97; 47 L. T. 701; 31 W. R. 114.

The plaintiff brought an action for damages for an alleged trespass under a claim of right, and prayed an injunction to restrain the defendant from a repetition of it. The issue was one of considerable importance as between the parties, and involved a lengthened and expensive inquiry into the title of property which had been in the possession of the plaintiff's family for more than three centuries. Upon the trial (without a jury) the plaintiff obtained judgment for nominal damages:—Held, not a case in which the court, in the exercise of its discretion under Ord. VI. r. 3, Rules of the Supreme Court (Costs), would order the costs to be taxed upon the higher scale. *Norfolk (Duke)* v. *Arbuthnot*, 50 L. J., Q. B. 384; 6 Q. B. D. 279; 29 W. R. 337.

—— **When the principal Relief Sought.**]—In an action for trespass to land, the plaintiff claimed and obtained an injunction in addition to damages for the trespass. The nature of the trespass complained of did not involve any assertion of title or any injury of a permanent, irreparable character. The plaintiff claimed costs on the higher scale under Rules of the Supreme Court (Costs), Ord. VI. r. 2 [repealed]:—Held, that this was not such an action for an injunction as to render the higher scale applicable within the rule. *Chapman* v. *Midland Ry.*, 49 L. J., Q. B. 449; 5 Q. B. D. 431; 42 L. T. 612; 28 W. R. 592—C. A.

The plaintiff, the lessee and owner of a market, brought an action to recover damages for breaches of covenant against the tenants of certain houses within the market, and claimed an injunction to restrain the defendants from further breaches. The judge before whom the action was tried, holding that the injunction was the principal relief sought, and that the action was brought to establish a right, made an order, allowing the plaintiff costs on the "higher scale." The judge who tries the action has jurisdiction to make such an order under r. 3 of Ord. VI. of the rules as to costs [repealed], and should, in the exercise of his discretion, regard the intention of the legislature, as expressed in r. 2 of the same order. *Horner* v. *Oyler*, 49 L. J., C. P. 655.

The plaintiffs brought an action in the Chancery Division claiming an injunction to restrain the defendants from allowing the wall of their dock to remain below a certain height prescribed by act of parliament, and 9,000*l.* for damages in respect of injury to his houses and land, caused by a high tide overflowing the wall. The claim for an injunction was only added by amendment of the statement of claim. A perpetual injunction was granted and an inquiry directed as to damages before a special referee. The referee reported that the plaintiff was entitled to 1,941*l.* damages; this amount was reduced on the ground that it had been assessed upon a wrong principle. The taxing-master gave the plaintiff costs on the higher scale:—Held, that it was the duty of the taxing-master to consider whether, having regard to all the circumstances, an injunction was the principal relief sought, but that the court could, though it would not except in a clear case, interfere with his finding; that the action was really a common law action, though brought in the Chancery Division; that, in order to see which was the principal relief sought, the comparison must be made between the injunction and the damages claimed; that if no injunction had been asked, the defendants would, as a matter of business, have raised their wall to the proper height; and, therefore, that the plaintiff had not sustained the onus of proving that an injunction was the principal relief sought, and was only entitled to costs on the lower scale. *Rust* v. *Victoria Graving Dock*, 60 L. T. 645—C. A.

Agency Denied.]—The costs of a suit for the purpose of establishing a right to property against an alleged agent, who has denied the agency, and claimed the property as his own, do not come within the lower scale, although the property in question is under the amount or value of 1,000*l.* *Stamford (Earl)* v. *Dawson*, 36 L. J., Ch. 749; L. R. 4 Eq. 352; 16 L. T. 516; 15 W. R. 896.

Bill of Exchange.]—In an action on a bill of exchange properly brought in the Chancery Division, costs may be allowed on the higher scale under Ord. VI. rr. 2, 3 [repealed]. *Pooley* v. *Driver*, 5 Ch. D. 458.

Estate or Fund less than £1,000.]—A husband purported to devise six freehold cottages to his wife for life, with remainder to his nephew in fee, and bequeathed his personal estate, which amounted to upwards of 1,000*l.*, to his wife absolutely. The cottages were not in fact the property of the husband, but of his wife. After his death his widow sold the cottages to a purchaser in fee. Upon the death of the widow a purchaser of the nephew's supposed reversion under the will brought an action against her executors, claiming damages in consequence of her alleged wrongful sale, or compensation in consequence of her having elected to take the cottages against her husband's will, and, if necessary, administration of the estates of herself and her husband. At the trial of the action it was declared that the plaintiff was entitled to prove against the widow's estate (which was already being administered in another action) for the value of the cottages—subsequently assessed at 360*l.*, and for his costs in the action. In taxing the costs the master taxed them on the lower scale under Ord. VI. r. 1 [repealed], on the ground that the value of "the estate or fund dealt with" in the action was under 1,000*l.*:—Held, that the action was nothing more than an action for damages, and not within the causes and matters assigned to the Chancery Division by the Judicature Act, 1873, s. 34, and that consequently the lower scale applied. *Rogers* v. *Jones*, 7 Ch. D. 345; 38 L. T. 17.

In an administration action, where the estate consisted of personalty, and the equity of redemption in real estate and the gross value, including the amount of the mortgage debt, exceeded 1,000*l.*, but the net value of the interest possessed by the testator was less than that sum, the lower scale of costs was held to be applicable. *Sanderson, In re*, 7 Ch. D. 176; 38 L. T. 379; 26 W. R. 309.

In estimating the value of an estate of a testator for the purpose of ascertaining whether costs are to be paid on the higher or lower scale, the value of the estate at the death of the testator is to be looked at, although the costs of a suit to get in part of the assets may reduce that amount. *Steward* v. *Nurse*, 43 L. J., Ch. 384.

In a suit to enforce a charge or a lien for an amount under 1,000*l.* against the purchasers of real estate for an account of the amount due, and for a receiver and sale, the costs ought to be taxed upon the lower scale. *Paddon* v. *Winch*, 44 L. J., Ch. 568; L. R. 20 Eq. 449; 32 L. T. 794; 23 W. R. 787.

A mortgagor received an advance of 900*l.* from a building society, and conveyed to the society property to secure the payment by him of 900*l.* and interest in 120 instalments (amounting together to 1,275*l.*), and also of certain fines and charges in the event of his failing to pay the instalments. A decree for redemption was made, the costs of the suit to be added to the security:—Held, that as the sum originally advanced was less than 1,000*l.*, the costs must be taxed on the lower scale, and that the fines and charges which might be incurred could not for this purpose be considered as added to the sum advanced. *Otterell* v. *Stratton*, 43 L. J., Ch. 573; L. R. 9 Ch. 514; 30 L. T. 589; 22 W. R. 607.

Held, also, that the scale of taxation was not dependent on the amount due when the bill was filed. *Ib.*

The lower scale of costs directed by the general orders of the court must govern the taxation where a sum exceeding 1,000*l.* has been reduced below that amount by payments before suit. *Judd* v. *Plumm*, 30 L. J., Ch. 94; 9 W. R. 27.

The costs of a suit seeking relief by way of account in respect of alleged fraud and overcharges by a builder fall within the higher scale upon taxation as between party and party; and especially when the account sought to be taken includes sums far exceeding 1,000*l.*, and the amount of overcharge is fixed by the plaintiff at a sum exceeding that limit. *Flockton* v. *Peake*, 4 N. R. 456; 12 W. R. 1023.

ii. *As between Solicitor and Client.*

Jurisdiction to Order.]—The Court of Chancery formerly had, and the High Court of Justice now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. Whether the High Court has the same power in matters of common law jurisdiction, quære. *Cockburn* v. *Edwards* (18 Ch. D. 449) questioned. *Mordue* v. *Palmer* (L. R. 6 Ch. 22) approved. *Andrews* v. *Barnes*, 57 L. J., Ch. 694; 39 Ch. D. 133; 58 L. T. 748; 36 W. R. 705; 53 J. P. 4—C. A.

An arbitrator to whom the matters at issue in a suit, including the costs of the cause, have been referred by the Court of Chancery, has power to award costs as between solicitor and client. *Mordue* v. *Palmer*, 40 L. J., Ch. 8; L. R. 6 Ch. 22; 23 L. T. 752; 19 W. R. 86. See *Hartnell* v. *Hill*, Forrest, Ex. Rep. 74.

In a suit against an attorney, for the purpose of having his bills of costs on the plaintiff taxed, and for an injunction against his proceeding at law in the meantime, defendants moved that the costs might be taxed as between attorney and client; but the court said, that the rules of taxation of costs, as between attorney and client, did not apply where they appear in the court as party and party in a cause, and that these costs, therefore, must be taxed as between party and party. *Spelman* v. *Woodbine*, 1 Cox, 49.

In what cases Ordered.]—When an unsuccessful party has been ordered to pay costs, it is not the practice to direct such costs to be taxed as between solicitor and client, except where a fiduciary relation exists between the parties, or where there is something in the nature of scandal, as where gross charges of fraud have been made and not sustained; but the court may direct an unsuccessful party to pay the costs of a trustee as between solicitor and client, whether there is or not any fund out of which they may be paid. *Turner* v. *Collins*, 40 L. J., Ch. 614; L. R. 12 Eq. 438; 25 L. T. 264. See *N. C.*, 41 L. J., Ch. 558; L. R. 7 Ch. 329; 25 L. T. 779; 20 W. R. 305.

—— **Fraud.**]—Costs as between attorney and client against parties to a fraudulent bankruptcy, except those who discovered and gave evidence; and the attorney deprived of the office of master extraordinary, and committed. *Thorp, Ex parte*, 1 Ves. J. 394.

A plaintiff, in a bill to enforce against the defendant an alleged agreement for the compromise of claims of the plaintiff against the defendant in respect of accounts, charged the defendant with various frauds in respect of the accounts, such alleged frauds being the ground of the claims included in the compromise. The plaintiff having failed in proving the agreement, and his bill being dismissed with costs, he was ordered to pay the defendant's costs so far as they had been increased by the irrelevant charges of fraud, as between solicitor and client. *Forester* v. *Read*, L. R. 6 Ch. 40; 24 L. T. 79.

—— **Scandal.**]—On a successful appeal from an order overruling exceptions for scandal, the appellant was allowed his costs of appeal as well as his costs in the court below, as between solicitor and client. *Christie* v. *Christie*, 42 L. J., Ch. 544; L. R. 8 Ch. 499; 28 L. T. 607; 21 W. R. 493. See *Pearse* v. *Pearse*, 29 L. T. 453; 22 W. R. 69.

In cases of scandal the costs are as between solicitor and client. *Porter, Ex parte, Robinson, In re*, 2 Mont. & Ayr. 220.

Affidavit in bankruptcy ordered to be taken off the file as irrelevant and scandalous, with costs as between attorney and client. *Simpson, Ex parte*, 15 Ves. 476; 10 R. R. 104.

Trusts.]—An action was brought by the vicar and churchwardens of a parish to recover from the defendants a fund of small amount which had been handed over to them upon trust for a charitable purpose connected with the parish, but, as the plaintiffs alleged, upon a condition which had become incapable of fulfilment. The plaintiffs failed to make out their case. The court, in dismissing the action, being of opinion

that it had been brought wholly without justification, ordered the plaintiffs to pay the costs of the defendants as between solicitor and client; and the Court of Appeal refused to interfere with the judgment. *Andrews* v. *Barnes*, supra. *And see also* TRUST AND TRUSTEE.

—— **Mortgage.**]—A taxation at the instance of a mortgagor of the bill of the mortgagee's solicitor, must be as between the solicitor and his client, the mortgagee. *Wells. In re*, 8 Beav. 416; 14 L. J., Ch. 215; 9 Jur. 820. S. P., *Harrison, In re*, 10 Beav. 57; 16 L. J., Ch. 170; 11 Jur. 197; *and see* MORTGAGE.

—— **Will—Representation Order.**]—On an adjourned summons for the decision of the court as to the construction of a will, three classes of issue were interested under the will, and representation orders had been made in respect of each class:—Held, that costs must be allowed as between solicitor and client. *Davies, In re, Jenkins* v. *Davies*, 64 L. T. 824.

—— **Against Receiver.**]—An adverse application was made against a receiver by a party to the cause, which was refused with costs. The applicant being wholly unable to pay the costs:—Held, that the receiver was entitled to be indemnified and have his costs, as between solicitor and client, out of the fund in hand belonging to incumbrancers. *Courand* v. *Hanmer*, 9 Beav. 3.

—— **Highway Act.**]—Section 109 of the Highway Act (5 & 6 Will. 4, c. 50) provides that where an action is brought against any person for anything done under the authority of the act, and judgment shall be given for the defendant, he shall have costs as between attorney and client:—Held, that this did not apply to an action for an injunction in the Chancery Division. *Pullin* v. *Deffel*, 64 L. T. 134.

—— **Proceedings without Authority.**—A suit instituted by a solicitor without authority was dismissed on motion, with costs of the suit, and of the motion, as between solicitor and client. *Allen* v. *Bone*, 4 Beav. 493.

A bill was filed by a solicitor as next friend, charging that the plaintiff was of unsound mind, against the plaintiff's housekeeper, to restrain her from exercising undue influence over the plaintiff. Proceedings directed by the court to be taken by the next friend in lunacy to ascertain the state of plaintiff's mind having resulted in a dismissal by the lords justices of the next friend's petition in lunacy with costs, the plaintiff applied to have the bill taken off the file, and Malins, V.-C., made an order accordingly, but, being of opinion that the suit had not been instituted by the next friend without reasonable cause, gave no costs. On appeal upon the subject of costs, the lords justices, in reversal pro tanto of the Vice-Chancellor's order, gave costs to the plaintiff as between solicitor and client, and to the defendant as between party and party. *Palmer* v. *Walesby*, 37 L. J., Ch. 612; 19 L. T. 1. See *Davies* v. *Davies*, 18 L. T. 701.

A person who has been made plaintiff without authority is entitled to full indemnity; and a defendant who, by reason of the bill being ordered to be taken off the file, cannot be heard on the merits, is entitled to costs as if the cause had come to a hearing, and the bill been dismissed on the merits. *Ib.*

Trustee Relief Act.]—*See* TRUST AND TRUSTEE.

In Creditor's Actions.]—*See* EXECUTOR AND ADMINISTRATOR.

In Proceedings by Legatee.]—*See* EXECUTOR AND ADMINISTRATOR—WILL.

In Charity Cases.]—*See* CHARITY.

Taxation.]—Costs directed by decree to be taxed as between a solicitor and client, cannot, on petition, be ordered to be taxed on another principle. *Massie* v. *Drake*, 4 Beav. 533.

The 159th General Order does not affect or regulate the taxation of costs as between solicitor and client. *Brangan* v. *Gorges*, 7 Ir. Eq. R. 225.

What Costs included.]—By a decree, the costs of all parties were ordered to be taxed as between solicitor and client. Upon a rehearing, the decree was affirmed, and the deposit was ordered to be returned, but nothing was said as to costs. By a subsequent order, the costs of all parties were ordered to be taxed, as between solicitor and client, from the last taxation:—Held, that this did not include the costs of the rehearing. *Agabeg* v. *Hartwell*, 5 Beav. 271.

A solicitor's bill having been partly taxed and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton* v. *Pardon*, Turn. & R. 301. And see *Gretton* v. *Leyburne*, *Ib.*, 407.

Where proceedings in an action were stayed by a judge's order on payment by the defendant of the debt and costs, to be taxed as between attorney and client, the costs of obtaining the leave of the Court of Chancery to bring the action, the plaintiff having, on a creditors' bill being there filed, been restrained from bringing an action against persons indebted to the estate without the leave of the court, were not allowed. *Lipscombe* v. *Turner*, 1 B. C. Rep. 101: 4 D. & L. 125; 15 L. J., Q. B. 410.

Where the costs of an ejectment have been taxed, the plaintiff cannot in an action for mesne profits recover costs as between attorney and client; and it makes no difference that the costs have been taxed on the application of the defendant. *Doe* v. *Filliter*, 2 D. & L. 186; 13 M. & W. 47; 13 L. J., Ex. 275.

iii. *County Court Scale.* *See* infra.

iv. *Double Costs.*

a. In what Cases.

Order LXV. r. 1—Discretion.]—Ord. LXV. r. 1, does not apply to costs which are given by a statute as a matter of right. Thus, in an action brought for anything done in pursuance of 8 & 9 Vict. c. 100, a successful defendant is entitled to double costs as a matter of right. *Hasker* v. *Wood*, 54 L. J., Q. B. 419; 33 W. R. 697—C. A.

—— **Full and Reasonable Indemnity.**]—The provisions of the Judicature Act and Order LXV. r. 1, do not apply to costs which are

specially given by statute to a particular individual as a matter of right, and therefore in an action brought to recover penalties for infringement of dramatic copyright under 3 & 4 Will. 4, c. 15, s. 2. a successful plaintiff is entitled, as a matter of right, to the full and reasonable indemnity as to costs, substituted by 5 & 6 Vict. c. 97, s. 2, for the double costs given by 3 & 4 Will. 4, c. 15, s. 2. *Hasker* v. *Wood* (54 L. J., Q. B. 419) followed. *Reeve* v. *Gibson*, 60 L. J., Q. B. 451; [1891] 1 Q. B. 652; 39 W. R. 420—C. A.

Before 5 & 6 Vict. c. 97.]—A magistrate who obtained a verdict in an action against him for an act done in his judicial capacity, there being nothing upon the face of the record to show that he was sued as a magistrate, must have procured the certificate of the judge who tried the cause, as a condition precedent, to have enabled him to obtain double costs under 7 Jac. 1, c. 5. *Penny* v. *Slade*, 5 Bing. (N.C.) 469: 7 Scott, 484; 7 D. P. C. 440; 2 Arn. 75; 8 L. J., C. P. 221.

A justice of the peace was not entitled to have a suggestion entered on the roll, that the action was brought against him for an act done by him as a justice of the peace, in order to obtain double costs. *Fosbrook* v. *Hall*, 1 M. & W. 205; 4 D. P. C. 701; 1 Gale, 440; 1 Tyr. & G. 464; 5 L. J., Ex. 152.

A suggestion was only necessary when there would otherwise be an inconsistency on the record, and was not necessary to be entered to give a party double costs. *Maberly* v. *Titterton*, 7 M. & W. 540; 9 D. P. C. 234; 10 L. J., Ex. 172; 5 Jur. 250.

A court of requests act enacted, that, in any action for any thing done in pursuance of the act, if upon a verdict or demurrer judgment should be given against the plaintiff, the defendant should recover treble costs:—Held, that the defendant, who had obtained a verdict without calling witnesses, the plaintiff having failed to establish his case, was entitled to treble costs, without having entered any suggestion on the roll, or given the act of parliament in evidence at the trial. *Forman* v. *Dawes*, 1 D. & L. 299; 11 M. & W. 730; 12 L. J., Ex. 437.

The court would not, on the last day of term, grant a rule nisi for the plaintiff to bring in the record, in order to enter a suggestion to entitle the defendant to double costs. *Anon.*, 4 Man. & G. 906.

b. How Computed.

The true mode of estimating the amount of double costs, is, first, to allow the defendant the single costs, including the expenses of witnesses, counsel's fees, &c., and then to allow him one-half of the amount of the single costs, without making any deduction on account of counsel's or court fees. *Stanniland* v. *Ludlam*, 7 D. & R. 484; 4 B. & C. 889.

Where treble costs are given by an act of parliament to parties sued for anything done in pursuance of the act, in the event of a verdict passing in favour of the defendants, if there are some issues found for the plaintiff and others for the defendants, the proper mode of taxing the costs is first to calculate those of the defendants and treble them, and from the amount subtract the single costs due to the plaintiff on the issues on which he has succeeded. *Wilson* v. *Dunn River Co.*, 7 D. P. C. 369; 5 M. & W. 89; 8 L. J., Ex. 161; 3 Jur. 343.

The double costs given to magistrates by 21 Jac. 1, c. 12, s. 5, were those costs only which were recoverable in the ordinary course of law, doubled. *Thomas* v. *Saunders*, 3 N. & M. 572; 1 A. & E. 552.

I. EFFECT OF COUNTY COURTS ACT.

Section 116, 51 & 52 Vict. c. 43.

1. In what Cases Applicable.

Claim on Contract, and Counterclaim.]—In an action of contract the defendant counterclaimed. By the award of a special referee it was found that the plaintiffs were entitled on their claim to 13*l.* 12*s.* 6*d.*, and that the defendant was entitled on the counterclaim to 63*l.* 8*s.* 6*d.*:—Held, that by reason of the provisions of s. 5 of the County Courts Act, 1867, the plaintiffs were not entitled to the costs of the issues found for them on the claim. *Lund* v. *Campbell* (14 Q. B. D. 821) distinguished. *Ahrbecker* v. *Frost*, 55 L. J., Q. B. 477; 17 Q. B. D. 606; 55 L. T. 264; 34 W. R. 789.

In an action tried by a jury, in which the plaintiff proves a claim, but a counterclaim of less amount is proved by the defendant, the plaintiff recovers judgment for the balance only, and if no order as to costs is made, the plaintiff's right to costs under the County Courts Act, 1867, and Ord. LV. of the Judicature Acts, must be decided with reference to that balance and not to the amount of the claim proved. *Staples* v. *Young*, 2 Ex. D. 324; 25 W. R. 304. S. P., *Ryan* v. *Fraser*, 16 L. R. Ir. 253—C. A.

The plaintiff claimed on a balance of account a sum of money exceeding 50*l.* The defendant pleaded a set-off, and also made a counterclaim for goods supplied to the amount of about 24*l.* The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from the defendant to the plaintiff on the claim 16*l.*, and from the plaintiff to the defendant on the counterclaim 23*l.*, and that the balance due from the plaintiff to the defendant was 7*l.*:—Held, that the defendant was entitled to his costs. *Chatfield* v. *Sedgwick*, 4 C. P. D. 459; 27 W. R. 790—C. A.

An action was brought claiming, first, 10*l.* for rent; secondly, 100*l.* as damages for breach of covenant in a lease of premises; and, thirdly, 30*l.* for conversion of the plaintiff's goods. The defendant pleaded, admitting that the rent was due, but denying the breach of covenant and conversion, and setting up a counterclaim for 100*l.* damages for breach of covenant by the plaintiff, and 15*l.* for money due for the use and occupation of other premises. The action was referred to an arbitrator by an order made by consent upon the terms that "the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator." The arbitrator found that the plaintiff was entitled to 10*l.* for rent; that the defendant had broken his covenant in the lease, and had been guilty of the conversion charged, and he awarded that the plaintiff was entitled to recover in respect of such breach of covenant and conversion the sum of 25*l.*, making together 35*l.* awarded to the plaintiff; that the plaintiff had broken his covenant, and that the defendant was entitled to recover in respect of that breach 20*l.*; and upon the whole matter he found that the plaintiff

was entitled to recover in the action 15*l.* and no more:—Held, that the provision in the order of reference as to costs did not alter the rights of the parties, and that upon the true construction of s. 67 of the Judicature Act, 1873, the plaintiff was entitled to the costs on the claim, and the defendant to his costs on the counterclaim. *Staples* v. *Young* (2 Ex. D. 324) questioned. *Chatfield* v. *Sedgwick* (4 C. P. D. 459) discussed. *Stooke* v. *Taylor*, 49 L. J., Q. B. 857; 5 Q. B. D. 569; 43 L. T. 200; 29 W. R. 49; 44 J. P. 748.

The plaintiff claimed a balance of 114*l.* 8*s.*, and the defendant established a counterclaim to the extent of 109*l.* 16*s.*; whereupon the judge directed the jury (as the result of their answers to certain questions submitted to them) to find a verdict for the plaintiff for the balance, 4*l.* 12*s.*, and no order was made as to costs. The court refused to alter the associate's certificate of the findings of the jury for the purpose of assisting the defendant to obtain costs upon his counterclaim. *Staples* v. *Young* (supra) and *Blake* v. *Appleyard* (supra) considered. *Potter* v. *Chambers*, 48 L. J., C. P. 274; 4 C. P. D. 69; 39 L. T. 350; 27 W. R. 414.

Where an action of contract is commenced in the High Court of Justice for a sum exceeding 50*l.*, and the plaintiff establishes his claim to the amount, but in consequence of a counterclaim being decided in favour of the defendant the plaintiff recovers judgment for a sum not exceeding 20*l.*, he is not deprived of his costs by virtue of the County Courts Act, 1867, s. 5, extended to actions in the high court by the Judicature Act, 1873, s. 67, for the relief sought by him could not, within the meaning of the latter section, have been given by a county court. *Potter* v. *Chambers*, 48 L. J., C. P. 274; 4 C. P. D. 457; 27 W. R. 414.

The plaintiffs claimed on a balance of account a sum of money exceeding 50*l.* The defendants denied their indebtedness, and pleaded by way of set-off and counterclaim that the plaintiffs were indebted to them for money advanced and money due for work done, and goods sold and delivered, and they claimed a balance on the accounts in their favour exceeding 50*l.* The cause was referred to an arbitrator, costs to abide the event. The arbitrator found that the defendants were indebted to the plaintiffs in a sum exceeding 50*l.*, and that the plaintiffs were indebted in like manner to the defendants in a sum exceeding 50*l.*, but that a balance was due to the plaintiffs on the whole account of 11*l.* 10*s.* 3*d.*:—Held, by Kelly, C.B., that the plaintiffs and the defendants were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county court; and by Hawkins, J., contrary to his own opinion, but on the authority of *Potter* v. *Chambers* (4 C. P. D. 457), that the plaintiffs were entitled to their general costs of action. *Neale* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438.

—— **Distributing Findings.**]—In an action for freight the plaintiff claimed about 50*l.*, and the defendants counterclaimed about 10*l.* for damage to the cargo, paying the remaining 40*l.* into court. The action was remitted to a county court under 19 & 20 Vict. c. 108, s. 26, and the registrar certified a verdict for the plaintiff for 16*s.*:—Held, that the court would alter the certificate by distributing the findings on the issues, so as to enable the defendant to be allowed the costs of his counterclaim. *Davidson* v. *Gray*, 5 Ex. D. 189, n.; 42 L. T. 834—C. A.

Reference back to find Specific Issues.]—The plaintiff, who had built two houses for the defendant at a contract price of 1,135*l.*, sued for 169*l.* 16*s.*, the balance of the price, and for other small items. The defendant raised various defences, and also counterclaimed 1,200*l.* for penalties for delay and for damages arising from bad work. The pleadings went as far as surrejoinder, after which the cause, with all matters in difference, was referred to an architect as arbitrator, upon the terms, inter alia, that the costs of action, reference, and award should follow the event, unless the arbitrator should otherwise order. The arbitrator by an award, silent as to costs, awarded 3*l.* 2*s.* 6*d.* to the defendant in respect of the action and matters in difference:—Held, that the word "event" ought to be construed distributively, and the award remitted to the arbitrator to find specific issues. *Ellis* v. *Desilva*, 50 L. J., Q. B. 328; 6 Q. B. D. 521; 44 L. T. 209; 29 W. R. 493—C. A.

Claim that cannot be brought in County Court.]—A plaintiff recovered 76*l.* in contract, and the defendant 64*l.* The plaintiff is not deprived of his costs by s. 116 of the County Courts Act, 1888, as such action, being for more than 50*l.*, could not have been brought in the county court. *Goldhill* v. *Clarke*, 5 R. 75; 68 L. T. 414.

The County Courts Act, 1867, s. 5, applies to actions which cannot be brought in a county court. *Sampson* v. *Mackay*, 10 B. & S. 694; 38 L. J., Q. B. 245; L. R. 4 Q. B. 643; 20 L. T. 807; 17 W. R. 883. *See now* s. 116 of County Courts Act, 1888.

But the circumstance that the action could only be brought in a superior court is to be taken into consideration by the court or a judge in exercising their discretion under that section. *Ib.*

—— **Slander.**]—A. suing B. for an assault, with a count for slander, and obtaining a verdict on the first count for 5*l.*, but failing to establish a cause of action on the second count, is entitled to no costs. *Smith* v. *Harnor*, 3 C. B. (N.S.) 829.

In an action for slander commenced in a superior court after the passing of the 30 & 31 Vict. c. 142, a verdict was found for the plaintiff for 10*l.*, and the judge refused to certify. On an application to the court for costs:—Held, assuming s. 5 to apply to cases in which the county court had no jurisdiction, that, as the plaintiff had recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander, and as he could not have sued in the county court, he ought to be allowed his costs. *Gray* v. *West*, 9 B. & S. 196; 38 L. J., Q. B. 78; L. R. 4 Q. B. 175; 20 L. T. 221; 17 W. R. 497.

The 30 & 31 Vict. c. 142, s. 5, applies to all actions, whether capable of being commenced or not in the county court. In an action for slander the plaintiff recovered 5*l.* damages in a superior court. On an application for a rule for costs:—Held, that inasmuch as he had necessarily brought his action in a superior court, and had recovered an amount of damages sufficient, in the absence of evidence to the contrary, to warrant the inference that his conduct in bring-

ing it was neither frivolous nor vexatious, he was entitled to a rule for costs. *Craven* v. *Smith*, 38 L. J., Ex. 90; L. R. 4 Ex. 146; 20 L. T. 400; 17 W. R. 710.

—— **Title to Land.**]—The provision of the 15 & 16 Vict. c. 54, s. 4, authorising a judge to grant a certificate for costs, where the cause of action is one for which a plaint could not have been brought in a county court, does not apply to the case where, to a good cause of action which might have been brought in the county court, the plaintiff joins a claim of title to land which, at the trial, proves to be unfounded. *Blackmore* v. *Higgs*, 33 L. J., C. P. 157; 15 C. B. (N.S.) 790; 10 Jur. (N.S.) 703; 10 L. T. 33; 12 W. R. 476.

In an action brought in the high court the plaintiff alleged that he was the owner in fee simple of certain premises the value of which exceeded 50*l.* by the year, and he claimed damages for the injury done to his reversion by the defendant's interference with the flow of water in a pipe laid through the defendant's land, to which the plaintiff claimed to be exclusively entitled in respect of his own premises. The defendant admitted the value of the premises, but by his pleading denied the plaintiff's title, and set up a title to the use of the water in himself:—Held, that, by reason of the question of title which was involved, the action was not one which could have been commenced in the county court, and consequently that the plaintiff, who had recovered less than 10*l.*, was not deprived of his costs by sect. 116 of the County Courts Act, 1888. *Howorth* v. *Sutcliffe*, 64 L. J., Q. B. 729; [1895] 2 Q. B. 358; 14 R. 722; 73 L. T. 277; 44 W. R. 33; 59 J. P. 678—C. A.

A jury returned a verdict of 3*l.* 10*s.* in an action for damages to the plaintiff's reversion by removing stones, &c. The pleas denied his interest and set up a right under a crown lease. The defendant abandoned at the trial all questions as to the plaintiff's interest and grounded his right under a reservation in an inclosure act only:—Held, that the plaintiff was entitled to costs. *Williams* v. *Jones*, 15 L. T. 248; 15 W. R. 133.

That plaintiff would have got a very small sum in damages, or reported due to him upon the account, is not to preclude him from costs, if the title to the land is in question, and he proves his right. Plaintiff, if he chooses to waive it, cannot be compelled to go into the office to take the account. *Hearne* v. *Riverston* (*Lord*), 2 Moll. 487.

The plea of not possessed, to an action of trespass quare clausum fregit, does not oust the jurisdiction of a county court; and if the title did not come in question on the trial, and the plaintiff recovers a sum not exceeding 5*l.* he is not entitled to costs. *Latham* v. *Spedding*, 2 L. M. & P. 378; 17 Q. B. 440; 20 L. J., Q. B. 302; 15 Jur. 576.

In an action of trespass, where the main issue to be determined was one of title to land, the plaintiffs claimed an injunction and damages. The action was tried before a judge with a jury. The jury found a verdict for the plaintiffs with 40*s.* damages. The judge gave judgment for the plaintiffs, and granted the injunction, but made no order as to costs:—Held, that the plaintiffs were not entitled to costs. *St. John's College, Cambridge* v. *Pierrepont*, 61 L. J., Q. B. 19; 66 L. T. 88.

—— **Breach of Promise of Marriage.**]—By Ord. LXV. r. 12, in actions founded on contract in which the plaintiff recovers by judgment or otherwise a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the court or a judge otherwise orders:—Held, that this rule does not apply to actions which could not have been brought in a county court. *Saywood* v. *Cross*, 54 L. J., Q. B. 17; 14 Q. B. D. 53; 51 L. T. 601; 33 W. R. 135.

Counterclaim against Third Party.]—Semble, that when a counterclaim is against a person not a party to the action, s. 24, sub-s. 3, of the Judicature Act, 1883, and Ord. XXI. rr. 11, 12, 13, 14. do not render s. 5 of the County Courts Act, 1867, applicable to such a counterclaim. *Lewin* v. *Trimming*, 21 Q. B. D. 230; 59 L. T. 511; 37 W. R. 16.

Not applying to Costs of Counterclaim.] — Ord. LXV. r. 12, by which a plaintiff, who recovers a sum not exceeding 50*l.* in an action of contract, is entitled only to costs on the county court scale unless the court or a judge otherwise orders, does not apply to the case of a counterclaim. Where, therefore, a plaintiff recovered 48*l.* on his claim, and also succeeded upon a counterclaim for 12*l.*:—Held, that for the purposes of taxation the claim and counterclaim must be treated as independent actions; that the costs of the counterclaim followed the ordinary rule as to costs, and that the plaintiff was entitled to have the costs of his defence to the counterclaim taxed on the high court scale. *Aman* v. *Bobbett*, 58 L. J., Q. B. 219; 22 Q. B. D. 543; 60 L. T. 912; 37 W. R. 329—C. A.

The County Courts Act, 1867, s. 5, does not apply to counterclaims, so that where a plaintiff proves a claim for 40*l.*, and the defendant a counterclaim in tort for 10*l.*, the defendant in the absence of any order as to costs, will be entitled to the costs of proving his counterclaim and of the issues, so far as they relate thereto. *Blake* v. *Appleyard*, 47 L. J., Ex. 407; 3 Ex. D. 195; 26 W. R. 592.

In an action for work and labour done, the plaintiff recovered a verdict for 20*l.* and costs on his claim, and also obtained a verdict with costs on a counterclaim for board and lodging:—Held, that he was entitled to the full costs of the counterclaim, and, in addition thereto, the costs of the original action, in so far as the same were not included in the costs of the counterclaim. *Griffiths* v. *Patterson*, 22 L. R., Ir. 656—C. A.

Specific Performance.]—A suit for specific performance of sale of leasehold property for 150*l.*, subject to rent of 92*l.* 10*s.* and covenant to keep insured, is a proper case to allow full costs, notwithstanding 30 & 31 Vict. c. 142. *Carpmael* v. *Carvell*, 18 W. R. 513.

Foreclosure Action.]—In an action to foreclose a mortgage for 65*l.*, where both plaintiff and defendant resided at the same place:—Held, that the plaintiff was entitled only to such costs as he would have obtained in the county court. *Simons* v. *McAdam* (L. R. 6 Eq. 324), followed. *Crozier* v. *Dowsett*, 55 L. J., Ch. 210; 31 Ch. D. 67; 53 L. T. 592; 34 W. R. 267.

In a suit to foreclose a mortgage for 40*l.*, where both plaintiff and defendant lived at the same place:—Held, that the plaintiff was

entitled only to such costs as he would have obtained in the county court. *Simons* v. *Meldam*, 37 L. J., Ch. 751 ; L. R. 6 Eq. 324 ; 18 L. T. 678 ; 16 W. R. 693.

Copyright—Infringement—Less than £10 recovered.]—Under the provisions of 3 & 4 Will. 4, c. 15, s. 2, a successful plaintiff in an action for penalties for infringement of dramatic copyright was entitled to receive double costs. Double costs given by any public act are abolished by 5 & 6 Vict. c. 97, s. 2, which substitutes for such costs a full and reasonable indemnity, to be taxed by the proper officer. In an action for infringement of dramatic copyright under the above act, the plaintiff claimed six penalties of 40*s.* each. The defendant paid into court 8*l.* in respect of four of such penalties, and the plaintiff took the money out of court in satisfaction of so much of the claim in respect of which it was paid in, and proceeded to tax his costs under Ord. XXII. r. 7. The master refused to tax on the ground that plaintiff, having recovered a sum of less than 10*l.* in an action founded on tort, was not entitled to costs by reason of the provision of s. 116 of the County Courts Act, 1888 :—Held, that the plaintiff was entitled to have his costs taxed. *Reere* v. *Gibson*, 60 L. J., Q. B. 451 ; [1891] 1 Q. B. 652 ; 64 L. T. 141 ; 39 W. R. 420.

Where Solicitor is Plaintiff.]—Section 5 of the County Courts Act, 1867, which deprives plaintiffs in actions commenced in the high court of costs if less than 20*l.* in contract, or 10*l.* in tort, is recovered, applies to an action in which a solicitor is plaintiff. *Blair* v. *Eisler*, 57 L. J., Q. B. 512 ; 21 Q. B. D. 185 ; 59 L. T. 337 ; 36 W. R. 767.

Costs of Execution.]—Section 30 of 19 & 20 Vict. c. 108, does not deprive a plaintiff of the costs of a writ of execution. *Armitage* v. *Jessop*, 36 L. J., C. P. 63 ; L. R. 2 C. P. 12 ; 12 Jur. (N.S.) 963 ; 15 L. T. 214 ; 15 W. R. 130.

Agreement to Refer.]—The parties by a reference in an action may contract themselves out of the provisions of the County Courts Act as to costs when less than 20*l.* is recovered. *Lang* v. *Eakin*, 16 W. R. 60.

Action against County Court Bailiff.]—A bailiff of a county court, who is sued for taking goods under an execution of that court, is within the exception of 9 & 10 Vict. c. 95, s. 128 ; and the plaintiff in such action, unless he recovers more than 20*l.*, or the judge certifies, is deprived of costs by s. 139. *Man* v. *Buckerfield*, 2 L. M. & P. 55 ; 20 L. J., Q. B. 265 ; 15 Jur. 57.

Transfer to County Court—Less than £50 recovered.]—If in an action commenced in the high court and transferred to a county court less than 50*l.* is recovered, s. 116 of the County Courts Act, 1888, applies, and not s. 65, and only county court costs can be given as to any part of the action—Per Kay, L.J. *Harris* v. *Judge*, 61 L. J., Q. B. 577 ; [1892] 2 Q. B. 565 ; 67 L. T. 19 ; 41 W. R. 9.

—— **Less than £20 recovered.**]—Where an action commenced in the high court is transferred to the county court under s. 65 of the County Courts Act, 1888, and results in a judgment for the plaintiff for less than 20*l.*, the plaintiff is entitled to his costs subsequent to the transfer but not to his costs incurred before such transfer, unless he obtains a certificate under s. 116. *Armitage* v. *Fison*, 67 L. T. 415.

Section 116 of the County Courts Act, 1888 (relating to actions on contract in which less than 20*l.* is recovered), applies to actions brought in the high court and transferred to the county court under s. 65 ; it applies to all the costs in such actions, including those costs incurred after the order of transfer. *Armitage* v. *Fison* (67 L. T. 415) overruled. *White* v. *Cohen*, 62 L. J., Q. B. 274 ; [1893] 1 Q. B. 580 ; 4 R. 352 ; 68 L. T. 305 ; 41 W. R. 396—C. A.

Removal of Action to Superior Court.]—Although an action may have been moved from a county court into a superior court at the instance of the defendant, the judge may refuse to certify for the costs of a plaintiff recovering a sum insufficient to carry costs under the County Courts Act, 1867, s. 5. *Flitters* v. *Allfrey*, 44 L. J., C. P. 10, n. ; L. R. 10 C. P. 29 ; 31 L. T. 881.

A plaintiff commenced an action in detinue in the Mayor's Court. At the instance of the defendant it was removed by certiorari into the Queen's Bench, where the plaintiff recovered 3*l.* The judge who tried the cause refused to certify under s. 5. to give him his costs :—Held, that he was not entitled to his costs of the action. *Pellas* v. *Breslauer*, 40 L. J., Q. B. 161 ; L. R. 6 Q. B. 438 ; 24 L. T. 762 ; 19 W. R. 779.

Order XIV.—Less than £50 recovered.]—By the County Courts Act, 1888, s. 116, if in an action founded on contract, the plaintiff shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. Provided that, if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the high court or a judge thereof, obtain an order under Ord. XIV. empowering him to enter judgment for 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the supreme court. The plaintiff, in an action founded on contract, claimed 48*l.* He obtained leave under Ord. XIV. to sign judgment for 45*l.*, and proceeding to trial recovered the balance of his claim with costs :—Held, that he was entitled by s. 116 (2) of the County Courts Act, 1888, to the costs of the whole action on the high court scale, although he had recovered less than 50*l.* *Barker* v. *Hempstead*, 58 L. J., Q. B. 369 ; 23 Q. B. D. 8 ; 60 L. T. 640 ; 37 W. R. 685.

An action of contract brought in the high court for more than 50*l.* was remitted to the county court after the plaintiffs had recovered less than 20*l.* under Ord. XIV. They recovered in all less than 50*l.* :—Held, that the plaintiffs were not entitled to costs on the supreme court scale in respect of the part of the proceedings which had taken place in the high court. *Wilson* v. *Statham*, 60 L. J., Q. B. 725 ; [1891] 2 Q. B. 261 ; 39 W. R. 686.

Effect of, on Arbitrations.]—*See* ARBITRATION.

Reference of Action—Costs to abide the Event—Sum Recovered.]—By an order made by con-

sent of the parties, an action on a building contract was referred to an arbitrator to ascertain the amount, if any, due from the defendant to the plaintiff, "the costs of the action, reference, and award, to abide the event." The arbitrator found the sum due to the plaintiff was 19*l.* 2*s.* 7*d.*, upon which an order was made for judgment for the plaintiff for that sum without costs:—Held, that the plaintiff had recovered in the action by judgment a sum not exceeding 20*l.*, and that he was therefore deprived of his costs of the action by the County Courts Act, 1867, s. 5, unless he got a certificate or order under that section. *Jones* v. *Jones* (7 C. B. (N.S.) 832) overruled. *Fergusson* v. *Davison*, 51 L. J., Q. B. 266; 8 Q. B. D. 470; 46 L. T. 191; 30 W. R. 462—C. A.

The act does not apply to the case of a reference without any action. *Ib.*

Where a cause was referred, before trial, by a judge's order, with power to certify the costs of the cause, to abide the event of the cause, and the award was 3*l.* 4*s.* 3*d.* to the plaintiff, but without a certificate:—Held, that the 13 & 14 Vict. c. 61, s. 11, did not apply, there being no recovery by judgment; and that he was entitled to the costs of the cause. *Jones* v. *Jones*, 7 C. B. (N.S.) 832; 29 L. J., C. P. 151; 6 Jur. (N.S.) 826; 1 L. T. 373; 8 W. R. 243. *See preceding case.*

Where a cause is referred, by consent of parties, after issue joined, the costs of the cause to abide the event of the award, and the arbitrator finds all the issues for the plaintiff, and awards that a sum not exceeding 20*l.* is due from the defendant to the plaintiff in respect of the breaches of contract alleged in the declaration, the plaintiff recovers that sum within 13 & 14 Vict. c. 61, s. 11, and is deprived of costs by that section. *Cowell* v. *Amman Aberdare Colliery Co.*, 6 B. & S. 333; 34 L. J., Q. B. 161; 11 Jur. (N.S.) 687; 12 L. T. 451; 13 W. R. 715.

Where a plaintiff, upon a compulsory order of reference, by which the costs of the cause are to abide the event of the award, recovers less than 10*l.*, he is not entitled to costs, without an order. *Robertson* v. *Sterne*, 13 C. B. (N.S.) 248; 31 L. J., C. P. 362; 9 Jur. (N.S.) 332; 7 L. T. 462; 11 W. R. 94.

A plaintiff sued L. for 365*l.* for goods sold and delivered. On the day after the writ was issued L. paid to the plaintiff 319*l.* which he accepted on account of his claim. After declaration L. pleaded in abatement the non-joinder of H., whereupon the plaintiff amended the writ and declaration under the Common Law Procedure Act, 1852, s. 38, by adding the name of H. as joint contractor. Both defendants pleaded never indebted, and also a plea that after the writ in the action had been issued against the defendant L. and before the action was commenced against the other defendant by amendment pursuant to s. 38, the defendants satisfied the plaintiffs' claim by payment. The cause having been referred to an arbitrator, costs to abide the event, with power to the arbitrator to certify as a judge at nisi prius, the arbitrator by his award found that the defendants were indebted to the plaintiff in 322*l.*, and that the defendants did, as in their plea alleged, satisfy 319*l.*, part of such debt, by payment, and the arbitrator directed that the verdict should therefore be entered for the plaintiff for 3*l.*, being the difference between the two sums of 322*l.* and 319*l.*, and he gave no certificate as to costs:—Held, that the only action in which the plaintiff recovered being the action against both defendants, he was deprived of his costs by the County Courts Act, 1867, s. 5, inasmuch as he recovered in that action less than 20*l.*, and he was not allowed to tax his costs of the cause against L. alone. *Balmain* v. *Lickfold*, 44 L. J., C. P. 94; L. R. 10 C. P. 203; 32 L. T. 67; 23 W. R. 310.

A cause having been referred, together with all matters in difference between the parties, the costs of the cause to abide the event of the reference, the arbitrator awarded—first, as to the cause, that there was due to the plaintiff from the defendant, the sum of 259*l.* 1*s.*; and, secondly, as to the matters in difference other than the cause, that there was due from the plaintiff to the defendant the sum of 242*l.* 13*s.* 10*d.*, and the arbitrator directed the latter sum to be allowed out of and deducted from the damages and costs recoverable by the plaintiff in the action, and the balance to be paid to the plaintiff:—Held, that the event of the reference was in favour of the plaintiff, and that he was not precluded from recovering his costs of the action by the County Courts Act, 1867, s. 5. *Stevens* v. *Chapman*, 40 L. J., Ex. 123; L. R. 6 Ex. 213; 24 L. T. 478; 19 W. R. 958.

An action of slander after issue joined and before trial, was by agreement referred, the costs of the cause to abide the event of the award. The arbitrator found one issue for the plaintiff, with twenty shillings damages:—Held, that he was entitled to the costs of the cause. *Frean* v. *Sargent*, 2 H. & C. 293; 32 L. J., Ex. 281; 8 L. T. 467; 11 W. R. 808.

A verdict was taken at the trial for 13*l.*, subject to a reference. The costs of the cause were to abide the event of the award. The arbitrator ordered that the verdict should be reduced to 2*l.* 16*s.* 11½*d.*:—Held, that the plaintiff was not entitled to costs, the reference having been after verdict given. *Smith* v. *Edge*, 2 H. & C. 659; 33 L. J., Ex. 9; 9 Jur. (N.S.) 1300; 9 L. T. 445; 12 W. R. 133.

A cause was referred, and by the order of reference the party in whose favour the award should be made was to be at liberty to enter up judgment for the sum awarded, as if a verdict had been obtained. The arbitrator awarded 20*l.*:—Held, that the costs must be taxed according to the reduced scale. *Waller* v. *Smith*, 3 M. & W. 136; 6 D. P. C. 103; M. & H. 326; 7 L. J., Ex. 15.

Where a cause is referred at nisi prius, care should be taken to give the arbitrator the same power of certifying that it was a fit cause to be tried before a judge as the judge at nisi prius would have had; since otherwise, if he awarded to the plaintiff a sum under 20*l.*, the master will not be warranted in taxing the costs, either as between party and party, or between attorney and client, except according to the reduced scale. *Wallen* v. *Smith*, 5 M. & W. 159; 7 D. P. C. 394; 2 H. & H. 1; 8 L. J., Ex. 164.

In an action on an attorney's bill, to which there was a set-off, the cause, being partially heard, was referred to the master, who was to enter into the whole account. The master found a balance in favour of the plaintiff of 2*l.* 12*s.*:—Held, that the plaintiff was not entitled to costs on the higher scale without a judge's certificate. *Parker* v. *Serle*, 6 D. P. C. 334.

—— **Costs of Reference and Award.**]—Where a cause is referred on the usual terms, costs to abide the event, the costs of the reference and

award to be at the discretion of the arbitrator, and by the award less than the sum of 20*l.* is recovered, and the costs of the reference and award are awarded to be paid by the defendant, the costs of the reference are not to be taxed on the lower scale. *Holland* v. *Vincent*, 9 Ex. 274; 2 C. L. R. 407; 23 L. J., Ex. 78; 17 Jur. 1059: 2 W. R. 96. S. P., *Nicholson* v. *Sykes*, 9 Ex. 357; 2 C. L. R. 992: 23 L. J., Ex. 193.

An action of contract was compulsorily referred to a master, and it was ordered that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the master. The master awarded to the plaintiff a sum less than 20*l.* and directed the defendant to pay the costs of the reference:—Held, that the plaintiff was not entitled to these costs; for that they could only be recovered upon the judgment, entered on the award, and (the judgment being for a sum not exceeding 20*l.*) the 13 & 14 Vict. c. 61, s. 11, deprived the plaintiff of costs. *Moore* v. *Watson*, 36 L. J., C. P. 122; L. R. 2 C. P. 314; 15 L. T. 662; 15 W. R. 429.

When an action is referred by consent to arbitration upon the terms that the costs of the cause shall abide the event, and the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiffs he may lawfully direct the defendant to pay the cost of the reference and award, although the plaintiff may be deprived of the costs of the cause under the County Courts Act, 1867, s. 5. Whether *Moore* v. *Watson* (L. R. 2 C. P. 314) was correctly decided, quære. *Gallatti* v. *Wakefield*, 4 Ex. D. 249; 48 L. J., Ex. 70; 40 L. T. 30—C. A.

In an action of trover and of debt a verdict was taken for the plaintiff for the damages claimed, subject to a reference, "the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator." The arbitrator awarded that the verdict should be entered for 2*l.* 10*s.* as to the claim in trover, and for 7*l.* 12*s.* 8*d.* as to the claim in debt, and directed the defendant to pay the costs of the reference and award. He had the power of certifying for costs, but gave no certificate. The master declined to tax on behalf of the plaintiff either his costs of the cause or of the reference and award:—Held, that the plaintiff was not entitled to the costs of the cause, but that he was entitled to those of the reference and award, although he had recovered in the cause sums not exceeding 10*l.* in tort and 20*l.* in contract. *Forshaw* v. *De Wette*, 40 L. J., Ex. 153; L. R. 6 Ex. 200; 24 L. T. 397; 19 W. R. 777.

2. Amount recovered.

Action on Contract—£50 Recovered.]—Order LXV. r. 12, of the Rules of the Supreme Court, 1883, is not inconsistent with, nor superseded nor repealed by s. 116 of the County Courts Act, 1888. A plaintiff who has claimed and recovered the exact sum of 50*l.* in an action founded on contract in the high court, and who has obtained no certificate from the judge for high court costs, is only entitled to costs on the county court scale. *Millington* v. *Harwood*, 61 L. J., Q. B. 582; [1892] 2 Q. B. 166; 66 L. T. 576; 40 W. R. 481—C. A.

The judge before whom a cause is tried has power to certify for costs under 13 & 14 Vict. c. 61, s. 12, where the verdict returned for the plaintiff is exactly 20*l.* in an action of contract, or exactly 5*l.* in an action of tort. *Garby* v. *Harris*, 7 Ex. 591; 21 L. J., Ex. 160; 16 Jur. 456.

Less than £50 recovered "in the Action."]—An action on a partnership account was by consent referred to an arbitrator. The terms of reference were that "all matters in difference between the parties in the action" were to be referred, and that "the costs of the action" should abide the award. Subsequently to this order of reference, the parties agreed to submit to the arbitrator a further matter of account outside the action. The arbitrator awarded 40*l.* to the plaintiff on his claim, and found that a further sum of 14*l.* 2*s.* was due to him on the subsequent account:—Held, that the plaintiff had recovered "in the action" less than 50*l.*, and therefore came under the provisions of Ord. LXV. r. 12, of the Rules of 1883, whereby the costs recoverable were limited to county court costs in actions of contract where less than 50*l.* is recovered, unless by leave of the court the high court scale is allowed. *Emmett* v. *Heyes*, 36 W. R. 237.

Nominal Damages—Bond—£20 Penalty.]—Judgment having been given for a plaintiff in an action on a bond in the penal sum of 20*l.* conditioned for payment of 12*l.*, he is deprived of costs by 13 & 14 Vict. c. 61, s. 11, on the ground, first, that the nominal damages do not make the sum recovered exceed 20*l.*; and, secondly, per Pollock, C.B., and Watson, B., that the sum recovered within the meaning of that section was 12*l.* only. *Gowens* v. *Moore*, 3 H. & N. 540; 27 L. J., Ex. 391.

Sum claimed no Criterion.]—A plaintiff sued in trespass in the supreme court of the island of Jamaica, laying his damages at 3,000*l.*, a sum above the limit of the jurisdiction of the local courts in that island, and recovered a verdict for 40*s.*:—Held, that the sum recovered by the verdict, and sanctioned by the judgment, and not the sum laid in the declaration, was the test to be applied to ascertain the right to sue in the supreme court, and to entitle the plaintiff to supreme court costs. *Emery* v. *Binns*, 7 Moore, P. C. 195.

Proceedings stayed on Payment.]—There were counts for unliquidated and liquidated damages in a declaration. The defendant, after judgment by default and notice of executing a writ of inquiry, obtained an order to stay all further proceedings on payment of 16*l.* 14*s.* 8*d.* and costs:—Held, that the costs must be taxed on the reduced scale. *Horn* v. *Pocock*, 2 D. (N.S.) 948; 12 L. J., Q. B. 274; 7 Jur. 813.

In such a case the defendant should get it made part of the judge's order, upon the application, that costs of the action should be taxed upon the higher scale. *Ib.*

Where, in an action for unliquidated damages, the defendant, just before the assizes, in order to save the expenses of the trial, agreed under a judge's order to withdraw his pleas, and that the plaintiff should be at liberty to sign judgment for 11*l.* 12*s.*, and that, on payment of that sum, with costs to be taxed, the proceedings should be stayed:—Held, that the costs must be taxed on the reduced scale. *Cook* v. *Hunt*, 5 M. & W.

161 ; 7 D. P. C. 397 ; 2 H. & H. 37 ; 8 L. J., Ex. 216 ; 3 Jur. 753.

Payment into Court.]—In an action for a sum not exceeding 20*l.*, the defendant paid the sum claimed into court, and the plaintiff took it out in satisfaction :—Held, that it was a sum recovered in the action within 13 & 14 Vict. c. 61, s. 11, and that the plaintiff was not entitled to his costs. *Parr* v. *Lillicrap*, 1 H. & C. 615 ; 32 L. J., Ex. 150 ; 9 Jur. (N.S.) 80 ; 7 L. T. 425 ; 11 W. R. 24.

So where a defendant pays money into court which the plaintiff accepts in satisfaction of his claim, he recovers the amount within the meaning of 13 & 14 Vict. c. 61, s. 11, which, in certain cases, deprives a plaintiff of costs if he "shall recover a sum not exceeding 20*l.*" *Boulding* v. *Tyler*, 3 B. & S. 473 ; 32 L. J., Q. B. 85 ; 9 Jur. (N.S.) 794 ; 11 W. R. 307. S. P., *Arkins* v. *Armstrong*, 17 W. R. 711.

But where in an action brought to recover a sum beyond the jurisdiction of the county court the defendant paid into court a sum under 20*l.* which the plaintiff accepted in satisfaction and discharge of his claim, and the parties dwelt more than twenty miles apart :—Held, that the plaintiff was entitled to his costs, under 15 & 16 Vict. c. 54, s. 4. *Waylett* v. *Windham*, 2 H. & C. 982 ; 33 L. J., Ex. 172 ; 9 L. T. 725.

A plaintiff who recovers in an action for a debt a sum which, together with a sum paid into court on a plea of tender, exceeds 20*l.*, is entitled to the costs of the action, notwithstanding 13 & 14 Vict. c. 61, s. 11. *Crosse* v. *Seaman*, 11 C. B. 524 ; 2 L. M. & P. 273.

In an action in which there were three counts, each in tort, and the parties resided within the jurisdiction of the civil bill court of the county in which the causes of action had arisen, the jury found a verdict for the plaintiff for 2*l.* damages on two counts, and that 5*l.*, which had been lodged in court by the defendant on foot of the third count, was sufficient :—Held, that the plaintiff had not recovered 7*l.*, and therefore was not entitled to any costs of the action. *Myers* v. *Phelan*, 26 L. R. Ir. 218—C. A.

"Admitted Set-off."]—A set-off admitted by the plaintiff on his writ is an "admitted set-off" within s. 57 of the County Courts Act, 1888, even although not admitted by the defendant, and if the amount recovered is, by such admission, reduced by 50*l.*, the plaintiff is only entitled to costs on the county court scale. *Lovejoy* v. *Cole*, 64 L. J., Q. B. 120 ; [1894] 2 Q. B. 861 ; 10 R. 482 ; 71 L. T. 374 ; 43 W. R. 48.

—— **Amount "Recovered."**]—In an action of contract a verdict was given for the plaintiff for 76*l.*, and for the defendant on a set-off, which was not admitted by the plaintiff, for 64*l.*, and judgment was given for the plaintiff for the balance of 12*l.* :—Held, that the amount "recovered" by the plaintiff within s. 116 of the County Courts Act, 1888, was the balance only of 12*l.* for which judgment was given ; but as there was no admitted set-off under s. 57—which must be a set-off admitted by both parties—the action being for over 50*l.*, was one which could not have been brought in a county court, and therefore s. 116 did not apply to deprive the plaintiff of his costs on the high court scale. *Goldhill* v. *Clarke*, 5 R. 75 ; 68 L. T. 414.

If the amount of the plaintiff's claim is reduced by the defendant's set-off to a sum not exceeding 20*l.*, the plaintiff's costs are to be taxed on the lower scale. *Tonge* v. *Chadwick*, 5 El. & Bl. 950 ; 25 L. J., Q. B. 128 ; 2 Jur. (N.S.) 232 ; 4 W. R. 266.

Where a plaintiff in an action in a superior court proves a debt exceeding 20*l.*, and the defendant proves a set-off, which reduces the verdict to a sum not exceeding 20*l.*, the plaintiff recovers the balance only, within 13 & 14 Vict. c. 61, s. 11, and therefore is not entitled to costs. *Beard* v. *Perry*, 2 B. & S. 493 ; 31 L. J., Q. B. 180 ; 8 Jur. (N.S.) 914 ; 6 L. T. 352 ; 10 W. R. 619.

Action on the money counts. Pleas never indebted and set-off. The writ of summons had been indorsed for more than 20*l.* On the trial the jury found that the defendant was indebted in 24*l.* 13*s.*, and no further, and that there was a set-off of 19*l.* 18*s.* 5*d.* This finding was entered on the postea, and the plaintiff had a verdict for the balance, 4*l.* 14*s.* 7*d.* The master taxed the costs on the higher scale :—Held, that the plaintiff was not deprived of his costs by the county courts acts, as the amount of the debt exceeded 20*l.*, though reduced by set-off, but that he had recovered less than 20*l.*, and therefore his costs must be taxed on the lower scale. *Tonge* v. *Chadwick*, 5 El. & Bl. 950 ; 25 L. J., Q. B. 128 ; 2 Jur. (N.S.) 232 ; 4 W. R. 266.

Unless a plaintiff, in an action of contract for which a plaint might have been entered in a county court, actually recovers more than 20*l.*, whatever the amount of his claim, and whether reduced by payment, by tender, or by set-off, he is by 13 & 14 Vict. c. 61, s. 11, deprived of costs, unless the judge certifies at the trial under s. 12, or he obtains a rule or order under 15 & 16 Vict. c. 54, s. 4. *Ashcroft* v. *Foulkes*, 18 C. B. 261 ; 25 L. J., C. P. 202 ; 2 Jur. (N.S.) 449 ; 4 W. R. 457. S. P., *Rumley* v. *Irwin*, 18 C. B. 312 ; 25 L. J., C. P. 205, n. ; 2 Jur. (N.S.) 450, n.

Tender.]—The act does not deprive the plaintiff of costs where the verdict is reduced to a sum under 20*l.* only by a tender, but which, with the amount tendered, is not less than 20*l.* *Cross* v. *Seaman*, 2 L. M. & P. 273 ; 11 C. B. 524 ; 15 Jur. 512.

A plea of tender is not a plea in bar ; therefore the sum paid into court under such plea is a sum recovered in the action. A plaintiff who in an action for more than 20*l.*, recovers a sum which, together with a sum paid into court under a plea of tender, exceeds 20*l.*, is entitled to have the costs taxed on the higher scale. *Couch* v. *Maltby*, 23 L. J., Q. B. 305 ; 2 W. R. 557 *See next case.*

Action to recover 28*l.* 19*s.* 4*d.* for goods sold and delivered. Pleas, except as to 26*l.* 10*s.* 6*d.*, never indebted ; and as to that sum a tender. The jury found for the defendant on the plea of tender, but that the plaintiff was entitled to 2*l.* 8*s.* 10*d.* more. The plaintiff did not obtain a certificate that the cause was proper to be tried in a superior court :—Held, that his costs were to be taxed on the lower scale. *James* v. *Vane* (*Lord*), 2 El. & El. 883 ; 29 L. J., Q. B. 169 ; 6 Jur. (N.S.) 731 ; 2 L. T. 281 ; 8 W. R. 446.

Where a plaintiff claims more than 20*l.*, but obtains a verdict for a sum under 20*l.*, by reason of a tender of the remainder of the amount, claimed before action, his costs must be taken on the reduced scale. *Dixon* v. *Walker*, 7 M. & W. 214 ; 8 D. P. C. 87 ; 10 L. J., Ex. 43. S. P., *Crosse* v. *Seaman*, 11 C. B. 524.

3. WHETHER CONTRACT OR TORT.

Livery Stable Keeper.]—A declaration alleged that the plaintiff delivered a horse to the defendant as a livery and bait stable-keeper, to be taken care of, and kept in a separate stall: breach, that he did not take care of the horse or keep it in a separate stall, in consequence of which it was injured and kicked by other horses: —Held, that this was an action of contract; and consequently the plaintiff, having recovered by verdict less than 20*l.*, was, in the absence of a certificate from the judge who tried the cause, deprived of costs by the 13 & 14 Vict. c. 61, ss. 11 and 12. *Legge* v. *Tucker*, 1 H. & N. 500; 26 L. J., Ex. 71; 2 Jur. (N.S.) 1235; 5 W. R. 78.

Injury to Subject of Bailment—Negligence.] —An action by a bailor against a bailee for reward for a breach of his common-law duty to keep safely the thing entrusted to his care is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888, and a plaintiff in such an action who recovers not less than 20*l.* is entitled to his full costs of the action. *Turner* v. *Stallibrass*, 67 L. J., Q. B. 52; [1898] 1 Q. B. 56; 77 L. T. 482; 46 W. R. 81—C. A.

Carriers—Goods.]—A declaration stated that goods were delivered to common carriers, to be safely carried and delivered: breach, that they, not regarding their duty, so carelessly and negligently conducted themselves that part of the goods was lost. The carriers suffered judgment by default, and the damages were assessed at 11*l.* 5*s.*:—Held, that this was an action on the case within 13 & 14 Vict. c. 61, s. 11, and was not an action of contract within 19 & 20 Vict. c. 108, s. 30, and therefore the plaintiff was entitled to costs. *Tattan* v. *G. W. Ry.*, 2 El. & El. 844; 29 L. J., Q. B. 184; 6 Jur. (N.S.) 800; 8 W. R. 606. Contra, *O'Sullivan* v. *Dublin, Wicklow and Waterford Ry.*, 16 W. R. 86.

A declaration alleged that the defendant at the time of the promise and negligence therein alleged, was the owner of a hackney cab, at the time of the promise conducted by his servant; that the plaintiff at his request hired it of him, and the defendant promised to convey the plaintiff's luggage safely, but not regarding his duty or promise, negligently lost the same:—Held, that the action was founded on contract, and that as a sum not exceeding 20*l.* was recovered, the plaintiff was deprived of costs under 30 & 31 Vict. c. 142, s. 5. *Baylis* v. *Lintott*, 42 L. J., C. P. 119; L. R. 8 C. P. 345; 28 L. T. 666.

A statement of claim alleged that the plaintiff, as vendor of goods, delivered them to the defendants, a railway company, as carriers for reward, the goods being consigned to the intending purchasers: that afterwards, and before the goods had been delivered to the consignees or claimed by them from the company, the plaintiff discovered that the consignees were insolvent, and, as unpaid vendor, gave notice to the company not to deliver the goods to the consignees, but to hold them to his order, and before the goods were delivered to the consignees, the plaintiff required the company to re-deliver them to him: that the company refused to do so, and delivered them to the consignees, who absconded without paying for the goods. The plaintiff claimed their value, viz. 12*l.* 16*s.* 6*d.*, as damages. The company paid the sum into court, and the plaintiff took it out in satisfaction:—Held, that the action was founded on tort, and not on contract within s. 5 of the County Courts Act, 1867, and that the plaintiff having recovered a sum exceeding 10*l.* was not deprived of costs by that section. *Pontifex* v. *Midland Ry.*, 47 L. J., Q. B. 28; 3 Q. B. D. 23; 37 L. T. 403; 26 W. R. 209. *S. C.*, and S. P., 35 L. T. 706; 25 W. R. 215.

But an action being brought against a railway company as a common carrier for damages for non-delivery of goods through negligence, the company paid into court a sum exceeding 10*l.*, but not exceeding 20*l.*, and the plaintiff took it out in satisfaction:—Held, that the action was founded on contract, and therefore the plaintiff was not entitled to costs under s. 5 of the County Courts Act, 1867. *Fleming* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 4 Q. B. D. 81; 39 L. T. 555; 27 W. R. 481—C. A.

—— **Injury to Passenger.**]—An action in the high court brought by a passenger against a railway company for an injury sustained by him through the negligence, amounting to a positive misfeasance, of the company's servants, is "an action founded on tort" within the meaning of s. 116 of the County Courts Act, 1888; and the fact that the passenger has a contract with the company, and a right of action against them for a breach thereof, does not for the purposes of that section make his action "an action founded on contract." If, therefore, the passenger in such a case recovers 20*l.* or upwards, he is entitled to have his costs taxed on the high court scale. *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 64 L. J., Q. B. 6; [1895] 1 Q. B. 134; 14 R. 34; 71 L. T. 596; 43 W. R. 120; 59 J. P. 100—C. A.

An action in respect of personal injuries to a passenger caused by the negligence of a railway company is an "action founded on tort" within s. 116 of the County Courts Act, 1888, although the negligence is also a breach of contract, and is so stated in the pleadings; and the action is equally one of tort whether the negligence consists in the doing or the omitting to do, an act. *Kelly* v. *Metropolitan Ry.*, 64 L. J., Q. B. 568; [1895] 1 Q. B. 944; 14 R. 417; 72 L. T. 551; 43 W. R. 497; 59 J. P. 437—C. A.

Wrongful Conversion after Contract for Sale.] —The plaintiff, a dealer, bought an hydraulic press from the defendant, an auctioneer, at a sale, under conditions of sale requiring payment before delivery. Time was allowed for payment. Payment was tendered within the time allowed, but the defendant refused to deliver the press, having contracted to resell it, and in fact reselling it, subsequent to the tender. The plaintiff had also contracted to resell the press, after delivery, at a profit. In the action the sole issue in dispute—namely, whether there had been tender within the time allowed for payment—was found in favour of the plaintiff, and evidence of the plaintiff's loss of profit on resale having been given as a measure of damage, judgment was given for the plaintiff for 29*l.* 15*s.* 3*d.* The defendant contended that the action was one for breach of contract, and that costs would therefore only be recovered on the county court scale:—Held, that the action was for a wrongful conversion subsequent to and independent of the contract passing the property, and that it was therefore an action of tort in which, more than 20*l.* having been re-

covered, costs followed on the high court scale. *Cohen* v. *Foster*, 61 L. J., Q. B. 643; 66 L. T. 616.

Detinue.]—A plaintiff by his statement of claim alleged that he was the owner and entitled to the possession of a picture, which the defendant detained from him, and the plaintiff claimed the picture or its value, and damages for its detention. At the trial the plaintiff recovered 10*l.* as the value of the picture, and 1*s.* damages for its detention:—Held, that the action was founded on tort within s. 5 of the County Courts Act, 1867, so that the plaintiff, having recovered more than 10*l.* was entitled to his costs. *Bryant* v. *Herbert*, 47 L. J., C. P. 670; 3 C. P. D. 389; 39 L. T. 17; 26 W. R. 898—C. A.

The 34th section of the 23 & 24 Vict. c. 126, does not apply to an action of detinue. *Danby* v. *Lamb*, 11 C. B. (N.S.) 423; 31 L. J., C. P. 17: 5 L. T. 353; 10 W. R. 43.

Compare *Brown* v. *Boorman*, 11 Cl. & F. 1; 3 Q. B. 511; *Courtenay* v. *Earle*, 10 C. B. 73; 20 L. J., C. P. 7; 15 Jur. 15; *Wood* v. *Fennis*, 7 Ex. 363; 21 L. J., Ex. 138; 16 Jur. 936; *Govett* v. *Radnidge*, 3 East, 62; *Weall* v. *King*, 12 East, 452; *Brotherton* v. *Wood*, 6 Moore, 141; 3 Br. & B. 54; 9 Price, 408.

4. CERTIFICATE OR ORDER.

Time for—When Arbitrator Functus Officio.]—An action having been referred, under the Common Law Procedure Act, 1854, s. 3, to a master, "with all the powers of certifying of a judge at nisi prius, the costs of the cause and of the reference to be in the discretion of the master," the master made his award in favour of the plaintiff for a sum not exceeding 20*l.*, and directed that the costs of the cause and of the reference should be paid by the defendant. After the award had been taken up, the master indorsed on the award a certificate that there was sufficient reason for bringing the action in the superior court:—Held, that the certificate was bad, the master being functus officio when it was given. *Bedwell* v. *Wood*, 46 L. J., Q. B. 725; 2 Q. B. D. 626; 36 L. T. 213.

An action of trespass was referred by consent to an arbitrator, who was to have all the powers of a judge at nisi prius as to certifying, and the costs of the cause were to abide the event. The arbitrator awarded to the plaintiff 2*l.* 14*s.*, and gave no certificate for costs. After a considerable lapse of time the plaintiff obtained ex parte from the arbitrator a document in which he stated that it appeared to him at the reference that there was sufficient reason for bringing the action:—Held, that the court or a judge had power under 30 & 31 Vict. c. 142, s. 5, to order that the plaintiff be allowed his costs, but that the court would not act upon the document merely, and that under those circumstances the award ought to be remitted to the arbitrator. *Hartland* v. *Newcastle-upon-Tyne Corporation*, 39 L. J., Q. B. 67.

—— **In other Cases.**]—Where an action is brought for a cause for which a plaint might have been entered in the sheriff's court under the 15 & 16 Vict. c. 77, and the plaintiff recovers less than 20*l.*, a certificate for costs must be granted "forthwith" at the trial. But if the sum recovered is between 20*l.*, and 50*l.* the judge may certify within a convenient time after the trial. *Chaplin* v. *Levy*, 9 Ex. 673; 2 C. L. R. 1024; 23 L. J., Ex. 200.

Where an action is brought in a superior court for a cause for which a plaint might have been entered in the sheriff's city court, and the plaintiff recovers less than 20*l.*, a certificate for costs must be granted forthwith. But if, on the application for a certificate immediately after the trial, the judge takes time to consider, and the defendant does not object, he will be precluded from objecting that a certificate granted afterwards was not granted forthwith. *Heden* v. *Atlantic Royal Mail Steam Navigation Co.* 2 El. & El. 671; 29 L. J., Q. B. 191; 6 Jur. (N.S.) 677; 2 L. T. 170; 8 W. R. 410.

Under 9 & 10 Vict. c. 95, s. 129, a judge of a superior court may certify for costs at any time before the costs are taxed. *Tharratt* v. *Trever*, 6 Ex. 187; 20 L. J., Ex. 189. S. P., *Mason* v. *Tucker*, 4 H. & N. 536; 28 L. J., Ex. 271.

So, under the 13 & 14 Vict. c. 61, s. 12, the certificate of the judge who tries an action brought in the superior court, that it appeared to him at the trial that there was sufficient reason for bringing the action in that court, may be given and indorsed on the record at any time after the assizes and before taxation of costs. *Bennett* v. *Thompson*, 6 El. & Bl. 683; 25 L. J., Q. B. 378; 2 Jur. (N.S.) 670; 4 W. R. 609.

A cause in which the superior court and the county court had concurrent jurisdiction was brought in the former and tried in February, 1852, the defendant being then absent from England on a voyage to Australia; the plaintiff having obtained a verdict and accepted his damages, applied for costs under 15 & 16 Vict. c. 54, s. 4, in January, 1853:—Held, not too late. *Reid* v. *Gardner*, 8 Ex. 651; 22 L. J., Ex. 253; 17 Jur. 442.

A cause was referred at the spring assizes, 1852, and on the 9th June the arbitrator awarded in favour of the plaintiff. An application by the plaintiff to a judge at chambers for costs, on the 7th February, 1853, under 15 & 16 Vict. c. 54, s. 4, was not too late. *Morris* v. *Bosworth*, 2 El. & Bl. 213; 22 L. J., Q. B. 276; 17 Jur. 438.

But the under sheriff on a writ of trial had no power to certify for costs after he had returned the writ. *Knapman* v. *Pryer*, 1 H. & N. 719; 26 L. J., Ex. 143.

By whom Granted.]—The judge who tries a cause is the only person who can certify to take a case out of the operation of the directions, where less than 20*l.* is recovered; and therefore, if the judge dies without making his certificate, the plaintiff has no remedy. *Southwell* v. *Bird*, 7 D. P. C. 557; 1 W. W. & H. 569.

So, where a cause was referred by order of nisi prius, with power to the arbitrator to certify whether the cause was a proper one to be tried before a judge, and the arbitrator certified to that effect, but the judge died before the arbitrator's certificate was made known to him:—Held, that the court had no power to make an order for full costs. *Astley* v. *Jay*, 1 P. & D. 460; 9 A. & E. 702; 2 W. W. & H. 85; 8 L. J., Q. B. 104.

It is not necessary for the judge who certifies to enable a plaintiff to obtain full costs so as to hear the cause throughout. *Nokes* v. *Frazer*, 3 D. P. C. 339.

—— **Action remitted to County Court.**]—The certificate as to costs in sect. 116 of the County

Courts Act, 1888, only applies to actions tried in the high court, and therefore the county court judge has no power under that section to grant the certificate in an action transferred under s. 65. *Harris* v. *Judge* ([1892] 2 Q. B. 565), discussed. *White* v. *Cohen*, 62 L. J., Q. B. 274; [1893] 1 Q. B. 580; 4 R. 352; 68 L. T. 305; 41 W. R. 396.

Where an action commenced in a superior court has been remitted to a county court under 30 & 31 Vict. c. 142, s. 10, the superior court has no longer any jurisdiction to make an order for costs under s. 5. *Moody* v. *Steward*, 40 L. J., Ex. 25; L. R. 6 Ex. 35; 23 L. T. 465; 19 W. R. 161.

Where a cause in a superior court is by order of a judge sent to be tried in a county court, the judge of the county court who tries the cause has power, under 30 & 31 Vict. c. 142, s. 5, to certify that there was sufficient reason for bringing the action in the superior court, so as to entitle the plaintiff to costs, and the issue sent down to the county court is the record on which he may certify. *Taylor* v. *Cass*, L. R. 4 C. P. 614; 20 L. T. 667; 17 W. R. 860.

An action was brought in the superior court, and sent down for trial in the county court, under 19 & 20 Vict. c. 108, s. 26, when the plaintiff obtained a verdict for 6*l.* 15*s.* above the amount of 15*l.* paid into court. The registrar of the county court returned a certificate finding "a verdict for the plaintiff for 6*l.* 15*s.* with costs"; and the plaintiff ex parte obtained a fiat to sign judgment, with costs, and entered judgment. The plaintiff had previously taken out a summons at chambers to sign judgment with costs, but had abandoned it. The defendant applied to have the judgment amended by striking out the words relating to costs, and the plaintiff applied for costs, if he was not entitled to them under the judgment:—Held, that the county court had no jurisdiction over the costs, and the registrar had no power to certify for costs. *Farmer* v. *May*, 50 L. J., Q. B. 295; 44 L. T. 148; 29 W. R. 612. See also, *Emeny* v. *Sandes*, 54 L. J., Q. B. 82; 14 Q. B. D. 6; 51 L. T. 641; 33 W. R. 187—C. A.

—— **Assessment of Damages—Under-Sheriff.**]—An under-sheriff, before whom damages are assessed in an action brought in the high court under a judgment signed in default of pleading, has no power to certify for costs on the high court scale under s. 116 of the County Courts Act, 1888, such power being now, under that section, exercisable only by the high court, or a judge of the high court. *Cox* v. *Hill*, 67 L. T. 26. *See* now s. 116 of County Courts Act, 1888.

The under-sheriff before whom a writ of inquiry is executed had the power of certifying on the record that there was sufficient reason for bringing the action in the superior court, given to the judge by 30 & 31 Vict. c. 142, s. 5. *Craven* v. *Smith*, 38 L. J., Ex. 90; L. R. 4 Ex. 146; 20 L. T. 400; 17 W. R. 710. Contra, *Ayres* v. *Lovelock*, W. N. (1874) 29.

—— **By Court.**]—The court or a judge has the power of certifying to give costs under 13 & 14 Vict. c. 61, s. 13, notwithstanding the power of certifying as a judge at nisi prius to give costs under s. 12, has by an order of reference been given to an arbitrator, who had failed to certify, the certificate under s. 13 being one which a judge or the court has power to give, and different from that which a judge at nisi prius is empowered to give under s. 12. *Sharp* v. *Eveleigh*, 20 L. J., Ex. 282.

Grounds for Granting.]—The court will not lay down any general rule with regard to giving a plaintiff costs under 13 & 14 Vict. c. 61, s. 13. *Palmer* v. *Richards*, 2 L. M. & P. 376; 6 Ex. 335; 20 L. J., Ex. 323.

The refusal of the registrar of a county court to grant a summons under a mistaken idea of the court's jurisdiction, or the probability of greater costs by proceedings in the county court, is not a sufficient reason for a superior court allowing costs to a plaintiff in an action where the amount recovered is less than 20*l.* in contract, or 10*l.* in tort. *Holborow* v. *Jones*, 38 L. J., C. P. 22; L. R. 4 C. P. 14; 19 L. T. 320; 17 W. R. 54.

The distance at which a defendant resides from the plaintiff when the action is brought is not alone a ground for granting costs under 30 & 31 Vict. c. 142, s. 5. *Thompson* v. *Dallas*, 9 B. & S. 193; 37 L. J., Q. B. 133; L. R. 3 Q. B. 358; 18 L. T. 288; 16 W. R. 703.

An action claiming an injunction to restrain a trespass was tried in the high court, although the value of the property in dispute was within the limits fixed for the jurisdiction of the county court. The trial lasted some days, and ultimately the plaintiff succeeded, and was given 5*l.* as damage:—Held, that, notwithstanding that the action might have been tried in the county court, it had proved to be a proper one to be disposed of in the high court, and the court would, therefore, in the exercise of its discretion, allow the plaintiff high court costs. *Williams* v. *Allen*, 60 L. T. 103.

A. brought an action against B. in the high court, asking for an injunction to restrain the defendants from excavating so as to injure the plaintiff's premises, and for damages. The writ was issued on the 17th April, 1888. The action came on for trial by consent on affidavit evidence, and without pleadings. The damages amounted to less than 10*l.* The court granted an injunction, and assessed the damages at 5*l.*, and directed the defendant to pay the costs, but if the action could have been brought in the county court, then only such costs as would have been incurred in the county court. *Cooper* v. *Streeter*, 60 L. T. 95.

In considering whether to certify for costs upon a verdict being found for a plaintiff in an action for slander, the judge, although he disapproves himself of the action having been brought, will give effect to an indication by the jury of a contrary opinion, and will treat a verdict for 40*s.* as such an indication. *Hume* v. *Marshall*, 37 L. T. 711.

The judge's power to certify exists where the question whether the plaintiff had reasonable cause for suing was compounded of facts and a doubtful point of law; and his power was not confined to mere facts. *Swift* v. *Jewsbury*, L. R. 9 Q. B. 560.

Semble, where, in an action against a joint-stock company in a superior court, not having concurrent jurisdiction with a county court, it appears that, if the plaintiff had sued in the county court, he could not have obtained satisfaction from the property of the company, and that the shareholders reside out of the jurisdiction of the county court, that would afford

sufficient ground for giving the plaintiff his costs. *Taylor* v. *Crowland Gas and Coke Co.*, 11 Ex. 1; 24 L. J., Ex. 233; 1 Jur. (N.S.) 358.

A judge has no power to certify under 23 & 24 Vict. c. 126, where a right, though a small one, is really in issue. *Gooding* v. *Britnall*, 11 C. B. (N.S.) 148; 31 L. J., C. P. 5; 5 L. T. 397; 10 W. R. 79.

A plaintiff brought an action of trespass against the defendant in the county court, whereupon the defendant obtained a stay of proceedings in the county court. The action being then brought in a superior court, the jury found all issues of fact in favour of the defendant; but the verdict was ultimately entered in favour of the plaintiff upon a point of law decided in his favour by the court in banc. The judge who tried the action declined to certify for costs, and the court concurred in his adverse opinion to the plaintiff on the merits:—Held, that the fact of the defendant having moved the action into a superior court set no limit upon the discretion of the judge, and a rule to allow costs was refused. *Flitters* v. *Allfrey*, 44 L. J., C. P. 10, n.; L. R. 10 C. P. 29; 31 L. T. 881.

The 30 & 31 Vict. c. 142, s. 5, gives to the court or a judge at chambers a power to review the decision of the judge at nisi prius; and, as the court takes into consideration all the circumstances of a case, the facts that the plaintiff could not sue but in a superior court, that he has recovered 10*l.* damages, that he has been put to unusual trouble and expense in bringing the action (although each, if it stood alone, might secure the plaintiff's costs), may, subject to such consideration, even when taken together, fail to entitle the plaintiff to costs. *Kent* v. *Lewis*, 21 W. R. 413.

The discretion of the court or a judge as to allowing or withholding costs, under 15 & 16 Vict. c. 54, s. 4, is to be exercised with reference to the propriety of bringing the action in the superior court at the time it is brought, and not with reference to the complications which may be introduced by the acuteness of a special pleader. *Howlett* v. *Tarte*, 11 C. B. (N.S.) 634.

In dealing with the County Courts Amendment Act, 30 & 31 Vict. c. 142, s. 5, the question is not simply whether the action should have been brought in the superior court; but the judge is justified in declining to certify for costs, if he is reasonably satisfied that the action should not have been brought at all. *Strachey* v. *Osborne* (*Lord*), 44 L. J., C. P. 6: L. R. 10 C. P. 92; 31 L. T. 374; 23 W. R. 75.

Action of trover and detinue for a portmanteau. During the trial the defendant's counsel suggested that the portmanteau, with its contents (value 25*l.*), was in court, and that the plaintiff might have it there and then. The contents being found all right, the plaintiff accepted the offer and took it. A verdict was returned for 40*s.*, and the judge at the moment refused to certify for costs on the ground that the whole litigation had arisen out of a demand of 1*s.* 6*d.*, which it was conceded the defendant had no right to make. The plaintiff's counsel asked to have the verdict returned for the value of the portmanteau as well as 40*s.* damages, but it was too late, as some of the jury had left the court:—Held, that the plaintiff was deprived of costs by 13 & 14 Vict. c. 61, s. 11, and that it was not a case in which the court could say, under 15 & 16 Vict. c. 54, s. 4, that there was sufficient reason for bringing the action in a superior court. *Dimsdale* v. *L. B. & S. C. Ry.*, 8 L. T. 453; 11 W. R. 729.

Where the plaintiff's affidavits disclosed some evidence that the defendant did not dwell or carry on his business within the jurisdiction of the county court within which the cause of action arose, and it appeared that after diligent inquiries the plaintiff was unable to ascertain the residence of the defendant, and his attorney refusing to give any information:—Held, that there was sufficient ground for an order that the plaintiff should recover his costs. *Springbett* v. *King*, 1 H. & N. 662; 26 L. J., Ex. 169.

Application, how made.]—An application to a judge by a plaintiff for costs need not be supported by affidavit, unless the facts are controverted by the defendant. *Power* v. *Jones*, 6 Ex. 121; 15 Jur. 66.

The 13 & 14 Vict. c. 61, s. 13, throws upon the plaintiff the onus of showing that he is entitled to costs in the cases mentioned in s. 11. *Latham* v. *Spalding*, 2 L. M. & P. 378; 20 L. J., Q. B. 302; 17 Q. B. 400; 15 Jur. 576.

On an application for costs it is sufficient for the plaintiff to establish a prima facie case, so as to call on the defendant for an answer. *Springbett* v. *King*, 1 H. & N. 662; 26 L. J., Ex. 169.

Statement in Case whether an Agreement not to apply.]—The plaintiff brought an action against G. for a misrepresentation made by him in his character of manager of a banking company, and joined as a defendant J., as the public officer of the company. At the trial a verdict was directed against both, with leave to move to enter the verdict for J. The rule was obtained accordingly, but the Court of Queen's Bench held both liable. A case was then stated on appeal in which the question for the court was, whether the defendant J., as public officer, was entitled to have the verdict entered for him. "If the court shall be of opinion in the affirmative, then the verdict is to be entered for the defendant, with costs of defence." The Exchequer Chamber (overruling the judgment of the Queen's Bench) directed the verdict to be entered for J. The plaintiff then applied to the judge who tried the cause, and he certified, under 3 & 4 Will. 4, c. 42, s. 32, that the plaintiff had reasonable ground for making J. a defendant:—Held, that the statement in the case was a mere conclusion of law, and could not be taken as an agreement by the plaintiff not to apply for a certificate. *Swift* v. *Jewsbury*, L. R. 9 Q. B. 560.

Discretion as to Scale.]—Ord. LXV. r. 1, has given a judge complete discretion, not only as to the incidence, but also as to the quantum, of the costs of an action in the superior court. Consequently, the costs of suit, which a judge at chambers may, by rule or order, allow a plaintiff, under s. 5 of the County Courts Act, 1867, are not confined to superior court costs, but may be costs on the county court scale. *Neares* v. *Spooner*, 58 L. T. 164; 36 W. R. 257—C. A.

An action of contract was referred by consent, the costs to abide the event of the award, and judgment on the award to be entered in the high court. The arbitrator found for the plaintiff for a sum less than 50*l.* and judgment was entered accordingly:—Held, that a judge at chambers had jurisdiction under Ord. LXV. r. 12, to order the plaintiff's costs to be taxed on the high court scale. *Hyde* v. *Beardsley*, 56 L. J., Q. B.

81; 18 Q. B. D. 244; 57 L. T. 802; 35 W. R. 140.

Contract—Over £20 and less than £50 recovered—Taxation—County Court Scale.]—Where an action on contract, which could have been commenced in the county court, is brought in the high court, and 20*l.* and upwards, but less than 50*l.*, has been recovered, costs, in the absence of special directions, are taxed on the county court scale, without regard to whether the work charged for has or has not been done. *Cook* v. *Crews*, 10 R. 315.

An order was made by a judge, under 19 & 20 Vict. c. 108, s. 26, directing an action to be tried in a county court. The order was silent as to the scale of costs. A verdict having been found for the defendant, the master allowed him only county court costs, so far as regarded the trial in the county court:—Held, that the taxation was right. *Wheatcroft* v. *Foster*, El. Bl. & El. 737; 27 L. J., Q. B. 277; 4 Jur. (N.S.) 896; 6 W. R. 651.

Order for New Trial—Costs of First Trial "to abide the Result."]—Where an order for a new trial provides that the costs of the first trial shall abide the result of the second, a plaintiff who obtains a verdict and judgment on the second trial, but is deprived of his costs by the refusal of the judge to certify under s. 116 of the County Courts Act, 1888, will not be entitled to any costs of the first trial. *Brotherton* v. *Metropolitan District Joint Committee*, [1894] 1 Q. B. 666; 9 R. 154; 70 L. T. 218; 42 W. R. 273—C. A.

Binding Character of Certificate.]—When a superior court of record has jurisdiction to make upon motion an order or a certificate for costs, such order is binding and conclusive, and the master's taxation for such costs cannot be impugned except by a suggestion of error in fact upon the record that no order or certificate was made by the court. *Scott* v. *Bennett*, L. R. 5 H. L. 234; 20 W. R. 686.

Form of Certificate.]—In an action of debt the writ of summons was indorsed for 50*l.* 3*s.*, which was reduced upon the trial, by a set-off, to 15*l.*, and a verdict was entered for the plaintiff for the latter amount, the judge certifying under the County Courts Act, 1867, s. 5, that there was sufficient reason for bringing the action in the superior court. He did not certify on the postea that the "cause was proper to be tried before him":—Held, that in the absence of the latter certificate, the plaintiff's costs were to be taxed under the 7th direction to the masters, H. T. 1853, upon the lower scale, the case not being one in which, "by reason of the nature of the action," no writ of trial could be issued. *Smith* v. *Hailey*, 42 L. J., Ex. 5; L. R. 8 Ex. 16; 27 L. T. 426; 21 W. R. 76.

Appeal from Discretion.]—Sect. 116 of the County Courts Act, 1888, gives the court or a judge a discretion to allow costs on the high court scale in actions brought in the high court and founded on contract, in which the plaintiff has recovered a sum of 20*l.* or upwards, but less than 50*l.*; so that by virtue of s. 49 of the Judicature Act, 1873, no appeal lies from an order allowing such costs. *Bazett* v. *Morgan*, 59 L. J., Q. B. 44; 24 Q. B. D. 48; 61 L. T. 434; 38 W. R. 108; 54 J. P. 119.

If a plaintiff applies for costs to a judge at chambers, and is refused, he cannot afterwards apply to the court as having an independent jurisdiction to grant costs, but must come by way of appeal from the judge's decision. *Warman* v. *Hulahan*, 30 L. J., Q. B. 48; 6 Jur. (N.S.) 1301; 3 L. T. 379; 8 W. R. 108. S. P., *Pryce* v. *Griffiths*, 9 L. T. 418; *Meredith* v. *Gittens*, 18 Q. B. 257; 21 L. J., Q. B. 273; 15 Jur. 564.

When an action is brought to try a right, and the right is of sufficient importance to make the action one proper to be brought in a superior court, the court will make an order for costs in favour of the successful plaintiff, although the judge at the trial has refused to certify. *Hinde* v. *Sheppard*, 41 L. J., Ex. 25; L. R. 7 Ex. 21; 25 L. T. 500; 20 W. R. 99.

A plaintiff brought an action to assert rights of trifling value and recovered 40*s.* damages; the judge at the trial refused to certify for costs:—Held, that this was not a case in which the court would grant a rule to allow the plaintiff his costs. *Barlow* v. *Briggs*, 27 L. T. 159; 20 W. R. 866.

The court required a strong case to be made out before it would overrule the exercise of a judge's discretion under the 15 & 16 Vict. c. 54, s. 4. *Dunston* v. *Paterson*, 5 C. B. (N.S.) 267; 28 L. J., C. P. 97; 4 Jur. (N.S.) 1024; 6 W. R. 768. S. P., *Courtenay* v. *Wagstaff*, 16 C. B. (N.S.) 110; 9 L. T. 689; 12 W. R. 431.

When the judge, although a substantial claim of right was put in issue by the pleadings and contested at the trial, refused to certify for costs under s. 5 of 30 & 31 Vict. c. 142, because he thought that the action was not bonâ fide brought to try the right, but merely to gratify an angry feeling against the defendant, the court declined to interfere, not being satisfied that the judge's discretion had been wrongly exercised. *Strachey* v. *Osborne* (*Lord*), 44 L. J., C. P. 6; L. R. 10 C. P. 92; 31 L. T. 374; 23 W. R. 75.

J. SET-OFF OF COSTS.

1. When Allowed.

In Same Action.]—Under Ord. VI. r. 19, of the Rules of the Supreme Court, 1875 (Costs)—by which, whenever, in cases specified, a party entitled to receive costs is liable to pay costs to the other party, the taxing-officer may adjust the costs by way of deduction or set-off—such set-off or deduction is limited to costs due to either party in respect of the same action, and cannot be enforced in respect of the costs of any separate proceeding between the same parties. *Barker* v. *Hemming*, 5 Q. B. D. 609; 43 L. T. 678—C. A. Affirming, 49 L. J., Q. B. 730; 28 W. R. 764.

It is a common practice of the court to award to each party a portion of the costs of a cause at the final hearing; and the court has jurisdiction to direct a set-off of costs awarded by the court itself as between two parties. *Magrath* v. *Magrath*, Ir. R. 10 Eq. 155.

Sums of costs incurred in the same suit or proceedings, though payable under different orders, may be set-off against each other; and this right of the parties is not affected by the solicitor's lien. So held, where the defendant, after becoming liable under orders in the suit, to pay costs to

the plaintiff, had changed his solicitor, and subsequently under another order became entitled to receive a smaller sum of costs from the plaintiff, and although the application to set-off was made by the plaintiff after notice from the defendant's solicitor that he claimed a lien upon the smaller sum. *Roberts* v. *Buce*, 47 L. J., Ch. 411; 8 Ch. D. 198; 26 W. R. 393.

Costs in Chancery cannot be set-off against costs on a rule. *Wenham* v. *Fowle*, 2 D. P. C. 144.

—— **Judgment against Married Woman.**]—A judgment obtained against a married woman after the death of her husband in respect of a pecuniary liability incurred during coverture binds her personally, even though execution thereon is limited to her separate property not subject to any restriction against anticipation; and the costs incurred by the creditor in obtaining such judgment may, under the powers given by Ord. LXV. r. 27, sub-r. 21, be set-off on taxation against the costs for which such creditor is liable to the married woman. *Holtby* v. *Hodgson* (24 Q. B. D. 103, followed. *Pelton* v. *Harrison*, 61 L. J., Q. B. 114; [1892] 1 Q. B. 118; 65 L. T. 845—C. A.

Proceedings in Bankruptcy.]—The costs of bankruptcy proceedings cannot be set-off against the costs of proceedings not in bankruptcy. *Bassett, In re, Lewis, Ex parte*, 65 L. J., Q. B. 144; [1896] 1 Q. B. 219; 73 L. T. 736; 44 W. R. 240. And see *Griffin, Ex parte*, infra.

Former Practice.]—The costs of one judgment may be set-off against the debt and costs of another. *Thrustout* d. *Barnes* v. *Crafter*, 2 W. Bl. 826.

In an action against an attorney, he may set-off the full amount of costs as taxed, without deducting from such amount the costs of taxation payable by him. *Field* v. *Besant*, 2 N. & M. 207; 5 B. & Ad. 357.

Costs of action may be set-off against each other, though the nominal parties are different, if the expenses are to be defrayed out of the same funds. *Gravatt* v. *Hall*, 16 L. J., Q. B. 352.

In trespass against several defendants, they appeared by the same attorney:—Held, that the costs of the successful defendants might be set-off against the costs of those who were unsuccessful. *Lee* v. *Kendall*, 3 A. & E. 707; 5 N. & M. 340; 1 H. & W. 316; 5 L. J., K. B. 19. S. P., *Norman* v. *Clemenson*, 1 D. (N.S.) 718; 4 Scott (N.R.) 735; 1 Man. & G. 243; 11 L. J., C. P. 191.

Several actions brought on two policies of insurance, underwritten by the same parties (among whom were A. and B.), were consolidated. But in one of the causes which went to trial, A. was defendant, in the other B., and the plaintiff became entitled to costs in one action, and the defendant in the other:—Held, that the costs taxed and allowed to the defendant might be set-off against those taxed and allowed to the plaintiff. *Nunez* v. *Modigliani*, 1 H. Bl. 217.

But costs due from the plaintiff to A. cannot be set-off against the costs due from B. to the plaintiff. *Holroyd* v. *Breare*, 4 B. & Ald. 43, 700.

The costs of a suit in equity may be set-off against the costs of an action. *Webber* v. *Nicholas*, 4 Bing. 16; 12 Moore, 87; 5 L. J. (O.S.) C. P. 19.

The costs of a bill in chancery, dismissed in favour of the defendant may be set-off against the plaintiff's costs of a suit in K. B. for the same cause of action, and where he had recovered a verdict, subject to the general lien of the attorney, upon the sum for which judgment was obtained. *Harrison* v. *Bainbridge*, 4 D. & R. 363; 2 B. & C. 800; 2 L. J. (O.S.) K. B. 171. And see *Hall* v. *Ody*, 2 Bos. & P. 28.

A. brings an action against B., the expenses of defending which are borne by C. and D., but A. is nonsuited. Afterwards C. brings an action against A., in which D. is interested as well as C., and C. is nonsuited. The costs of the one nonsuit may be set-off against the other. *O'Connor* v. *Murphy*, 1 H. Bl. 657.

A plaintiff having been nonsuited, and costs taxed for the defendant, the court refused to allow the plaintiff to set them off against costs to be taxed for him in an ejectment, in which he had obtained a verdict, but which the defendant had obtained a rule nisi to set aside, and enter a nonsuit. *Masterman* v. *Malin*, 7 Bing. 435; 5 M. & P. 324; 1 D. P. C. 222; 9 L. J. (O.S.) C. P. 171

By a decree of the Court of Chancery, made in a suit to which A. and B. were parties, it was ordered that the former should pay to the latter certain costs, when taxed. In an action on an account stated, by A. against B.:—Held, that, the costs not having been taxed, B. was not entitled to set-off the sum claimed to be due on foot of them. *Treacy* v. *Barnewall*, Ir. R. 6 C. L. 325—Ex. Ch.

If, upon the reference of an action, the arbitrator awards the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off without motion. *Eyes* v. *Adams*, 4 Taunt. 632.

On a reference of an ejectment and all matters in difference between the parties, the arbitrator directed that a sum of money should be paid by the lessor of the plaintiff to the defendants by way of compensation for buildings erected by them, and that a verdict should be entered for the former. On motion, the court directed the sum awarded to the defendants to be set-off against the costs of the lessor of the plaintiff, saving the lien of their attorney. *Doe* d. *Swinton* v. *Sinclair*, 5 D. P. C. 27; 3 Scott, 42; 2 Hodges, 111; 5 L. J., C. P. 184.

Cross costs in two suits ordered to be set-off. *Budge* v. *Bulge*, 12 Beav. 385.

2. Bankruptcy of Party.

In What Cases.]—The Court of Bankruptcy will not allow costs of proceedings in the high court to be set off against costs of proceedings in bankruptcy. *Griffin, Ex parte, Adams, In re*, 49 L. J., Bk. 28; 14 Ch. D. 37; 42 L. T. 704; 28 W. R. 714—C. A. And see *Bassett, In re*, supra.

Costs to be paid to a party ordered, after his bankruptcy, to be set off against costs ordered to be paid by the same party before his bankruptcy. *Lee* v. *Pain*, 4 Hare, 225.

Costs ordered against bankrupt to be set off against those ordered in his favour. *Hawley, Ex parte, Richards, In re*, 4 Deac. & C. 572; 2 Mont. & Ayr. 59; 4 L. J., Bk. 17.

The court refused, but without costs, a motion for special direction to the master, requiring him to deduct in his taxation of the costs of the parties, the costs which he should allow to the plaintiff (who had become insolvent) after the decree had been passed and acted upon. *Rumney*

v. *Beale*, 10 Price, 113 ; Daniell, 35 ; Wils. Ex. Eq. 127.

Costs ordered to be paid, but not taxed until after the bankruptcy of the person to receive them, cannot be set off by the party from whom they were due, proving a debt under the commission. *Rhodes, Ex parte*, 15 Ves. 539.

3. Interlocutory Costs.

Right to Set off.]—Interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged, is not strictly a condition precedent to ulterior proceedings. *Doe* d. *Hope* v. *Carter*, 1 M. & Scott, 516 ; 8 Bing. 330 ; 1 D. P. C. 269 ; 1 L. J., C. P. 97.

A rule for staying proceedings in a second ejectment until the costs of the first have been paid will not be enlarged, in order to set off the costs claimed against any one to which the lessors of the plaintiff may become entitled on the trial of the second ejectment. *Doe* d. *Maslin* v. *Packer*, 4 Tyr. 144; 3 L. J., Ex. 148 ; 2 C. & M. 457.

A plaintiff, after having given notice of trial, withdrew his record, and the defendant obtained a rule for payment of the costs of the day, which were taxed. At the next assizes the plaintiff obtained a verdict, and a new trial was afterwards granted on payment of costs :—Held, that the defendant might set off the costs due to him against those payable on the rule for the new trial. *Doe* d. *Dangerfield* v. *Allsop*, 9 B. & C. 760.

A defendant, being taken in execution, on a ca. sa., applied to a judge for his discharge, on the ground of irregularity in the proceedings ; the plaintiff made a cross application to amend the proceedings, and the judge gave leave to amend, and ordered "that the plaintiff should pay the defendant the costs of both applications :" —Held, that these being interlocutory costs, arising in the same suit as the judgment, and the order not making the payment of them a condition precedent to the amendment, they might be set off against the judgment. *Thompson* v. *Parish*, 5 C. B. (N.S.) 685 ; 28 L. J., C. P. 153 ; 5 Jur. (N.S.) 986 ; 7 W. R. 210.

Final judgment in an action having been signed against the defendant, he was arrested under a ca. sa., and discharged by a judge's order, with costs, to be taxed, against the plaintiff ; and a summons by the plaintiff to stay taxation till the next term, in order to review the judge's decision, was discharged with costs :—Held, that both these costs were interlocutory costs, which might be set off against the judgment. *Melville* v. *Leeson*, E. B. & E. 324 ; 27 L. J., Q. B. 318 ; 4 Jur. (N.S.) 1146.

Interlocutory costs may be set off against each other, although no express leave is given for the purpose. *Levy* v. *Drew*, 2 B. C. Rep. 142 ; 5 D. & L. 307 ; 12 Jur. 119.

Where the petitioner did not object, costs of unnecessary matter in a petition set-off against other costs, and respondents to pay costs proportionate to difference ; but where the parties objected, the court referred it to the master to tax, on the footing of the matter being unnecessary. *Bedminster Charities, In re*, 12 Jur. 665.

Exceptions for insufficiency were heard before the court in the first instance, under Sir G. Turner's Act ; the costs of those allowed were set off against those disallowed. *Willis* v. *Childe*, 13 Beav. 454.

Costs of exceptions allowed, and of those disallowed, apportioned and set off. *Bally* v. *Worham*, 32 Beav. 69.

Where a plaintiff is ordered to pay costs on interlocutory applications, which are partly in respect of matters in the suit itself, and partly in other suits, the defendant has a right to set off those costs against costs which he is ordered to pay, where the plaintiff is alone the applying party ; but where he is not, but others join with him as to their interests, there is no such right of set off. *Jenner* v. *Morris*, 11 W. R. 943, 2 N. R. 479.

4. Against Debt.

Costs given to the plaintiff out of the fund in question, directed to be set off against payment out of such fund erroneously made by the trustees to the use of the plaintiff. *Cooper* v. *Pitcher*, 4 Hare, 485.

By an order of the court, the costs to be incurred by a married woman, suing by her next friend in a future proceeding, were ordered to be paid to A. B., her solicitor. Pending the proceedings, A. B. was discharged, and C. D. appointed solicitor. A. B. received the whole costs :—Held, that A. B. could not set off, as against the amount, a debt due to him from the next friend. *Bailey & Hope, Ex parte*, 14 Beav. 18.

A defendant, with his mother's money, purchased leaseholds, which were assigned to him, and subsequently, at her request, he covenanted to hold them upon trust for her for life, and afterwards for himself and two others. He afterwards re-assigned them to his mother, who sub-let them to the plaintiff. The mother received the rents from the sub-lease during her lifetime, and on her death the plaintiff, in ignorance of the real nature of the lessor's title, paid the rent to her executrix. Disputes arose between the persons interested under the settlement, and a suit was instituted, in the course of which the defendant was declared to be a trustee of the leaseholds upon the trusts of the settlement. The defendant subsequently brought ejectment against the plaintiff, and failed in it, but succeeded in a replevin. The plaintiff then filed a bill for a declaration that he was entitled to set off the costs due to him in the ejectment and other items against the rent due from him to the defendant. The defendant demurred for want of equity :—Held, that the demurrer must be allowed. *Pratt* v. *Keith*, 33 L. J., Ch. 528 ; 10 Jur. (N.S.) 305 ; 10 L. T. 15 ; 12 W. R. 394.

A decree was made, dismissing a bill with costs, against husband and wife, so far as it sought to charge the separate estate of the wife. The husband was also declared liable to the plaintiff for certain occupation rent :—Held, first, that the costs of dismissing the bill should be paid to the husband alone ; and, secondly, that the plaintiff was entitled to set off the occupation rent against the costs payable by him. *Wright* v. *Chard*, 4 Drew. 702 ; 1 L. T. 182 ; 8 W. R. 122.

The court will not order costs due from one party to another to be set off against a sum obtained from the former by the latter to obtain his liberation from an illegal arrest, but ordered by the court to be repaid. *Pitt* v. *Coombes*, 1 H. & W. 13 ; 2 A. & E. 459 ; 4 N. & M. 535 ; 4 L. J., K. B. 83.

Costs will not be set off against sums due on an unascertained account. *Whalley* v. *Ramage*, 8 L. T. 499.

5. When Right Lost.

The execution of a writ of attachment for costs does not deprive the party issuing it of any lien or right of set-off he may possess for the payment of such costs. *Bawtree* v. *Watson*, 2 Keen. 713 : 7 L. J., Ch. 183.

An order was made against a plaintiff for payment of the costs of an application for an injunction, and execution was issued upon failure of payment, but no return had been made to the writ. The defendant was subsequently ordered to pay the costs of an application to dismiss the bill. An appeal by the plaintiff against the first decision was still pending. The defendant moved to set off his costs against those ordered to be paid by the plaintiff. The motion was granted, upon the defendant undertaking not to levy for more than the balance; and as the defendant had not applied for a set off when the order was made against him, no costs as to the application were given on either side. *Bryon* v. *Metropolitan Saloon Omnibus Co.*, 28 L. J., Ch. 798 ; 7 W. R. 423.

6. Staying Proceedings.

Interlocutory Costs and Costs of Appeal.]—A party, who under a former order in the action was entitled to certain costs out of the estate, appealed from an interlocutory order, and his appeal was dismissed with costs. The respondent asked that under Ord. LXV. r. 27, sub-s. 21, these costs might be set-off against the costs which the appellant was entitled to receive, the certificate of the taxation of which was ready for signature. The court declined to order the set-off, but directed that no costs should be paid out to the appellant for a fortnight, so as to give the respondent time to carry in his bill of costs of the appeal, that the set off might be considered by the taxing-master. *Crawshay, In re, Dennis* v. *Crawshay*, 45 Ch. D. 318 ; 63 L. T. 597—C. A.

Probable Costs in another Action—Time for Application.]—An action for infringement of a patent, and a cross-action by the defendant for groundless threats, had been set down together for trial. The judge held at the trial of the first action that the defendant had infringed, and gave judgment for the plaintiff in the first action, and as a consequence dismissed the cross-action of the defendant. On appeal, the Court of Appeal held there had been no infringement, and dismissed the first action with costs, and ordered the cross-action to be remitted for trial again to the judge below. Though the defendant in the first action had been ordered to give security for the costs of the appeal, the plaintiff in the first action did not, on the occasion of the judgment of the Court of Appeal, apply to the Court of Appeal for a stay of taxation in order that any costs which the defendant in the first action might become liable to pay, if his cross-action for threats were not successful, might be set off against the costs ordered to be paid by the plaintiff in the first action to the defendant; but, on a subsequent occasion, the plaintiff did make such an application :—Held, that the application must be refused, as the defendant in the first action had then, by the judgment of the Court of Appeal, obtained a present right, which he could not be deprived of, to payment of the costs in the first action. *Automatic Weighing Machine Co.* v. *Combined Weighing and Advertising Machine Co.*, 58 L. J., Ch. 647 ; 61 L. T. 536 ; 37 W. R. 636—C. A.

Semble, if the application for stay of taxation for the purposes of set-off had been made on the occasion of the delivery of the judgment in the first action by the Court of Appeal, it would probably under the circumstances of the case, have been granted. *Ib.*

In a suit for tithes, the plaintiff obtained a decree with costs, for part of his demand. As to the remainder, issues were directed, which issues were afterwards found for the defendants. The court stayed the payment of the costs decreed to the plaintiff, in order that the defendants might have an opportunity to set off, as against those costs, the costs of the issues. *Taylor* v. *Cook*, Younge, 201.

7. Solicitor's Lien.

Distinct Proceedings.] — Ord. LXV. r. 14, allowing a set-off for costs notwithstanding the solicitor's lien, applies only to costs in the same proceeding. *Hassell* v. *Stanley*, 65 L. J., Ch. 194 ; [1896] 1 Ch. 607 ; 74 L. T. 375 ; 44 W. R. 405.

Under Ord. LXV. r. 14, the costs of an unsuccessful application by a defendant for a certiorari to remove a county court action to the high court cannot be set-off against the costs subsequently ordered to be paid by the plaintiff on the action in the county court being dismissed, inasmuch as the application for the certiorari and the county court action are distinct and independent proceedings. *Ib.*

Cross-Judgments in Distinct Actions—Discretion.]—Whether r. 14 of Ord. LXV. of the Rules of Court, 1883, does or does not apply to the case of cross-judgments in distinct actions between the same parties, the allowing a set-off for damages or costs between parties is a matter in the discretion of the court. *Edwards* v. *Hope*, 54 L. J., Q. B. 379 ; 14 Q. B. D. 922 ; 53 L. T. 69 ; 33 W. R. 672—C. A.

The plaintiff in a patent action brought a separate trade mark action against the same defendant. An appeal by the plaintiff from the judgment in the patent action was dismissed with costs. Under an order in the trade-mark action, certain costs in that action were ordered to be paid by the defendant to the plaintiff. The defendant in the patent action having issued execution for the costs of the appeal in that action, the plaintiff paid the same to the sheriff under protest. The plaintiff in that action then moved, under Ord. LXV. r. 14, that, notwithstanding a lien claimed by the defendant's solicitor on the costs ordered to be paid by him, the plaintiff, on the appeal, he might set off against those costs, the costs ordered to be paid by him in the trade-mark action, as well as certain costs in the patent action which, prior to the appeal in that action, had been ordered to be paid to him by the defendant :—Held (following *Edwards* v. *Hope*, supra), that Ord. LXV. r. 14, applied only to costs in the same action, and not to costs in different actions : and that, accordingly, the plaintiff's right to set off his costs in the trade-mark action against the appeal costs in the patent action was intercepted by the solicitor's lien ; but that his right of set-off as to the costs in the patent action only was not so intercepted. *Blakey* v. *Latham*, 41 Ch. D. 518 ; 60 L. T. 624 ; 37 W. R. 569.

If A. recovers against C., and C. recovers against A. and B., the court will permit C. to set off the damages which he has recovered against those obtained by A., on his undertaking that the bill of A.'s solicitor in the first action shall be satisfied, he having a lien on the judgment for his costs. *Mitchell* v. *Oldfield*, 4 Term Rep. 123; 2 R. R. 342.

The lien of the plaintiff's solicitor upon the debt and costs recovered in the cause after affirmance upon a writ of error, must be satisfied before the defendants are entitled to set off against them a judgment recovered by them in another cause against the plaintiff. *Middleton* v. *Hill*, 1 M. & S. 240; 14 R. R. 422.

No set-off of judgments will be allowed, even though they arise out of the same award, without satisfying the solicitor's lien. *Domett* v. *Hellyer*, 2 D. P. C. 540.

The right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the court with reference to all the circumstances of the transaction, and will not be allowed so as to defeat the solicitor's lien for costs. *Simpson* v. *Lamb*, 7 El. & Bl. 84; 26 L. J., Q. B. 121; 3 Jur. (N.S.) 412; 5 W. R. 227.

Where Plaintiff's Solicitor really Plaintiff.]—Plaintiffs in an ejectment at law recovered against the defendants with costs, which they assigned to their solicitor, the plaintiff in the suit in equity, against the same defendants; but the assignment was not executed by all the parties. The bill in equity was dismissed, with costs, amounting to less than the costs at law:—Held, that the solicitor was not entitled to set off the costs of dismissing the bill against so much of the costs of the action at law, either in his character of solicitor or assignee of the plaintiffs at law. *Gwynn* v. *Kroms*, 7 Ir. Eq. R. 271.

A successful defendant's costs will be set off against the costs of the plaintiff, without regard to the lien of such plaintiff's solicitor, if shown that the solicitor is substantially the plaintiff in the cause. *Pocock* v. *O'Shaunessy*, 6 A. & E. 807.

Costs against Debt.]—An order having been obtained in 1847, superseding a commission of bankruptcy against B., with costs, to be paid by the petitioning creditors, and, before those costs were paid, B. in 1849 was discharged under the Insolvent Act:—Held, that the assignee, who had been one of the petitioning creditors in bankruptcy, took, as ordered in 1847, subject to the lien of the solicitor who obtained the order, and could not be allowed to set off against that lien a debt due to himself by the insolvent when those costs were incurred. *Orr*, *Ex parte*, 1 Ir. Ch. R. 102.

A rule was obtained by the defendant's solicitor to set aside the service of the writ for irregularity with costs. The defendant afterwards became bankrupt:—Held, that the plaintiff might set off his debt against the costs of that rule, and that the defendant's solicitor had no lien upon those costs. *Marshall* v. *Geary*, 9 L. J. (O.S.) K. B. 9.

A., being at the time a creditor of B., presented a petition in bankruptcy against B., which was dismissed with costs. A., before the final taxation of the costs, having executed a creditor's deed in the form of Schedule D to the Bankruptcy Act of 1861, B. applied for leave to issue execution for the costs on which his solicitor claimed a lien:—Held, that there could have been no set off in respect of two such debts in equity; and that B.'s solicitor having, in consequence of his lien, a joint interest with B. in the costs, and B. being thus pro tanto a trustee for his solicitor for the costs when paid, there could be no set off in bankruptcy. *Davies*, *In re*, *Cleland*, *Ex parte*, 36 L. J., Bk. 45; L. R. 2 Ch. 808; 15 W. R. 1160.

Money in Solicitor's Hands.]—A solicitor who receives rents in a cause, without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wilkins* v. *Townshend*, 1 Russ. & M. 361.

A liquidator is not entitled to make any payment to his solicitor without the sanction of the court; nor may such solicitor set off his costs against funds recovered through his own exertions. All moneys must in the first instance be paid into court. *Union Cement and Brick Co.*, *In re*, 26 L. T. 240; 20 W. R. 361.

Effect of Attachment.]—The solicitor is not deprived of his lien on the funds in court, for his costs in the cause, by having issued an attachment against his client, and committed him to gaol for non-payment of his bill; but the costs which he may receive in the cause are to be taken in discharge of the attachment, pro tanto. *Davies* v. *Bush*, Younge, 358.

The Lord Chancellor on the 8th November ordered the defendant to pay costs to the plaintiff, but the order was not completed till the 23rd December. The Master of the Rolls on the 15th December ordered the plaintiff to pay costs to the defendant, and on the 19th the plaintiff offered to set off the costs. The defendant in January following issued an attachment for the costs:—Held, that the plaintiff, notwithstanding he was in contempt, might, under these circumstances, move to set off the costs. *Cuttell* v. *Simons*, 6 Beav. 304.

The execution of a writ of attachment for costs does not deprive the party issuing it of any lien or right to set off he may possess for the payment of such costs. *Bawtree* v. *Watson*, 2 Keen, 713; 7 L. J., Ch. 183.

Property Preserved.]—A lien on an estate for costs, as between solicitor and client, allowed to a solicitor, the property having been preserved for the benefit of all parties interested, notwithstanding an order directing payment of the costs out of the estate to the client, and an alleged set off in respect of a debt due from him to the estate. *Bailey* v. *Birchall*, 2 Hem. & M. 371; 11 Jur. (N.S.) 57.

And see SOLICITOR.

Trust Estate.]—Where a person, at the time of an order being made for the payment of his costs by trustees on a petition in the matter of a trust, is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, and the trustees, therefore, can set off the costs payable by them against the amount due from him. His solicitor cannot be in a better position than he is himself, and has no lien on such costs. *Harrald*, *In re*, *Wilde* v. *Walford*, 53 L. J., Ch. 505; 51 L. T. 441—C. A. Reversing 31 W. R. 318.

Secus, as to the costs of the trustees incurred in recovering such amount. *Ib.*

In same Action]—By an arbitrator's award in an action, the plaintiff was ordered to pay a sum of money to the defendant, and the defendant was ordered to pay the plaintiff a part of his costs when taxed:—Held, that the defendant was entitled to have the debt set off against the taxed costs, and that the right of set off in such a case was not interfered with by the ordinary solicitor's lien for costs. *Pringle* v. *Gloag*, 48 L. J., Ch. 380; 10 Ch. D. 676; 40 L. T. 512; 27 W. R. 574.

Where there are costs in equity and at law due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter. *Smith* v. *Brocklesby*, 1 Anstr. 61; 3 R. R. 547.

Rule 63 of Hilary Term, 1853, does not prohibit the setting off mutual claims for costs between the parties in the same suit. In an action against three, a verdict was found against one and in favour of the other two:—Held, that the costs of the successful defendants might be deducted from the amount of damages and costs payable to the plaintiff by the other defendant, without regard to the lien of the plaintiff's solicitor. *George* v. *Elston*, 1 Scott, 518; 3 D. P. C. 419; 1 Bing. (N.C.) 513; 1 Hodges, 63; 4 L. J., C. P. 167. See *Lee* v. *Kendall*, 5 N. & M. 340; 3 A. & E. 707; 1 H. & W. 316; 5 L. J., K. B. 19, and *Norman* v. *Cimenson*, 1 D. (N.S.) 718; 4 Scott (N.R.) 735; 4 Man. & G. 243; 11 L. J., C. P. 191.

Rule 63 of Hilary Term, 1853, only applies to cases in which the court has a discretion to allow costs or damages of different actions to be set off against each other, and where there has been an application to allow such set-off. *Dunn* v. *West*, 10 C. B. 420; 1 L. M. & P. 608; 20 L. J., C. P. 1; 15 Jur. 88.

The lien of the plaintiff's solicitor upon the debt and costs recovered in the cause must be satisfied before the defendant is entitled to set off the costs recovered by him in another cause against the plaintiff. *Randle* v. *Fuller*, 6 Term Rep. 456; 3 R. R. 230. And see *Glaister* v. *Hewer*, 8 Term Rep. 69.

Costs receivable and payable by two parties ordered to be mutually set off without regard to the lien of the solicitors. The Master of the Rolls has jurisdiction to direct costs which have been ordered by the Lord Chancellor to be paid by the defendant to the plaintiff to be set off against costs ordered by the Master of the Rolls to be paid by the plaintiff to the defendant. *Cattell* v. *Simons*, 6 Beav. 304.

The court made absolute without costs, a rule for setting off the costs of a successful defendant against the damages and costs awarded for the plaintiff against the other defendant, disregarding the solicitor's lien. *Rawlings* v. *Sowell*, 7 Scott, 231.

Where a party in a suit has a right of set off, it has priority over the lien of the solicitor, which is always subject to the equities between the parties. *Jenner* v. *Morris*, 11 W. R. 943.

In equity, the solicitor's lien is only upon the balance of costs arranged according to the equities of the parties. *Taylor* v. *Popham*, 15 Ves. 72.

Sums of costs incurred in the same suit or proceedings, though payable under different orders, may be set off against each other; and this right of the parties is not affected by the solicitor's lien. So held, where the defendant after becoming liable under orders in the suit to pay costs to the plaintiff, had changed his solicitor, and subsequently under another order became entitled to receive a smaller sum of costs from the plaintiff; and although the application to set off was made by the plaintiff after notice from the defendant's solicitor that he claimed a lien upon the smaller sum. *Roberts* v. *Bute*, 47 L. J., Ch. 414; 8 Ch. D. 198; 26 W. R. 393.

In an action containing several counts in the declaration, some issues were found for the plaintiff and some for the defendant:—Held, that the master was correct in deducting the costs of the defendant's issues from the plaintiff's costs, and that the lien of the plaintiff's attorney was only upon the balance coming to the plaintiff. *Eades* v. *Everatt*, 3 D. P. C. 687.

A partnership suit having been compromised upon the terms of the plaintiff taking the assets, and covenanting to pay thereout and to the extent thereof the costs of the suit, etc., and the defendant covenanting, so soon as these liabilities had been discharged, to pay in a certain event a sum of money to the plaintiff, by an order in the suit the compromise was confirmed, and the plaintiff was ordered to pay the costs as covenanted out of assets to be received by him. An account was afterwards settled between the parties which showed assets in excess of liabilities including the costs; but the plaintiff afterwards alleging that the moneys had become payable under the defendant's covenant, claimed to set them off against the defendant's costs. Upon an application by the defendant and his solicitor for an order for payment of his costs:—Held, that, apart from other considerations, the solicitor intervening had such a lien on the defendant's costs payable under the order as precluded the set-off. *Herron* v. *Hobson*, 47 L. J., Ch. 574.

—— **Interlocutory Costs.**]—By a judge's order, the defendant was allowed to go to trial upon payment of a certain sum of money, together with the costs of the cause up to the date of the order; and the defendant having recovered a verdict without previously complying with the terms of the order:—Held, that the costs taxed in his favour on the postea could not be set off against the interlocutory costs, so as to deprive the plaintiff's attorney of his lien. *Aspinall* v. *Stamp*, 4 D. & R. 716; 3 B. & C. 108.

The plaintiff having succeeded upon issues of fact joined upon two counts, but judgment having been given upon a demurrer to a third for the defendant, obtained a rule to show cause why satisfaction should not be entered upon the roll as to the defendant's costs, and those costs be deducted from his own damages and costs, without regard to the lien of the defendant's attorney. The rule was made absolute:—Held, that in such case the defendant's costs were "interlocutory costs in the same suit," within the rule of court, and that the former part of the rule, prohibiting the allowance of any set-off of costs to the prejudice of the attorney's lien, applied only to the case of costs of different suits. *Scott* v. *De Richebourg*, 2 L. M. & P. 421; 11 C. B. 447; 20 L. J., C. P. 263; 15 Jur. 882.

Interlocutory costs may be set off against final costs in the same cause, without reference to the

attorney's lien. *Halliday* v. *Lawes*, 5 D. P. C. 636: 3 Bing. (N.C.) 774; 4 Scott, 475; 3 Hodges, 130.

After verdict, a rule nisi for a new trial was granted, and on the hearing, the cause and another cause between the same parties then pending in a county court, and all matters in difference between the parties to these causes, were by consent referred, the costs of the cause respectively, and of the rule to abide the event, and the costs of the reference and the award to be in the discretion of the arbitrator, the attorney for the plaintiff in both actions being the same. The arbitrator decided the cause in the superior court in favour of the defendant, and the cause in the county court in favour of the plaintiff, with damages 45*l.* 10*s.* 6*d.*, and gave the plaintiff the costs of the reference, and divided the costs of his award:—Held, that the costs of the cause and of the rule could not be set off against the money and costs payable to the plaintiff in the other cause, to the prejudice of the lien of the plaintiff's attorney, as they were not interlocutory costs in the same suit awarded to the adverse party, within the proviso to the rule. *Little* v. *Philpotts*, 2 B. & S. 383; 31 L. J., Q. B. 125; 8 Jur. (N.S.) 1175.

To what Costs applicable.]—The solicitor's lien does not extend beyond his taxed costs in the particular cause, where one judgment is set off against another. *Watson* v. *Maskall*, 1 Scott, 658; 1 Bing. (N.C.) 366; 3 D. P. C. 638; 1 Hodges, 73; 4 L. J., C. P. 266.

But such lien only extends to the general balance of the costs. *Howell* v. *Harding*, 8 East, 362; 9 R. R. 468.

K. RECOVERY OF COSTS.

1. BY APPLICATION TO THE COURT.

Where there are several defendants, each is liable for the whole costs; and if, after satisfaction from any one, the plaintiff takes it against another, such defendant may apply to the court. *Wilson* v. *Foot*, Bull. N. P. 335.

One of several defendants, who had given a general release to the plaintiff after the costs of a nonsuit had been taxed, was ordered to pay to the other defendants their shares. *Darlow* v. *Collinson*, Bull. N. P. 335.

Action for breaking and entering the plaintiff's close and cutting heath; plea, not guilty, and verdict for the plaintiff. On the trial it appeared that the trespasses were committed by the direction of A., and the heath taken to his premises. On a motion being made that A. should pay the plaintiff the damages and taxed costs, the court refused the application, as the plaintiff ought, before he brought the action, to have ascertained who was the substantial defendant. *Berkeley* v. *Dimery*, 10 B. & C. 113.

Ne exeat does not lie in respect of costs taxed in a chancery suit. *Goodman* v. *Sayers*, 5 Madd. 471.

Mode of proceeding to compel payment of costs by one not a party to the suit. *Att.-Gen.* v. *Skinners' Co.*, C. P. Coop. 1.

How payment of costs enforced by and against persons not a party to the suit. *Sanger* v. *Gardiner*, C. P. Coop. 262.

Order against two persons jointly to pay costs: the process for giving it effect may be joint or several. *Ib.*

When a plaintiff has given notice to the defendant to discontinue the action, and the costs have been taxed, no further order of the court is required to enable the chief clerk to issue a writ to enforce payment, and the writ may be varied to suit the circumstances of the case. Ord. XXIII. (Judicature Act) has the force of an order of the judge or court. *Bolton* v. *Bolton*, 35 L. T., 358; 24 W. R. 663.

Proceedings stayed—Dismissal of Action.]—The defendant succeeded on a demurrer to the plaintiff's statement of claim, and plaintiff was ordered to pay the costs of the demurrer, liberty being given to him to amend. He amended accordingly, and the action was set down for trial. The plaintiff failed to pay the costs, and the defendant obtained an order to stay proceedings until payment. Five months after the date of this order, the costs being still unpaid, the court ordered the action to be dismissed unless the costs were paid within a month from the date of the notice of motion. *White* v. *Bromige*, 26 W. R. 312.

2. BY ACTION.

In what Cases.]—An action will lie on a final order of the Privy Council for payment of costs, notwithstanding the order is made in a proceeding collaterally to the original suit, and that suit is still undetermined. *Hutchinson* v. *Gillespie*, 11 Ex. 798; 25 L. J., Ex. 103: 2 Jur. (N.S.) 403; 4 W. R. 302.

A motion made by a defendant in an action pending in the Queen's Bench in Ireland to set aside proceedings was dismissed with costs to the plaintiff:—Held, that no action would lie for those costs in this country, and that the order awarding them could only be enforced by attachment in Ireland. *Sheehy* v. *Professional Life Assurance Co.*, 2 C. B. (N.S.) 211; 26 L. J., C. P. 301; 3 Jur. (N.S.) 748.

An action will lie on an order of the House of Lords directing an unsuccessful appellant to pay the respondent's costs. *Marbella Iron Ore Co.* v. *Allen*, 47 L. J., C. P. 601; 38 L. T. 815.

An order of the President of the Probate Division that defendant pay plaintiff a named sum, being the amount of plaintiff's taxed costs of a discontinued probate action which defendant had been ordered to pay, may be enforced by an action in the Queen's Bench Division. *Norton* v. *Gregory*, 14 R. 735; 73 L. T. 10—C. A.

An action lies to recover the costs on an indictment for libel given by 6 & 7 Vict. c. 96, s. 8. *Richardson* v. *Willis*, 42 L. J., Ex. 68; L. R. 8 Ex. 69; 28 L. T. 71; 12 Cox C. C. 351.

Costs payable under a judge's order can be recovered by action or counterclaim. *Philpott* v. *Lehain*, 35 L. T. 855.

An order made by the court, upon an application to strike a solicitor off the rolls for misconduct, that the solicitor shall pay the costs of the proceedings may, by virtue of Ord. XLII. r. 24, be enforced by an action upon the order. *Godfrey* v. *George*, 65 L. J., Q. B. 249; [1896] 1 Q. B. 48; 73 L. T. 599; 44 W. R. 245—C. A.

An unsuccessful application by the person to whom the costs are ordered to be paid to attach the solicitor for disobedience to the order is no bar to a subsequent action upon the order. *Ib.*

Agreement Binding on Parties.]—The quarter sessions, on appeal, quashed an order made against the defendant by the petty sessions, subject to a case for the consideration of the Queen's

Bench Division, and further ordered that the costs of the appeal then before it should abide the event of the decision of that court. The case, which was stated and signed by the chairman of the quarter sessions, after stating the question submitted to the Queen's Bench Division, contained (inter alia) the following clause:—"The court are . . . in all respects to exercise the power of the sessions to confirm, amend, alter, vary, modify, or reverse their decision in such manner and to such extent as to such court shall seem expedient and proper; costs to follow the event." At the hearing of the case, the Queen's Bench Division quashed the order of the quarter sessions, but the judgment was silent as to costs. In an action brought to recover the costs incurred in the argument of the case, and also the costs of certain applications made to the quarter sessions from time to time until the judgment of the Queen's Bench Division in the plaintiff's favour was obtained:—Held, that the words "costs to follow the event" referred, and were intended to refer, to costs such as were claimed by the plaintiff in the action. *Lear* v. *Botting*, 44 L. T. 58; 45 J. P. 240.

Held, also, that these words, although contained in a case stated and signed only by the chairman of the quarter sessions, amounted to an agreement which was binding on the parties to the case, and that the defendant was therefore liable to pay the costs so incurred. *Ib.*

Taxation not a Condition Precedent.]—An award for costs generally, without ascertaining the amount, is good under 11 & 12 Vict. c. 63, s. 127, and the party to receive, after delivering his bill for the amount, may maintain an action to recover them. The party to pay may have the costs taxed, but the taxation is not a condition precedent to the other party's right to bring an action to recover them. *Holdsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289; 10 Jur. (N.S.) 171; 8 L. T. 434: 11 W. R. 733—Ex. Ch.

The right to costs is entirely independent of the taxation of them, and an action can be maintained for costs though the amount of them has not been previously settled or ascertained by taxation. *Metropolitan District Ry.* v. *Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425; 43 L. T. 130; 29 W. R. 617; 44 J. P. 716—H. L. (E.)

Taxation of the costs is not a condition precedent to the plaintiff's right to bring an action to recover them. *Lear* v. *Botting*, 44 L. T. 58; 45 J. P. 240.

3. By Attachment or Charging Order on Shares.

Attachment of Debts.]—The order for costs on dismissing an action for want of prosecution is not enforceable by attachment of debts under Ord. XLV. r. 2. *Cremetti* v. *Crom*, 18 L. J., Q. B. 337; 4 Q. B. D. 225; 27 W. R. 411.

Under sub-s. 8 of s. 25 of the Judicature Act, 1873, the Divorce Court has power to attach a debt due to a respondent in order to compel obedience to an order of that court for payment of costs. *Whittaker* v. *Whittaker*, 51 L. J., P. 80; 7 P. D. 15; 47 L. T. 131; 30 W. R. 431. *But see preceding case.*

Attachment of Persons for Non-Payment of.]—Upon a motion for attachment, no order was made, except that the respondent pay the costs of the motion. Upon default in payment:—Held, that the court had no jurisdiction to commit to prison for the default. *Micklethwaite* v. *Fletcher*, 27 W. R. 793.

Where costs are directed to be paid to A. or his solicitor, a personal demand by A. alone is sufficient ground for an order of committal against the party for non-payment of such costs. *Diack, Ex parte*, 3 Deac. 53.

See also Debtors Act.

Charging Property with.]—A plaintiff's bill having been dismissed with costs, an order nisi charging railway shares belonging to the plaintiff with the amount of the defendant's costs when taxed was made before taxation. *Burns* v. *Irving*, 46 L. J., Ch. 423; 3 Ch. D. 291; 34 L. T. 752; 25 W. R. 66. *See further* Execution.

Where a motion was dismissed with costs, and every endeavour made to serve the party with a subpœna for them had failed, the court enforced the order by charging government stock of the party, under 1 & 2 Vict. c. 110. *Blake* v. *White*, 3 Y. & Coll. 434; 3 Jur. 749.

A decree declaring a plaintiff entitled to one-fifth of the proceeds of sale of chattels, and directing an account to be taken of what was due, and payment of such amount together with the costs of the action to him, does not entitle him to a charging order under 1 & 2 Vict. c. 110, s. 18, or to a stop order against funds in court in another suit belonging to the same defendant. *Widgery* v. *Tepper*, 6 Ch. D. 364; 37 L. T. 297; 25 W. R. 872.

Parties interested in a fund standing in the name of the accountant-general in one suit were ordered to pay the defendants in another suit their costs. These being taxed, and a minute having been left with the senior master of the Common Pleas, the court on petition made a charging order on the fund for such costs, and granted an interim stop order. *Wells* v. *Gibbs*, 22 Beav. 204.

A master's allocatur, and a fortiori, a mere rule for taxation of costs, is not an order whereby money is payable, so as to operate as a judgment within 1 & 2 Vict. c. 113, s. 18. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635.

A plaintiff who had obtained an order for payment of costs was held entitled under 1 & 2 Vict. c. 110, to rank as an incumbrancer upon the defendant's estate from the date of the first resignation of the certificates of taxation only. *Hargrave* v. *Hargrave*, 25 Beav. 484.

4. By Execution.

A rule for taxation of costs, and the allocatur, do not amount to a rule or an order whereby money is payable within 1 & 2 Vict. c. 110, s. 18, so as to operate as a judgment. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635.

When a rule of court for the payment of money has the effect of a judgment, under the above section, a rule nisi calling upon the parties to shew cause why the amount should not be paid is unnecessary. *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 745.

Where a defendant is entitled to costs against an infant who sues by his prochein amy, the court will not grant a rule calling on the prochein amy to pay those costs, unless it is made to appear that

he has been served with the allocatur in the same manner as is required in order to ground an attachment. *Abrahams* v. *Taunton*, 1 D. & L. 319: 12 L. J., Ex. 417; 7 Jur. 678.

The trial of a cause at the assizes was postponed by order of nisi prius on payment by the defendant of the costs of the day, to be taxed. The defendant died before any verdict in the cause, and before the order of nisi prius was made a rule of court. The suit having abated (17 Car. 2, c. 8, s. 1), the court discharged a rule calling on the executrix of the defendant to shew cause why the costs should not be taxed, the remedy for recovering the cost under the above section not being clear as against an executrix. *Hill* v. *Brown*, 16 M. & W. 796: 11 Jur. 290.

In ejectment there was a verdict for the defendant, and an allocatur given for the costs under the consent rule, which ordered, that, if a verdict should be given for the defendant, the lessors of the plaintiff should pay to the defendant costs to be adjudged. A fi. fa., issued pursuant to 1 & 2 Vict. c. 110, s. 18, was regular. *Doe* d. *Pennington* v. *Barrell*, 16 L. J., Q. B. 296.

5. By Mandamus.

A plaintiff who had recovered a judgment for debt and costs in a county court, and had received the debt out of court, was entitled to have a writ of execution issued for the costs, and the Queen's Bench would grant a mandamus to the clerk of the county court, commanding him to issue such writ. *Reg.* v. *Fletcher*, 2 El. & Bl. 279; 21 L. J., Q. B. 310; 7 Jur. 179.

6. By Sequestration.

It is not necessary that the applicant for a writ of sequestration should be able to point to some particular property which may be made available for the payment of the costs due to him. When the court or the judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior court, unless it is shown that the tribunal below has acted upon an erroneous principle, or has improperly exercised its discretion, or that there has been some miscarriage of justice. *Hulbert* v. *Cuthcart*, 65 L. J., Q. B. 644; [1896] A. C. 470; 75 L. T. 302—H. L. (E.)

When a deposit on an appeal had been ordered to be returned to the appellant, and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the appellant. *Conn* v. *Garland*, L. R. 9 Ch. 101; 22 W. R. 175.

Costs of a sequestration as between solicitor and client will not be taxed. *Shapland, In re, Hunt, Ex parte*, 23 W. R. 40.

In a proceeding in which a married woman and her husband are co-plaintiffs or co-petitioners, a sequestration cannot issue for costs against her separate estate; semble, it is otherwise if she sues by her next friend. *Keogh* v. *Cuthcart*, 12 Ir. Eq. R. 215.

On a motion the court gave leave in its discretion, under the Rules of Court of April, 1880, to issue a sequestration for the payment of costs. *Snow* v. *Bolton*, 50 L. J., Ch. 743; 17 Ch. D. 433; 44 L. T. 571; 29 W. R. 538.

Where such application is made in an action which is transferred, for hearing only, to a judge who does not sit in chambers, it is properly made to such judge in court; otherwise in chambers. *Ib.*

L. INTEREST ON COSTS.

Mortgage.]—The court will not allow interest on the costs of a judgment for foreclosure to be charged against the mortgaged estate. *Eardley* v. *Knight*, 58 L. J., Ch. 622; 41 Ch. D. 537; 60 L. T. 780; 37 W. R. 704.

Where a mortgagee has been empowered to add his taxed costs of appeal to his security, interest is chargeable on the costs of the appeal, not from the date of the judgment, but only from the date of the taxing-master's certificate. *Ib.*

A deed after reciting that A. had agreed to charge certain property with all sums which B. should pay as surety for a third party, together with interest on all such payments, and all such costs, &c., as he might sustain, &c., proceeded to charge the property with the payment of all such sums, costs, &c., with interest as aforesaid: —Held, that interest was not payable on the costs, &c. *Hodgson* v. *Hodgson*, 2 Keen, 704; 7 L. J., Ch. 5.

Costs out of Estate.]—Under 1 & 2 Vict. c. 110, ss. 17, 18, interest is recoverable on costs which one party is ordered to pay another, but not on costs directed to be raised out of an estate. *Att.-Gen.* v. *Nethercote*, 11 Sim. 529; 10 L. J., Ch. 162.

Administration Action.]—The rule that interest on costs in an administration action ordered to be raised out of a fund is not recoverable except by express provision to that effect contained in the order is not affected by the Solicitors' Remuneration Act, 1881, General Order VII., nor by the rules of Supreme Court, 1883, Ord. XLI. r. 3, and XLII. r. 16. *Marsden's Estate, In re, Withington* v. *Neumann*, 58 L. J., Ch. 260; 40 Ch. D. 475; 60 L. T. 696; 37 W. R. 525.

Where Appeal Heard.]—In a suit by the purchasers of certain mines to set aside a sale, a decree with costs was made in favour of the plaintiffs. The House of Lords reversed the decree, and remitted the cause to the court below. That court directed the costs to be repaid to the defendants, but without interest. Where money is paid out of court through the erroneous order of the court, the party who receives it, and is called upon to refund, is not liable to pay interest upon it. *Small* v. *Attwood*, 3 Y. & Coll. 105.

The superior courts have no power to give interest on costs incurred on appeal from the Exchequer Chamber for such time as may elapse between the judgment of that court and its affirmance by the House of Lords. *Lancashire and Yorkshire Ry.* v. *Gidlow*, 43 L. J., Ex. 1; L. R. 9 Ex. 35; 29 L. T. 399; 22 W. R. 17.

Disbursements.]—The 33 & 34 Vict. c. 28, s. 17, which enables the master upon a taxation of costs to allow interest on moneys disbursed by a solicitor for his client, is intended to apply only as between a solicitor and his own client, and does not apply to a taxation of costs to be paid as between solicitor and client out of a fund in

court belonging wholly or partly to other persons than the client. *Hartland* v. *Murrell*, 43 L J. Ch. 94; L. R. 16 Eq. 285; 28 L. T. 725; 21 W. R. 781.

From what Time Running—Judgment.]—By a judgment delivered before the Rules of the Supreme Court, 1883, came into operation, an action was dismissed and the plaintiff was ordered to pay the costs, but the judgment contained no direction as to the date from which interest on the costs was to run. Taxation took place, and the taxing-master's certificate was made after the rules of 1883 had come into operation:—Held, that the rules of 1883 applied to the taxation proceedings and therefore that interest on the costs ran, not from the date of the taxing-master's certificate as the rules of 1875 provided, but from the date of the judgment as the form No. 1, Appendix H. to the Rules of the Supreme Court, 1883, directs. *Boswell* v. *Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

Where costs are given by a judgment and taxed, interest on such costs is payable, not from the date of the taxing-master's certificate but from the date of the judgment. *London Wharfing Co., In re*, 54 L. J., Ch. 1137; 53 L. T. 112; 33 W. R. 836.

Where a decree was pronounced for the payment to the plaintiffs of a sum of money and costs, the costs do not bear interest (under s. 27 of 3 & 4 Vict. c. 105) from the date of the decree, but from the date of the certificate of taxation of the costs. *Lidwell* v. *Lidwell*, 7 Ir. Eq. R. 91.

Interest on a judgment for costs runs from the date of the master's certificate of taxation, and not from the time of entering up the judgment. *Schröder* v. *Cleugh*, 46 L. J., C. P. 365; 35 L. T. 850.

—— **Interlocutory Order.**]—An interlocutory order in an action for the payment of taxed costs falls within s. 18 of 1 & 2 Vict. c. 110, and consequently such costs carry interest from the date of the order. *Taylor* v. *Roe*, 63 L. J., Ch. 282; [1894] 1 Ch. 413; 8 R. 295; 70 L. T. 232; 42 W. R. 426.

Rate.]—As a general rule, in the absence of any special order, interest at the rate of 4*l.* per cent. per annum is payable on the costs of an action from the date of the judgment. *Landowners' West of England Drainage Co.* v. *Ashford*, 33 W. R. 41.

A party was directed to pay certain costs and make other payments, but was declared to be entitled to be indemnified out of the funds in court:—Held, that he was entitled to interest at 4*l.* per cent. on all sums paid for costs or otherwise. *Wainman* v. *Bowker*, 8 Beav. 363.

M. REVIVOR FOR COSTS.

See PRACTICE (Parties).

N. APPEAL FOR COSTS.

1. GENERALLY.

Under former Practice.]—There shall not be an appeal for costs only. *Newton* v. *Bennet*, 1 Bro. C. C. 140; Dick. 594.

Where a question arises as to an interest in a trust fund, separated from general residue, the costs must come out of the particular fund, and having been given by decree as specifically prayed by the bill out of the general personal estate, the decree, although affirmed in other respects, was corrected in that particular, being considered as relief prayed, and therefore not within the rule against appeal for costs only. *Jenner* v. *Jenour*, 10 Ves. 562.

A court of appeal will not entertain an appeal for costs alone. *Home* v. *Pringle*, 8 Cl. & F. 264.

On Question of Principle.]—A question of the principle on which costs are awarded is subject to appeal, notwithstanding s. 49 of the Judicature Act, 1873. *The City of Manchester*, 49 L. J., P. 81; 5 P. D. 221; 42 L. T. 52—C. A.

Although an appeal will not be allowed in respect of costs only, yet where there has been a mistake upon a matter of law which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Yeo* v. *Tatem*, *The Orient*, 40 L. J., P. 29; L. R. 3 P. C. 696; 24 L. T. 918; 20 W. R. 6; 8 Moore, P. C. (N.S.) 74. S. P., *Perks* v. *Starkert*, 3 N R. 545; 8 L. T. 858; 11 W. R. 1016.

An appeal will not lie for costs only, where costs are in the discretion of the court; but where the court is directed by an act of parliament to give costs, it is a proper subject of appeal, if they are not given according to the requisitions of the act. *Tod* v. *Tod*, 1 Bligh, (N.S.) 639.

An appeal lies from an order refusing a party his costs, where the costs have been withheld, not on the ground of the conduct of the party, but by reason of the application of a supposed rule of law. *Cockle* v. *Treacy*, [1896] 2 Ir. R. 267—C. A.

As a general rule, where a plaintiff's title to equitable relief depends on a legal right, on the establishment of such right, either by an action or an issue, he will be entitled to the costs both at law and in equity. After an issue had been directed and found in favour of the defendant, the plaintiff applied for a new trial which was refused; the cause was then brought to a hearing, when the bill was dismissed with costs. The plaintiff then appealed from the decree, as well as the order refusing the new trial. On that appeal the bill was retained for a year, with liberty for the plaintiff to bring an action. An action was accordingly brought, and a verdict was found in the plaintiff's favour; but a new trial of the action was subsequently granted, on the ground of misdirection of the judge. The plaintiff having been successful in the second action, the cause was brought before the Vice-Chancellor Knight-Bruce, on the equity reserved, when he made a decree in conformity with the result of the trial at law, but did not think fit to make any order as to costs:—Held, on an appeal from that decree, that the appeal involved so much of principle as to render it an exception to the ordinary rule, which prohibits an appeal for costs alone. *Rochester Corporation* v. *Lee*, 2 De G. M. & G. 427.

A decree which involves much principle as to payment of the costs, may be appealed from, as to the question of costs only. *Taylor* v. *Southgate*, 4 Myl. & C. 203; 8 L. J., Ch. 137; 3 Jur. 214.

The general rule of the court is, that there cannot be a re-hearing for costs alone, unless

some principle is involved in the mode of dealing with them, and it is only in extreme cases that the court will re-hear the merits on the question of costs. *Chappell* v. *Gregory*, 2 De G. J. & S. 111.

Error apparent on Order.]—The rule which prohibits an appeal for costs alone, is confined to those cases in which the correctness of the decision as to costs cannot be judged of without re-hearing the cause upon the merits, and therefore does not apply to a cause in which the error of such decision is apparent on the face of the decree or order appealed from. Where a bill to restrain an alleged infringement of a copyright is retained, at the hearing, with liberty to the plaintiff to bring an action, and the action is accordingly brought and fails, it is of course that the bill should be dismissed with costs: and therefore, if dismissed without costs, it is error on the face of the decree. *Chappell* v. *Purday*, 2 Ph. 227; 16 L. J., Ch. 261: 11 Jur. 256.

The Court of Appeal refuses to inquire into the various causes which may have influenced the decision of the court below in awarding costs, and therefore an appeal for costs will not generally be entertained; but where the judge of the court below placed on record on the face of the decree the reason why he ordered the party to pay the costs, and such reason was founded on the determination of a question of law, the Court of Appeal allowed the question of law to be argued on the appeal, that it might determine whether the reason embodied in the decree by the judge below was well founded. *Walker* v. *French*, 21 W. R. 493.

Application to Commit for Contempt of Court.]—The power of a judge to order payment of costs in cases where an application is made to commit a person for contempt of court depends on the question whether or not the contempt has been committed, and therefore where on such an application an order has been made that the person shall pay costs of the application, an appeal from such an order is not an appeal for costs only. *Emmerson, In re, Rawlings* v. *Emmerson*, 57 L. J., P. 1—C. A.

A motion to commit a defendant for breach of an injunction having been refused without costs, the defendant appealed:—Held, that there is no rule that a motion to commit, if refused, must be refused with costs, and that an appeal as to costs in such a case will not be entertained. *Hope* v. *Carnegie*, L. R. 4 Ch. 264; 20 L. T. 5; 17 W. R. 363.

An order declaring that the defendant had committed a breach of an injunction, but giving no directions, except that he should pay the costs of the application to commit, may be appealed from, and is not within the rule against appeals for costs. *Witt* v. *Corcoran*, 45 L. J., Ch. 603; 2 Ch. D. 69; 34 L. T. 550; 24 W. R. 501—C. A.

A plaintiff moved to commit the defendant for contempt in having sold property of the intestate in the cause in disobedience to an order that she should deliver up to the receiver all property of the intestate in her hands, but the notice did not ask for restitution of the property. The vice-chancellor refused to commit, and made the costs of the application costs in the action:—Held, that an appeal would not lie from this order. *Ashworth* v. *Outram*, 5 Ch. D. 943—C. A.

Costs directed to be Paid out of Fund.]—The respective rights of incumbrancers on a fund having been determined in an action brought by one of them, the court below directed that the costs of all parties should be paid first out of the fund, and that the residue should go to the incumbrancers in order of their priorities. It was found that the fund would be insufficient, after payment of such costs, to satisfy in full K., the incumbrancer, who had been declared entitled to priority:—Held, that an appeal by him was not an appeal as to costs only, and might be brought without special leave. *Johnstone* v. *Cox*, 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114—C. A.

The costs of the suit, which the order of the court below had thrown exclusively on the excess of accumulations arising from the annual produce of the trust estate, after the period allowed by the Thellusson Act, were, upon appeal, directed to be paid out of the general estate of the testator, including the fund accumulated within the permitted period, except the costs incurred in the separation of the excessive accumulation, which costs were directed to be paid out of such excessive accumulations. An appeal against such an order is an exception to the ordinary rule prohibiting appeals merely upon costs. *Eyre* v. *Marsden*, 4 Myl. & C. 231; 3 Jur. 450.

Appeal for costs where the question is which of two funds shall bear the costs, where the costs are the whole question, and the object of the motion is to ascertain by whom they are to be paid. *Malone* v. *Clarke*, 1 Moll. 15.

Semble, that the fact that costs have been ordered to be paid to a trustee out of a particular fund or by a particular person will not render an appeal from the order the less an appeal for costs, such a direction being a mere incident of the order as to the mode of payment. *Chennell, In re, Jones* v. *Chennell*, 47 L. J., Ch. 80; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595.

Interpleader Issue.]—No appeal lies from a judge's order dealing with the costs of an interpleader issue made as between the parties. *Hartmont* v. *Foster*, 51 L. J., Q. B. 12; 8 Q. B. D. 82; 45 L. T. 429; 30 W. R. 129—C. A.

Action for Receiver.]—A suit was instituted for the appointment of a receiver pending proceedings in the Probate Court to impeach a will which had been already proved. A motion for a receiver was refused. The will was afterwards declared void, and the plaintiff then moved that the executors might pay the costs of the suit for a receiver. Malins, V.-C., made an order staying all proceedings in the suit without costs, except as to some infant defendants, whose costs the plaintiff was ordered to pay. On appeal:—Held that the appeal was one for costs only, and that therefore it could not be entertained. *Grimston* v. *Timms*, 18 W. R. 781.

Payment of Costs—Condition Precedent to Appeal.]—An appeal must not be brought for costs, or in relation to costs. But an appeal against an order which imposes, as a condition to having a new trial, the payment within a certain time, of the costs of the first trial, does not fall within that principle. The competency of the appeal being established, the costs of the cause were reserved till the hearing of the case itself. *Metropolitan Asylum District Managers* v. *Hill*,

49 L. J., Q. B. 745; 5 App. Cas. 582; 43 L. T. 225; 28 W. R. 663—H. L. (E.)

Change of Position before Appeal.]—On appeal from an order of the county court registrar dismissing a bankruptcy petition presented by the appellant against the debtor, the objection was taken that as the petitioning creditor's debt had been paid since the order appealed from was made, the appeal was as to costs only:—Held, that the ground of the appeal was not as to costs only, but that the order dismissing the petition was wrong. *Ross, Ex parte, Sartoris, In re*, 8 Morrell, 25.

Where a second suit for administration of a deceased person's estate was instituted after decree in a previous suit, for objects which could have been well attained in the first suit, and a decree had been pronounced dealing with the costs of the second suit on a different principle, an appeal for costs only was held not within the rule which prohibits such appeals. *Menzies* v. *Connor*, 3 Macn. & G. 648.

Where the parties to a suit have by their conduct, after decree, reduced the question between them to one of costs only, the court will not entertain a petition of re-hearing. *Perks* v. *Wycombe Ry.*, 1 N. R. 1.

Lunacy Inquiry.]—An appeal lies to the Court of Appeal from the Lords Justices sitting in Lunacy, where the latter have made an order under s. 109 of the Lunacy Act, 1890, dealing with the costs of a lunacy inquiry. *Cathcart, In re*, 62 L. J., Ch. 320; [1893] 1 Ch. 166; 2 R. 268; 68 L. T. 358; 41 W. R. 277—C. A.

Order on Solicitor personally to Pay Costs.]—An order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally is not within the Judicature Act, 1873, s. 49, and therefore is subject to appeal without leave. *Bradford, In re*, 53 L. J., Q. B. 65; 15 Q. B. D. 635; 50 L. T. 170; 32 W. R. 238—C. A.

Referee's Report.]—The court in adopting a referee's report left the costs of the reference to be dealt with by the taxing-master, an appeal from such an order is for costs only. *Leigh, In re, Rowcliffe* v. *Leigh*, 26 W. R. 729.

2. Varying Orders of Court below as to Costs.

Where Appeal on Merits fails.]—If we were to vary the order of the court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs—Per Jessel, M.R. *Harpham* v. *Shacklock*, 19 Ch. D. 215; 15 L. T. 572; 30 W. R. 50—C. A. S. P., *Llanover* v. *Homfray*, 19 Ch. D. 232—C. A.

Under the new practice and notwithstanding Ord. LVIII. r. 5, the Court of Appeal will not open a decision, which it otherwise affirms, for the mere purpose of making a different order as to costs. *New Gas Co., In re*, 5 Ch. D. 703; 37 L. T. 111; 25 W. R. 643—C. A.

A bill was dismissed by a vice-chancellor without costs. The plaintiff appealed against the whole decree, and his appeal was dismissed:—Held, that the court had no power to vary the order of the vice-chancellor by directing that the bill should be dismissed with costs. *Harris* v. *Aaron*, 46 L. J., Ch. 488; 4 Ch. D. 719; 36 L. T. 43; 25 W. R. 353—C. A.

Unless the appellant can succeed on the questions of substance he cannot ask the Court of Appeal to review the question of costs. There is no fixed rule of law on this point. The rule is that inasmuch as costs are not the subject of appeal, unless a substantial variation is made in the order appealed from, the fact that a substantial question has been raised will not of itself be enough to allow the question of costs to be gone into on the appeal. *Games* v. *Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—Per L. C.

Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point which is presented as the ground of appeal has no substance. *Att.-Gen.* v. *Butcher*, 4 Russ. 180.

In an action for specific performance of an alleged contract for sale the plaintiff obtained an ex parte injunction to restrain the defendant from parting with the subject-matter of the contract. A motion to extend the injunction not coming on for hearing through pressure of business in the court, the plaintiff obtained a further ex parte injunction on the usual undertaking as to damages. At the hearing Malins, V.-C., dismissed the action without costs, but refused the defendant an inquiry as to damages: The defendant appealed on the ground that there ought to have been an inquiry as to damages, and that he ought to have had his costs, and there was a cross-appeal by the plaintiff:—Held, that the Court of Appeal was precluded by the provisions of the Judicature Act from varying the decree as to costs, though it had been necessary to hear the whole case by reason of the cross-appeal, as the defendant's appeal was merely one for costs, the inquiry as to damages being a wholly collateral matter. *Graham* v. *Campbell*, 47 L. J., Ch. 593; 7 Ch. D. 490; 38 L. T. 195; 26 W. R. 336—C. A.

A defendant having during a suit offered to pay all that was ultimately found due from him, the plaintiff was ordered to pay all the subsequent costs of the suit. On appeal, it was decided that costs being in the discretion of the judge, the Court of Appeal would not vary the order of the Master of the Rolls as to them on the mere ground that if the case had originally been before the Court of Appeal, it might have arrived at a different result as to the costs. *Remnant* v. *Hood*, 30 L. J., Ch. 71; 6 Jur. (N.S.) 1173; 3 L. T. 485—L.JJ.

A vice-chancellor ordered the costs of two inquiries, which had been prosecuted in his chambers, to be costs in the cause, although his decision as to one of the inquiries was favourable to one of the parties litigant, and his decision as to the other of the inquiries was in favour of the other party litigant. On appeal the court decided that the costs, being in respect of matters purely personal between the two litigants, should be borne personally respectively by them, and that the question of these costs was a proper subject of appeal. *Horn* v. *Coleman*, 26 L. J., Ch. 544; 5 W. R. 409.

Where the Master of the Rolls or the Vice-Chancellor has given substantial relief against a defendant, with costs against him personally, it is competent to the court, upon a re-hearing

by way of appeal, affirming the decree as to the relief, to vary it as to the costs; but such a variation should only be made where the appeal court, clearly and without doubt, dissent from the decision of the court below as to the costs. *Reynell* v. *Sprye*, 8 Hare, 277, n. Affirmed 1 De G. M. & G. 600; 21 L. J., Ch. 664.

Where a court of appeal agrees with the main relief given in the court below, it requires a very strong and clear case at the hearing of the cause to depart from the adjudication of the former court as to costs. *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 495; 21 L. J., Ch. 401; 16 Jur. 787.

Parties cannot appeal for costs, and it is indispensably necessary to maintain the rule that parties appealing should not be permitted to mix up their appeal with matter of merits, in order to cover an appeal for costs. *Clyne's Trustees* v. *Dunnett*, Macl. & R. 28.

The rule with respect to costs in the House of Lords, as in the privy council and in chancery, is, that one cannot appeal for costs alone; but if an appeal be brought on the merits, not on colourable grounds of appeal, for the purpose of raising the question of costs, the house will not treat that as an appeal for costs, but will, even in affirming the judgment of the court below, consider the question of costs as fairly raised; and where there is hardship on the appellant, will reverse so much of the judgment of the court below as gave costs against him. *Inglis* v. *Mansfield*, 3 Cl. & F. 362.

An appeal for costs does not lie, yet if an appeal be brought on a substantial question not colourable, the court of appeal may deal with the costs awarded by the court below. *Macaulay* v. *Adam*, 3 Cl. & F. 385.

The rule which forbids an appeal on the question of costs alone, does not preclude the court, where the appeal embraces other matters also, from varying the decree as to costs, though it affirm it as to such other matters. *Lewes* v. *Smith*, 1 Macn. & G. 417.

Order varied, on appeal, as to costs, in a case in which they formed the sole subject matter of the appeal. *Angell* v. *Davis*, 4 Myl. & C. 360; 9 L. J., Ch. 3; 3 Jur. 838.

Decree varied on appeal in respect of costs only. *Burkett* v. *Spray*, 1 Russ. & M. 113.

Though no appeal is allowed in matters of costs only, they may be considered in an appeal on other grounds. *Fitzgibbon* v. *Scanlan*, 1 Dow, 270; 14 R. R. 62.

Interlocutory Proceedings Inconsistent with Final Judgment.]—The court has no power to annul a direction in a judgment previously delivered, that a third party shall pay the costs of the interlocutory proceedings taken to bring him before the court, although by the judgment in the action it is ordered that he be dismissed from the action with costs to be paid by the defendants. *Beynon* v. *Godden*, 48 L. J., Ex. 80; 4 Ex. D. 246—C. A.

Of Master or District Registrar.]—The enactment in s. 49 of the Judicature Act, 1873, that no order by the high court, or any judge thereof, as to costs only which by law are left to the discretion of the court shall be subject to any appeal, does not apply to the order of a master or district registrar, and therefore a judge of such court has power to vary as to costs an order of a district registrar dismissing the action without costs. *Foster* v. *Edwards*, 48 L. J., Q. B. 767. Sed quære.

3. Jurisdiction and Discretion of Court Below.

Trial by Jury—"Good Cause" not shown.]—In an action for the recovery of several closes of land the jury gave a verdict for the plaintiff for about half the land claimed, and for the defendant for the remainder. The judge before whom the action was tried ordered that the costs of both parties should be added together, divided equally, and that each party should pay half the total thus arrived at:—Held, that an appeal could be brought from this order, for that good cause must exist before the jurisdiction to make the order could arise, and that whether facts did or did not exist which would constitute good cause could be the subject of an appeal. *Jones* v. *Curling*, 53 L. J., Q. B. 373; 13 Q. B. D. 262; 50 L. T. 349; 32 W. R. 651—C. A.

And see ante, col. 694.

Interpleader Summons—Costs of Action.]—Where a master has exceeded his jurisdiction by ordering one party to pay the costs of the action on an interpleader summons, an appeal will lie. *Hanson* v. *Maddox*, 53 L. J., Q. B. 67; 12 Q. B. D. 100; 50 L. T. 123; 32 W. R. 183.

Payment of Costs ordered by way of Penalty.]—Where the court ordered that the action be dismissed without costs; that the costs of the plaintiffs of this action and counter-claim be taxed, and that the counter-claim be dismissed with costs, and in case such last-mentioned costs shall not amount to one-half of the plaintiff's costs of the action and counter-claim, then it was ordered that the defendant pay to the plaintiffs such a sum as will with such costs amount to such one-half of the entire costs of the action and counter-claim:—Held, that the court had no power to order any party to pay a sum by way of penalty, and that an appeal would lie though in substance it was only an appeal for costs. *Willmott* v. *Barber*, 17 Ch. D. 772; 45 L. T. 229—C. A.

Order on Persons not Liable.]—An officer of the crown, suing on behalf of the crown, or in matters in which the crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted. Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs. *Lord Advocate* v. *Douglas* (*Lord*), 9 Cl. & F. 173.

Where tenant by elegit has received rents and profits beyond the debt, though he shall account to the debtor, yet he shall not pay costs. In such case appeal may be for the costs only, where defendant decreed to pay them. *Owen* v. *Griffith*, Ambl. 520; 1 Ves. sen. 249.

—— **Defendant ordered to pay Costs when Plaintiff unsuccessful.**]—In an action for infringement of alleged copyright in the title of a novel, the defendant, before trial, discontinued the use of the title. At the trial the judge held that the plaintiff had established his claim to copyright, and that the defendant had invaded it, but he made no order except that the defen-

dant should pay the costs of the action. The defendant appealed, contending that the plaintiff had no title, and that the action ought to have been dismissed:—Held, that it is not within the discretion of the court to make a defendant pay the whole costs of an action if the plaintiff had no right to sue, that there was therefore implied in the order a declaration that the plaintiff had a good cause of action, that this was not an "order as to costs only" under s. 49 of the Judicature Act, 1873, and that the defendant could appeal against the order. *Dicks* v. *Yates*. 50 L. J., Ch. 809; 18 Ch. D. 76; 44 L. T. 660—C. A.

—— **Ascertainment of Costs Payable out of Fund.**]—By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The chief clerk made his general certificate, finding (inter alia) that two specified leaseholds belonging to the partnership were of no value. The plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into court, and Bacon, V.-C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the estate. The defendants appealed:—Held, that the case did not come within the rule in *Foster* v. *G. W. Ry.* (8 Q. B. D. 25, 515), viz. that the court cannot make a successful defendant pay the costs of a plaintiff who has wholly failed; but that it was within the discretion of the court to order all costs reasonably incurred in ascertaining the sum to be paid out of the fund, and that an appeal would not lie. *Butcher* v. *Pooler*, 52 L. J., Ch. 930; 24 Ch. D. 273; 49 L. T. 573; 32 W. R. 305—C. A.

Order on Third Party to Pay Costs of Unsuccessful Defendant.]—The high court has jurisdiction to order a third party to pay to an unsuccessful defendant the costs payable by such defendant to the plaintiff. On an appeal against such an order:—Held, that these costs were within the discretion of the high court, and, therefore, the order was not appealable. *Hornby* v. *Cardwell*, 51 L. J., Q. B. 89; 8 Q. B. D. 329; 45 L. T. 781; 30 W. R. 263—C. A.

Discretion not Exercised.]—By Ord. LXV. r. 1, the costs of all proceedings are in the discretion of the court, and therefore the general rule of practice in the admiralty court as to the costs of references, viz. that when more than a fourth is struck off a claim each party pays his own costs, and when more than a third the claimant pays the other party's costs, may be appealed against and is wrong, and the court must exercise its discretion according to the circumstances of each particular case. *The Friedeberg*, 54 L. J., P. 75; 10 P. D. 112; 52 L. T. 837; 33 W. R. 687; 5 Asp. M. C. 426—C. A.

Action Dismissed for want of Prosecution.]—The statutable right of a defendant to the costs of an action in the Chancery Division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Ord. XXXIII. r. 10, of the Chancery Consolidation Orders of 1860, was preserved by s. 4 of 42 & 43 Vict. c. 59, yet Ord. LXV. r. 1, of the rules of 1883 has changed such practice, so that the costs of a defendant where such action has been dismissed for want of prosecution are now in the discretion of the judge, and therefore his order as to such costs is by s. 49 of the Judicature Act, 1873, not subject to appeal. *Snelling* v. *Pulling*, 29 Ch. D. 85; 52 L. T. 335; 33 W. R. 449—C. A.

Judgment in Default of Defence.]—When a plaintiff moves for judgment in default of a defence, under Ord. XXVII. r. 11, the judge, in deciding the issues between the parties, must look to the statement of claim, and nothing else; but he has the same discretion as to costs, under Ord. XLV. r. 1, in cases coming under Ord. XXVII. r. 11, as in all other cases; and the court of appeal will not review his discretion, even though there has been leave to appeal, unless there has been a disregard of principle or misapprehension of facts. *Young* v. *Thomas*, 61 L. J., Ch. 196; [1892] 2 Ch. 134; 66 L. T. 575; 40 W. R. 168—C. A.

Confessing Defence.]—By Ord. XX. r. 3 [Ord. XXIV. r. 3 (1883)], the plaintiff may, after delivering a confession of defence, "sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge shall, either before or after the delivery of such confession, otherwise order":—Held, that there is no appeal, without leave, to a divisional court from the refusal of a judge at chambers to deprive the plaintiff of his costs under the above rule. It is an appeal as to costs only, left to the discretion of the judge within the meaning of s. 49 of the Judicature Act, 1873. *Perkins* v. *Beresford*, 47 L. T. 515.

—— **Delegation of Discretion.**]—In an application by the plaintiff to have all proceedings stayed in the action, the defence having been admitted, the judge made an order, under Ord. XXVI. r. 1, that all proceedings should be stayed, each party to bear his own costs, except such as in the opinion of the master to whom the matter was referred for taxation were occasioned by any proceedings unnecessarily taken by the plaintiff:—Held, that the judge had jurisdiction to make such an order; and that it was no delegation of his discretion to the master to do so. *Musman* v. *Boret*, 66 L. T. 171; 40 W. R. 352. See *Leigh, In re, Rowcliffe* v. *Leigh*, 26 W. R. 729.

Inspection of Property.]—An order was made in chambers for the inspection of the defendants' property, the costs of the inspection to be paid by the plaintiff:—Held, that under Ord. LII. r. 3, the judge had a discretion to order the plaintiff to pay the costs, and the order being made in his discretion, the plaintiff had no right without leave to appeal from it. *Mitchell* v. *Darley Main Colliery Co.*, 52 L. J., Q. B. 394; 10 Q. B. D. 457; 31 W. R. 549.

Taxation.]—Two sets of defendants having put in separate answers, on the taxation of their

costs the master refused to allow more than one set :—Held. that there was no appeal. *Beattie* v. *Ebury* (*Lord*), 29 L. T. 419 ; 22 W. R. 68.

See also ante, col. 715.

County Courts Act—Action on Contract.]—A writ in an action founded on contract, was specially endorsed for a sum of 49*l.* More than 21 days after service of the writ, the plaintiff obtained judgment under Ord. XIV. for 23*l.*, leave to defend as to the remainder being given. An order was afterwards made, directing the case to be tried in the county court, but subsequently the plaintiff abandoned the remainder except 4*l.* which was by consent ordered to be paid to the plaintiff with costs to be taxed. A judge at chambers gave the plaintiff his costs on the high court scale, and the defendant appealed :—Held, that under s. 116 of the County Courts Act, 1888, the judge at chambers had a discretion to give costs on the high court scale, and that no appeal lay from the exercise of his discretion. *Bazett* v. *Morgan*, 59 L. J., Q. B. 44 ; 24 Q. B. D. 48 ; 61 L. T. 434 ; 38 W. R. 108 ; 54 J. P. 119.

Costs as between Solicitor and Client.]—The Court of Chancery formerly had, and the High Court of Justice now has in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. Whether the high court has the same power in matters of common law jurisdiction, quære. *Cockburn* v. *Edwards* (18 Ch. D. 449) questioned. *Mordue* v. *Palmer* (L. R. 6 Ch. 22) approved. *Andrews* v. *Barnes*, 57 L. J., Ch. 691 ; 39 Ch. D. 133 ; 58 L. T. 748 ; 36 W. R. 705 ; 53 J. P. 4—C. A.

An action was brought by the vicar and churchwardens of a parish to recover from the defendants a fund of small amount which had been handed over to them upon trust for a charitable purpose connected with the parish, but, as the plaintiffs alleged, upon a condition which had become incapable of fulfilment. The plaintiffs failed to make out their case. The court, in dismissing the action, being of opinion that it had been brought wholly without justification, ordered the plaintiffs to pay the costs of the defendants as between solicitor and client ; and the Court of Appeal refused to interfere with the judgment. *Ib.*

Payment into Court.]—In an action for libel the defendant tendered an apology and paid money into court in satisfaction of the claim. After certain further proceedings the plaintiff accepted the money paid into court in full satisfaction, and the judge at chambers allowed him all costs before and after payment into court :—Held, that there is no provision whereby "good cause" in such a case can be shown to deprive the plaintiff of his costs, that the costs were in the discretion of the judge, and that no appeal would lie. *Marriage* v. *Wilson*, 53 J. P. 120.

Lunacy Inquiry—Verdict of Sanity.]—Where the result of a lunacy inquiry is that the person who was alleged to be a lunatic is found to be of sound mind, the judges sitting in lunacy, in exercising their discretion over the costs of the inquiry under s. 109 of the Lunacy Act, 1890, may, if the application for the inquiry seems to them to have been prompted by a desire to protect the person and property of he alleged lunatic, and to have been made on reasonable grounds and in a reasonable manner, order the costs of the application to be paid by the person who was alleged to be a lunatic. *Cuthbert, In re*, 62 L. J., Ch. 320 ; [1893] 1 Ch. 466 ; 2 R. 268 ; 68 L. T. 358 ; 41 W. R. 277—C. A.

Injunction—Damages.]—An action was commenced against A. and B. for a mandatory injunction to compel them to pull down a wall. The defendant A. then took out a summons to stay the action by offering to pull down the wall, to consent to a perpetual injunction, to an inquiry as to damages and to pay the plaintiff's costs. This offer was refused by the plaintiff, but the defendant A. pulled down the wall and completed his building. At the trial damages were assessed at 40*s.* without costs. The plaintiff appealed and asked that the defendants should be ordered to pay the costs of the action inasmuch as damages had been assessed at 40*s.* : —Held, that these costs were in the discretion of the judge, and that there was no appeal by reason of s. 49 of the Judicature Act, 1873. *Cooper* v. *Whittingham* (15 Ch. D. 501) distinguished. *Florence* v. *Mallinson*, 65 L. T. 354—C. A.

—— **Summons.**]—A judge at chambers having refused to allow a railway company their costs of resisting an unsuccessful summons for an injunction under the Railway Traffic Act, 1854, the court refused to review his decision. *Ilfracombe Public Conveyance Co., In re*, L. R. 4 C. P. 151.

Breach of Injunction.]—When the jurisdiction of a judge to inflict costs on a party arises from his being guilty of a breach of an injunction or other misconduct, an appeal lies as to costs, although the judge makes no order except that the party shall pay costs. *Stevens* v. *Metropolitan District Ry.*, 29 Ch. D. 60 ; 52 L. T. 832—C. A.

Where the subject of Relief claimed.]—If the nature of the case be such as to render costs a matter of discretion with the court, the mere circumstance that they form part of the relief specifically prayed by the bill, does not make them a substantive matter of appeal from the decree. *Lancashire* v. *Lancashire*, 2 Ph. 657 ; 17 L. J., Ch. 270 ; 12 Jur. 363.

Distinction where costs are disposed of as a subject of relief ; an appeal not open to the objection upon an appeal for costs only. *Taylor* v. *Popham*, 15 Ves. 72.

Where question arises on interest in a trust fund, separated from general residue, the costs must come out of the particular fund ; and having been given by decree, as specifically prayed by the bill, out of the general personal estate, the decree, although affirmed in other respects, was corrected in that particular, being considered as relief prayed, and therefore not within the rule against appeal for costs only. *Jenour* v. *Jenour*, 10 Ves. 562.

Judicial Separation—Wife's Costs of Unsuccessful Suit.]—An order having been made in a wife's suit for judicial separation that the costs should be paid by her, her solicitor subsequently applied for taxation and payment of the wife's costs to the extent of a bond given to him by the husband under the usual order for security.

This application was refused on the ground that the wife had the means of paying the costs herself:—Held, that the matter was within the discretion of the judge, and that no appeal lay. *Russell* v. *Russell*, 61 L. J., P. 45; [1892] P. 152; 66 L. T. 436—C. A.

Divorce—Rescission of Decree Nisi.]—A wife petitioned for divorce, and there was a cross-petition by the husband. Under an order of the court, the husband paid a sum of money into court to provide for the wife's costs. A decree nisi was pronounced on the wife's petition, and costs were given her; but before the decree was made absolute the Queen's Proctor intervened. The husband under an order paid a further sum into court to provide for the wife's costs. Upon the trial of the issue with the Queen's Proctor, it was found that there had been collusion at the first trial, and the decree nisi was rescinded. The Court of Appeal affirmed this order. The wife then applied for payment out of the money deposited in court to meet her costs, but the application was refused on the ground that the original order as to costs was gone when the decree nisi was rescinded. The wife appealed without having obtained leave:—Held, that the wife's costs were in the discretion of the court, and there was no right of appeal either as to the sum paid in before decree nisi or upon the intervention of the Queen's Proctor. *Butler* v. *Butler*, 15 P. D. 126; 62 L. T. 477—C. A.

Mortgagee or Trustee—Granting or Refusing Costs to.]—A mortgagee will not be deprived of his costs in a redemption suit because he has overstated the amount due to him. *Cotterell* v. *Stratton*, 42 L. J., Ch. 417; L. R. 8 Ch. 295.

The disallowance of a mortgagee's costs, incurred in a suit for redemption, is not within the discretion of the judge, but is a matter for his judgment, and must be based on sufficient facts to warrant such disallowance; and therefore, where costs were disallowed to a mortgagee, though no misconduct was alleged against him either in the pleadings or evidence:—Held, that an appeal lay on the sole question of disallowance. Nothing short of misconduct can deprive a mortgagee of his costs in a redemption suit. *McDonnell* v. *McMahon*, 23 L. R. Ir. 283.

The master of a ship belonging to a company drew a bill on the company for necessaries supplied to the ship, which was accepted, but was dishonoured at maturity. He paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. The master then applied in the winding up for leave to take proceedings in the Admiralty Court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into court to a separate account to meet the claim 150*l.*, which exceeded the principal and interest, the master undertaking not to proceed in the Admiralty Court; the payment to be without prejudice to any application by him to increase the amount. The 150*l.* was paid in, and he applied to increase the amount so as to cover the costs of defending an action brought against him by the holder of the bill, and his costs of the application in the winding-up. Bacon, V.-C., ordered the principal and interest on the bill to be paid to the master out of the 150*l.*, and the residue to be paid to the liquidator:—Held, that though if there had not been mortgagees in possession of the ship the proper mode of enforcing the master's lien on the ship would have been by application in the winding-up, the order giving leave to proceed in the Admiralty Court was a proper order, the mortgagees not being parties to the winding-up; and that the master was entitled to all his costs before the Vice-Chancellor as costs properly incurred by a mortgagee in enforcing his security. *Rio Grande Do Sul Steamship Co., In re*, 46 L. J., Ch. 277; 5 Ch. D. 282; 36 L. T. 603; 25 W. R. 328.

Held, also, that the case was not within the rule that an appeal will not lie as to costs. *Ib.*

The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the judge; although he may be deprived of them for misconduct. Therefore the costs of a trustee are not within s. 49 of the Judicature Act, 1873, and an appeal may be brought from the decision in respect of them. *Cotterell* v. *Stratton* (L. R. 8 Ch. 295) and *Farrow* v. *Austin* (18 Ch. D. 58) followed. *Hoskin, In re* (6 Ch. D. 281), disapproved. *Turner* v. *Hancock*, 51 L. J., Ch. 517; 20 Ch. D. 303; 46 L. T. 750; 30 W. R. 480—C. A.

The case of a trustee ordered to pay costs personally forms in general no exception to the rule that an appeal will not be allowed for costs only. *Hoskin's Trusts, In re*, 46 L. J., Ch. 817; 6 Ch. D. 281; 25 W. R. 779—C. A. *But see* preceding case.

Although a mortgagee who has been deprived of his costs on the ground of misconduct may appeal from the order of the judge, yet if the judge, notwithstanding charges of misconduct, allows a mortgagee his costs, the mortgagor has no right of appeal; because the fact of the misconduct, if proved, would bring the costs within the discretion of the judge. *Charles* v. *Jones*, 56 L. J., Ch. 161; 33 Ch. D. 80; 55 L. T. 331; 35 W. R. 88—C. A.

A trustee may appeal from an order depriving him of costs on the ground of misconduct, notwithstanding r. 1 of Ord. LXV. *Knight's Trusts or Will, In re*, 26 Ch. D. 82; 50 L. T. 350; 32 W. R. 417—C. A.

An order giving one set of costs between two trustees who have severed in their defence to an action, and directing such costs to be certified as payable to one only of the trustees, is, as regards the other, an order depriving him of costs within the meaning of Ord. LXV. r. 1, of the Rules of the Supreme Court, 1883, and an appeal from such an order will lie. *Isaac, In re, Cronbach* v. *Isaac*, 66 L. J., Ch. 160; [1897] 1 Ch. 251; 75 L. T. 638; 45 W. R. 262—C. A.

An action was brought by a married woman and her infant children by their next friend against a trustee an executor, asking for administration of the trusts of a will and settlement, and for accounts of the principal and income of the trust property, making charges of misconduct against the defendant and seeking to charge him with the costs of the action. At the trial an order was made for administering the trusts, with special inquiries as to the alleged acts of misconduct. On taking the accounts it appeared that the defendant had before action given a correct account of the capital, but that in the accounts he had rendered of the income he had not accounted for nearly so much as he ought. The special cases of misconduct alleged against him

were not substantiated. The court ordered the plaintiffs' costs relating to the income account, and the defendant's costs of the rest of the action, to be taxed and set off against each other. The plaintiffs appealed, asking that their costs, or at all events those incurred before the Rules of 1883, except those ordered to be paid by the defendant, might be paid out of the trust property:—Held, that the order was not appealable, for that the costs of a hostile action, seeking to charge the defendants with costs on the ground of acts of misconduct, were not within the old rule of the Court of Chancery that the plaintiff in an administration action was entitled to costs out of the fund unless there were special grounds for depriving him of them, but were in the discretion of the judge. *Williams* v. *Jones*, 56 L. J., Ch. 1014; 34 Ch. D. 120; 56 L. T. 68—C. A.

The decision of a judge of the High Court of Justice, ordering a defendant executor to pay the costs of an administration action, on the ground that he has caused litigation by refusing to furnish accounts, is subject to appeal. *Pugh, In re, Lewis* v. *Prichard*, 57 L. T. 858—C. A.

Costs incurred by a trustee in actions relating to the estate are not "costs" in administration proceedings, but only "charges and expenses," and therefore an appeal lies from an order of the judge in such administration proceedings, allowing a trustee his costs of such actions out of the estate. *Charles* v. *Jones* (33 Ch. D. 80) explained; *Chennell, In re* (8 Ch. D. 492), approved. *Beddoes, In re, Downes* v. *Cottam*, 62 L. J., Ch. 233; [1893] 1 Ch. 547; 2 R. 223; 68 L. T. 595; 41 W. R. 177—C. A.

An order directing payment to a trustee of his "costs, charges, and expenses" of action, properly incurred, is not an order as to "costs only," which are "left to the discretion of the court," within the meaning of s. 49 of the Judicature Act, 1873. And, therefore, an appeal from such an order will lie without the leave of the court. *Chennell, In re, Jones* v. *Chennell*, 47 L. J., Ch. 80; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595—C. A.

Where an action against a trustee has been occasioned by the trustee's own misconduct, his costs before and subsequent to judgment are in the discretion of the court. *Hewett* v. *Foster* (7 Beav. 348) explained. *Easton* v. *Landor*, 62 L. J., Ch. 164; 2 R. 176—C. A.

Where a settlement is set aside, the trustee has no claim to his costs as a matter of right, and therefore, if costs are given against him, he has no right of appeal. *Dutton* v. *Thompson*, 52 L. J., Ch. 661; 23 Ch. D. 278; 31 W. R. 596—C. A.

A married woman who was one of the executors of a testator and also tenant for life of the residue, filed a bill for administration of the estate. Upon the accounts being taken it turned out that the residuary estate was insufficient for payment of debts and costs, and that it would be necessary to resort to specifically bequeathed property. Malins, V.-C., on further consideration, refused to give the plaintiff any costs of the suit, and ordered the next friend to pay the costs of taking an account of what, if anything, was due from another of the executors on an account current between him and the testator. The plaintiff appealed:—Held, that as a residuary legatee or executor filing a bill for administration is entitled to costs out of the estate, unless some special grounds are shown for depriving him of them, the costs in question were not costs in the discretion of the court within the meaning of the Supreme Court of Judicature Act, 1873, s. 49, and that an appeal would lie. *Farrow* v. *Austin*, 18 Ch. D. 58; 45 L. T. 227; 30 W. R. 50—C. A.

Order LXV. r. 1, of the Rules of the Supreme Court, 1883, directing that the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or a judge, applies, in the case of causes and matters pending on the 24th of October, 1883, when those rules came into operation, only to the costs of proceedings taken on and after that day; and the costs incurred in proceedings taken in such causes and matters before that day, although not adjudicated upon until afterwards, are not within that rule. In an action for administration by one of several residuary legatees, all the proceedings except those on subsequent further consideration were taken before Ord. LXV. r. 1, came into operation, though the costs were not adjudicated upon until the order on further consideration, which was made afterwards:—Held, that an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent, proceedings. *Farrow* v. *Austin* (18 Ch. D. 58) followed. *McClellan, In re, McClellan* v. *McClellan*, 54 L. J., Ch. 659; 29 Ch. D. 495; 52 L. T. 741; 33 W. R. 888—C. A.

—— **Costs of Parties where Joinder unnecessary.**]—In an action by trustees of a will against mortgagees of part of the estate, the other beneficiaries of the will were made co-defendants, and it was ordered that the mortgagees must pay the plaintiff's costs of the action, and also the costs of the co-defendants:—Held, by the Court of Appeal, that, inasmuch as, by virtue of r. 7 of Ord. XVI., trustees may sue on behalf of their cestuis que trustent, the beneficiaries ought not to have been made parties to the action. Consequently, the order that the mortgagees should pay their costs could be appealed from, and that order was discharged. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A.

Trustee in Bankruptcy.]—A trustee in bankruptcy had been ordered to personally bear his own costs:—Held, that in such a case an appeal would lie. *Wainwright, Ex parte, Wainwright, In re*, 51 L. J., Ch. 67; 19 Ch. D. 140; 45 L. T. 562; 30 W. R. 125—C. A.

Official Liquidator.]—An official liquidator is a person who, as a general rule, is entitled to his costs out of the estate, and therefore an appeal for costs will lie. *Silver Valley Mines, In re*, 21 Ch. D. 381; 31 W. R. 96—C. A.

Special Leave—Interfering with Discretion.]—Where an appeal from an order as to costs, which are left by law to the discretion of the judge, is brought by leave of the judge, under s. 49 of the Judicature Act, 1873, the Court of Appeal will still have regard to the discretion of the judge, and will not overrule his order unless there has been a disregard of principle or misapprehension of facts. *Gilbert, In re, Gilbert* v. *Huddlestone*, 54 L. J., Ch. 751; 28 Ch. D. 549; 52 L. T. 8; 33 W. R. 832—C. A. S. P., *Young* v. *Thomas*, 61 L. J., Ch. 496; [1892] 2 Ch. 134; 66 L. T. 575; 40 W. R. 468—C. A.

O. UNDERTAKING AS TO COSTS.

A man cannot be made liable for the costs of another by a parol undertaking. *Howell* v. *Edmunds*, 7 L. J. (o.s.) Ch. 147.

An undertaking to indemnify in costs, being annexed as a condition on an order, it is sufficient if a personal undertaking in court: Lord Chancellor refusing a reference on the ground that parties ought not to be put to the cost of going before the master for matters of that kind. *Caine* v. *Bloomfield*, 1 Moll. 501.

By Solicitor.]—*See* SOLICITOR—APPEAL.

J. M.

COUNSEL.

See BARRISTER.

COUNTERCLAIM.

See PRACTICE.

COUNTERFEIT COIN.

See CRIMINAL LAW.

COUNTY.

Divisions.]—7 & 8 Vict. c. 92, enables the Queen by order in council to direct that any county shall be divided into districts, to each of which a separate coroner is to be appointed; and where "any such county has been customarily divided into districts for the purpose of holding inquests during seven years before the passing of the act, and it shall seem expedient to her Majesty that the same division of the county be made under the act, each of such districts shall be assigned to the coroner usually acting in and for the same district; but if it shall appear expedient to her Majesty that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, her Majesty may direct the Lords of the Treasury to assess the amount of such compensation." The power to direct compensation to be assessed extended only to those cases where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division is ordered under the act. *Reg.* v. *Lechmere*, 16 Q. B. 284; 20 L. J., Q. B. 169; 15 Jur. 558.

—— **Isle of Ely.**]—By 6 & 7 Will. 4, c. 87, the Isle of Ely has a separate commission and clerk of the peace, a separate county rate, and a separate custos rotulorum, from the county of Cambridge. By 7 Will. 4 & 1 Vict. c. 53, s. 7, under statutes theretofore passed or thereafter to be passed respecting counties, ridings or divisions, the Isle of Ely shall be deemed and taken to be a division of a county:—Held, that the word division in this section must be understood in the large sense in which it is equivalent to riding; and that the word riding in 22 Hen. 8, c. 5, is not limited to districts called by that name, but includes any division of a county which corresponds in its definition with that of a riding. *Reg.* v. *Isle of Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223; 14 Jur. 956.

—— **Isle of Wight.**]—The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace, and the county is legally liable to repair the bridges in the island. *Reg.* v. *Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

—— **Cinque Ports.**]—Where the moiety of a penalty is given by statute to the treasurer of a county, riding, or division, the word "division" does not apply to small districts, such as the Cinque Ports of Seaford in Sussex, but must be construed with reference to county and riding, and means something analogous to them. *Evans* v. *Stevens*, 4 Term Rep. 224, 456.

—— **Berwick-on-Tweed.**] — The town and liberties of Berwick-upon-Tweed are not for any purpose within, or part of the county of Northumberland. *Berwick-upon-Tweed Corporation* v. *Shanks*, 11 Moore, 372; 3 Bing. 459; 4 L. J. (o.s.) C. P. 152.

Riding.]—The word "riding" in the Statute of Bridges (22 Hen. 8, c. 5, s. 3) is not confined to districts called by that name, but includes any division of a county which corresponds in its definition to a riding. *Reg.* v. *Isle of Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223.

T. H. W.

COUNTY COUNCIL.

See LOCAL GOVERNMENT.

COUNTY COURT.

[BY JOSEPH SMITH.]

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A. OFFICERS.

1. JUDGES.

County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 8—24.

Appointment.]—The same person may, at the discretion of the lord chancellor, be appointed to be judge of two different county courts. *Reg.* v. *Parham*, 13 Q. B. 858; 18 L. J., Q. B. 281; 13 Jur. 981.

By an order in council made in pursuance of 9 & 10 Vict. c. 95, the county court of Worcestershire was directed to be held at several towns and places specified in the order, and the county court of Herefordshire was also to be held at several places. Afterwards the lord chancellor appointed the same person to be judge of the county court of Herefordshire to be holden at A., and of the county court of Worcestershire to be holden at B., C. and D., the places specified in the order in council:—Held, that the appointment was good. *Ib.*

By the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 9, after a county has been divided into districts by order in council, for the purposes of the act, it is in the discretion of the lord chancellor either to make many judges of the same county court, and, by limiting the jurisdiction of each in his appointment to one district, to prevent them from having any joint or co-ordinate jurisdiction, or to appoint one person to be the judge of the county court, and to hold it in as many districts as, by the appointment, he is directed. *Ib.* *See* County Courts Act, 1888, s. 13.

Removal.]—Upon an application for a criminal information against a judge of a county court for misconduct in his office, it appeared that the applicant had addressed a memorial to the lord chancellor to remove the judge from his office for the same misconduct, and that the lord chancellor had declined to interfere:—Held, that the applicant was disqualified from making the application. *Reg.* v. *Marshall*, 3 C. L. R. 676; 4 El. & Bl. 475; 24 L. J., Q. B. 242; 1 Jur. (N.S.) 676; 3 W. R. 170.

Application was made for a quo warranto against a county court judge, on the relation of a person who had held the office immediately before him, and who had been removed for inability and misbehaviour by the chancellor of the duchy of Lancaster. It appeared that on a memorial addressed to the chancellor charging the relator with general misbehaviour, and particularising one instance more strongly, and praying for his dismissal, the chancellor had held an inquiry, which was attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and, within a few days of the close of the inquiry, had dismissed the relator by an instrument finding inability and misbehaviour, but not specifying any particular instance. Affidavits denying the inability and misbehaviour in the cases adduced on the inquiry, and generally, were put in. The court refused the rule, it not appearing that the relator had not been fully heard, or that the charges, if true, did not show inability, and the decision of the chancellor being therefore final. And the court held it not necessary that after the inquiry had closed, a fresh notice to the relator should have been given, to show cause against his being dismissed. *Ramshay, Ex parte*, 18 Q. B. 173; 21 L. J., Q. B. 238; 16 Jur. 684.

Pension.]—Judgment having been obtained against a county court judge for a large sum, a judge's order, under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, was made for payment of the judgment debt by quarterly instalments of 50*l.* each on days named Default being made in the payment of some of these instalments, and there being no other means of enforcing obedience to the order, writs of sequestration were issued under Ord. XLVII. The debtor having resigned his office, a pension of 1,000*l.* per annum was granted to him under 15 & 16 Vict. c. 54, s. 15, charged upon and payable out of the consolidated fund —Held, that this pension, being a reward for past services only, was liable to seizure under the writ of sequestration; and the court, at the instance of the judgment creditor, made an order to restrain the debtor from receiving the quarterly payments, and empowering the sequestrators to receive the same, to the extent of the moneys due and payable under the judge's order. *Willcock* v. *Terrell*, 3 Ex. D. 323; 39 L. T. 84—C. A.

Liability to Action.]—No action will lie against the judge of a county court for words spoken by him while trying a cause, although they are alleged to be spoken falsely and maliciously and without any reasonable or probable cause, and not bonâ fide in discharge of his duty. *Scott* v. *Stansfield*, 37 L. J., Ex. 155; L. R. 3 Ex. 220; 18 L. T. 572; 16 W. R. 911.

The judge of a county court is not answerable at common law in an action of trespass for an erroneous judgment, or for the wrongful act of his officer, done not in pursuance of, though under colour of, a judgment; but he is responsible in an action for an act done by his command and authority when he has no jurisdiction. *Houlden* v. *Smith*, 14 Q. B. 841; 19 L. J., Q. B. 170; 14 Jur. 598.

In an action against a judge of the county court of S., in Lincolnshire, to which he pleaded only not guilty, the facts were, that the plaintiff being resident and carrying on his business in Cambridgeshire, had been sued, by leave of the judge, in the county court of S., where judgment was given against him by default. A summons, under 9 & 10 Vict. c. 95, s. 98, was afterwards, and while the defendant resided and carried on business in Cambridgeshire, issued by order of the judge, calling on the plaintiff to appear at the county court of S. to be examined as to his not paying debt and costs. This summons was served on the plaintiff in Cambridgeshire, and on his non-appearance at S., the judge, bonâ fide believing that he had power to do so, made a minute in his book, ordering the plaintiff to be committed to Cambridge gaol, and he was so committed accordingly:—Held, that the commitment was without jurisdiction, and that the judge must be taken to be aware of the want of jurisdiction, and was therefore liable in trespass. *Ib.* But by the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 48, jurisdiction was given to a county court judge in such circumstances.

In the case of an action against a county court judge for disobeying a writ of prohibition in proceeding with a matter therein referred to, such judge is entitled to notice of action under the County Courts Act, 1846, s. 138, if he proceeded honestly, believing that his duty as a judge called upon him to do so, since in that case the act done by him must be considered as done in pursuance of the act. *Booth* v. *Clive*, 2 L. M. & P. 283; 10 C. B. 827; 20 L. J., C. P. 151; 15 Jur. 563.

Liability to Criminal Proceeding.]—In the absence of a direct allegation of a corrupt motive the court will not grant a criminal information against a county court judge, however wrongly he may have acted. Where, therefore, a criminal information was moved for against a county court judge for committing a judgment debtor to prison without first hearing him on his offering to show cause why he should not be so committed, but there was no imputation of any corrupt motive, the rule was refused. *County Court Judge, In re*, 16 Jur. 995; 1 W. R. 38.

See infra, col. 986.

Deputy Judge.]—A deputy judge has no authority to deliver judgment after the expiration of the period for which he was appointed, or after the death of the judge who appointed him; and if a deputy judge sends his judgment in writing to the registrar after such event, and after the appointment of a new judge of the county court, such judge ought not to enter up the judgment, but to rehear the cause. *Hoey* v. *Macfarlane*, 4 C. B. (N.S.) 718; 4 Jur. (N.S.) 785.

An action in which there could not have been an appeal before the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 13, was tried in the sheriffs' court by a deputy of the judge in his absence, who took time to consider: the judge on his return in August, 1867, read the decision of his deputy, but in order to give the defendant power of appealing, postponed the formal delivery of judgment until the 1st January following, when he delivered judgment and gave leave to appeal, and the parties not agreeing a case was stated by the deputy and signed by the judge:—Held, first, that the judgment of the deputy was the judgment of the court, and the postponement of its formal delivery made it a judgment of the 1st January, 1867. *Rathbone* v. *Munn*, 9 B. & S. 708; 18 L. T. 856.

Held, secondly, that the County Courts Act, 1867, s. 13, affected procedure, and not the rights of the parties, and therefore was retrospective, and gave an appeal in the action.

2. Registrars and Clerks.

County Courts Act, 1888, ss. 25—32.

Appointment.]—B. held the office of clerk of a court of requests; but owing to illness his son, who was in partnership with him as an attorney, had been appointed his deputy, and was acting as such at the time of the passing of the County Courts Act, 1846:—Held, that the son was not entitled, by virtue of s. 34, to be the first clerk of the county court, as performing the duties of clerk at the time when the local act was repealed. *Reg.* v. *Edye*, 12 Q. B. 936; 18 L. J., Q. B. 6; 15 Jur. 8.

Under an appointment, pursuant to the County Courts Act, 1846, s. 25, of two, to execute jointly the office of clerk to a county court, the death of one does not vacate the office as to the other. *Reg.* v. *Wake*, 8 El. & Bl. 348; 27 L. J., Q. B. 11; 4 Jur. (N.S.) 68; 6 W. R. 36.

Removal.]—A county court clerk removed for inability or misbehaviour may question the

validity of such removal by quo warranto against his successor. *Reg.* v. *Owen*, 15 Q. B. 476 ; 19 L. J., Q. B. 490 ; 14 Jur. 953.

A plea to an information alleged that the clerk was removed for inability. By a special verdict it was found that the clerk was dismissed for inability ; that such inability was very great pecuniary embarrassment and want of money to pay his debts existing before and at the time of his dismissal ; that no other inability existed, and that he was not, nor had been imprisoned for debt, or physically disabled from performing his duties . —Held, that such pecuniary embarrassment did not of itself constitute inability. *Ib.*

A registrar who has been appointed to his office by virtue of having been clerk to a court of requests, abolished by the County Courts Act, 1846, schedule (A), is liable to be removed for not giving security, although under the local act he was not required to give security. *Wilkins, Ex parte*, 1 L. T. 61.

City of London Court.]—The county court acts do not affect the jurisdiction of the mayor, aldermen, and commons to remove the Registrar of the City of London Court, conferred by 15 & 16 Vict. c. lxxvii., s. 11. *Osgood* v. *Nelson*, 41 L. J., Q. B. 329 ; L. R. 5 H. L. 636. Affirming, 10 B. & S. 119 ; 20 L. T. 958 ; 17 W. R. 895.

Fees—Right to sue for—Return to Writ of Certiorari.]—The making a return to a writ of certiorari is a "proceeding in the county court," so that the commissioners of the treasury may impose a fee upon it under the County Courts Act, 1856, s. 79. The registrar of the county court may sue in respect of such fees when not paid at the time when the return is made or other proceeding taken. *Batt* v. *Price*, 45 L. J., Q. B. 170 ; 1 Q. B. D. 264 ; 33 L. T. 808 ; 24 W. R. 318.

Liability to Action—Issuing Warrant of Commitment.]—The clerk of a county court is only a ministerial officer to carry into effect the order of the judge, and is not therefore liable to an action for signing and issuing a warrant of commitment, in conformity with an order of the judge, although such order may be bad. *Dews* v. *Ryley*, 2 L. M. & P. 544 ; 11 C. B. 434 ; 20 L. J., C. P. 264 ; 15 Jur. 1159.

In an action against a clerk for so issuing such warrant, he may, by virtue of the County Courts Act, 1850, s. 19, plead the general issue, and give the special matter in evidence ; such section applying to clerks as well as bailiffs. *Ib.*

—— **Omission to give Notice of Judgment.**]—The County Courts Act, 1846, imposes no duty upon the clerk of the court to prepare or cause to be prepared notices of judgments or orders of the court for the payment of money (whether by instalments or otherwise) for service on the defendant. *Robinson* v. *Gell*, 12 C. B. 191 ; 21 L. J., C. P. 155 ; 16 Jur. 615.

No action therefore lies against a clerk for omitting to prepare such a notice, or for negligently preparing it, whereby the defendant was misled as to the time of payment of certain instalments ordered by the judge, and had his goods taken in execution. *Ib.* S. P., *Ely* v. *Moule*, 5 Ex. 918 ; 20 L. J., Ex. 29.

—— **For Expenses of Court.**]—A., by direction of a registrar of a county court, supplied stationery for the court ; a balance being left unpaid by the registrar :—Held, that a mandamus would not lie to the lords of the treasury to pay the balance out of moneys voted by parliament for the expenses of the county court, in pursuance of the County Courts Act, 1856, s. 85. *Walmesley, Ex parte*, 1 B. & S. 81 ; 7 Jur (N.S.) 1010 ; 4 L. T. 212 ; 9 W. R. 599.

A clerk of a county court employed A. to fit up a court house and offices It having been left to the jury to say whether or not the clerk contracted on the footing of personal liability, and they having found for A., the court declined to enter a nonsuit, the defendant's personal liability not being excluded by his position as clerk of the court, or negatived by the nature or by the terms of the particular contract. *Auty* v. *Hutchinson*, 6 C. B. 266 ; 17 L. J., C. P. 304 ; 12 Jur. 962.

Redemption Suit against Transfer of Action.]—When a redemption suit is commenced in the Court of Chancery against the registrar of the county court, within the jurisdiction of which the property dealt with by the suit lies, an order may properly be made under the County Courts Act, 1867, s. 8, to transfer the suit to the county court of the adjoining district, as the word action in 19 & 20 Vict. c. 108, s. 21, includes suit. *Linford* v. *Gudgeon*, 40 L. J., Ch. 514 ; L. R. 6 Ch. 359 ; 19 W. R. 577.

Deputy—Remuneration.]—The judge of the City of London court, on finding that the registrar was not present at the sitting of the court, appointed a deputy under r. 8 of the County Court Rules of 1867 ; the registrar, half-an-hour afterwards, was present in the court buildings transacting such business of his office as was transacted out of court ; and at the sitting of the court an assistant clerk was present and ready to act. The deputy brought an action against the registrar to recover remuneration for acting as deputy :—Held, that, even if r. 8 were within the jurisdiction given for making county court rules by the County Courts Act, 1856, s. 32 (which the court thought not to be so), still there was no such absence of the registrar as to justify the appointment of a deputy, so as to cast on the registrar an obligation to remunerate the deputy. *Wetherfield* v. *Nelson*, 28 L. J., C. P. 220 ; L. R. 4 C. P. 571 ; 20 L. T. 366 ; 17 W. R. 651.

Assistant Clerk practising as an Attorney.]—The assistant clerk is an officer of the county court within the County Courts Act, 1846, s. 29, especially as explained by the County Courts Act, 1850, s. 4, and is therefore liable to be sued for the penalty imposed by s. 30 of the former statute for practising as attorney in any proceeding in the court. *Ackroyd* v. *Gill*, 5 El. & Bl. 808 ; 25 L. J., Q. B. 111 ; 2 Jur. (N.S.) 184 ; 4 W. R. 204.

3. Bailiffs.

County Courts Act, 1888, s. 33, et seq.

a. The High Bailiff.

Title of Bailiff of Court of Requests to Appointment.]—At the passing of the County Courts Act, 1846, A. was the high bailiff of the court of requests, held at Kidderminster, for the borough of Kidderminster, in the county of Worcester, by virtue of a local act, cited in schedule (A). By an order in council of the 10th March, 1847, it was directed, that on and

from the 13th March, 1847, the several courts holden for the recovery of small debts under the provisions of any act or acts cited in schedule (A) should be abolished: and that from the 15th March, 1847, the county court for the county of Worcester should be holden, amongst other places, at Kidderminster:—Held, that the county court so held at Kidderminster was not, within the meaning of the County Courts Act, 1846, s. 34, the same court as the old court of requests; and that therefore A. was not entitled, as of right, to be appointed high bailiff of the county court. *Reg.* v. *Dyer*, 13 Q. B. 851; 18 L. J., Q. B. 285; 13 Jur. 364.

Fees—Poundage—Landlord's Claim for Rent on Levy of Execution.]—Where a bailiff has levied execution under a fi. fa., and has also received a notice under s. 160 of the County Courts Act. 1888, of the landlord's claim to rent, and has distrained therefor, he is entitled to poundage or possession fees in respect of both proceedings. *Brooter, In re, Pruddah, Ex parte*, 66 L. J., Q. B. 766; [1897] 2 Q. B. 429; 76 L. T. 692; 45 W. R. 576; 4 Manson, 212.

—— **Withdrawal of Execution Creditor on Claim made—Right to Sue for Possession Fees.**]—Where a claim is made to goods taken in execution by the high bailiff of a county court, and the execution creditor sends notice, under Ord. XXVII. r. 1, of the County Court Rules, 1886, of his admission of the claim to the high bailiff, who withdraws from possession, the judge of the county court has power to award possession-money up to the time of the receipt of such notice to the high bailiff, and the high bailiff can recover such possession-money from the execution creditor by action in the county court, if the judge in the exercise of his discretion is of opinion that the circumstances of the case are such that possession-money ought to be awarded. *Thomas* v. *Peek*, 57 L. J., Q. B. 497; 20 Q. B. D. 727; 36 W. R. 606.

Interpleader Costs.]—A claim having been made to goods taken in execution under a judgment in a county court, the high bailiff took out an interpleader summons, and ultimately the claim was disallowed, and the claimant was ordered to pay the costs of the proceedings. The high bailiff paid the amount of the levy into court, deducting the fees and expenses incidental to the levy, but not his costs incident to the interpleader proceedings, and the balance was paid out of court to the execution creditor:—Held, that the high bailiff could not maintain an action against the execution creditor for the interpleader costs. *Bloor* v. *Huston*, 3 C. L. R. 222; 15 C. B. 266; 24 L. J., C. P. 26; 1 Jur. (N.S.) 256; 3 W. R. 113.

Liability to Action—Wrongful Act of Underbailiff.]—The high bailiff of a county court is liable, to the same extent as the sheriff, for the wrongful act of a person employed by one of his sub-bailiffs, to whom a warrant is delivered for execution. *Burton* v. *Le Gros*, 34 L. J., Q. B. 91.

—— **Warrant beyond Jurisdiction of Court.**]—Section 19 of the County Courts Act, 1850, and s. 6 of the County Courts Act, 1852, protect the registrar of a county court and the bailiff and his assistants from liability to be sued in an action for seizing the goods of a party under a warrant of the court signed by the registrar and under the seal of the court, even assuming that the judge had no jurisdiction to make the order upon which the warrant is founded. *Aspey* v. *Jones*, 54 L. J., Q. B. 98; 33 W. R. 217—C. A.

Section 6 of the County Courts Act, 1852, also affords a like protection to any person who acts under a warrant so issued. *Ib.*

—— **Seizure of Implements of Trade.**]—The high bailiff of a county court who in levying execution seizes and sells implements of trade without any wrongful intent is not guilty of "misconduct" within s. 59 of the County Courts Act, 1888, even though he acted recklessly and committed a serious error of judgment. *Moore* v. *Brompton County Court Bailiff*, 62 L. J., Q. B. 498; 5 R. 427; 69 L. T. 140; 41 W. R. 557; 57 J. P. 742.

—— **Seizure by Mistake.**]—Where, on a claim being made to goods seized by mistake by a bailiff, the execution creditor does not direct the bailiff to give up the goods to the claimant, but appears and contests his title in interpleader proceedings:—Held, no evidence of a ratification by the execution creditor of the bailiff's detention. *Toppin* v. *Buckerfield*, 1 Cab. & E. 157.

—— **Seizure of Goods of Stranger—Liability of Execution Creditor.**]—The defendant, having a county court judgment against C., caused the following letter to be written and delivered to the high bailiff of the county court:—"The plaintiff in this action has some reason to believe in the possibility of a third person claiming the goods, at the address given on the back of the execution. He will, however, contest any claim that may be made, and he desires that the high bailiff at Liverpool should be so informed, that the officer who levies may not in any way be deterred from putting the warrant in force by reason of any party setting up a claim." The address on the back of the warrant was that of a house in the occupation of a brother of the judgment debtor; but the name of the judgment debtor was on the door, and he had a considerable quantity of property in the house. The bailiff entered the house, and seized property of the execution debtor, and also of the plaintiff:—Held, that the defendant was not responsible for the act of the bailiff in seizing the plaintiff's goods. *Cronshaw* v. *Chapman*, 7 H. & N. 911; 31 L. J., Ex. 277; 5 L. T. 54; 10 W. R. 323.

—— **Distraining Goods of Stranger for Rent.**]—If a bailiff seizes under a warrant of a county court goods belonging to a stranger, he cannot under 19 & 20 Vict. c. 108, s. 75, distrain such goods for the rent of the landlord; and if he does so, the true owner is entitled to have his goods back. *Beard* v. *Knight*, 8 El. & Bl. 865; 27 L. J., Q. B. 359; 4 Jur. (N.S.) 782; 6 W. R. 226. S. P., *Foulger* v. *Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154; 1 L. T. 481; 8 W. R. 279.

—— **Wrongful Entry.**]—An owner of a chattel, taken on his own premises, under a county court execution against a third party, cannot sue the bailiff for taking the chattel, though he may for the wrongful entry. *Lewis* v. *Cole*, 3 F. & F. 17.

On the hearing of an interpleader summons

in the county court, under 9 & 10 Vict. c. 95, s. 118, in respect of goods taken in execution under a judgment of the court, the judge ordered that the goods were the property of the claimant, and that the execution creditor should pay the costs of the proceedings, with 1*s.* damages for the seizure of the goods, and that the high bailiff should pay 1*s.* damages for the seizure of the goods:—Held, that the proceedings in the county court did not bar the plaintiff's right of action against the high bailiff for the trespass to his house, in respect of which no damages had been awarded, and that the county court had no jurisdiction to entertain the question of trespass. *Jousiffe* v. *Bayley*, 15 L. T. 219.

—— **Action for Wrongful Entry—Right of Successful Plaintiff to Costs.**]—To an action for entering the plaintiff's house, and carrying away his goods, the defendant pleaded a justification, as high bailiff, under a fi. fa., issued out of the county court against the plaintiff's goods. The plaintiff admitted the issuing of the writ, and replied de injuriâ to the rest of the plea. At the trial the jury found a verdict for the plaintiff, with 10*l.* damages:—Held, upon the construction of s. 139 of the 9 & 10 Vict. c. 95, taken in connection with ss. 128 and 129, that the plaintiff was not entitled to costs. *Mann* v. *Buckerfield*, 2 L. M. & P. 55; 20 L. J., Q. B. 265; 15 Jur. 57.

—— **Arrest of Debtor after Payment**]—On the hearing of a summons under 9 & 10 Vict c. 95, s. 98, the debtor did not attend, and on proof of service the judge, under s. 99, ordered him to be committed for seven days. The clerk to the court issued to the bailiff a warrant of commitment, under which the debtor was arrested. Before his arrest, but after the warrant was issued, the debtor paid the debt and costs to the judgment creditor, who wrote a letter to the clerk of the court informing him of the fact. The debtor having sued the clerk and bailiff for false imprisonment:—Held, that the action could not be supported, as the order and warrant were regularly issued and in force at the time of the arrest. *Davis* v. *Fletcher*, 2 E. & B. 271; 22 L. J., Q. B. 429.

—— **Damages for Neglect to levy Execution.**]—Where judgment has been recovered in a county court, the plaintiff may maintain an action in that court against the high bailiff of another county court for neglecting to levy upon the goods of the defendant under a warrant of execution delivered to such high bailiff for that purpose. *Watson* v. *White*, 65 L. J., Q. B. 492; [1896] 2 Q. B. 9; 74 L. T. 702; 44 W. R. 525.

Action against for not Executing Warrant—Issue of Summons in Adjoining District.]—Under 19 & 20 Vict. c. 108, s. 21, where an action is brought against the high bailiff for not executing a warrant, a summons may issue in any adjoining district, the judge of which is not the judge of a court of which the high bailiff is an officer, whether or not such adjoining district is in the same county in which he neglected to execute the warrant. *Partridge* v. *Elkington*, 40 L. J., Q. B. 49; L. R. 6 Q. B. 82; 19 W. R. 385.

Warrant sent for Execution to another Court—Liability for act of Under-bailiff of other Court.]—Where a warrant issues upon a judgment of a county court against a party resident within another jurisdiction, and is sealed by the court there, under 9 & 10 Vict. c. 95, s. 104, the high bailiff of the court out of which the warrant was originally issued is not responsible for any irregularities in its execution by the under-bailiff of the foreign jurisdiction, even though his own under-bailiff assists therein. *Smith* v. *Pritchard*, 8 C. B. 565; 19 L. J., C. P. 53; 14 Jur. 224.

Under a warrant so issued by one court and sealed by the clerk of another court, the officers broke and entered the premises of a third person, under a mistaken impression that the party against whom the warrant was directed was there; and upon the owner of the premises resisting their entry, the bailiffs took him into custody and carried him before a magistrate:—Held, that the high bailiff of the court from which the warrant was reissued was liable with the under-bailiffs for the breaking and entering, which was an act done by the latter under the supposed authority of the writ, but not for the assault which was committed in the assertion of a power given by the statute to the individual officer. *Ib.*

—— **Negligence of High Bailiff of other Court—Jurisdiction of Judge to order Payment of Damages.**]—Where execution was issued in a county court and the warrant was sent for execution to another county court, and the high bailiff of such court was guilty of negligence in levying under it:—Held, that the judge of the home court had no power, under s. 115 of the County Courts Act, 1846, to order the high bailiff of the foreign court to pay damages to the plaintiff, who had been injured by his negligence, and that the high bailiff was entitled to a prohibition. *Reg.* v. *Shropshire County Court Judge*, 57 L. J., Q. B. 143; 20 Q. B. D. 242; 58 L. T. 86: 36 W. R. 476.

Acting for Party on Application for Warrant under 14 & 15 Vict. c. 52—Liability for Penalty.]—Under the 14 & 15 Vict. c. 52, the issuing of a warrant by a county court judge is not a proceeding in the county court, and therefore, if a high bailiff of a county court acts for the party applying for the warrant, he is not thereby liable to a penalty under 9 & 10 Vict. c. 95, ss. 29, 30. *Warden* v. *Stone*, 7 El. & Bl. 603; 26 L. J., Q. B. 200; 3 Jur. (N.S.) 491; 5 W. R. 501.

But it is more fitting that a bailiff should not so act. *Ib.*

Action against—Right to Notice.]—The fact of the bailiff having, in taking goods under process from the county court, acted under an indemnity from the execution creditor, does not deprive him of the protection of the 9 & 10 Vict. c. 95, s. 138; which entitles him to a notice of action for anything done by him in pursuance of the act. *White* v. *Morris*, 11 C. B. 1015; 21 L. J., C. P. 185; 16 Jur. 500.

A bailiff, who, under a warrant of execution upon a judgment of the court against A., takes the goods of B., under the bonâ fide belief that they are the goods of A., is entitled to the protection of the 9 & 10 Vict. c. 95, s. 138, as in respect of a thing done in pursuance of the act.

Burling v. *Harley*, 3 H. & N. 271 ; 27 L. J., Ex. 258 ; 4 Jur. (N.S.) 789.

—— **Notice of Statutory Defence.**]—The defence accorded to county court bailiffs by s. 54 of the County Courts Act, 1888, being a statutory defence, notice must be given as provided by the County Court Rules, 1889, Ord. X. rr. 10, 18A, if a county court bailiff intends to rely on the section as a defence to an action against him. *Denny* v. *Bennett*, 44 W. R. 333.

Motion against, under s. 46 of Bankruptcy Act, 1883—Right to Notice.]—The word "action" in ss. 53 and 54 of the County Courts Act, 1888, being the sections which require notice and other formalities to be gone through before proceedings can be taken against a person for anything done in pursuance of that act, will not be enlarged so as to include a motion by a trustee in bankruptcy against a high bailiff, under s. 46 of the Bankruptcy Act, 1883, for a declaration that he was entitled as against the high bailiff to certain goods taken in execution, on the ground that the execution had not been completed by seizure and sale. *Poppleton, Ex parte, Locke, In re*, 62 L. T. 942 ; 63 L. T. 320 ; 39 W. R. 15 ; 7 Morrell, 184.

b. Under Bailiffs.

Assault upon—Execution of Duty.]—A defendant was arrested by a bailiff under a warrant of the county court good on its face. He assaulted the bailiff in resisting the arrest. On an indictment against him for a common assault on the bailiff :—Held, that it was not necessary to prove the proceedings in the county court, but that proof of the warrant alone was sufficient to show that the officer was justified in arresting the defendant, and to sustain a conviction of the defendant for the assault. *Reg.* v. *Davis*, L. & C. 64 ; 30 L. J., M. C. 159 ; 4 L. T. 559 ; 9 W. R. 711 ; 8 Cox, C. C. 486.

A county court bailiff, while acting in the course of his duty, was assaulted by F., who was summoned for the assault under 9 & 10 Vict. c. 95, s. 114 :—Held, that that section was not impliedly repealed by 24 & 25 Vict. c. 100, s. 42, and that the justices could not decline jurisdiction on the ground that a question might arise as to the execution under the process of a court of justice. *Reg.* v. *Briggs* 47 J. P. 615.

C., being under-bailiff of county courts, was left on certain premises in execution of a warrant to levy on goods of D. Having no refreshment provided for him, he went out to a public-house, a mile distant, and took his warrant with him. On his return he was assaulted by D., to prevent his re-entry :—Held, that C. was in the execution of his duty in returning, and that D. was liable to be convicted under 9 & 10 Vict c. 95, s. 114. *Coffin* v. *Dyke*, 48 J. P. 757.

Bond—Alteration of Nature of Office.]—A bond was executed by G., and two sureties, conditioned for indemnifying the high bailiff of a county court against liabilities from the misconduct in his office of G , who was appointed by the high bailiff one of the bailiffs. At the time the bond was executed the jurisdiction of the county court was regulated by 9 & 10 Vict. c. 95. After the execution of the bond, the jurisdiction of the county court was extended and increased by 10 & 11 Vict. c. 102, 12 & 13 Vict. c. 101, 13 & 14 Vict. c. 61, and 14 & 15 Vict. c. 52 :—Held, that these statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by 9 & 10 Vict. c. 95, in respect of which the duty of the bailiff was not altered by the subsequent acts. *Pybus* v. *Gibb*, 6 El. & Bl. 902 ; 26 L. J., Q. B. 41 ; 3 Jur. (N.S.) 315 ; 5 W. R. 44.

Embezzlement by.]—*See* CRIMINAL LAW.

c. Special Bailiffs.

Appointment where High Bailiff Interested.]—When the judgment debtor under county court process is himself the high bailiff of the court, a special bailiff may be appointed to levy execution, and the warrant may be directed to him and others, although 9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142, contain no express provision upon the subject. *Bellamy* v. *Hoyle*, 44 L. J., Ex. 169 ; L. R. 10 Ex. 220 ; 33 L. T. 21 ; 23 W. R. 754.

The judge of a county court made an order against the high bailiff for payment of certain sums of money and costs, the costs to be settled by the registrar. The amount of costs was settled by the registrar, but not formally approved by the judge. Orders for payment were drawn up under seal of the court, and served on the high bailiff. Default having been made in payment, the registrar issued a warrant of execution for the sums and costs. The registrar, after consulting the judge, specially appointed W. R., who was not a bailiff of the court, to act as assistant bailiff in the execution of the warrant which was given under the seal of the court, directed to "W. R. and others, the bailiffs thereof," and signed by the registrar. Acting under this warrant, W. R levied on the goods of the high bailiff, who thereupon brought an action against the registrar :—Held, that, although the judge had not personally exercised his discretion as to the amount of costs, yet there was a valid order in existence, and the court had inherent power to enforce its process, and the right mode of doing so had been adopted, inasmuch as the analogy afforded by the practice of the superior courts, which appoint coroners or elisors to execute judgments against sheriffs, had been followed by appointing a special person to levy the execution ; that the registrar was therefore justified in making that appointment, and consequently that he was not liable for the acts of W. R. done in pursuance thereof. *Ib.*

4. TREASURERS.

Right of Access to Books.]—A registrar rented offices in which he carried on his business as a solicitor and also the county court business, he being allowed by the Treasury an annual sum for the part of the offices used for county court purposes. The treasurer of the county court gave the registrar notice of his intention to audit the accounts on a Saturday, when, by a county court rule, the office closed at one o'clock. The treasurer went to the office after one o'clock, and finding it closed, broke the locks of an inner door and a cupboard in which the books were

kept, and having taken away the books and audited them, returned them to the office. The registrar having brought an action of trespass against him:—Held, that the treasurer was justified in so doing under the county court acts. *Burridge* v. *Nicholetts*, 6 H. & N. 383; 30 L. J., Ex. 145; 3 L. T. 703; 9 W. R. 345.

The 29 & 30 Vict. c. 11, *provides for the abolition of these officers.*

B. JURISDICTION.

County Courts Act, 1888, s. 5.

1. District in which Action Commenced.

County Courts Act, 1888, s. 74.

a. Defendant dwelling in District.

Body Corporate—Gas Company.]—A corporation dwells, within the meaning of the 9 & 10 Vict. c. 95, s. 128, at the place where its business is carried on. *Taylor* v. *Crowland Gas & Coke Co.*, 11 Ex. 1; 24 L. J., Ex. 233; 3 C. L. R. 865; 1 Jur. (N.S.) 358; 3 W. R. 368.

—— **Railway Company.**]—The Great Western Railway Company has its principal station at Paddington, where the directors meet, the secretary resides, general meetings are held, and whence orders emanate:—Held, that the company dwells at Paddington within the meaning of that word in the 9 & 10 Vict. c. 95, s. 128, and consequently that, where a plaintiff in an action against the company dwelt more than twenty miles from Paddington, the superior courts had concurrent jurisdiction. *Adams* v. *G. W. Ry.*, 6 H. & N. 404; 30 L. J., Ex. 124; 3 L. T. 631; 9 W. R. 254.

—— **Manufacturing Company.**]—A company incorporated for the manufacture and sale of goods dwells at the place of manufacture and sale, and not at its registered office. *Keynsham Blue Lias Lime Co.* v. *Baker*, 2 H. & C. 729; 33 L. J., Ex. 41; 9 Jur. (N.S.) 1346; 9 L. T. 418; 12 W. R. 156.

A joint-stock company sold and delivered goods to the defendant at its works at Keynsham, in Somersetshire, seven miles distant from the place where the defendant resided and carried on his business. The registered office of the company, where the directors met and transacted all its business, was in London. The company being in the course of winding-up, the official liquidator, who dwelt and carried on business in London, sued the defendant in a superior court for the price of the goods, and recovered judgment by default for a sum under 20*l.*:—Held, that he was not entitled to costs. *Ib.*

—— **Joint Stock Company.**]—A joint stock company dwells where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated and its immediate objects carried out. *Aberystwith Promenade Pier Co.* v. *Cooper*, 35 L. J., Q. B. 44; 12 Jur. (N.S.) 995; 13 L. T. 273; 14 W. R. 28.

A promenade pier company, whose objects were the erection and maintenance of a pier and the reception of tolls thereon at Aberystwith, but whose registered offices were at Westminster, where the substantial business of the company and its negotiations were carried on, dwells at Westminster, and not at Aberystwith. *Ib.*

Temporary Residence.]—A defendant who, at the time of an action brought, has no permanent residence, dwells at the place of his temporary residence. *Alexander* v. *Jones*, 4 H. & C. 204; 35 L. J., Ex. 78; L. R. 1 Ex. 133; 12 Jur. (N.S.) 125; 13 L. T. 719; 14 W. R. 400.

Where a plaintiff has a permanent dwelling more than twenty miles from the defendant, the superior courts have concurrent jurisdiction, although the plaintiff has also lodgings for a temporary purpose, at the time the action is brought, within twenty miles of the defendant. *Macdougall* v. *Paterson*, 11 C. B. 755; 2 L. M. & P. 681; 21 L. J., C. P. 27; 15 Jur. 1108.

A plaintiff is entitled to costs though he obtains a verdict for 40*s.* only, if his permanent place of residence is more than twenty miles from the place where the defendant dwells or carries on his business, although at the time of the commencement of the action he was, for a temporary purpose, residing within that distance. *Marsh* v. *Conquest*, 17 C. B. (N.S.) 432.

—— **Gaol.**]—A temporary or compulsory residence, at the time of the commencement of an action, in a gaol, does not constitute the place of detention the dwelling of the party. *Dunston* v. *Paterson*, 5 C. B. (N.S.) 267; 28 L. J., C. P. 97; 4 Jur. (N.S.) 1024; 6 W. R. 768.

Residence for purpose of Founding Jurisdiction.]—It is no objection to the jurisdiction of a county court, that the plaintiff has become resident within the district of the court for the very purpose of giving it jurisdiction, provided that the residence was actually and bonâ fide, and not colourably and collusively acquired before issuing the summons. *Massey* v. *Burton*, 2 H. & N. 597; 27 L. J., Ex. 101; 3 Jur. (N.S.) 1130; 6 W. R. 108.

On the 22nd of September a plaintiff took lodgings, and went to reside within the Bloomsbury district, and on the 23rd a summons issued from the Bloomsbury county court, in respect of a cause of action which had arisen in the Marylebone district, where the defendant resided. The defendant objected to the jurisdiction, but upon hearing the evidence the county court judge decided that the plaintiff dwelt within the district of the Bloomsbury county court.—Held, that the plaintiff did dwell within the Bloomsbury district, and, therefore, that the judge had jurisdiction. *Ib.*

Two Residences.]—A plaintiff had two permanent places of residence; one in London, where the defendant dwelt, and where the cause of action accrued; the other more than twenty miles from London. At the time of bringing the action the plaintiff was living with his family at his country residence:—Held, a case of concurrent jurisdiction, and that he was entitled to costs. *Butler* v. *Ablewhite*, 6 C. B. (N.S.) 740; 28 L. J., C. P. 292; 5 Jur. (N.S.) 1268; 7 W. R. 583.

A plaintiff, having hired a house at Margate, occupied it, with his wife, family, and servants, as their home; at the same time the plaintiff, carrying on business in London, occupied two houses there for the purpose of his business, and passed three or four days and nights of each week there, occupying two rooms in one of the

houses, which had been fitted up for his residence while staying in town :—Held, that he dwelt at Margate alone. *Kerr* v. *Haynes*, 29 L. J., Q. B. 70; 6 Jur. (N.S.) 169; 2 L. T. 211; 8 W. R. 277.

A writ of summons issued against a defendant on the 5th of January, 1865. He had two residences, one in London, the other in Kent, more than twenty miles distant from the plaintiff's residence, which was in London. On the 4th of January the plaintiff's attorney received a letter from the defendant, dated from his residence in Kent, referring him to his attorneys in London to accept service of process for him. The defendant's attorneys, on the day of the issuing of the writ, gave an undertaking to appear, and on that day one of them had an interview with the defendant at his London residence :—Held, that the defendant was residing in Kent at the time of the commencement of the action, and consequently that there was concurrent jurisdiction, and the plaintiff was entitled to his costs. *Pilgrim* v. *Knatchbull*, 18 C. B. (N.S.) 798; 34 L. J., C. P. 257; 11 Jur. (N.S.) 389; 12 L. T. 383; 13 W. R. 657.

One of two plaintiffs was a member of parliament, and had a residence in London within twenty miles from the residence of the defendant, which he occupied for about three months, for the purpose of attendance in parliament; he resided the rest of the year at his ironworks in Wales, and was dwelling there when the action was brought :—Held, that the plaintiff "dwelt" in London. *Bailey* v. *Bryant*, 1 El. & El. 340; 28 L. J., Q. B. 86; 5 Jur. (N.S.) 468.

Residence of nominal Defendant.]—In order to bring a plaint within the jurisdiction of a county court on the ground of a defendant residing in the district of that court, such defendant must be a substantial defendant, and where a plaint was issued in the Bristol county court to charge the separate estate of a married woman with a sum secured by her acceptance, upon the ground that the bill of exchange was drawn and made payable at Bristol, and that one of the defendants resided there, on its appearing that this defendant was in the same interest as the plaintiff, it was held that the county court had no jurisdiction, and an order was made to remove the plaint to the court of chancery. *Baker* v. *Watt*, 39 L. J., Ch. 204; L. R. 9 Eq. 103; 21 L. T. 632; 18 W. R. 185.

b. Defendant Carrying on Business in District.

Railway Company.]—A railway company does not carry on business at a receiving-house or a booking-office, kept by an agent for the receipt and booking of parcels and packages for all the railways generally. *Minor* v. *L. & N.-W. Ry.*, 1 C. B. (N.S.) 325; 26 L. J., C. P. 39; 2 Jur. (N.S.) 1168; 5 W. R. 122.

A railway company carries on business only at the place where the general management of its different lines and stations is carried on; and a station, however extensive and important, so long as those under whose immediate supervision it is are themselves under superior control, is not within s. 60 of the 9 & 10 Vict. c. 95. *Brown* v. *L. & N.-W. Ry.*, 4 B. & S. 326; 32 L. J., Q. B. 318; 10 Jur. (N.S.) 234; 11 W. R. 884.

A railway company carries on its business at its principal station, and not at the intermediate stations on its line; and where a cause of action arises in a district of one of such intermediate stations, and no leave of the court of such district has been obtained to sue in such district, a plaint must be brought in the district of such principal station. *Shiels* v. *G. N. Ry.*, 30 L. J., Q. B. 331; 7 Jur. (N.S.) 631; 4 L. T. 479; 9 W. R. 739. S. P., *Taylor* v. *Crowland Gas and Coke Co.*, 11 Ex. 1; 3 C. L. R. 865; 24 L. J., Ex. 233; 1 Jur. (N.S.) 358; 3 W. R. 368. And *Le Taillieur* v. *S. E. Ry.*, 3 C. P. D. 18; and *Rogers* v. *L. C. & D. Ry.*, 26 W. R. 192.

Surgeon.]—A surgeon, who was also an apothecary and an accoucheur, residing at C., in the district of county court A., and daily attending to patients requiring his advice residing in the district of county court B., carries on his business within the jurisdiction of the county court B. *Mitchell* v. *Hender*, 2 C. L. R. 460; 23 L. J., Q. B. 273; 18 Jur. 430; 3 W. R. 411.

Deputy Sealer in Court of Chancery.]—The duty of the deputy sealer in the court of chancery is to affix the great seal to instruments to which it is appropriated, and to attend the lord chancellor for that purpose; and when the lord chancellor does not sit judicially, he attends at the Great Seal Patent Office, in Chancery Lane :—Held, that he did not carry on his business at any fixed place, within 9 & 10 Vict. c. 95, s. 128, so as to deprive the plaintiff of costs, under ss. 128, 129. *Rolfe* v. *Learmonth*, 14 Q. B. 196; 19 L. J., Q. B. 10; 13 Jur. 986.

Clerk in Government Office.]—A clerk in the privy council office is not a person who carries on a business. *Sangster* v. *Cave* or *Kay*, 5 Ex. 386; 19 L. J., Ex. 311. *S. C.*, nom. *Glennie* v. *Delmar*, 1 L. M. & P. 402.

To entitle a defendant to enter a suggestion on the roll to deprive the plaintiff of costs under this act, on the ground that the defendant carried on his business within the jurisdiction of the court thereby established, it is not sufficient to show that the defendant is a clerk attending a public office within the jurisdiction, but residing elsewhere. *Buckley* v. *Hann*, 7 D. & L. 188; 5 Ex. 43; 19 L. J., Ex. 151; 14 Jur. 226.

Branch Office of Scotch Firm.]—Where a Scotch firm carrying on business in Scotland with a branch office situate within the jurisdiction of a county court were sued in the firm's name, and the summons was served at the branch office :—Held, that the firm "carried on business" within the jurisdiction, that the service was good, and that the county court judge was wrong in declining to exercise jurisdiction; that, if the service had been bad, it amounted to a mere irregularity, which might be waived by the conduct of the defendants. *Weatherley* v. *Calder*, 61 L. T. 508.

—— **Acting through Agent.**] — A company carrying on business in London, which employs in a country town a general commission agent, who transacts the company's business in such town, in an office for which the company pay him rent, does not carry on business in that town within the meaning of the 9 & 10 Vict. c. 95, s. 128. *Corbett* v. *General Steam Navigation Co.*, 4 H. & N. 482; 28 L. J., Ex. 214; 7 W. R. 498.

A commission agent sold, in his own name, goods to the defendant, at a place within twenty miles of the defendant's residence. The principal, a company which carried on its business at a place more than twenty miles from the defendant's residence, sued him in a superior court, and recovered 6*l.*:—Held, that the court had concurrent jurisdiction with the county court, and that the company was entitled to costs. *Oldham Building and Manufacturing Co.* v. *Heald*, 3 H. & C. 132; 33 L. J., Ex. 236; 10 L. T. 534.

One who resides in Scotland, and carries on business in London by means of an agent, is not bound to sue in the City Small Debts Court for a debt not exceeding 20*l.* *Sheils* v. *Rait*, 7 C. B. 116.

c. Cause of Action arising wholly or in part in District.

Sale of Goods—Order in District.]—A verbal offer to buy goods for more than 10*l.* having been made to the vendor's agent within the district of a county court, was communicated to the vendor at his residence outside the district, where he accepted it and signed a memorandum within s. 17 of the Statute of Frauds. This memorandum, with a counterpart, he sent by post to the purchaser, who signed the counterpart within the district. The vendor having delivered the goods to the plaintiff's agent outside the district, the purchaser issued a plaint in the county court against the vendor to recover damages for deficiency in weight:—Held, that the cause of action arose in part in the district so as to give the county court jurisdiction under 30 & 31 Vict. c. 142, s. 1. *Green* v. *Beach*, 42 L. J., Ex. 151; L. R. 8 Ex. 208; 21 W. R. 850.

A., carrying on business in Manchester, by his traveller, sold goods to B., at Oxford, which goods were to be forwarded by the London and North-Western Railway. The goods were accordingly packed and sent by A. to the railway station at Manchester, addressed to B., at Oxford:—Held, that as the order for the goods was received at Oxford, the whole cause of action did not arise in Manchester, so as to give the county court there jurisdiction to try it under the 9 & 10 Vict. c. 95, s. 60. *Borthwick* v. *Walton*, 15 C. B. 501; 3 C. L. R. 364; 24 L. J., C. P. 83; 1 Jur. (N.S.) 142; 3 W. R. 203.

Where goods were ordered at Leeds, deliverable at Manchester, the judge of the county court at Leeds has no jurisdiction to try the case, as the whole cause of action did not arise within his jurisdiction within the 9 & 10 Vict. c. 95, s. 60. *Jackson* v. *Beaumont*, 24 L. J., Ex. 301.

A defendant entered into a written agreement to take 20,000 bricks of the plaintiff at a stated price. After the delivery of 3,000 he refused to take any more, or to pay for those already delivered, alleging that they were not the sort specified in the agreement. The plaintiff and the defendant resided more than twenty miles apart. The bricks were delivered at the plaintiff's place of business, but the agreement was signed by both parties within the jurisdiction of the court. The plaintiff sued the defendant in the superior court to recover the price of the 3,000 bricks delivered, and recovered less than 20*l.* At the trial the agreement was put in as part of the plaintiff's case:—Held, that he was not entitled to recover his costs, as the cause of action arose in some material point within the jurisdiction of the county court, within 9 & 10 Vict. c. 95, s. 128, and the action ought not to have been brought in the superior court. *Norman* v. *Marchant*, 7 Ex. 723; 21 L. J., Ex. 256.

—— **Delivery in District.**]—On an application by a plaintiff in an action for goods sold and delivered for costs under the 19 & 20 Vict. c. 108, s. 30, on the ground that the cause of action did not wholly, or in a material part, arise within the jurisdiction of the county court of the district in which the defendant resided, it appeared by the affidavits of the defendant as to the principal parcel of goods that they were delivered there by a carrier, who was to be paid by the plaintiff (there being, on the part of the plaintiff, no positive affidavit as to the disputed facts, but only an affidavit of information and belief):—Held, that the delivery must be deemed to have been in that district in which the defendant resided, and therefore that the plaintiff was not entitled to costs. *Arndt* v. *Porter*, 30 L. J., Ex. 19.

—— **Breach of Contract to Deliver.**]—A plaint was issued by leave of the judge against a defendant not resident in the jurisdiction. The particulars were, for not delivering a cargo of corn bought by the plaintiff of the defendant by a contract in writing. The plaintiff, within the jurisdiction, made a contract with a broker, who professed to act for the defendant, in these terms: "Sold the cargo of corn, per T., now at Q., at 27*s.* per quarter, including cost, freight and insurance to a safe port in the United Kingdom. Payment, cash in exchange for shipping documents and policy of insurance." Q. was out of the jurisdiction; and so was the ship. The plaintiff requested that the ship should be sent to D., a port also out of the jurisdiction. The defendant sold the cargo to another person, delivered him the shipping documents, and caused the cargo to be delivered to him:—Held, that the non-delivery of the cargo was a breach of the contract, and a cause of action, but out of the jurisdiction of the county court, and that the rule must be absolute to prohibit proceeding in the plaint for that; but held, that the non-delivery of the shipping documents was also a breach of the contract, and a cause of action within the jurisdiction, and that the rule must be modified so as to allow the plaintiff to proceed for that, if the judge in his discretion thought fit to amend the particulars. *Walsh* v. *Ionides*, 1 El. & Bl. 383; 22 L. J., Q. B. 137; 17 Jur. 596.

—— **Non-payment in District.**]—In an action for the price of goods sold and delivered, non-payment of the price is part of the cause of action, and therefore the county court of the district in which the plaintiff resides has (on leave being given by the registrar) jurisdiction under s. 74 of the County Courts Act, 1888. *Northey Stone Co.* v. *Gidney*, [1894] 1 Q. B. 99; 10 R. 16; 70 L. T. 82; 42 W. R. 99.

—— **Part Delivery outside District.**]—Orders were given for goods at Poplar to be delivered to a carrier named by the buyer and to be paid by him. The goods were received by the carrier, on delivery orders handed to him by the seller in the city of London, partly within and partly without the City. An action having been brought for the price in the Mayor's Court:—Held, that part of the cause of action arose out of the jurisdiction

of the court, and therefore the defendant was entitled to prohibition. *Gold* v. *Turner*, L. R. 10 C. P. 149 ; 23 W. R. 732.

The plaintiff, a carrier and wharfinger at Swindon, agreed in writing with the defendant, living in Surrey, to carry his timber by barge to London at 16*s.* per ton, including all charges but wharfage. It was necessary to haul the timber from the place where it lay to the wharf, and the plaintiff provided horses for the purpose when the defendant's horses were absent. The plaintiff sued in the Swindon county court for the balance of his account for the carriage, including a separate charge for hauling :—Held, that the hauling and the carriage formed one cause of action, that such cause of action was not complete until the timber was delivered in London, and that therefore the judge of the county court had not jurisdiction under 9 & 10 Vict. c. 95, s. 60. *Burnes* v. *Marshall*, 18 Q. B. 785 ; 21 L. J., Q. B. 388 ; 16 Jur. 1086.

Work done—Order by Letter.]—A plaintiff brought an action in the county court within the district of which he carried on business, to recover a trade debt collected by the defendant at his place of business out of the district. The employment of the defendant by the plaintiff was by letter, written and posted within the district, but not answered by the defendant, who had never before the action been himself within the district. Upon a rule for a writ of prohibition to the county court judge, obtained by the defendant :—Held, that the cause of action or suit did not, in the words of s. 1 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), wholly or in part arise within the plaintiff's county court district ; and that the action could not be proceeded with. *Rennie* v. *Ratcliff*, 35 L. T. 833 ; 25 W. R. 319.

A defendant, residing and carrying on business in London, wrote to the plaintiffs, residing and carrying on business in S., ordering them to do work for him. The letter was received by the plaintiffs, and the work was done, in S. A summons having issued upon their application against the defendant, in the county court of S., by leave of the registrar, to recover the amount due for such work :—Held, that the whole cause of action arose within the district of that court, and that the registrar therefore had jurisdiction to issue the summons, under 9 & 10 Vict. c. 95, s. 60, and 19 & 20 Vict. c. 108, s. 15. *Newcomb* v. *De Roos*, 2 El. & El. 271 ; 29 L. J., Q. B. 4 ; 6 Jur. (N.S.) 68 ; 8 W. R. 5.

—— **Retainer of Solicitor.**]—A defendant within a district of a county court at B., agreed with A. to give C. a mortgage security for a debt due to C. from the defendant ; and A. afterwards, at a place beyond the district of such county court, retained the plaintiff, a solicitor, to prepare such mortgage deed. The plaintiff having brought an action in the superior court against the defendant for his charges of preparing the deed, and obtained a verdict for less than 20*l.* :—Held, that the cause of action arose in a material point within the jurisdiction of the county court of B., and therefore, as the superior court had not concurrent jurisdiction within the county court, the plaintiff was not entitled to recover his costs. *Jackson* v. *Grinley*, 16 C. B. (N.S.) 380 ; 33 L. J., C. P. 238 ; 10 L. T. 340 ; 12 W. R. 686.

Breach of Warranty.]—A plaintiff went to the defendant's residence, which was beyond the jurisdiction of a particular county court, and there verbally agreed to purchase of him a horse for 28*l.*, to be delivered on the following day at the plaintiff's residence, which was within the jurisdiction of the county court. On that day the defendant brought the horse to the plaintiff's residence, when he required a warranty, which was given, and the price paid. The plaintiff afterwards sued the defendant in the county court for a breach of the warranty :—Held, that there was no complete contract until the warranty was given, and consequently the "whole cause of action," arose within the jurisdiction of the county court. *Aris* v. *Orchard*, 6 H. & N. 163 ; 30 L. J., Ex. 21 ; 3 L. T. 143 ; 9 W. R. 106.

Bill of Several Items.]—If the items in a plaintiff's bill under 20*l.* are so connected together as to form one cause of action, and any one item arises within the jurisdiction of a county court within which the defendant dwells or carries on his business at the time of the action brought, and the parties do not dwell more than twenty miles apart, the cause of action, "in some material point,' arises within such jurisdiction, and the superior court has no concurrent jurisdiction under 9 & 10 Vict. c. 95, s. 128, and the case falls within s. 129. *Wood* v. *Perry*, 3 Ex. 442 ; 6 D. & L. 194 ; 18 L. J., Ex. 161.

The fact of one item in a tradesman's bill being separated from the rest by an interval of several years does not prevent its operating (if accruing within the jurisdiction of the county court within which the defendant dwells) to take the case out of the concurrent jurisdiction clause of the 9 & 10 Vict. c. 95, s. 128. *Copeman* v. *Hart*, 14 C. B. (N.S.) 731 ; 33 L. J., C. P. 107.

The plaintiff was a butcher, carrying on his business within the jurisdiction of the county court of A. The defendant resided within the jurisdiction of the county court of B. The plaintiff sued the defendant in the superior court for a bill, some of the items of which consisted of goods which had been ordered in the A. district, but delivered in the B. district :—Held, that the whole formed one cause of action, and as a part of it arose in the jurisdiction within which the defendant resided (and within twenty miles), there was no concurrent jurisdiction, and consequently the plaintiff was not entitled to his costs. *Bonsey* v. *Wordsworth*, 18 C. B. 325 ; 25 L. J., C. P. 205 ; 2 Jur. (N.S.) 494 ; 4 W. R. 566.

Composite Cause of Action—Action for Advertised Reward.]—The 9 & 10 Vict. c. 95, s. 60, which gives jurisdiction to the county court of the district "in which the cause of action arose," means the district in which the whole cause of action arose. *Hernaman* v. *Smith*, 10 Ex. 659 ; 3 C. L. R. 435 ; 24 L. J., Ex. 175 ; 1 Jur. (N.S.) 190 ; 3 W. R. 208.

Therefore, where a cause of action is made up of several things, the county court of a district has no jurisdiction under 9 & 10 Vict. c. 95, s. 60, unless they all occur within the district. *Ib.*

It makes no difference in this respect that of the matters thus making out the cause of action, those occurring within the district constituted all that was necessary to be done on the part of the plaintiff to entitle him to recover, and that those occurring without it were contingencies on

which his right of action depended, but over which he had no control. *Ib.*

A number of persons formed themselves into an association for the detection, apprehension and prosecution of felons, issued a placard offering rewards for apprehending any person committing certain specified offences on any or either of their respective persons or properties; the rewards to be paid on conviction of the offenders, by application to the treasurer of the association. A felony having been committed against the property of one of the association, the offender was apprehended by a party within the jurisdiction of the county court of N., and tried and convicted at H., which is out of the jurisdiction of that court:—Held, that the county court of N. had no jurisdiction over an action brought for the reward offered by the placard. *Ib.*

Action against Administrator.]—A. bequeathed to his servant F. 20*l.*, and appointed executors. The will was made in the district of the county court of H., and the testator died there. The executors renounced probate; and M. took out letters of administration with the will annexed in the Prerogative Court of Canterbury. M. resided in London. F., by leave of the judge of the county court of H., sued M. in that court for the 20*l.*:—Held, that the grant of letters of administration was part of the cause of action, and that the judge of the county court of H. had not, under the 9 & 10 Vict. c. 95, s. 60, jurisdiction in respect of it over M., who was not within his district. *Fuller* v. *Mackay*, 2 El. & Bl. 573; 1 C. L. R. 1021; 22 L. J., Q. B. 415; 17 Jur. 989; 1 W. R. 447.

Bills of Exchange.]—Action in a superior court by the drawer against the acceptor of a bill for 12*l.* 18*s.* 4*d.*, accepted within the jurisdiction of a county court, within which the defendant dwelt, but delivered to the plaintiff without:—Held, that the cause of action arose within the jurisdiction. *Roff* v. *Miller*, 19 L. J., C. P. 278; 14 Jur. 746.

A bill was drawn and accepted, and the indorser put his name upon it within the city of London, but it was delivered to the indorsee in the county of Middlesex:—Held, that the cause of action did not arise within the city of London. *Buckley* v. *Hann*, 5 Ex. 43; 7 D. & L. 188; 19 L. J., Ex. 151; 14 Jur. 226.

An action was brought by a second indorsee of a bill against the drawer. The bill was drawn and indorsed, and notice of dishonour given, within the jurisdiction of a county court within which the defendant dwelt:—Held, that the cause of action arose in some material point within the jurisdiction of the county court. *Huth* v. *Long*, 1 L. M. & P. 333; 19 L. J., Q. B. 325; 15 Jur. 511.

If a bill is drawn and indorsed within the jurisdiction of a county court, an indorsee is not at liberty to sue in the superior courts by reason of his not knowing where the bill was drawn and indorsed. *Ib.*

The plaintiff, residing at N., drew a bill of exchange upon the defendant, who resided at L., and without the jurisdiction of the county court of N. The defendant accepted the bill at L., and returned it to the plaintiff at N., and was afterwards sued upon it in the county court of N., under 9 & 10 Vict. c. 95, s. 60:—Held, that the county court had no jurisdiction, the whole cause of action not having arisen within that district. *Wilde* v. *Sheridan*, 1 B. C. C. 56; 21 L. J., Q. B. 260; 16 Jur. 426.

—— **Notice of Dishonour.**]—In an action by an indorsee against the drawer of a bill of exchange for a sum less than 20*l.*, the defendant traversed the notice of dishonour, and it appeared at the trial that the bill had been drawn and indorsed within the jurisdiction of a county court where the defendant resided, but that the notice of dishonour was given elsewhere:—Held, that the plaintiff was deprived of his costs by 9 & 10 Vict. c. 95, s. 129. *Betteley* v. *Buck*, 13 Jur. 368.

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 1, an action may be brought in the county court "in the district of which the cause of action wholly or in part arose." The plaintiff drew in Norwich a bill of exchange upon the defendant, which he accepted and made payable in London. The bill being dishonoured, the plaintiff sued the defendant thereon in the county court at Norwich, and the judge found in favour of the plaintiff for the amount of the bill:—Held, that the cause of action arose in part within the jurisdiction of the Norwich county court. *Trevor* v. *Wilkinson*, 31 L. T. 731.

Promissory Note.]—A party suing in a superior court on a promissory note, and recovering less than 20*l.*, might be deprived of costs under s. 113 of 10 & 11 Vict. c. lxxi., though the cause of action had no locality. *Lowley* v. *Rossi*, 12 Q. B. 952.

d. Leave of Judge.

Leave in Discretion of Judge or Registrar.]—The judge or registrar of a county court in the district of which the cause of action wholly or in part arises has a discretion under s. 74 of the County Courts Act, 1888, to grant leave to commence an action or matter in that court; and Ord. V. r. 9*a*, of the County Court Rules, 1889, is not ultra vires. *Reg.* v. *Turner*, 66 L. J., Q. B. 417; [1897] 1 Q. B. 445; 76 L. T. 556; 45 W. R. 316.

Leave not obtained—Appearance by Defendant—Waiver.]—A defendant was, without any leave having been obtained pursuant to s. 74 of the County Courts Act, 1888, sued in the district of a county court where he was non-resident, but in which he had carried on business within six months before the commencement of the action. When the case had been heard and partially decided the defendant took objection to the jurisdiction, which was overruled by the county court judge. An application for a prohibition having been afterwards made:—Held, that the defendant was not entitled to a prohibition, inasmuch as he had waived the objection to the jurisdiction by appearing and contesting the action. *Moore* v. *Gamgee*, 59 L. J., Q. B. 505; 25 Q. B. D. 244; 38 W. R. 669.

—— **Rule to Judge to issue Execution Refused.**]—In order to give jurisdiction to a county court on the ground that the cause of action arose within the district, it is a condition precedent that leave to issue the summons is granted pursuant to s. 60 of 9 & 10 Vict. c. 95, or s. 15 of 19 & 20 Vict. c. 108; and an action having been tried and judgment given without

such leave, the court refused to rule the judge of the county court to issue execution, on the ground that he had no jurisdiction. *Brown* v. *L. & N.-W. Ry.*, 4 B. & S. 326; 32 L. J., Q. B. 318; 10 Jur. (N.S.) 234; 8 L. T. 695; 11 W. R. 884.

2. IN PERSONAL ACTIONS.

County Courts Act, 1828, s. 56.

a. Generally.

Detinue.]—The county court has jurisdiction to try cases of detinue. *Taylor* v. *Addyman*, 13 C. B. 309; 22 L. J., C. P. 94; 17 Jur. 461.

False Imprisonment — Malicious Prosecution.]—A plaintiff issued a plaint in a county court for false imprisonment, with a notice appended that he did not claim for malicious prosecution. It was proved at the trial that he lodged at the defendant's; that the defendant had removed the plaintiff's goods on a claim of money owing; that the plaintiff broke open a door of a room in the house to get them, upon the defendant's wife refusing to give them up; that she gave him in charge; that at the police station the defendant signed the charge-sheet, on the police saying that everything must be on his responsibility; and that the plaintiff was kept in charge, taken before justices, and discharged. The judge nonsuited, on the ground that, though there was evidence of false imprisonment till the signing of the charge, the case then became one of malicious prosecution, over which he had no jurisdiction, and the whole evidence was inseparable, and had been heard by the jury: —Held, that the false imprisonment lasted till the plaintiff was before the magistrates, and that the judge should not have nonsuited the plaintiff, but told the jury to exclude from their consideration anything that then occurred. *Austin* v. *Dowling*, 39 L. J., C. P. 260; L. R. 5 C. P. 534; 22 L. T. 721; 18 W. R. 1003.

Patent — Action for Infringement.] — The jurisdiction of the county courts to try an action for infringement of patent is ousted by the Patents Act, 1883, which confines the trial of such an action to the High Court of Justice. *Reg.* v. *Halifax County Court Judge*, 60 L. J., Q. B. 550; [1891] 2 Q. B. 263; 65 L. T. 104; 39 W. R. 545—C. A.

—— **Validity—"Franchise."**]—The grant of letters patent for an invention is a "franchise" within s. 56 of the County Courts Act, 1888, and therefore a county court judge has no jurisdiction to try an action in which the validity of a patent is in dispute. *Ib.*

Slander.]—In an action of slander, commenced after the passing of the act 30 & 31 Vict. c. 142, the plaintiff recovered 10*l.*; the judge refused to certify that there was sufficient reason for bringing the action in the superior court:—Held, that, inasmuch as by 9 & 10 Vict. c. 95, s. 58, the plaintiff could not bring an action of slander in the county court, and as he could only proceed in the superior court, the court would order that he should be allowed his costs. *Gray* v. *West*, 9 B. & S. 196; 38 L. J., Q. B. 78; L. R. 4 Q. B. 175; 20 L. T. 221; 17 W. R. 427.

Where, in an action of slander, a plaintiff recovers less than 10*l.*, and the judge declines to certify, under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior court, the court, if called upon to determine whether costs should be allowed or not, will consider all the circumstances under which the action was brought, the amount of damages recovered, the fact of the judge declining to certify, and the fact that the action could not have been brought in the county court. *Sampson* v. *Mackay*, 10 B. & S. 694; 38 L. J., Q. B. 245; L. R. 4 Q. B. 643; 20 L. T. 807; 17 W. R. 883.

The 5th section is general in its application, and applies to all actions, whether they can be brought in a county court or not. *Ib.*

b. Amount of Debt, Demand, or Damages.

Balance of Account.]—In a plaint, the plaintiff, in his particulars, set forth a debt of 57*l.* 4*s.* for services rendered to the defendant, allowing 15*l.* 0*s.* 4*d.* as paid by the defendant on the plaintiff's behalf at different times, and 4*l.* as received by cash at different times, stating the balance as 38*l.* 3*s.* 8*d.*; but there was no evidence of an account stated, or of any agreed or settled balance between the parties, nor did the defendant at the trial admit the 15*l.* 0*s.* 4*d.* as constituting a part payment:—Held, that the demand was a claim for 57*l.* 4*s.*, and consequently that the county court had no jurisdiction over the cause. *Avards* v. *Rhodes*, 22 L. J., Ex. 106; 8 Ex. 312; 17 Jur. 71.

Action for Detinue—Value of Goods.]—In an action for the hiring of two pianos, with a count in detinue for the pianos themselves, the defendant paid into court the amount due for the hire, and (after the commencement of the action) delivered up the pianos. At the trial the jury found that the value of the pianos was 130*l.*, and gave a verdict for the plaintiff for 1*s.* damages on the count in detinue:—Held, that he was entitled to costs, under the 15 & 16 Vict. c. 54, s. 4, the cause of action, at the time of its commencement, not being one for which a plaint could have been entered in a county court. *Leader* v. *Rhys*, 10 C. B. (N.S.) 369; 30 L. J., C. P. 345; 7 Jur. (N.S.) 1199; 4 L. T. 330; 9 W. R. 704.

The test of the jurisdiction of the county court is the actual value of the goods sought to be recovered. *Ib.*

—— **Deposit Note for over £50.**]—The plaintiff brought an action in a county court for the delivery up to him of a deposit note for 65*l.* which was detained by the defendants. Upon an objection as to the jurisdiction:—Held, that, the value to the plaintiff of the deposit note being merely the amount represented by the cost and trouble he would be put to in proving his title to the money in the event of the note being withheld, the county court had jurisdiction to try the case. *Clegg* v. *Baretta*, 56 L. T. 775.

Action for Penalties.]—By 55 Geo. 3, c. 194, a penalty of 20*l.* is imposed on any person practising as an apothecary without having obtained a certificate. In a plaint, the summons to appear stated it to be to recover 20*l.* for illegally practising as an apothecary, and the particulars mentioned the names of four persons whom the defendant had attended and supplied with medi-

cines:—Held, that on these proceedings the plaintiff could only recover one penalty of 20*l.*, and consequently that in entertaining the plaint the county court did not exceed its jurisdiction. *Apothecaries Company* v. *Burt*, 1 L. M. & P. 405; 5 Ex. 363; 19 L. J., Ex. 334; 14 Jur. 487.

Evidence of more than £50 Damages in Tort.]—When, in an action of tort in a county court, the plaintiff, who by his plaint claims 50*l.*, puts, in his evidence, the damage sustained by him at a higher sum, the jurisdiction of the county court is not thereby ousted. *Bodger* v. *Nicholls*, 28 L. T. 441.

It is not necessary, in such a case, that the plaintiff should have abandoned the excess before the trial. The county court judge may at the trial make the requisite amendment in the particulars. *Ib.*

c. Set-off.

County Courts Act, 1888, s. 57.

Admitted by both Parties.]—A demand exceeding 20*l.*, and reduced by an unadmitted set-off to a sum not exceeding 20*l.*, was not within the jurisdiction of the county courts under 9 & 10 Vict. c. 95. *Beswick* v. *Capper*, 7 C. B. 669; 18 L. J., C. P. 216, n.

A defendant was not entitled to enter a suggestion to deprive a plaintiff of costs under 9 & 10 Vict. c. 95, s. 129, where the debt or demand originally exceeding 20*l.* was reduced below that sum by a claim of set-off. *Woodhams* v. *Newman*, 7 C. B. 654; 6 D. & L. 683; 18 L. J., C. P. 213; 13 Jur. 456.

If a plaintiff claims more than 50*l.* without admitting any set-off to reduce it to that amount, and the defendant, by proof of a set-off, reduces the amount recovered below 20*l.*, the plaintiff is entitled to costs, as there is no admitted set-off, reducing the claim to 50*l.*, so as to give the county court jurisdiction. *Walesby* v. *Gouldstone*, 35 L. J., C. P. 302; L. R. 1 C. P. 567; 12 Jur. (N.S.) 873; 14 L. T. 662; 14 W. R. 899.

By s. 57 of the County Courts Act, 1888, where in any action the debt or demand claimed consists of a balance not exceeding 50*l.* after an "admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff," the court shall have jurisdiction to try such action:—Held, that the "set-off" referred to in the section is a set-off the existence of which is admitted by both parties, and not merely by the plaintiff. *Hubbard* v. *Goodley*, 59 L. J., Q. B. 285; 25 Q. B. D. 156; 62 L. T. 763; 38 W. R. 639.

d. Splitting Claim.

"Cause of Action"—Items of Tradesman's Bill.]—The expression "cause of action" in s. 63 of the 9 & 10 Vict. c. 95, meant in general "cause of one action," and was not limited to an action on one separate contract. *Grimbley* v. *Aykroyd*, 1 Ex. 479; 3 D. & L. 701; 17 L. J., Ex. 157; 12 Jur. 357.

Where a tradesman has a bill against a party for an amount exceeding 20*l.*, in which the items are so connected with each other that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, if he divides that demand in order to bring several suits in the county court, a prohibition will be issued. *Ib.*

A tradesman's bill for a series of articles delivered continuously cannot be split into different causes of action. *Bonsey* v. *Wordsworth*, 18 C. B 325; 25 L. J., C. P. 205; 2 Jur. (N.S.) 494; 4 W. R. 566.

A defendant was indebted to the plaintiff for liquors supplied, and money lent at different times. The plaintiff had been in the habit of marking down the separate items, and afterwards entering them in his book as one account, and sent the defendant an account including the whole, amounting to 36*l.* 10*s.* 4*d.* The plaintiff levied a plaint in a county court for 20*l.* for goods sold, the particulars comprising no items for money lent. Having recovered judgment, and obtained payment of this amount, he levied another plaint for 5*l.* 1*s.* 6*d.* for money lent, being the amount of the loans included in the account of 36*l.* 10*s.* 4*d.* At the hearing of the first plaint there was no abandonment:—Held, that these were distinct demands. *Brunskill* v. *Powell*, 1 L. M. & P. 550; 19 L. J., Ex. 362.

Money due in different Rights.]—The plaintiff was in the employment of the defendant as manager of a mine of which the defendant was the contractor. He issued two plaints in a county court against the defendant, one for 30*l.* due to him for salary, and the other for 30*l.* money paid by him at the mine for and at the request of the plaintiff:—Held, that these two claims were separate and distinct, that there was no splitting of claims, and that the two plaints could issue. *Richards* v. *Marten*, 23 W. R. 93.

A. having a cause of action against B. for 19*l.* 0*s.* 8*d.* for money lent between 1846 and 1849, and also a cause of action against him on a separate account for goods sold and delivered, work and labour and money paid between 1845 and 1849, amounting to 19*l.* 19*s.*, after deducting a payment on account of 8*l.* 5*s.* 3*d.*, levying two plaints in respect of them in a county court is not a splitting or a dividing of a cause of action. *Kimpton* v. *Willey*, 9 C. B. 719; 1 L. M. & P. 280; 19 L. J., C. P. 269; 14 Jur. 765.

Rent in arrear and a demand for double value for holding over after the expiration of a notice to quit, under 4 Geo. 2, c. 28, s. 1, are separate causes of action, and therefore may be sued for by separate plaints in a county court. *Wickham* v. *Lee*, 12 Q. B. 521; 18 L. J., Q. B. 21; 12 Jur. 628.

A court of requests act enacted that it should not be lawful for any plaintiff to divide any cause of action into two or more suits, for the purpose of bringing the same within the jurisdiction of the court:—Held, that where a plaintiff had three demands, one for a horse sold, another for rent due, and a third for goods sold and delivered, he was not precluded from suing in the superior court for the two last-named demands by the fact of his having sued for and recovered the price of the horse in the inferior court, for that the three demands were separate and distinct, and were not all one cause of action within the meaning of the act. *Neale* v. *Ellis*, 1 D. & L. 163; 12 L. J., Q. B. 329; 7 Jur. 929.

Work and Labour in different Places.]—A plaintiff was employed by the defendant to paint

and repair houses belonging to the defendant, situate some in Northumberland and some in Durham, under a general agreement at a fixed rate. The course of dealing was that the plaintiff called every Saturday at the defendant's office for guidance and direction as to the work, and payments on account were from time to time made. On the 9th July, 1877, the plaintiff issued a summons in the Newcastle County Court for 15*l.* 3*s.* 10*d.* for work done and materials supplied, and on the 13th August recovered judgment for 10*l.* On the 24th September the plaintiff issued a second summons for 37*l.* 15*s.* 1*d.* for work done and materials supplied. The hearing of this cause was adjourned, and the defendant applied for a prohibition. The defendant swore that the greater part of the amount claimed was due when the first summons was issued, and that the plaintiff had been employed to work on all the houses indiscriminately. The plaintiff alleged that the first claim had been confined to the Northumberland houses, and the second to those in Durham:—Held, that, without deciding how far the two claims were so connected as to form in reality a single cause of action, the objection to the jurisdiction could not be taken at that stage and in that mode, and that a rule for prohibition must consequently be discharged. *Adkin* v. *Friend*, 38 L. T. 393.

e. Abandoning Excess of Claim.

The levying in a county court of a plaint for a sum less than 20*l.*, part of a larger demand exceeding that amount, is not, per se, an abandonment of the excess. *Vines* v. *Arnold*, 7 D. & L. 277; 8 C. B. 632; 19 L. J., C. P. 98; 14 Jur. 350. And see *Avards* v. *Rhodes*, ante, col. 894, and *Bodger* v. *Nicholls*, ante, col. 895.

Where a party sued in a county court to recover 50*l.* in respect of a right of action to a greater amount, the abandonment of the excess required by 9 and 10 Vict., c. 95, s. 63, might be made at any time on or before the hearing of the cause, provided it was by some act in court. *Isaacs* v. *Wyld*, 2 L. M. & P. 676; 7 Ex. 163; 21 L. J., Ex. 46; 15 Jur. 1135.

Where at the hearing the excess was abandoned, and a minute made by the judge of the abandonment:—Held, that he had jurisdiction to give judgment and grant execution for 50*l.* *Ib.*

The abandonment of the excess above 50*l.* of the claim of a plaintiff, in order to give the court jurisdiction under 9 & 10 Vict., c. 95, s. 63, and 13 & 14 Vict., c. 61, s. 1, must be the act of the plaintiff himself or some person authorised by him, and not the act of the judge. *Hill* v. *Swift*, 10 Ex. 726; 3 C. L. R. 724; 24 L. J., Ex. 137; 1 Jur. (N.S.) 167; 3 W. R. 171.

When a judge, of his own authority, and without the consent of the plaintiff, amended the particulars, so as to reduce the plaintiff's claim to 50*l.*, and thus gave himself jurisdiction, a prohibition was issued. *Ib.*

f. Payment on Account before Action.

Balance of Account.]—The words "on balance of account or otherwise," in s. 58 of 9 & 10 Vict., c. 95, have reference to a debt reduced by payments, or a balance settled, and ascertained before action. *Woodhams* v. *Newman*, 7 C. B. 654; 6 D. & L. 683; 18 L. J., C. P. 213; 13 Jur. 456.

The words balance of account are not limited to cases where the parties have met and settled an account, but include a debt reduced below 20*l.* by payment on account, and in such case where in an action in a superior court less than the sum of 20*l.* is recovered by the verdict, the plaintiff is not entitled to costs. *Turner* v. *Berry*, 1 L. M. & P. 744; 5 Ex. 858; 20 L. J., Ex. 89; 14 Jur. 1099.

In an action for a debt of 50*l.*, the defendant pleaded, as to 15*l.* 16*s.* 8*d.*, non-joinder of a creditor, and as to the residue, never indebted. The defendant obtained a verdict upon the non-joinder. As to the residue, the plaintiff proved a debt for 35*l.* 5*s.* 8*d.*, reduced by payments to 11*l.* 5*s.* 8*d.*:—Held, that the defendant was entitled to a suggestion to deprive the plaintiff of costs, under 9 & 10 Vict., c. 95, s. 129. *Hudspeth* v. *Yarnold*, 9 C. B. 625; 19 L. J., C. P. 321; 14 Jur. 378.

A party who sued in a superior court a defendant residing within the jurisdiction of a court of requests for a debt being the balance of account on a demand originally exceeding 5*l.*, but reduced below that amount by payments before action, was not liable to costs, though he recovered less than 40*s.* *Elsley* v. *Kirby*, 9 M. & W. 536; 1 D. (N.S.) 946; 12 L. J., Ex. 96.

3. Actions of Ejectment and for Recovery of Premises.

County Courts Act, 1888, s. 59 and ss. 138—145.

Test of Value—9 & 10 Vict. c. 95.]—Under s. 122 of the 9 & 10 Vict. c. 95, by which the landlord of any house, land or other hereditament might, after the interest of the tenant had expired, enter a plaint in a county court to recover possession of the premises where the value of the premises or the rent payable in respect of such tenancy did not exceed 50*l.*, the court had jurisdiction if either the rent, no fine having been paid, or the annual value of the premises, did not exceed 50*l.* *Harrington* (*Earl*) v. *Ramsay*, 8 Ex. 879; 22 L. J., Ex. 326; 1 W. R. 456; *S. C.* and S. P., 2 El. & Bl. 669; 22 L. J., Q. B. 460; 1 W. R. 470.

The judges of the county courts had jurisdiction in all cases under 9 & 10 Vict. c. 95, s. 122, whatever might be the value of the premises, if the rent did not exceed 50*l.* per annum, and there was no fine. *Fearon* v. *Norvall*, 5 D. & L. 445; 2 B. C. Rep. 333; 18 L. J., Q. B. 9; 13 Jur. 325.

By a written agreement the plaintiff let to the defendant premises at a rent of 20*s.* a week payable as demanded; four weeks' notice to quit from any day to be sufficient. During the continuance of this tenancy, the plaintiff verbally agreed with the defendant to accept 16*s.* a week, which was accordingly paid, and, on two occasions, the defendant submitted to a distress for that amount: Held, that no new demise was thereby created, and consequently the county court had no jurisdiction under 9 & 10 Vict. c. 95, s. 122, the rent being above 50*l.* *Crowley* v. *Vitty*, 7 Ex. 319; 21 L. J., Ex. 135.

—— **30 & 31 Vict. c. 142, s. 11.**]—Under 30 & 31 Vict. c. 142, s. 11, the test of the jurisdiction of the county court was the value or rent as between the litigant parties, and not the value or rent as between the lessee and a sub-lessee. *Brown* v. *Cocking*, 9 B. & S. 503; 37 L. J., Q. B. 250; L. R. 3 Q. B. 672; 18 L. T. 560; 16 W. R. 933.

Where a judge had decided that the annual value did not exceed 20*l.*, and there was evidence to support his decision, the court could not grant a prohibition. *Ib.*

In ejectment against the occupier by the assignee of a term subject to a ground-rent, the county court judge was of opinion that by deducting the ground-rent the annual value of the premises was reduced below 20*l.*, and therefore he had jurisdiction:—Held, first, that the value intended in s. 11 was the marketable value of which the rent paid by the tenant to the immediate landlord is, in the absence of exceptional circumstances, a fair criterion. *Livtone* v. *Rose*, 3 B. & S. 509; 38 L. J., Q. B. 6; L. R. 4 Q. B. 4; 19 L. T. 280; 17 W. R. 52.

Held, secondly, that the county court judge having adopted an erroneous test of value, the court would grant prohibition. *Ib.*

——**Effect of Dismissal of Summons for Prohibition.**]—A plaintiff having sued in a county court to recover possession of hereditaments, the defendant applied by summons to a judge of the High Court of Justice sitting at chambers for a prohibition, on the ground that the annual value was greater than 20*l.*: the judge dismissed the summons, and the defendant did not appeal from his decision. At the trial of the action the judge of the county court refused to receive evidence from the defendant that the hereditaments were of greater value than 20*l.* a year, and he gave judgment for the plaintiff:—Held, that the decision of the judge of the county court was right, for by the dismissal of the summons the value of the hereditaments was conclusively ascertained for the purposes of the action, which therefore must be assumed to be within his jurisdiction. *Symons* v. *Rees*, 1 Ex. D. 416; 25 W. R. 116.

Ouster of Jurisdiction by Claim of Title.]—A summons was taken out in a county court under 9 & 10 Vict. c. 95, s. 122, by A. against B., to recover land. On application for a prohibition by B., it appeared that B. held as tenant to C., in his lifetime, two farms, C. being leaseholder of one, and tenant in fee of the other. C. died; and A. produced a will by which he was devisee of all C.'s real estate, and appointed executor. A. proved the will and gave B. notice to quit. B. bonâ fide disputed the validity of the will:—Held, that the restriction contained in s. 58 of 9 & 10 Vict. c. 95, as to the jurisdiction of the county court when title to corporeal hereditament comes in question, applies to proceedings under s. 122. The title to the leasehold could not come in question, inasmuch as the probate was conclusive that the title to that was in A., but that the title to the freehold did come in question; and a prohibition went as to the freehold farm, and was refused as to the leasehold. *Kerkin* v. *Kerkin*, 3 El. & Bl. 399; 18 Jur. 813.

The jurisdiction of the county court under 19 & 20 Vict. c. 108, s. 50, was ousted if in proceedings under that section it appeared that the party in possession of the premises disputed the existence of any tenancy and bonâ fide claimed to be the owner. *Pearson* v. *Glazebrook*, 37 L. J., Ex. 15; L. R. 3 Ex. 27; 17 L. T. 260.

In a plaint in a county court for the recovery of premises by a landlord against his tenant, the court is not necessarily deprived of its jurisdiction by the judge being satisfied from the evidence that there is a bonâ fide claim of title to the premises by a third person, who has not only given notice to his tenant not to pay rent, but who has succeeded in obtaining possession from him. It is the duty of the judge, before he declines to try such cause, to ascertain whether the person so claiming title has obtained possession under circumstances which would amount to an eviction by title paramount; for if the tenant voluntarily gave up possession, the cause could have been tried without the judge having to determine any question of title. *Emery* v. *Barnett*, 4 C. B. (N.S.) 423; 27 L. J., C. P. 216; 4 Jur. (N.S.) 634; 6 W. R. 634.

A. was let into possession of premises as tenant to B., and paid him rent, C. claiming title. A. gave up possession to him in consideration of a sum for crops. In an action in a county court by B. against A. to recover arrears of rent, and also possession of the premises:—Held, that whether C.'s title could be set up or not, depended upon whether A. had been evicted by title paramount, or had voluntarily yielded up possession. *Ib.*

Relation of Landlord and Tenant.] — The 9 & 10 Vict. c. 95, s. 122, only applies where the relation of landlord and tenant exists; and therefore a mortgagee cannot recover possession under that section from a person who has entered into the occupation as tenant of the mortgagor subsequently to the mortgage and has not become tenant to the mortgagee. *Jones* v. *Owen*, 5 D. & L. 669; 18 L. J., Q. B. 8; 13 Jur. 261.

By an agreement in writing, R. sold a house to S. for 150*l.*; the house was to be conveyed upon the payment of that sum; but in the meantime, and until the payment, a weekly rent was reserved. S. afterwards married the defendant. The purchase money was satisfied, and R. died. The executors then proceeded in the county court against the defendant to recover possession of the house:—Held, that the relation of landlord and tenant did not exist. *Banks* v. *Rebbeck*, 2 L. M. & P. 453; 20 L. J., Q. B. 476; 15 Jur. 657.

In 1857 a defendant was entitled to 500*l.* with interest, charged on Whiteacre, belonging to A., and it was verbally arranged that the defendant should rent Blackacre from A., and deduct the interest of the 500*l.* from the rent. In 1858 A. conveyed the reversion of Blackacre to the plaintiff:—Held, that the defendant was a mere tenant of Blackacre, and that the plaintiff could determine the tenancy by notice merely, and recover possession. *Jones* v. *Thomas*, 4 L. T. 210.

Determination of Tenancy—Legal Notice to Quit.]—The judge of a county court has jurisdiction to inquire whether the tenancy has been determined by legal notice to quit, and his decision on that fact is conclusive, and cannot be questioned on a motion for a prohibition, and the jurisdiction of the county court is not ousted by the tenant appearing and showing cause. *Fearon* v. *Nowall*, 5 D. & L. 439, 445; 17 L. J., Q. B. 161; 18 L. J., Q. B. 9.

The plaintiff let to the defendant a house for three years at a rent of 3*l.* 6*s.* 8*d.* a month, payable monthly; the agreement of tenancy contained a power of re-entry on non-payment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance of any of the conditions in the agreement. A month's rent having been in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit at

the end of the next month of the term, alleging as breaches non-payment of rent and a breach of a condition in the agreement:—Held, that a "legal notice to quit" within the meaning of 19 & 20 Vict. c. 108, s. 50, must be taken to mean the notice to quit required by law and not one depending on the express stipulation of the parties; that the tenancy had not, therefore, been determined within the meaning of the section, and that an action to recover possession of the premises could not be brought in the county court. *Friend* v. *Shaw*, 57 L. J., Q. B. 225; 20 Q. B. D. 374; 58 L. T. 89; 36 W. R. 236; 52 J. P. 438.

Pendency of other Proceedings.]—The fact of the pendency of an action of ejectment is not a bar to the plaintiff proceeding in a county court for the recovery of possession of the same tenements. *Williamson* v. *Bissill*, 7 H. & N. 391; 31 L. J., Ex. 131; 8 Jur. (N.S.) 42; 5 L. T. 321; 10 W. R. 109.

Warrant of Possession—Where Available.]—Although the plaintiff and the defendant both reside within the jurisdiction of a county court, if property sought to be recovered is situate without the jurisdiction, a warrant of possession cannot be executed. *Ellis* v. *Peachey*, 5 D. & L. 675; 18 L. J., Q. B. 137; 13 Jur. 564.

—— **Evidence of Title.**]—A warrant of possession obtained under 19 & 20 Vict. c. 108, s. 50, by a landlord proceeding in the county court against his tenant, but not against the person actually in possession, is not conclusive against the latter, who may, notwithstanding the warrant, bring an action of trespass against the landlord, if the landlord had not in fact a right to the possession of the premises. Per Channell, B., and Pigott, B.; contra by Martin, B. *Hudson* or *Hodson* v. *Walker*, 41 L. J., Ex. 51; L. R. 7 Ex. 55; 25 L. T. 937; 20 W. R. 489.

A county court order for giving up possession of premises, made against a person holding under the tenant, is not conclusive evidence of title in a subsequent action against him for mesne profits. *Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J., Ex. 50; 11 Jur. (N.S.) 286; 11 L. T. 608; 13 W. R. 348.

4. ACTIONS IN WHICH TITLE IS IN QUESTION.

County Courts Act, 1888, s. 60.

Question, how raised.]—A mere statement of the party claiming, unsupported by other evidence, is not sufficient to oust the court of its jurisdiction. *Lilley* v. *Harvey*, 5 D. & L. 648; 2 B. C. Rep. 312; 17 L. J., Q. B. 357; 12 Jur. 1026.

Duty of Judge.]—Where a question is raised incidentally before the judge of a county court, on the trial of an action over which he has originally jurisdiction, under the 9 & 10 Vict. c. 95, s. 58, whether title to land is in dispute between the parties, the judge has jurisdiction to inquire and decide whether title really is in dispute, but his decision is not final; and if he decides that title did not come in dispute, and the superior court is satisfied that title did come in dispute, a prohibiton will issue against him. *Thompson* v. *Ingham*, 14 Q. B. 710; 19 L. J., Q. B 189; 14 Jur. 429.

Claim in Good Faith.]—To oust the jurisdiction of a county court the claim set up must be a bonâ fide one, and the right one which can exist in point of law. *Lloyd* v. *Jones*, 6 C. B. 81; 5 D. & L. 784; 17 L. J., C. P. 206; 12 Jur. 657.

The proviso in the 58th section of the 9 & 10 Vict. c. 95, deprives the county court of jurisdiction in all cases where the title to real estate is the matter in question, however fraudulent or malâ fide the claim of either party may be. *Marsh* v. *Dewes*, 17 Jur. 558.

Claim material to Issue.]—The court will not grant a prohibition to restrain a judge from proceeding in a plaint where evidence respecting title to land is given, unless such question of title is material to the decision of the case. *Morton* v. *Grand Junction Canal Co.*, 6 W. R. 543.

Landlord and Tenant.]—A tenant, sued for use and occupation of premises by the landlord of whom he took them on lease, is at liberty to show that the latter's title expired during the tenancy, even though the tenant continued to enjoy or occupy the premises for the whole term, without being subjected to any eviction from the real owner; and if the tenant sets up such a defence when so sued in a county court, that court has no longer any jurisdiction to decide the cause, as title to land has come in question. *Mountney* v. *Collier*, 1 El. & Bl. 630; 22 L. J., Q. B. 124; 17 Jur. 503; 1 W. R. 179.

A party sued in a county court for rent and double value cannot oust the court of jurisdiction, by alleging title to the premises in himself, if it is proved that he has admitted himself to have been tenant to the plaintiff at the times when the rent accrued, and from which the holding over commenced. *Wickham* v. *Lee*, 12 Q. B. 521; 18 L. J., Q. B. 21; 12 Jur. 628.

On the trial of a plaint for a trespass committed by breaking the doors of certain rooms in a cottage of the plaintiff, his case was, that he had let to the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant's case was, that the plaintiff had let him the whole of the cottage:—Held, that title to an incorporeal hereditament was in dispute, and that the county court had no jurisdiction. *Chew* v. *Holroyd*, 8 Ex. 249; 22 L. J., Ex. 95; 1 W. R. 68.

Trespass.]—A plea of not possessed, to an action of trespass quare clausum fregit, takes the case out of the jurisdiction of the county courts. *Timothy* v. *Farmer*, 7 C. B. 814.

But not unless a question of title in fact comes in question. *Latham* v. *Spedding*, 2 L., M. & P. 378; 17 Q. B. 440; 20 L. J., Q. B. 302; 15 Jur. 576.

A summons had been served to answer a plaint in the nature of an action on the case, for an injury to the plaintiff's reversionary interest in land. The injury complained of, as set forth in the particulars, was the removal of a boundary fence between the lands of the plaintiff and the defendant, cutting down trees, &c., and the erection of a new fence in such a manner as to make it appear that a portion of the plaintiff's land belonged to the defendant:—Held, that the defendant, upon showing that the title to land was bonâ fide in dispute, was entitled to a prohibition, and that he was not bound to wait till the county court had proceeded to hear the case.

Sewell v *Jones*, 1 L M & P 525, 19 L J, Q B 372, 15 Jur 153

False Imprisonment]—A was found taking sand from premises in the occupation of B (under a lease) and was given into custody by B on a charge of stealing it On appearing before a magistrate, A denying that B had any right to the land, the charge was dismissed, as involving a question of title A afterwards sued B in a county court for false imprisonment A prohibition having issued, the court set it aside on the ground that no question of title could arise on the hearing *Eversfield* v *Newman*, 4 C B (N S) 418

Replevin]—If a plea asserting a title to the freehold be pleaded in a county court, the court is immediately ousted of its jurisdiction, and should not proceed Therefore, where the defendant in replevin made cognizance for the taking of cattle that the place in which they were taken was the freehold of a corporation, and that he, as the bailiff of the corporation, took them damage feasant to which the plaintiff pleaded that the defendant was not such bailiff, and did not take them as such bailiff on which issue was joined after verdict and judgment for the plaintiff in the county court, it was held that such judgment was erroneous *Tennyswood* v *Pattison*, 3 C B 243, 15 L J, C P 231, 10 Jur 572

—— **Jurisdiction notwithstanding Title**]—Where an action of replevin is commenced in a county court, and the defendant does not take steps to remove it under 19 & 20 Vict c 108, s 67, the county court has power to try the action notwithstanding title to an incorporeal hereditament comes in question, the 9 & 10 Vict c 95, s 58, not applying to an action of replevin *Fordham* v *Akers*, 4 B & S 578, 33 L J, Q B 67, 9 L T 478, 12 W R 201 *And see* post, col 915

Liability in Respect of Ownership.]—The 11 & 12 Vict c 123, s 3, which directs that the amount paid for carrying into force an order of justices under that statute to abate a nuisance may be recovered from the owner of the premises where the nuisance existed, either in the county court or by proceeding before two justices, gives those tribunals exclusive jurisdiction, and therefore the county court has jurisdiction in such case, although title to land comes in issue *Hertford Union* v *Kempton*, 11 Ex 295, 25 L J, M C 41, 3 W R 521.

Where a party is charged in a county court with a liability arising from his being owner of land, and he disclaims being the owner of that land, this raises a question of title *Reg* v *Harden*, 2 El & Bl 189, 22 L J, Q B 299, 17 Jur 804.

Hereditaments — Leasehold Property.] — By the County Courts Act, 1888, s. 56, except as in this act provided, the court shall not have cognizance of any action "in which the title to any corporeal or incorporeal hereditaments shall be in question", and by s 60 jurisdiction is given to try such actions where neither the value of the hereditaments in dispute, nor the rent thereof, shall exceed 50*l* by the year. Where the defendant disputed the plaintiffs' title to houses held by them under leases for years, and exceeding the specified yearly value —Held, that the title to "hereditaments was in question within the meaning of s 56 and therefore that the county court had no jurisdiction to try the action *Lumbers* v *Jones* 58 L J Q B 222 22 Q B D 599, 60 L T 939, 37 W R 328—C A

Easement]—The plaintiff sued in the High Court for damage to his reversion by reason of the defendant's interference with the flow of water through a pipe under the defendant's land to which the plaintiff claimed to be entitled in respect of his premises The defendant, by his defence, refused to admit the plaintiff's title to the easement claimed, pleaded leave and licence from the plaintiff's tenant, and, while denying liability, brought 40*s* into court The plaintiff took the 40*s* out of court in satisfaction of his claim The yearly value of the premises in respect of which the easement was claimed exceeded 50*l* —Held, that the action could not have been commenced in the county court, because a question of title to a hereditament arose which the county court had no jurisdiction to try *Howarth* v *Sutcliffe*, 61 L J, Q B 729, [1893] 2 Q B 358, 14 R 722, 73 L T 277, 44 W R 33, 59 J P 678

—— **User by Public of Navigable Water**]—In an action in a county court for damage done to the plaintiff's oyster bed by the defendant's barge, the plaintiff gave evidence of fourteen years' possession of the oyster-bed The defendant, prior to the hearing, gave notice to the plaintiff to produce his documents of title, and at the hearing cross examined him as to his title, but tendered no evidence in contradiction of it. The value of the oyster bed exceeded 50*l* by the year —Held, on application for prohibition, that no question of title to hereditaments, within the meaning of s 56 of the County Courts Act, 1888, arose, and that the word 'easement" in s 60 of the same act applies only to an easement over a servient tenement in respect of a dominant tenement, and does not apply to the user of a navigable water by the public, and that the county court judge, therefore had jurisdiction to entertain the action *Hawkins* v *Rutter*, 61 L J, Q B 146, [1892] 1 Q B 668, 40 W R 238

Church Rates]—By a local act of parliament for rebuilding a church, trustees were employed to levy rates upon all houses in the parish, one half to be paid by the landlord and the other half by the tenant, the tenants to pay the whole rate in the first instance, and to deduct a moiety out of the rent, and the landlord to allow of such deduction accordingly, notwithstanding any agreement to the contrary After the passing of this act a lease was granted in the parish to a tenant who covenanted to pay all parliamentary and other taxes and rates. The tenant paid the full rent and the rate, but the landlord refused to deduct a moiety of it from the plaintiff, on the ground that the act only applied to agreements in existence at the time it was passed The tenant having sued the landlord in a county court for a moiety of the amount so paid for rates —Held, that as no question was raised as to the title to any corporeal or incorporeal hereditaments, there was no ground for a writ of prohibition. *Gwynne* v *Knight*, 1 Ex. 802, 17 L. J., Ex. 168; 12 Jur. 101.

Paving Rates]—Paving rates assessed under the authority of an act of parliament are not incorporeal hereditaments and may therefore be sued for in a county court *Baddeley* v *Denton*, 7 D & L 210, 4 Ex 504 19 L J, Ex 44

Custom]—The county courts are not precluded from trying a disputed custom *Davis* v *Walton*, 8 Ex 153, 22 L J, Ex 25 16 Jur 954, 1 W R 8

Therefore they have power to try a custom for the occupier of a wharf on a public navigable river to cause vessels coming to his wharf to unload to overlap the adjoining wharf of another *Ib*

In an action in a county court for fishing in the plaintiff's river the defendant set up a custom for all the inhabitants of the town to fish in such river, and claimed the privilege to himself as such inhabitant, as a defence to the action — Held that the custom being bad, as a profit à prendre, the jurisdiction of the county court could not be excluded by setting it up *Lloyd* v *Jones* 5 D & L 781, 6 C B 81, 17 L J, C P 206 12 Jur 657

Held also that the right claimed was not an hereditament, and therefore not within the proviso to s 58 of 9 & 10 Vict c 58 ousting the county court of its jurisdiction *Ib*

Office]—A plaintiff sued in a county court, as chapel clerk of a parochial chapelry for arrears of an ancient customary yearly sum due from each inhabitant householder of the chapelry The defendant disputed the title of the plaintiff to the office of chapel clerk, and also his right to the customary payment —Held, that the title to an incorporeal hereditament was in question, and therefore the county court had not jurisdiction *Stephenson* v *Raine*, 2 El & Bl 744 2 C L R 234, 23 L J, Q B 62, 18 Jur 176, 2 W R 77

If the question of title to an office is not raised on the hearing of a plaint but the party is taken to be duly appointed the court will not afterwards grant a writ of prohibition *Stevenson* v *Stickle*, 13 Jur 1103

Railway Tolls]—In a plaint in a county court against a railway company to recover damages for expense and loss of time sustained by a party in consequence of the improper omission of the company to convey goods on their line, a question was raised as to the right of the company to charge toll for empty waggons —Held that the title to toll did not thereby come in question within the meaning of the proviso in 9 & 10 Vict c 95, s 58 *Hunt* v *G N Ry*, 10 C B 900 S P and *S C*, 2 L, M & P 268, 20 L J, Q B 349, 15 Jur 400

Harbour Dues]—In a plaint in a county court against a collector of the trustees of Ramsgate Harbour to recover back a sum paid as a duty imposed by statute on vessels passing within certain limits the question was raised as to the right of the trustees to take a second rate or duty for vessels repassing as well as passing —Held, that the title to toll thereby came in question *Adey* v *Trinity House Deputy Master*, 22 L J, Q. B 3, 17 Jur 489 1 W R 53 *S C*, nom *Reg* v. *Everett*, 1 El & Bl 273

Annual Value—Party-wall]—The plaintiff was the lessee of certain premises at an annual rental of 36*l*, including a party-wall which separated his house from that of the defendant, who denied the plaintiff's title to the wall and committed a trespass upon it —Held, that inasmuch as the only portion of the premises the title to which was in dispute was under the annual value of 20*l* the county court had jurisdiction to try the action *Stolworthy* v *Powell*, 55 L J, Q B 228, 54 L T 795

—— **Arrears of Rent-charge**] — A county court has jurisdiction within s 60 of the County Courts Act 1888, to try an action for recovery of arrears of a rent charge of 10*l* a year issuing out of land the value whereof exceeds 50*l* by the year, inasmuch as in such action the title to the rent charge is in question, and not the title to the land out of which it issues and therefore the value of the hereditaments in dispute does not exceed the sum of 50*l* by the year *Bassano* v *Bradley*, 65 L J, Q B 479 [1896] 1 Q B. 645, 74 L T 353, 44 W R 576

Practice—Nonsuit—Costs]—In a plaint in a county court when on the hearing it appears that title to land is disputed the judge has no power to nonsuit the plaintiff and before the County Courts Act, 1867 s 14 he had no power to award costs against him *Linford* v *Partridge*, 1 H & N 621 26 L J, Ex 147, 3 Jur. (N S) 271, 5 W R 235

5 In Equity Matters

County Courts Act, 1888, ss 67, 75

Administratio]—The county courts have power, under the County Courts Equitable Jurisdiction Act (1865, 28 & 29 Vict c 99), to entertain administration suits instituted by the assignees and representatives of next of kin, and of the other classes of persons specified in s 1, sub-s 1, of that act *Turner* v *Reynolds*, 42 L J, Ch 510, L R 16 Eq 37, 28 L T 530, 21 W R 558

—— **Order within Discretion of Judge**]—A person interested in the estate of a deceased person is not entitled as of right to an administration order in a county court the combined effect of Ord VI r 6 and Ord XXII r 11, of the County Court Rules, 1886, being to place the granting of such order within the discretion of the county court judge *Pearson* v *Pearson*, 56 L T 445

—— **Proceedings, where taken—Metropolitan District**]—Section 75, sub-s 3 of the County Courts Act, 1888, which provides that proceedings for the administration of the assets of a deceased person are to be taken in the court within the district of which the deceased had his last place of abode in England, or in which the executors or administrators, or anyone of them, have their or his place of abode, does not apply to the metropolitan county court districts named in s 84 of that act Where therefore the plaintiff in such proceedings dwells or carries on business in any of such districts and the defendant dwells or carries on business in any other of such districts, the proceedings may be taken in the court within the district of which either the plaintiff or the defendant dwells or carries on business *Reg* v *Bloomsbury County Court Judge*, 24 Q B D 309, 62 L T 286, 38 W. R. 320

—— **Practice—Statement of Value of Estate.**]—An administration plaint need not contain a specific statement that the estate to be administered does not exceed in amount or value 500*l.* *Cheeseyright* v. *Thorn*, 38 L. J., Ch. 615; 20 L. T. 152.

—— **Transfer where Estate exceeds 500*l.***]—A plaint was instituted in the county court for the administration of the estate of a testator, alleging (as the plaintiff then believed to be the fact) that the estate was worth less than 500*l.* Previously to the hearing, notice was given by the defendant to the plaintiff that the estate was worth more than 500*l.*, and at the hearing this was proved to be the case. The judge made an order transferring the suit to the Court of Chancery:—Held, that he was right in so doing. *Birks* v. *Silverwood*, 41 L. J., Ch. 638; L. R. 14 Eq. 101; 27 L. T. 18.

—— **Staying Proceedings in High Court.**]—Since the Judicature Act, 1873, a county court before which an administration suit is pending has no power to stay proceedings in the High Court, in respect of claims provable in the administration suit. *Cobbold* v. *Pryke*, 49 L. J., Ex. 8; 4 Ex. D. 315; 28 W. R. 259; cp. *Allison, In re*, 47 L. J., Ch. 755; 8 Ch. D. 4; 38 L. T. 304; 26 W. R. 450.

—— **Restraining Creditor's Action.**] — Notwithstanding that, by Ord. 1, r. 8, of the County Court Orders in Equity, 1865, a decree cannot be made till a month after the plaint has been filed, a county court judge has not jurisdiction under Ord. XII. r. 1, of the County Court Orders in Equity, 1865, in a creditor's administration suit, before decree, or on an ex parte application, to restrain a creditor's action commenced previously to the institution of the suit. *Nokes* v. *Gandy*, 43 L. J., Ch. 276; L. R. 17 Eq. 297; 29 L. T. 828; 22 W. R. 293.

—— **Action for Legacy — Residuary Bequest.**]—A residuary bequest is a legacy within 9 & 10 Vict. c. 95, s. 65. *Pears* v. *Wilson*, 2 L. M. & P. 515; 6 Ex. 833; 20 L. J., Ex. 381; 15 Jur. 932.

—— **Bequest payable through Trustee.**]—A bequest of money may be a legacy within the meaning of the section, although payable through the intervention of a trustee. *Ib.*

—— **Trust for Investment.**] — But a bequest of money in trust to invest the same during the minority of an infant, and pay it to him when of age, with power to apply it towards his education and advancement, is not. *Phillips* v. *Hewston*, 11 Ex. 699; 25 L. J., Ex. 133; 4 W. R. 293.

Where property was left in trust to invest in government securities, to pay the dividends to the widow during her life, and after her death to dispose of the estate in a certain way, paying certain legacies, and then with a bequest of a certain sum to be divided equally among the four children of a certain party:—Held, in a plaint by one of them for his share, that this was so far a matter of trust that it was not a fit subject for a county court, the widow not being shown to be dead. *Beard* v. *Hine*, 10 W. R. 45.

—— **Devastavit.**] — Where a plaint is brought for a legacy, and the executor shows that he has paid for the testator's debts exceeding the amount of the assets, and the plaintiff contends that the executor has been guilty of a devastavit, and on that account seeks to charge him with assets, the county court judge has jurisdiction to try the question of the devastavit. *Winch* v. *Winch*, 13 C. B. 128; 22 L. J., C. P. 104; 17 Jur. 88; 1 W. R. 131.

An action in a county court, by a legatee, to recover a legacy under 50*l.*, will be stayed by a court of equity, and the legatee restrained from proceeding, after a decree for the administration of the testator's assets, although the legatee submitted to take a judgment against the executor de bonis propriis only on the allegation of a devastavit. *Ratcliffe* v. *Winch*, 17 Beav. 217; 22 L. J., Ch. 915; 17 Jur. 586.

—— **Mortgage of Legatee's Interest.**] — So legatees, who have mortgaged their interest in a legacy, will be restrained by a court of equity from prosecuting a suit in the county court to obtain payment from the executors. *Neighbour* v. *Brown*, 26 L. J., Ch. 670.

—— **Action on Condition of Bequest.**]—A plaintiff in a county court claimed, by his particulars of demand, 17*l.* 18*s.* "due from the defendant as administratrix of D., for that W., by his will, bequeathed to D. certain freehold hereditaments, and also leasehold and other personal estate, on condition of D. paying unto the plaintiff 4*s.* a week during her life. And D., on on the death of W., accepted the bequest and entered into possession, and enjoyed the aforesaid freehold and personal estate, and duly paid the weekly sum during his life; but since his death the defendant, although she has possessed herself of the hereditaments, goods, chattels, and effects of D. to an amount more than sufficient for the purpose, has refused to pay the plaintiff." On the death of D. the freehold estates so bequeathed descended to his nephew and heir-at-law, a minor:—Held, that the sum in question was claimed as a debt, and consequently the county court had jurisdiction. But the court ordered a certiorari to issue on account of the legal difficulties in the case. *Longbottom* v. *Longbottom*, 8 Ex. 203; 22 L. J., Ex. 74.

—— **Proceedings, where taken.**]—A testator gave a legacy in the following words:—"Likewise, should my executors think proper, to S. I give 20*l.* conditional on his continuing to conduct himself faithfully in all respects." The executors having renounced, letters of administration were granted to the defendant by the Prerogative Court of Canterbury. The will was made within the jurisdiction of the county court of Kent. The estate of the testator was being administered in London, where the bulk of the assets would be realised:—Held, that the cause of action did not arise in the district of the county court of Kent, within 9 & 10 Vict. c. 95, s. 60. *Fuller, In re*, 2 El. & Bl. 573; 22 L. J., Q. B. 415; 17 Jur. 989; 1 W. R. 447.

Execution of Trusts.]—The county courts have power, under 28 & 29 Vict. c. 99, to decree execution of constructive or implied trusts, when the trust estate or fund does not exceed in amount or value the sum of 500*l.* *Clayton* v. *Renton*, 36 L. J., Ch. 428; L. R. 4 Eq. 158; 16 L. T. 48.

Mortgage — Foreclosure — Concurrent Jurisdiction of Superior Court.]—The 28 & 29 Vict. c. 99, does not oust the jurisdiction of the superior courts of equity in the matters to which its provisions apply. They retain a concurrent jurisdiction, and it is not obligatory upon a plaintiff to resort to the county court. *Scotto* v. *Heritage*, 36 L. J., Ch. 123; L. R. 3 Eq. 212; 15 L. T. 349; 15 W. R. 168.

A plaintiff, residing more than twenty miles apart from the defendant, filed a bill to foreclose a mortgage for 50*l.*, upon which a few pounds as interest were due. The court held him entitled to select his tribunal; and, considering it doubtful, under the circumstances, that less expense would have been incurred by proceeding in the county court, gave him a decree for foreclosure with the ordinary costs. *Ib.*

—— **Bankruptcy of Mortgagor.**] — B. advanced 100*l.* to C. upon the security of a deposit of the title deeds of real estate. C. subsequently became bankrupt, and therefore B. filed a plaint in the county court to enforce the payment of his money:—Held, that the county court had jurisdiction to grant the relief prayed; and that B. having two jurisdictions, viz. the bankruptcy court and the county court, to choose from, had a right to go to either. *Medhurst* v. *Golder*, 16 L. T. 50.

A married woman advanced 250*l.* upon the security of a deposit of title deeds of real estate. Her husband died, and she married a second time. Shortly after the second marriage her husband borrowed money upon a deposit of the deeds. Subsequently she separated from her husband, and a deed was then executed, whereby he released to his wife all his interest in her real and personal estate. The husband became bankrupt, and his assignee, having paid off the second mortgage, obtained possession of the deeds. Upon the death of the first mortgagee the bankrupt's assignee filed a plaint in the county court, making the mortgagee's executors the only defendants, and claiming to be paid the 250*l.*, or in default that the property might be sold. The judge, overruling an objection taken that the wife was a necessary party, made the order prayed:—Held, that she was a necessary party, and that the case must stand over in the county court, with liberty to the plaintiff to amend his plaint by adding parties. *Robinson* v. *O'Kell*, 22 L. T. 399.

—— **Redemption Suit.**]—A suit for redemption, in which the right to redeem is resisted, and a sale of the mortgaged hereditaments is sought to be set aside, is within the jurisdiction in equity, conferred upon the county courts by 28 & 29 Vict. c. 99, s. 1. *Powell* v. *Roberts*, 39 L. J., Ch. 44; L. R. 9 Eq 169; 21 L. T. 451; 18 W. R. 84.

—— **Improper Exercise of Power of Sale—Action for Damages.**]—Sub-s. 2 of s. 21 of the Conveyancing and Law of Property Act, 1881, provides that "any person damnified by an unauthorised, or improper, or irregular exercise of the power"—that is, the power of sale conferred by the act—"shall have his remedy in damages against the person exercising the power":—Held, that this remedy in damages may be obtained by means of a common law action brought in the county court, under s. 56 of the County Courts Act, 1888, where the amount claimed is under the county court jurisdiction. *Ames* v. *Higdon*, 69 L. T. 292.

Specific Performance—Agreement for Lease.]—Agreements for leases are within the 4th clause of s. 1 of the 28 and 29 Vict. c. 99, authorising decrees for specific performance. *Willcox* v. *Marshall*, 36 L. J., Ch. 358; L. R. 3 Eq. 270; 15 L. T. 527; 15 W. R. 333.

—— **Agreement for Use of Footpath.**]—A plaint was entered in a county court claiming specific performance of an agreement that the plaintiff should have the free and exclusive use of a footpath, and that the defendant would not grant permission to any other person to use it, and also claiming damages for an alleged breach of the agreement:—Held, on rule for prohibition, that the agreement was not "for the sale, purchase, or lease of any property" within the meaning of s. 9 of the County Courts Act, 1867, and that prohibition must therefore issue as to the claim for specific performance, but that the action must proceed as to the claim for damages. *Reg.* v. *Westmoreland County Court Judge*, 58 L. T. 417; 36 W. R. 477.

The defendant entered on premises under an executory agreement for a lease. He subsequently gave six months' notice to quit, as if on a yearly tenancy, and left the premises. An action was brought in the county court for a quarter's rent, accruing due after the defendant had given up possession. The value of the premises exceeded 50*l.*, so that the judge had no jurisdiction to decree specific performance of the agreement; but he was of opinion that it was a case in which specific performance would be decreed, and that he was therefore bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff:—Held, that the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied where the court in which the action is brought has concurrent jurisdiction in law and equity, and that the plaintiff could not recover in the action. *Foster* v. *Reeves*, 61 L. J., Q. B. 763; [1892] 2 Q. B. 255; 67 L. T. 537; 40 W. R. 695; 57 J. P. 23—C. A.

6. Where Special Statutory Provisions as to Proceedings.

Bills of Exchange.]—The 19 & 20 Vict. c. 108, s. 4, has not deprived the county court of its jurisdiction to issue a summons under the Bills of Exchange Act (18 & 19 Vict. c. 67). *Holbrow* v. *Jones*, 38 L. J., C. P. 22; L. R. 4 C. P. 14; 19 L. T. 320; 17 W. R. 54.

Bills of exchange are within the jurisdiction of the county courts. *Waters* v. *Handley*, 6 D. & L. 88.

Section 129 of the 9 & 10 Vict. c. 95, which prohibits a plaintiff from recovering costs in an action brought in a superior court for which a plaint might have been entered in the county court, applies to actions on negotiable instruments in the same manner as to other actions. *Nind* v. *Rhodes*, 17 L. J., Q. B. 179; 2 B. C. Rep. 226.

—— **Defences.**]—In an action on a bill of exchange in a county court, the defendant may

avail himself of any defence of which the facts admit, and is not confined to the particular defence disclosed in the affidavit on which he is let in to defend. *Saul* v. *Jones*, 1 El. & El. 59; 28 L. J., Q. B. 37; 5 Jur. (N.S.) 220; 7 W. R. 47.

Whether Claim arises within District.]—*See Cases* ante, col. 891.

Demands under Public Health Act — Six Months after Cause of Complaint arose.]—A local board brought an action in a county court to recover 13*l.* 5*s.* 5*d.*, the share apportioned to, and payable by, the defendant of the expenses of certain works executed by the board under the Public Health Act, 1848, s. 69. By ss. 69 & 129, the expenses were to be recovered in a summary manner before two justices, and by 11 & 12 Vict. c. 43, s. 11, the time for making complaints before justices (unless specially limited), is limited to six months after the cause of complaint arose. By the Local Government Act, 1858, and Amendment Act, 1861, s. 24, proceedings for the recovery of demands below 20*l.*, which local boards could then recover in a summary manner, might, "at the option of the local board, be taken in the county court as if such demands were debts." The action was commenced more than six months after the cause of complaint arose:—Held, that, according to the true construction of the above enactments, the option to proceed in the county court could only be exercised for as long a time as the right to proceed before justices existed, and therefore that the action, having been commenced more than six months after the cause of complaint arose, could not be maintained. *Tottenham Local Board* v. *Rowell*, 46 L. J., Ex. 432; 1 Ex. D. 514; 35 L. T. 887; 25 W. R. 135—C. A.

—— **Title to Land.**]—By 11 & 12 Vict. c. 123, s. 3, all costs and expenses incurred in obtaining an order, for the removal of a cause of complaint, or in carrying the same into effect, shall be deemed to be money paid for the use and at the request of the owner or occupier of the premises in respect whereof such costs and expenses shall have been incurred, and may be recovered as such, by the guardians of the union, in any county court, or, if the guardians think fit, before two justices, and a county court has jurisdiction over a suit for such costs and expenses, though title to land is in question, notwithstanding the proviso in s. 58 of 9 & 10 Vict. c. 95. *Reg.* v. *Harden*, 2 El. & Bl. 189; 22 L. J., Q. B. 299; 17 Jur. 804.

Local Sewers Act.]—By a local act, passed before the County Courts Act, rates for cleansing and sewering a town might be recovered by action "in any of her Majesty's courts of record at Westminster":—Held, that the county court had jurisdiction to hear a plaint brought to recover a sum under 20*l.* due in respect of a rate under the local act. *Stewart* v. *Jones*, 1 El. & Bl. 22; 22 L. J., Q. B. 1; 16 Jur. 1020.

Waterworks Clauses Act, 1847.]—When the annual value of a tenement charged with water rate is bonâ fide disputed before action, it is a condition precedent to the right of suing for the rate that the water company should procure the dispute to be determined by summoning before justices the party liable, under the Waterworks Clauses Act, 1847, s. 68. *New River Co.* v. *Mather*, 44 L. J., M. C. 105; L. R. 10 C. P. 442; 32 L. T. 658.

A water company, in January, 1874, sued the defendant in the county court for a balance of two years' water rate, due Christmas, 1872. The defendant had from April, 1873, up to the time of action, disputed the claim as excessive, on the ground that annual value meant net annual value after deduction made for repairs, and paid into court a sum calculated upon an annual value of 18*l.* The company based their claim upon a gross annual value of 22*l.* Neither party had summoned the other before justices for the purposes of having the dispute as to annual value determined:—Held, that the county court judge had no jurisdiction to determine the question as to annual value. *Ib.*

Building and Friendly Societies—Winding up.]—The Companies (Winding Up) Act, 1890, applies to the winding up in county courts of building societies registered under the Building Societies Act, 1874, and the county court judge has power to state the facts in the form of a special case for the opinion of the High Court under s. 3, sub-s. 3 of the act of 1890. Semble, r. 146 of the County Court Rules of February, 1892, is ultra vires. *Portsea Island Building Society, In re*, 62 L. J., Ch. 845; [1893] 3 Ch. 205; 3 R. 646; 69 L. T. 138; 41 W. R. 587.

A county court has power, under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32, to make an order for winding up a building society. *Andrew* v. *Swansea Cumbrian Benefit Building Society*, 50 L. J., Q. B. 428; 44 L. T. 106; 29 W. R. 382; 46 J. P. 507.

—— **Rule referring Disputes.**]—On a rule for a mandamus to the judge of a county court to hear a plaint brought by a member of a building society within 6 & 7 Will. 4. c. 32, against an officer of that society, under a rule of the society directing a reference of all disputes to two justices of the peace:—Held, that the right to bring an action was taken away, and that the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 58, did not operate to revive a power of bringing actions in the county courts which had been taken away from all courts generally. *Payne, Ex parte*, 5 D. & L. 679; 18 L. J., Q. B. 197; 13 Jur. 634.

—— **Unregistered Society—Rules.**]—In the case of an unregistered society under s. 30, sub-s. 10, of the act of 1875 (explained by 42 Vict. c. 9), the right of appeal to a county court or court of summary jurisdiction overrides any rules of the society to the contrary. *Knowles* v. *Booth*, 32 W. R. 432.

See also BUILDING SOCIETY—FRIENDLY SOCIETY.

Master and Servants Act, 1867.]—Journeymen painters sued their former employer in a county court for wages claimed upon a concluded contract of service. The defendant shewed that a magistrate had on the merits heard and dismissed summonses for the same wages taken out under the Master and Servants Act, 1867. The county court judge refused on that ground to entertain the plaintiff's claim:—Held, that the magistrate had jurisdiction to hear such a claim under that act, and that the decision of the

county court judge was right. *Millett* v. *Coleman*, 44 L. J., Q. B. 194; 33 L. T. 204.

In Admiralty—Merchant Shipping Act Amendment Act, 1862, s. 49, sub.-s. 6—Salvage.]—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 458, 460, entitles a person by whom services are rendered to a ship in distress to a reasonable amount of salvage, which in case of dispute, within certain limits as to amount, shall be referred to the arbitration of justices of the peace. By 25 & 26 Vict. c. 63, s. 49 (6), it shall be competent for any county court judge to exercise the same jurisdiction in salvage cases as is given to two justices. By r. 276 of the rules, orders and forms for regulating the practice of the county courts, 1867, "In proceedings in the county courts under 25 & 26 Vict. c. 63, a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of the court shall be adopted with respect to such proceedings, so far as the same are applicable." A plaint was entered and summons issued in a county court, and the particulars claimed "250*l.*, the amount agreed to be paid" for getting the defendant's schooner off the shore. The value of the schooner was under 1,000*l.*:—Held, first, that by 25 & 26 Vict. c. 63, s. 49 (6), the jurisdiction was given to the county court judge as an independent arbitrator, and not as judge of the county court. *Beadnell* v. *Breeson*, 9 B. & S. 315; 37 L. J., Q. B. 171; L. R. 3 Q. B. 384; 16 W. R. 1008.

Held, secondly, that the proceeding before him was properly commenced by plaint and summons, in pursuance of the County Court Rules, 1867, r. 276. *Ib.*

Held, thirdly, that this was a claim for salvage, the amount of which was to be determined notwithstanding the bargain for a fixed sum, and therefore the county court judge had exclusive jurisdiction. *Ib.*

—— **Breach of Charterparty.**]—The 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases. *Cargo ex Argos* (L. R. 5 P. C. 134) followed. *Simpson* v. *Blues* (L. R. 7 C. P. 290) and *Gunnestad* v. *Price* (L. R. 10 Ex. 65) disapproved. *The Alina*, 49 L. J., P. 40; 5 Ex. D. 227; 42 L. T. 517; 29 W. R. 94—C. A.

And see SHIPPING.

Under Agricultural Holdings Act.] — *See* LANDLORD AND TENANT.

As to Tithe.]—*See* ECCLESIASTICAL LAW.

Under Debtors Act.]—*See* infra. col. 954.

7. CONTEMPT OF COURT.

Power to Commit—Extent.]—A county court judge has no power to commit anyone for contempt which has not occurred in the face of the court. *Reg.* v. *Lefroy*, 42 L. J., Q. B. 121; L. R. 8 Q. B. 134; 28 L. T. 132; 21 W. R. 332.

The fact that the County Courts Act (9 & 10 Vict. c. 95), ss. 113, 114, gives a limited power of summarily dealing with contempt committed in face of the court, but is silent as to contempt committed out of court, is a strong, if not conclusive argument against the summary power of a county court judge to punish for such contempt. *Ib.*

Wilful Insult.]—Action for false imprisonment against the bailiff of a county court and the gaoler. Pleas justifying under a warrant under the hand of the judge and seal of the county court, directed to them, which, after reciting that the plaintiff did wilfully insult the judge during his sitting, and thereupon he ordered him to be taken into custody, and detained till the rising of the court, therefore required the bailiff and gaoler to take and imprison the plaintiff for seven days:—Held, that the ground of commitment was not uncertain. *Lery* v. *Moylan*, 10 C. B. 189; 1 L. M. & P. 307; 19 L. J., C. P. 308; 14 Jur. 983.

The recital, that the plaintiff had insulted the judge, was a direct adjudication that he had done so. *Ib.*

It was not necessary to set forth in the warrant the nature of the insult. *Ib.*

—— **Sentence before Warrant.**]—A warrant for the committal to prison of a person guilty of a wilful insult during the sitting of a county court, issued at the rising of the court, is regular, although the judge orally sentenced him to pay a fine, with imprisonment in default, and the sentence was entered in the registrar's book. *Reg.* v. *Staffordshire County Court Judge* or *Jordan*, 57 L. J., Q. B. 483; 36 W. R. 796—C. A.

Form of Order—Particulars should be stated.]—An order was made in an action in a county court upon one Harris, as acting manager of a certain partnership fund, to pay into court within fourteen days the sum of 65*l.* odd, and to deliver up certain documents. Harris did deliver up the documents, but failed to pay in the money, whereupon an order of committal was made out by the county court judge, on the ground that Harris in his fiduciary position had been guilty of contempt of court by neglecting to obey the previous order. The committal order merely recited the terms of the original order, and did not specify any particular breach:—Held, that it was immaterial whether the process of committal was by an order of committal or a writ of attachment, since the distinction no longer existed in chancery practice, according to *Harvey* v. *Harvey* (26 Ch. D. 644); but that the above order was bad for uncertainty, since it did not specify in what particular Harris was guilty of contempt, so as to enable him to purge such contempt. *Reg.* v. *Lambeth County Court Judge*, 36 W. R. 475.

Unqualified Person practising as Solicitor.]—The judge of a county court has no jurisdiction to commit for contempt a person who has acted as a solicitor in an action in his court without being duly qualified. *Reg.* v. *Brompton County Court Judge*, 62 L. J., Q. B. 604; [1893] 2 Q. B. 195; 5 R. 462; 68 L. T. 829; 41 W. R. 648; 57 J. P. 648.

8. EXEMPTIONS.

Solicitors.]—Before the 12 & 13 Vict. c. 101, the 9 & 10 Vict. c. 95, did not deprive attorneys of their privilege of suing in the superior courts,

but by s. 18, no privilege shall be allowed to any attorney, solicitor or other person, to exempt him from the provisions of the act. *Jones* v. *Brown*, 2 Ex. 329; 5 D. & L. 716; 17 L. J., Ex. 163; 12 Jur. 380. S. P., *Lewis* v. *Hance*, 11 Q. B. 921; 5 D. & L. 641; 17 L. J., Q. B. 172; 12 Jur. 375.

The privilege of an attorney to be sued in the superior court of which he was an attorney, was taken away by the London Small Debts Act (10 & 11 Vict. c. 71, s. 49). *Jeffreys* v. *Beart*, 5 D. & L. 646; 2 B. C. Rep. 296; 17 L. J., Q. B. 290; 12 Jur. 1003.

The Small Debts Extension Act, 1852, did not deprive an attorney suing for a bill of costs in a superior court of the costs of the action, where he recovered a sum exceeding 20*l*. *Borradaile* v. *Nelson*, 14 C. B. 655; 2 C. L. R. 740; 23 L. J., C. P. 159; 18 Jur. 431; 2 W. R. 470.

Working Tinners in Stannaries.]—By a charter of Edw. I, working tinners in the stannaries of Cornwall have the privilege of being sued only in the court of the vice-warden, in certain causes; and there is in it a grant that the vice-warden may hold pleas between the persons and in the causes specified. By 9 & 10 Vict. c. 95, s. 67, no privilege, "except as hereinafter excepted," shall be allowed to any person to exempt him from the jurisdiction of the county court; and by s. 141, nothing in the act shall be construed to affect the court of the vice-warden; but this provision shall not be deemed to prevent the establishment of a county court within the stannaries, or to limit or affect the jurisdiction of such court:—Held, that the personal privilege of the working tinner to plead to the jurisdiction of the county court was taken away; and that as regards the parties to the suit, the county court had concurrent jurisdiction with the stannary court. *Newton* v. *Nancarrow*, 15 Q. B. 144; 19 L. J., Q. B. 314; 14 Jur. 911.

By the Stannaries Court (Abolition) Act, 1896, and an order of the Lord Chancellor thereunder, the jurisdiction and powers of the Stannaries Court has been transferred to the county courts of Cornwall.

9. In Bankruptcy.—*See* Bankruptcy.

10. In Probate.—*See* Will.

11. In Admiralty.—*See* Shipping.

C. REPLEVIN.

County Courts Act, 1888, ss. 133—136.

1. Generally.

Under 9 & 10 Vict. c. 95, ss. 119 and 121, a county court had jurisdiction to try an action of replevin for an alleged illegal distress for rent, although the title to the premises, in respect of which the rent distrained for was due, appeared to be in dispute; the steps necessary for the removal of the action under s. 121 not having been taken. *Reg.* v. *Raines*, 1 E. & B. 855; 22 L. J., Q. B. 223.

Before 19 & 20 Vict. c. 108 and 23 & 24 Vict. c. 126 after freehold pleaded a county court was ousted of its jurisdiction. *Tenniswood* v. *Pattison*, 3 C. B. 243; 15 L. J., C. P. 231; 10 Jur. 572.

But since those statutes a county court has jurisdiction to try an action of replevin though title is in question, subject to the power of removal by the defendant under 19 & 20 Vict. c. 108, s. 67. *Fordham* v. *Akers*, 4 B. & S. 578; 33 L. J., Q. B. 67; 9 L. T. 478; 12 W. R. 201.

Certiorari.]—The 9 & 10 Vict. c. 95, s. 90, which takes away the writ of certiorari in plaints for debt or damages, does not apply to plaints in replevin. *Mungean* v. *Wheatley*, 6 Ex. 88; 2 L. M. & P. 30; 20 L. J., Ex. 106; 15 Jur. 110.

Notice by Infant.]—Service of notice of replevy by an infant, and who is neither a bailiff nor a sheriff's officer, is illegal and void. *Cuckson* v. *Winter*, 2 M. & Ry. 313.

2. Bond or Security.

In what Cases.]—A rent-charge is within the meaning of the 11 Geo. 2, c. 19, s. 23, upon a replevin. *Short* v. *Hubbard*, 2 Bing. 349; 10 Moore, 107; 3 L. J. (O.S.) C. P. 35. S. P., contra, *Bulpit* v. *Clarke*, 1 Bos. & P. (N.R.) 56.

Growing crops may be considered in the nature of goods and chattels, under the 11 Geo. 2, c. 19, s. 23, as they may be distrained in the same manner as articles of the latter description. *Glover* v. *Coles*, 7 Moore, 231; 1 Bing. 6.

Form and Mode of taking before 19 & 20 Vict. c. 108.]—On the removal of an action of replevin from a county court, under 9 & 10 Vict. c. 95, ss. 121, 127, the judge of the county court, instead of taking the bond to the other party to the suit, as directed by the latter of those sections, took it, through mistake, to himself, as a trustee for him. That party having succeeded in the court above:—Held, first that the bond, though irregular, was not void, but might be sued on by the judge as a voluntary bond. *Stansfield* v. *Hellawell*, 7 Ex. 373; 21 L. J., Ex. 148; 16 Jur. 317.

Held, secondly, that by declaring in the court above, the opposite party had waived the objection to the want of a regular bond. *Ib.*

Held, thirdly, that the obligee of the bond was entitled to recover under it, as a trustee of the party, the amount of the costs incurred by him in the replevin suit. *Ib.*

A plaint in replevin for an excessive distress having been entered in a county court against a landlord and bailiff, they by leave of a judge, on an affidavit that the rent exceeded 20*l*., sued out a writ of certiorari, to remove the cause into the Exchequer. The writ was returnable on the day the plaint stood for trial, and the defendant's attorney then presented the writ to the judge, and offered on the part of the landlord to make the declaration required by 9 & 10 Vict. c. 95, s. 121, stating that the bailiff was unable to make it. The landlord was too ill to attend, but he had executed a power of attorney to W., authorising him to sign and seal the bond, and generally to perform such acts about the conduct of the writ as he should think proper. The defendant's attorney tendered the bond, which was conditional, to prove in the superior court that the rent exceeded 20*l*., but the clerk of the court did not approve of the sureties in consequence of not having had notice of them in time to inquire into their sufficiency. The judge refused to allow the certiorari, and tried the cause on the ground of the want of time for the clerk of the court to inquire into the sufficiency of the sureties, but he

did not fix the amount for which they were to be responsible:—Held, first, that there was no ground for quashing the certiorari. *Mungean* v. *Wheatley*, 6 Ex. 88; 2 L. M. & P. 30; 20 L. J., Ex. 106; 15 Jur. 110.

Held, secondly, that the judge was liable to an attachment for not receiving and returning the writ, although his disobedience was not wilful, but originated in an erroneous construction of an obscure statute. *Ib.*

Held, thirdly, that the declaration required by 9 & 10 Vict. c. 95. s. 121, might be verbally made either by the attorney in the cause or the party, and that it was sufficient if made by one of several defendants; and that the person named in the power of attorney was authorised, not only to sign and seal the bond, but also to make the declaration. *Ib.*

Cattle Damage Feasant.]—It was sufficient if the sheriff took one pledge on a replevin for distraining cattle damage feasant. *Hucker* v. *Gordon*, 1 C. & M. 58; 3 Tyr. 107; 2 L. J., Ex. 47.

In City of London.]—One of the sheriffs of London, without his companion, may take and assign replevin bonds in his own name only. *Thompson* v. *Farden*, 1 Man. & G. 535; 8 D. P. C. 815; 1 Scott (N.R.) 275; 9 L. J., C. P. 284; 4 Jur. 600.

Inquiry into Sufficiency.]—A sheriff was not bound to warrant or inquire into the actual sufficiency of the pledges in a replevin bond; if they were apparently responsible it was sufficient. *Hindle* v. *Blades*, 5 Taunt. 225; 1 Marsh. 27. S. P., *Sutton* v. *Waite*, 8 Moore, 27.

In taking sureties the sheriff was to exercise a reasonable discretion in deciding upon their sufficiency; and in an action for taking insufficient sureties, it was for the jury to decide whether he had used that discretion or not. *Jeffery* v. *Bastard*, 4 A. & E. 823; 6 N. & M. 303; 2 H. & W. 60.

In proof of the insufficiency of the circumstances of them, it was good evidence to show that they were in debt, had been applied to for payment, and had promised payment, but did not pay. *Gwyllim* v. *Scholey*, 6 Esp. 100.

A fi. fa. executed in an action for use and occupation, brought by the now plaintiff against the plaintiff in replevin, to recover the rent which had been distrained for, was evidence in an action against the sheriff to show that such execution having been unproductive, the plaintiff had failed to obtain satisfaction of the rent after taking the bond, though the plaintiff in replevin was no party to the present action. *Plumer* v. *Briscoe*, 11 Q. B. 46; 17 L. J., Q. B. 158; 12 Jur. 351.

The plaintiff having brought actions against the sureties, without notice to the sheriff, which actions had proved unproductive, might recover the costs from the sheriff, their amount not exceeding, with the other damages proved, the penalty of the bond. *Ib.*

Proceedings against Sheriff for Insufficiency.]—The high and under sheriff and replevin clerk were all answerable to a defendant in replevin for the sufficiency of the pledges de retorno habendo. *Richards* v. *Acton*, 2 W. Bl. 1220.

If insufficient pledges de retorno habendo were taken by the officer of the court below in replevin, the remedy against him was by action, and the court would not order him to pay the costs recovered by the defendant in replevin. *Tessyman* v. *Gildart*, 1 Bos. & P. (N.R.) 292.

The court refused an attachment against a sheriff, for neglecting to take a replevin bond, as the party injured might bring his action. *Rex* v. *Lewis*, 2 Term Rep. 617.

If a defendant in replevin elects to proceed on the 17 Car. 2, c. 7, he is not confined to his execution under that statute, but may sue the sureties on the replevin bond, or the sheriff in an action on the case, for negligence in losing the bond. *Perreau* v. *Bevan*, 8 D. & R. 72; 5 B. & C. 284; 4 L. J. (O.S.) K. B. 177.

A count stating that a sheriff, instead of taking a bond from the plaintiff in replevin, and two sufficient sureties, took a bond from the plaintiff in replevin and one surety, who was alleged to be insufficient, is bad, for not alleging that the plaintiff in replevin was insufficient. *Hucker* v. *Gordon*, 3 Tyr. 107; 1 C. & M. 58; 2 L. J., Ex. 47.

A declaration against a sheriff for taking insufficient pledges in replevin should show that a writ of retorno habendo had been issued, and elongata returned thereon. *Ib.*

A count against a sheriff for not restoring the goods was bad, for his duty, under 13 Edw. 1, West, 2nd, c. 2, was only to take pledges for that object. *Ib.*

In an action against a sheriff for taking insufficient pledges in a replevin bond, the court would not stay proceedings on an affidavit that the cause was referred without the consent of the sureties, that being matter of defence. *Dale* v. *Gordon*, 2 M. & Scott, 532.

—— **Amount of Sheriff's Liability.**]—In an action against a sheriff, for taking insufficient sureties in a replevin bond, the penalty of the bond was the limit of liability. *Jeffery* v. *Bastard*, 4 A. & E. 823; 6 N. & M. 303; 2 H. & W. 60.

He was liable to the amount of the penalty in the bond, viz. double the value of the goods distrained. *Paul* v. *Goodlake*, 2 Bing. (N.C.) 224; 1 Hodges, 370; 2 Scott, 363; 5 L. J., C. P. 10.

In an action against a sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond could not recover, as special damage, beyond the penalty of the bond, the costs incurred by him in suing the sureties without effect, unless notice of his intention to sue them had been previously given to the sheriff. *Baker* v. *Garratt*, 10 Moore, 324; 3 Bing. 56; 3 L. J. (O.S.) C. P. 145.

The amount of rent for which the distress is made, plus the expenses of the distress, is a proper measure of damages in an action by the landlord against the sheriff for granting an insufficient replevin bond. *Edmonds* v. *Challis*, 6 D. & L. 581; 7 C. B. 413; 18 L. J., C. P. 164; 13 Jur. 389.

Forfeiture of Bond before the Statute.]—To an action on a replevin bond, conditioned for the defendant to prosecute his suit below with effect, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead that the defendant did appear at the next county court, and there prosecute his suit which he had there commenced against the now plaintiff, and which suit was

still depending and undetermined; and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the suit is not still depending, without showing how it was determined and ceased to depend *Brackenbury* v. *Pell*, 12 East, 585. See *Ryder* v. *Edwards*, 3 Scott (N.R.) 456; 3 Man. & G. 202; 10 L. J., C. P. 237; 5 Jur. 728.

The condition in a replevin bond, for prosecuting the suit with effect, means the prosecuting it to a not unsuccessful termination. *Jackson* v. *Hanson*, 8 M. & W. 477; 1 D. (N.S.) 69; 10 L. J., Ex. 396.

In a declaration in an action on a replevin bond, a breach that the defendant did not appear at the next county court, and then and there prosecute his suit with effect, was not well assigned, it being consistent therewith that the suit might have been begun at the next county court, and was still pending. *Ib.*

If judgment was given against a plaintiff in replevin for not prosecuting his suit with effect, his sureties on the bond were answerable to the avowant, notwithstanding he had afterwards proceeded on the 17 Car. 2, c. 7, s. 2, and obtained a judgment under a writ of inquiry, to recover the arrearages of rent and costs. *Turnor* v. *Turner*, 4 Moore, 606; 2 Br. & B. 107.

—— **Delay.**]—Allowing two years to elapse without proceedings was a breach of the condition of a replevin bond to prosecute the replevin without delay. *Axford* v. *Perrett*, 4 Bing. 586; 1 M. & P. 476; 6 L. J. (O.S.) C. P. 116.

In an action on a replevin bond conditioned to prosecute with effect and without delay, it is a sufficient breach of the condition that the plaintiff in replevin did not use due diligence in the prosecution of the suit. *Harrison* v. *Warale*, 2 N. & M. 703; 5 B. & Ad. 146.

It was no breach of a bond conditioned to appear at the next county court and "then and there to prosecute the suit with effect," that the plaint had been removed by a recordari facias loquelam; and that after the removal the suit abated by the death of the plaintiff in replevin. *Morris* v. *Matthews*, 2 Q. B. 293; 1 G. & D. 677; 11 L. J., Q. B. 57; 6 Jur. 600.

The condition in a replevin bond, to prosecute the suit without delay, may be broken by a delay which does not exceed the time allowed by the ordinary practice of the courts if the defendant in replevin is unduly prejudiced by such delay. *Gent* v. *Cutts*, 11 Q. B. 288; 17 L. J., Q. B. 55; 12 Jur. 113.

—— **After 9 & 10 Vict. c. 95.**]—A plaintiff giving a bond, under 9 & 10 Vict. c. 95, s. 121, to prosecute his suit with effect and without delay, and proving that the title to corporeal property was in question, was not entitled to obtain a certificate from the judge at nisi prius that he had done so, if he did not succeed in the cause; and not having done so, he had not prosecuted his suit with effect. *Tunnicliffe* v. *Wilmot*, 2 Car. & K. 626.

Where a party to a suit in replevin in a county court, whether plaintiff or defendant, removed the case, and gave, under 9 & 10 Vict. c. 95, s. 121, a bond conditioned for prosecuting the suit with effect, the bond is forfeited if the obligor does not succeed in the suit. *Tummons* v. *Ogle*, 6 El. & Bl. 571; 25 L. J., Q. B. 403; 3 Jur. (N.S.) 82; 4 W. R. 596.

Former Proceedings against Sureties.]—A replevin bond might be assigned to the avowant only, who might bring an action upon it without joining the party making cognizance. *Archer* v. *Dudley*, 1 Bos. & P. 381, n

And both avowant and person making cognizance might take an assignment of the bond and sue jointly upon it. *Phillips* v. *Price*, 3 M. & S. 180.

If a plaintiff in replevin was nonsuited for want of a plea in bar, the avowant might sue the sureties on the bond, and need not execute a writ of inquiry for his damages. *Waterman* v. *Yea*, 2 Wils. 41.

If a plaintiff in replevin was nonsuited the defendant was not bound to have his damages assessed by the jury, under 17 Car. 2, c. 7, or to take the earliest moment to prosecute his writ de retorno habendo. And he might again distrain the same goods for rent subsequently accrued, previously to executing his retorno habendo, without waiving his action against the sureties in the bond. *Hefford* v. *Alger*, 1 Taunt. 218.

Staying Proceedings against Surety.]—The court will not, in general, stay proceedings on a replevin bond, unless it clearly appears that the application is made on behalf of the sureties, and not of the principal. *Warton* v. *Blicknell*, 1 D. & L. 650; 12 M. & W. 558; 13 L. J., Ex. 112.

The court stayed proceedings, where the defendant had not been able to declare in the replevin suit, owing to the plaintiff's neglect to appear in that action. *Evans* v. *Bowen*, 7 D. & L. 320; 19 L. J., Q. B. 8.

A bill in equity will not lie by a tenant against his landlord to restrain proceedings upon a replevin bond on the ground of set-off against the rent distrained for. *Pratt* v. *Keith*, 3 N. R. 264; 33 L. J., Ch. 528; 10 Jur. (N.S.) 305; 10 L. T. 15; 12 W. R. 394.

Proceedings may be stayed on payment of the penalty and costs, though the plaintiff's costs in the replevin suit much exceed the penalty. *Branscombe* v. *Scarbrough*, 6 Q. B. 13; 13 L. J., Q. B. 247.

A judge may order such stay of proceedings. *Ib.*

The terms on which the court will stay proceedings on a replevin bond, at the instance of the sureties, are the payment of the appraised value of the goods if that is less than the amount of rent due and the costs of the application. *Miers* v. *Lockwood*, 9 D. P. C. 975.

An action on a replevin bond was stayed, on the application of the sureties, upon their paying into court the value of the goods distrained, together with the costs; such value to be ascertained by the prothonotary. *Gingell* v. *Turnbull*, 3 Bing. (N.C.) 881; 5 Scott, 153.

—— **Execution by one Surety only.**]—It is no plea that the bond purports to be entered into by two sureties, but is executed only by one. *Austin* v. *Howard*, 7 Taunt. 28: 2 Marsh. 352.

—— **Nature of Proceedings.**]—The court will not set aside proceedings on a replevin bond because the action is commenced before breach, for it may be pleaded. *Anon.*, 5 Taunt. 776.

The court refused to set aside an execution in an action on a replevin bond, upon an objection

to the proceedings which might have been taken before judgment. *Short* v. *Hubbard*, 2 Bing. 445 ; 9 Moore, 667 ; 10 Moore, 107.

—— **Fraud.**]—In an action by the assignee of a replevin bond against the surety, the declaration alleged that a return of the goods was adjudged, but that S., the plaintiff in replevin, did not make return. The defendant pleaded, first, that the judgment was obtained by the plaintiff by fraud, in collusion with S. ; and secondly, that before judgment obtained, all matters in difference between the plaintiff and S. were referred to arbitration, pending which the proceedings were stayed :—Held, that the first plea, not stating that the judgment was obtained for the purpose of defrauding the sureties, was no answer to the action ; and that the second plea was bad, since the reference was as much for the benefit of the sureties as of the principal, and therefore no prejudice could arise to them from the delay. *Moore* v. *Bowmaker*, 2 Marsh 392 ; 7 Taunt. 97 ; 4 Price, 223. But see *S. C.*, 6 Taunt. 379 ; 3 Price, 214 ; 16 R. R. 628 ; *S. C.* nom *Bowmaker* v. *Moore*, 1 Daniel, 264 ; 21 R. R. 758.

—— **Arbitration.**]—It is no plea to an action against sureties that the replevin cause was referred to an arbitrator, and that he, without their knowledge, enlarged the time for making his award. *Aldridge* v. *Harper*, 10 Bing. 118 ; 3 M. & Scott, 519 ; 2 L. J., C. P. 274.

But where the plaintiff and the defendant referred the cause to an arbitrator, and agreed without the privity of the sureties that the bond should stand as a security for the performance of the award :—Held, that the sureties were discharged. *Archer* v. *Hall* or *Hale*, 4 Bing. 464 ; 1 M. & P. 285 ; 6 L. J. (o.s.) C. P. 79.

Where parties had agreed to be bound by an award and after the award was made treated it as invalid, it was ordered that the replevin bond should be delivered up. *Leicester Waterworks Co.* v. *Cropstone Overseers*, 44 L. J., M. C. 92 ; 32 L. T. 567.

Amount of Liability of Surety.] — The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the suit on the bond. *Hefford* v. *Alger*, 1 Taunt. 218.

The liabilities of sureties in a replevin bond is limited to the amount of rent in arrear at the time of the distress and costs ; and they are not liable for subsequent rent. *Ward* v. *Henley*, 1 Y. & J. 285 ; 30 R. R. 781.

The sureties are only liable for the value of the goods seized ; and if that value exceeds the amount of rent due, they will only be liable for the rent. *Hunt* v. *Round*, 2 D. P. C. 558.

If a sheriff took a replevin bond from one surety only, and he was sued thereon by the person making cognizance for having taken insufficient pledges, who recovered damages and costs in such action :—Held, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches according to the 8 & 9 Will. 3, c. 11, was not entitled to recover the costs incurred in defending the action against him as such sheriff ; and that as the surety was deprived of calling on his co-surety for contribution, he was only liable to a moiety of the damages awarded by the jury in the action against the sheriff. *Austen* v. *Howard*, 1 Moore, 68 ; 7 Taunt. 327.

Replevin bonds are not an exception to the rule, that, on a bond, the plaintiff cannot recover more than the penalty and costs of suit on the bond. *Branscombe* v. *Scarbrough*, 6 Q. B. 13; 13 L. J., Q. B. 247. S. P., *Plumer* v. *Briscoe*, 11 Q. B. 46 ; 17 L. J., Q. B. 158 ; 12 Jur. 351.

Refunding Overplus.]—Where more is levied under a replevin bond than the assignee of the sheriff was entitled to, the court would not grant a rule to make the assignee refund, though the overplus was alleged to be due to a second execution creditor of the same defendant. *Bowser* v. *Lloyd*, 9 D. P. C. 1029 ; 5 Jur. 826.

D. TRANSFER OF ACTIONS AND MATTERS FROM HIGH COURT.

1. Actions of Contract.

County Courts Act, 1888, s. 65.

Section Retrospective.]—Section 65 of the County Courts Act, 1888, applies to actions commenced before the act came into operation. *Curtis* v. *Stovin*, 58 L. J., Q. B. 174 ; 22 Q. B. D. 513 ; 60 L. T. 772 ; 37 W. R. 315.

The 19 & 20 Vict. c. 108, s. 24, applied to an action commenced before the passing of the act. *Kimbray* v. *Draper*, 9 B. & S. 80 ; 37 L. J., Q. B. 80 ; L. R. 3 Q. B. 160 ; 17 L. T. 340 ; 16 W. R. 539.

Claims outside Jurisdiction—Claim for Interest.]—A claim indorsed on a writ of "50*l.* and interest at the rate of 5*l.* per cent. per annum from the date hereof until payment or judgment," is a claim exceeding 50*l.* within the meaning of the County Courts Act, 1867, s. 7, and the action cannot be sent to a county court under that section. *Insley* v. *Jones*, 48 L. J., Ex. 222 ; 4 Ex. D. 16 ; 27 W. R. 111.

—— **Unliquidated Demand.**]—There is no power under 19 & 20 Vict. c. 108, s. 26, or the Judicature Act, 1875, to order an action for unliquidated damages to be tried in a county court, even where the writ is indorsed with a claim for a specified sum. *Knight* v. *Abbott*, 52 L. J., Q. B. 131 ; 10 Q. B. D. 11 ; 31 W. R. 505.

An action on contract in the high court cannot be sent for trial in a county court under s. 65 of the County Courts Act, 1888, if the claim indorsed on the writ, although for a specified sum, is for unliquidated damages. *Bassett* v. *Tong*, 63 L. J., Q. B. 653 ; [1894] 2 Q. B. 332 ; 10 R. 212 ; 71 L. T. 16 ; 42 W. R. 668.

Claim Reduced by Payment—Judgment under Order XIV. for Part.]—By the County Courts Act, 1888, s. 65, where in any action of contract brought in the high court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court. In an action of contract brought in the high court, in which the claim indorsed on the writ, though it originally exceeded 100*l.*, had been reduced to a sum not exceeding 100*l.* by a payment made by the defendant to the plaintiff in pursuance of a judgment under Ord. XIV. for part of the plaintiff's claim :—Held, that "payment" in s. 65 meant payment before action, and there was therefore no juris-

diction, under that section, to order the trial of the action in the county court. *Hodgson* v. *Bell*, 59 L. J., Q. B. 231; 24 Q. B. D. 525; 62 L. T. 481; 38 W. R. 325—C. A

—— **Payment after Writ.**]—A plaintiff brought an action to recover 66*l.* 18*s.* The defendant obtained an order from the master that upon payment of 43*l.* 10*s.* to the plaintiff, the case should be sent down to the county court under 30 & 31 Vict. c. 142, s. 7:—Held, that the order was wrong, as the words "reduced by payment to a sum not exceeding 50*l.*" meant a payment before action brought. *Osborne* v. *Homburg*, 45 L. J., Ex. 65; 1 Ex. D. 48; 33 L. T. 534; 24 W. R. 161.

Payment by the defendant of part of the plaintiff's claim pursuant to a judgment under Ord. XIV. r. 4, was a reduction of such claim within s. 26 of the County Courts Act, 1856, and when the claim was reduced by such payment to a sum not exceeding 50*l.*, the action might be remitted to a county court for trial. *Gray* v. *Hopper*, 57 L. J., Q. B. 505; 21 Q. B. D. 246; 59 L. T. 286; 36 W. R. 746—C. A.

An action for a liquidated demand exceeding 50*l.* cannot be remitted to the county court, though the amount of the claim has been reduced below that sum by payment made before service, but after the issuing of the writ of summons. *Donohoe* v. *Donohoe*, 16 L. R. Ir. 135.

When a claim indorsed on a writ of summons originally exceeds 50*l.*, and is reduced below that sum by a payment of money into court after action brought, a judge has no jurisdiction, under 30 & 31 Vict. c. 142, s. 7, to order that the action be tried in a county court. *Foster* v. *Usherwood*, 47 L. J., Ex. 30; 3 Ex. D. 1; 37 L. T. 389; 26 W. R. 94—C. A.

—— **Claim reduced by admitted Set-off.**]—By 19 & 20 Vict. c. 108, s. 24, where in any action the debt or demand claimed consists of a balance not exceeding 50*l.*, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the county court shall have jurisdiction:—Held, that "admitted set-off" meant a set-off admitted by the plaintiff at the time of the action brought. *Walesby* v. *Gouldstone*, 1 H. & R. 625; 35 L. J., C. P. 302; L. R. 1 C. P. 567; 14 L. T. 662; 14 W. R. 899.

By County Courts Act, 1867, s. 7, where in any action of contract brought in any of the superior courts of common law the claim indorsed on the writ does not exceed 50*l.*, or "where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*," the defendant may apply to a judge at chambers, who may order the action to be tried in the county court:—Held, that the section applies where a payment or set-off reducing the claim below 50*l.* appears on the writ to be admitted by the plaintiff, although such payment or set-off is not also admitted by the defendant. *Percival* v. *Pedley*, 18 Q. B. D. 635; 35 W. R. 566.

—— **Counter-claim.**]—A plaintiff claimed for 22*l.* The defendant denied the claim in toto, and counter-claimed for 20*l.* The plaintiff admitted the counter-claim, and applied to a judge at chambers for the remittal of the cause to the county court under s. 26 of 19 & 20 Vict. c. 108, as for a claim not exceeding 17*l.*, and obtained an order therefor:—Held, that the judge was right in remitting the action, inasmuch as the amount in dispute did not exceed 50*l.*, and that the fact that the defendant "counter-claimed" for the amount due to him did not prevent the amount being treated as a "set-off" against the plaintiff's claim under s. 18 of the Judicature Act, 1884. *Lewis* v. *Lewis*, 57 L. J., Q. B. 38; 20 Q. B. D. 56; 57 L. T. 715; 36 W. R. 63.

—— **Counter-claim for Unliquidated Damages.**]—The jurisdiction of the high court to remit an action to a county court under s. 65 of the County Courts Act, 1888, is not taken away by the fact that the defendant sets up a counter-claim, though the same be for unliquidated damages. *Guilford* v. *Lambeth*, 64 L. J., Q. B. 95; [1895] 1 Q. B. 92; 14 R. 86; 71 L. T. 738; 43 W. R. 97—C. A.

Where an action has been remitted under 19 & 20 Vict. c. 108, s. 26, by consent of the defendant, to the county court for trial, and the defendant has appeared in the county court, a writ of prohibition will not be granted, even though there be a counter-claim for unliquidated damages. *Mouflet* v. *Washburn*, 54 L. T. 16.

An action, although for a sum not exceeding 50*l.*, could not be remitted under 19 & 20 Vict. c. 108, s. 26, to the county court for trial if there was a counter-claim for unliquidated damages. *Mackay* v. *Banister*, 55 L. J., Q. B. 106; 16 Q. B. D. 174; 53 L. T. 567; 34 W. R. 121.

Discontinuance by Plaintiff—Jurisdiction to try Counter-claim.]—An action commenced in the high court cannot be sent down for trial in a county court under s. 65 of the County Courts Act, 1888, where the plaintiff has discontinued and only a counter-claim by the defendant remains to be tried. *Reg.* v. *City of London Court Judge*, 60 L. J., Q. B. 575; [1891] 2 Q. B. 71; 64 L. T. 869.

Death of one Defendant—Summons to proceed or Dismiss—Jurisdiction of High Court.]—An action was brought in the high court against several defendants whom it was sought to make severally liable on a contract. One of the defendants having died, the plaintiff obtained an order remitting the action to the county court under s. 65 of the County Courts Act, 1888:—Held, that the high court had no jurisdiction to make an order under Ord. XVII. r. 8, that the plaintiff should proceed with the action against the deceased defendant's administrator, or that, in default, the action might be dismissed against him. *Duke* v. *Davis*, 62 L. J., Q. B. 549; [1893] 2 Q. B. 260; 4 R. 518; 69 L. T. 490; 41 W. R. 673—C. A.

Court to which Transfer made—Court in which Action might have been commenced.]—By s. 65 of the County Courts Act, 1888, "where in any action of contract brought in the high court the claim indorsed on the writ does not exceed 100*l.*, . . . it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the high court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the applica-

tion the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly." By s. 56, "All personal actions, where the debt, demand, or damage claimed is not more than 50*l.*, . . . may be commenced in the court." By s. 186 the word "court" or "county court" "shall mean and include any court held under this act, and also the City of London Court, and shall include and mean the judge or registrar of the court":—Held, that s. 65 gives power to order the trial to take place in any county court in which the action (if the amount claimed had been such that it could have been commenced in a county court) might have been commenced. *Curtis* v. *Stovin*, 58 L. J., Q. B. 174; 22 Q. B. D. 513; 60 L. T. 772; 37 W. R. 315.

By the County Courts Act, 1888, s. 74 an action may be commenced in any county court of the district in which the defendant, or one of the defendants, dwells or carries on business, or by leave of the judge or registrar, in the court of the district in which the cause of action wholly or in part arose. An action of contract was brought in the high court in which the claim did not exceed 100*l.* The defendant dwelt and carried on business in London, but a part of the cause of action arose in Yorkshire. On an application by the plaintiff for an order that the action may be tried in Yorkshire:—Held, that such an order could be rightly made under s. 65 of the County Courts Act, 1888, as the expression "the court in which the action might have commenced" included all courts in which the action might have commenced under s. 74 of the act, either as of right, or by leave of the judge or registrar. *Burkill* v. *Thomas*, 61 L. J., Q. B. 322; [1892] 1 Q. B. 312; 66 L. T. 150; 40 W. R. 250—C. A.

Making the Order—Jurisdiction of Master of High Court.]—By 30 & 31 Vict. c. 68, the judges are authorised to delegate to the masters such powers as are now exercised by the judges at chambers. The 30 & 31 Vict. c. 142, s. 7, which was passed after the above statute, enables the judges at chambers to send certain causes down to the county courts:—Held, that the masters have power to send such causes for trial at the county courts. *Walsh* v. *Smith*, 30 L. T. 304; 22 W. R. 576. S. P. *Palmer* v. *Roberts*, 29 L. T. 403; 22 W. R. 577, n.

——**Order before Issue joined.**]—An order to try in the county court, under 19 & 20 Vict. c. 108, s. 26, will not be rescinded, or the subsequent proceedings set aside, on the ground that it was made before issue joined, where the cause has been tried, and both parties have appeared at the trial without objecting to the validity of the order or to the case being heard. *Tomkins* v. *Beard*, 18 L. T. 363; 16 W. R. 720.

——**Dismissal of Application—Power of Judge to impose Condition as to Costs.**]—If an action is brought for more than 50*l.*, the order dismissing the defendant's application to have it tried in the county court cannot go on to provide that if only 50*l.* is recovered the plaintiff shall be entitled only to county court costs. *Insley* v. *Jones*, 48 L. J., Ex. 222; 4 Ex. D. 16; 27 W. R. 111.

Order binding on County Court Judge.]—When an order purporting to be made by a judge at chambers, and bearing the signature of the judge impressed by a stamp, in the usual way, transferring a cause from the superior court to the county court, is served on the judge of the county court, he is bound to obey the order, and he cannot inquire into the circumstances under which it was made. *Blades* v. *Lawrence*, 43 L. J., Q. B. 133; L. R. 9 Q. B. 374; 30 L. T. 378; 22 W. R. 643.

Practice after Action Remitted—Amendment of Proceedings.]—When an action is sent for trial in a county court under 19 & 20 Vict. c. 108, s. 26, the judge may, by virtue of s. 57, amend all defects and errors in the proceedings, such as variances and accidental mistakes, but cannot add a new plea, as that would be raising a different issue from that which the judge of the superior court in his discretion sent down to be tried. *Thomas* v. *Purcell*, 22 L. T. 474.

But, per Hannen, J., in such a case the judge of the county court may not only amend variances and accidental mistakes, but may exercise the same powers of amendment as a judge at nisi prius. *Ib.*

—— —— **At the Trial.**]—When a cause is ordered to be tried in a county court, under 19 & 20 Vict. c. 108, s. 26, the judge of the county court has at the trial the same power of amending a misjoinder of defendants as a judge of a superior court sitting at nisi prius has under the Common Law Procedure Act, 1852, s. 37. *Rennison* v. *Walker*, 41 L. J., Ex. 43; L. R. 7 Ex. 143; 26 L. T. 167; 20 W. R. 471.

The county court judge has no power to amend the issue. *Bain* v. *Gregory*, 14 L. T. 601; 14 W. R. 845.

—— **Notice of Trial.**]—There was no rule respecting the notice of trial necessary when a cause commenced in a superior court was ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26; it was enough that the notice was reasonable. *Ipswich Gaslight Co.* v. *Norman*, 7 B. & S. 847; 15 L. T. 290.

—— **Right to try by Jury.**]—When a cause was sent to a county court for trial, under 19 & 20 Vict. c. 108, s. 26, and no special terms were imposed by the order, the parties were entitled (the demand being of sufficient amount) to have it tried by a jury; and this notwithstanding a second trial was directed in a case where the first trial was by the judge, without a jury. *Ford* v. *Taylor*, 47 L. J., C. P. 116; 3 C. P. D. 21; 37 L. T. 431; 26 W. R. 170. *See also* post, col. 943.

—— **Judgment—No Motion Necessary.**]—Ords. XXXVI. and XL. do not repeal the enactment in 19 & 20 Vict. c. 108, s. 26, by which, where a cause is ordered to be tried in a county court, the registrar is to certify the result of the trial to the superior court, and judgment is to be signed according to such certificate; and no motion for judgment is necessary. *Scutt* v. *Freeman*, 46 L. J., Q. B. 173; 2 Q. B. D. 177; 35 L. T. 939; 25 W. R. 251.

—— **Judgment, how Signed.**]—Where an action brought in the high court is ordered, under 19 & 20 Vict. c. 108, s. 26, to be tried in a county court, and after the hearing the registrar of the county court certifies the result to the

master's office, judgment may be signed in accordance with such certificate without taking out a summons for an order to sign judgment. *Scutt* v. *Freeman* (35 L. T. 989) approved. *Johnson* v. *Wilson*, 46 L. T. 647—C. A.

—— **Application for New Trial.**]—Where a cause, commenced in a superior court, was tried in a county court, under a judge's order, in pursuance of 19 & 20 Vict. 108, s. 26, an application for a new trial was made to the superior court, in whose jurisdiction the cause remained. *Balmforth* v. *Pledge*, 6 B. & S. 425; 35 L. J., Q. B. 169; L. R. 1 Q. B. 427; 12 Jur. (N.S.) 644; 14 L. T. 361.

—— **Jurisdiction of High Court after Transfer —Costs.**]—After an action has been transferred from the high court to a county court under section 65 of the County Courts Act, 1888, the high court has no further original jurisdiction in it, and a judge of that court cannot make any order as to the taxation of the costs of the action. In such an action the rules as to costs contained in section 116 of the act must be applied by the judge of the county court to which it has been transferred, and not by a judge of the high court, who can only exercise jurisdiction under that section in an action remaining in the high court and tried there. *Harris* v. *Judge*, 61 L. J., Q. B. 577; [1892] 2 Q. B. 565; 67 L. T. 19; 41 W. R. 9—C. A.

—— —— **Appeal.**]—Where an action brought in the superior court was, after issue joined, remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, the action still remained in the superior court, and an appeal to the court of appeal would lie without special leave from the refusal of a divisional court to grant a new trial. *Babbage* v. *Coulbourn*, 52 L. J., Q. B. 50; 46 L. T. 515. But see *Bowles* v. *Drake* and *Moody* v. *Steward*, infra, col. 932.

—— —— **Further Direction.**] — When an action was commenced in the high court, remitted for trial to a county court, under 19 & 20 Vict. c. 108, s. 26, the division of the high court in which it was instituted still retained it for purposes of further directions. *Swan* v. *Inglis*, 36 L. T. 114.

—— **Costs — Taxation — Scale — Balance of Claim only remitted.**]—Where in an action brought in the high court a portion of the amount is recovered and the action is remitted to the county court under the County Courts Act, 1888, s. 65, for trial as to the balance, in deciding the scale on which the costs in the county court should be taxed, account must be taken of the whole amount recovered in the action. *Keeble* v. *Bennett*, 63 L. J., Q. B. 694; [1894] 2 Q. B. 329; 10 R. 290; 71 L. T. 247; 42 W. R. 539.

—— **Costs in High Court before Transfer.**]—A plaintiff brought an action of contract in the high court which could have been commenced in a county court. The action was transferred to a county court under the County Courts Act, 1888, s. 65, and the plaintiff recovered less than 20*l.*: —Held that the County Courts Act, 1888, s. 116, which provides that if in an action on contract brought in the high court which could have been commenced in a county court, the plaintiff recovers a sum less than 20*l.*, he shall not be entitled to any costs of the action, applies to all actions brought in the high court which might have been commenced in the county court, and to all costs of such actions, and not only to so much of them, as in a case ordered to be tried in the county court have been incurred before the order, and that the plaintiff was not entitled to any costs of the action. *Armitage* v. *Fison* (67 L. T. 415) overruled. *White* v. *Cohen*, 62 L. J., Q. B. 274; [1893] 1 Q. B. 580; 4 R. 352; 68 L. T. 305; 41 W. R. 396.

The certificate as to costs in s. 116 of the County Courts Act, 1888, only applies to actions tried in the high court, and a county court judge has no power to grant the certificate in an action transferred under s. 65. *Ib.*

The provisions of section 118 of the County Courts Act, 1888, as to taxation, do not apply to costs incurred in the high court up to the date of an order remitting to the county court an action commenced in the high court. *Boydell* v. *Millar* (60 L. J., Q. B. 251) approved. *Cubison* v. *Mayo*, 65 L. J., Q. B. 267; [1896] 1 Q. B. 246; 74 L. T. 65; 44 W. R. 473; 60 J. P. 212—C. A.

A judge ordered under 19 & 20 Vict. c. 108, s. 26, that a trial in an action brought in the Queen's Bench should be had in a county court. The action having been tried, the costs were taxed by the master according to the scale of the superior courts, so far as regarded the proceedings in the Queen's Bench; but, so far as regarded the proceedings in the county court, according to the county court scale:—Held, that he was justified in so far adopting the county court scale as his guide. *Wheatcroft* v. *Foster*, El., Bl. & El. 737; 27 L. J., Q. B. 277; 4 Jur. (N.S.) 896; 6 W. R. 651.

2. Actions of Tort.

County Courts Act, 1888, s. 66.

What Actions—Trover.]—An action of trover may be remitted under 30 & 31 Vict. c. 142, s. 10, although it is not specially mentioned. *Clapham* v. *Oliver*, 30 L. T. 365; 22 W. R. 655.

—— **Action for Slander.**]—Notwithstanding the provisions of s. 67 of the Judicature Act, 1873, which applies the provisions of s. 10 of the County Courts Act, 1867, to "all actions in the High Court in which any relief is sought which can be given in a county court," there is still jurisdiction, under s. 10 of the County Courts Act, 1867, to remit an action for slander to a county court for trial. *Stokes* v. *Stokes*, 56 L. J., Q. B. 494; 19 Q. B. D. 419; 36 W. R. 28—C. A. Affirming 56 L. T. 712.

—— **Counter-claim where Action stayed.**]—A counter-claim is not an "action" within s. 66 of the County Courts Act, 1888, and therefore there is no jurisdiction to remit a counter-claim for trial to the county court where the original action has been stayed, and the counter-claim is the only matter remaining to be tried. *Delobbel Flipo* v. *Varty*, 62 L. J., Q. B. 398; [1893] 1 Q. B. 663; 5 R. 347; 68 L. T. 797; 42 W. R. 48.

—— **Security for Costs—"Visible Means."**]—By the term "visible means" as used in s. 10 of the County Courts Act, 1867, is intended such means as could be fairly ascertained by a reason-

able person in the position of the defendant. On the filing of the affidavit the jurisdiction of the judge arises, and he is to satisfy himself not merely whether the plaintiff has any "visible means," but whether he has any means at all of paying the costs, and the judge has a judicial discretion whether he will make the order. On an application under the above section, it appeared from the affidavit that the defendant was in possession of certain property of the plaintiff under a claim for rent for 5,929*l.*; that the plaintiff had no property upon which an execution under a judgment for 2,404*l.* could be levied; that his furniture had been sold under an execution, and that he had assigned his property for the benefit of his creditors. It also appeared that the plaintiff was being employed as a colliery manager at a weekly wage of 4*l.*, the employment being determinable upon three months' notice, or on payment of three months' salary in lieu of notice, or without notice in the event of wilful misconduct:—Held, that whether or not the salary could be attached, the plaintiff had no substantial means of paying the costs of the action in the event of the verdict being for the defendant, and that an order was rightly made under s. 10. *Counsel* v. *Garvie*, (Ir. R. 5 C. L. 74) considered. *Lea* v. *Parker*, 54 L. J., Q. B. 38; 13 Q. B. D. 835; 33 W. R. 101—C. A.

Possession of movable chattels, the full value of which would merely suffice to cover the probable amount of the defendant's costs, does not constitute "visible means" within the meaning of s. 6 of the Common Law Procedure (Amendment) Act (Ireland), 1870 (equivalent to s. 10 of the County Courts Act, 1867), so as to prevent the action from being remitted to the county court. *Watson* v. *McCann*, 6 L. R. Ir. 21.

The plaintiff who was manager of his father's business of cabinet maker at a salary of 120*l.* per annum was held not to have visible means within s. 6 of the Common Law Procedure Amendment Act, 1870. *Torkington* v. *Connor*, Ir. R. 8 C. L. 340.

An affidavit by a defendant merely stating that he has been informed and believes that the plaintiff has no visible means, is defective for not showing the source whence he has derived his information; but that defect may be cured by the affidavit in reply of the plaintiff attempting to show he has visible means and failing to do so. *Mohun* v. *Creedon*, 2 L. R. Ir. 115.

Cause of Action fit to be Prosecuted.]—Section 66 of the County Courts Act, 1888, provides that in certain cases actions of tort may be remitted to the county court for trial, unless the plaintiff satisfies the judge of the high court that he has a cause of action fit to be prosecuted in the high court. It is not, however, necessary for the plaintiff to show that he has a cause of action which must succeed, but rather that he must satisfy the judge that he has a cause of action of superior fitness to be tried in the high court. *Farrer* v. *Lowe*, 53 J. P. 183.

Before the Judicature Acts a judge sitting at chambers for all the courts, although not a judge of the particular court in which the action was brought, had jurisdiction to make an order for trial of an action in the county court. But the order made by the judge was open to review by the court; and his decision was not final as to whether the plaintiff had a cause of action fit to be prosecuted in the superior court. *Owens* v. *Woosman*, 9 B. & S. 243; 37 L. J., Q. B. 159; L. R. 3 Q. B. 469; 18 L. T. 357; 16 W. R. 932.

Discretion as to Remitting — Appeal.] — Making the order remitting an action to the county court under s. 10 of the County Courts Act, 1867, is a question for the discretion of the master, and the court will not, unless strong cause is shown for so doing, interfere with the exercise of that discretion. *Clapham* v. *Olirer*, 30 L. T. 365; 22 W. R. 655.

—— **Power to make Order without Affidavit.**]—The high court has no jurisdiction to remit an action of tort to the county court under s. 10 of the County Courts Act, 1867, without an affidavit under such section as to the plaintiff's want of means. *Reg.* v. *Marylebone County Court Judge*, 30 L. T. 97.

—— **Judge at Chambers requiring Affidavits in Answer.**]—A judge at chambers may properly decline to remit an action to a county court under s. 10 of the County Courts Act, 1867, without requiring an affidavit from the plaintiff in answer to the defendant's affidavit under that section. *Cowell* v. *London General Omnibus Co.*, 27 W. R. 381.

—— **Appearance entered by one Defendant—Motion to remit by another Defendant.**]—A writ was issued against A, as sole defendant in an action of tort, and served upon him; and an appearance was entered by A., requiring a statement of claim. Subsequently the plaintiff obtained leave to amend the writ by adding B. as a co-defendant in the action, and the writ, so amended, was served upon B. B., within the prescribed period (eight days), moved that in default of the plaintiff giving security for costs, the action should be remitted to the civil bill court in which the defendants were described in the writ as residing, grounding the motion on the usual affidavit, that the plaintiff had no visible means:—Held, that in default of the plaintiff giving security for costs the action should be remitted; but that such security should be given for the costs of the defendant B. only. *Fagan* v. *Monks*, 20 L. R., Ir. 1—C. A.

Jurisdiction of Superior Court over Action until Order Lodged in County Court.]—An order was made under the County Courts Act, 1867, s. 10, remitting an action to the county court unless security was given for the costs within a week. The plaintiff did not give security within the time limited, but after that time applied for and obtained an order extending the time for giving security:—Held, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court in accordance with the section, the action remained in the superior court, and consequently there was jurisdiction to make the order extending the time for giving security. *Welply* v. *Buhl*, 47 L. J., Q. B. 151; 3 Q. B. D. 253; 38 L. T. 115; 26 W. R. 300—C. A.

Where the time limited by an order made under s. 66 of the County Courts Act, 1888, remitting an action commenced in the high court for trial to a county court, has expired, the action nevertheless remains in the high court until the plaintiff has lodged the original writ and such order with the registrar of the county

court; and until that has been done a master of the high court has jurisdiction on the application of the plaintiff to make an order for further and better answers to interrogatories. *Welply* v. *Buhl* (47 L J., Q. B. 151) followed. *D'Errico* v. *Samuel*, 65 L. J., Q. B. 197; [1896] 1 Q. B. 163; 73 L. T. 680; 44 W. R. 356—C. A.

Delay in Lodging Writ and Order.]—Where an action is remitted to the county court under 30 & 31 Vict. c. 142, s. 10, and the plaintiff does not lodge the original writ and the order with the registrar of the county court, the proper course for the defendant to pursue is to apply by summons at chambers to compel the plaintiff either to proceed with the action or abandon it. The county court judge cannot refuse to hear the action on the ground that there has been delay in lodging the writ and order with the registrar. *Driscol* v. *King*, 49 L. T. 599; 32 W. R. 370.

Appeal from Order.]—Upon an order made by a judge at chambers under 30 & 31 Vict. c. 142, s. 10, directing a cause to be tried in a county court in default of security being given for the defendant's costs, or of satisfying the judge that the plaintiff has a cause of action fit to be prosecuted in the superior court, an appeal lies to the superior court. But such court, although entertaining an opinion that the cause is one which might be fit to be tried in the superior court, will not interfere with the decision of the judge at chambers unless it is of opinion that such decision is obviously wrong. *Jennings* v. *London General Omnibus Co.*, 30 L. T. 266.

Before the court will review the discretion of a judge in remitting an action to the county court, on the plaintiff failing to give security for costs, it must be very clearly shown that the judge wrongly exercised such discretion. *Roppon* v. *Joyce*, 31 L. T. 475.

An action for seduction was remitted to the county court by a judge at chambers, under the 30 & 31 Vict. c. 142, s. 10, by which the judge has power to remit such action to the county court on the application of the defendant, unless the plaintiff shall give security for costs, or "satisfy the judge that he has a cause of action fit to be prosecuted in a superior court." The plaintiff deposed that he was advised that it was expedient, as a matter of law, that the action should be tried in a superior court. The court was equally divided in opinion as to whether the discretion of the judge had been rightly exercised, but refused a rule to review it. *Ib.*

—— **Affidavits to be Produced.**]—A cause had been, by order, under 30 & 31 Vict. c. 142, s. 10, remitted to the county court upon an affidavit of the defendant, stating the nature of the action, and that the plaintiff had no visible means of paying the costs. The plaintiff, in appealing against the order, did not bring the affidavit before the court:—Held, that the rule of practice being that all relevant affidavits used at chambers must be referred to on appeal to the court, this was a relevant affidavit, because it disclosed the nature of the cause of action. *Holmes* v. *Mountstephen*, L. R. 10 C. P. 474; 33 L. T. 351.

Practice after Action Remitted—Pleadings to be Regarded.]—When an action is remitted from the high court, under 30 & 31 Vict. c. 142, s. 10, for trial, and the writ and statement of claim, if any, are lodged in the county court, together with particulars given under the County Court Rules, 1875, Ord. XX. r. 1, the county court judge ought not to restrict the plaintiff to proof of the claim as indorsed on the writ or stated in the particulars, but should take cognizance of the statement of claim, and, if asked to do so, receive evidence in support of the allegations therein. *Johnson* v. *Palmer*, 4 C. P. D. 258; 27 W. R. 941.

—— **Power of County Court Judge to add Defendant.**]—Where an action has been remitted for trial in the county court under section 10 of the County Courts Acts, 1867, the county court judge has no power to add a defendant without his consent. *Mullenciesen* v. *Coulson*, 57 L. J., Q. B. 334; 20 Q. B. D. 667; 36 W. R. 524.

—— **Power to Stay Proceedings.**]—Where an action, commenced in the high court, under 30 & 31 Vict. c. 142, s. 10, the county court judge has power to make an order staying the proceedings until the plaintiff has paid the costs of a previous action brought by him in the high court against the same defendant. *Reg.* v. *Bayley*, 51 L J., Q. B. 244; 8 Q. B. D. 411; 30 W. R. 522.

—— **Appeal.**]—Where a case was remitted for trial before a county court under the County Courts Act, 1867 (30 & 31 Vict. c. 142) s. 10, it became a county court cause, and the determination of a divisional court on appeal from the decision of the county court judge was within s. 45 of the Judicature Act, 1873, and therefore final, unless special leave to appeal was given. *Bowles* v. *Drake*, 51 L. J., Q. B. 66; 8 Q. B. D. 325; 45 L. T. 576; 30 W. R. 333.

——. **Costs.**]—The judge of a county court, to which an action of slander has been referred from a superior court, under 30 & 31 Vict. c. 142, s. 10, has jurisdiction over the costs of suit, both before as well as after such order. The last words of the section indicate the scale on which such costs are to be allowed, and do not mean that the superior court is to exercise any jurisdiction over them. *Moody* v. *Steward*, 40 L. J., Ex. 25; L. R. 6 Ex. 35; 23 L. T. 465; 19 W. R. 161.

—— **Costs of Appeal to Court of Appeal after Order to Remit—Taxation.**]—After an order has been made remitting an action of tort to the county court, under s. 66 of the County Courts Act, 1888, but before the writ and order were lodged with the registrar, an interlocutory appeal was taken by the plaintiff to the Court of Appeal, and was allowed with costs. The action was subsequently tried in the county court, and the plaintiff succeeded:—Held, that the provisions of s. 66 of the County Courts Act, 1888, did not apply to the costs in the Court of Appeal, and that those costs must be taxed by the taxing officer of the high court, and not by the registrar of the county court. *D'Errico* v. *Samuel*, 75 L. T. 59—C. A.

3. Equity Matters from Chancery Division.

County Courts Act, 1888, s. 69.

Special Reason Necessary.]—Although the subject-matter of a suit is within the jurisdiction

of the county court, the court, in the absence of any special reason, will not order the suit to be transferred to the county court. *Picard* v. *Hine*, 18 L. T. 705.

Obedience to previous Orders of Court required.]—Where a party to a suit in the court of chancery has not obeyed an order of that court, although the subject-matter may be under 500*l*., the judge to whose court the suit is attached will not order a transfer of it to the county court under 30 & 31 Vict. c. 142, s. 8. *Maudesley* v. *Maudesley*, 18 L. T. 51.

Jurisdiction of High Court until Transfer completed.]—Where an order was made transferring an action commenced in the chancery division to a county court, and the plaintiff failed to enter the action in the county court:—Held, on motion by the defendant, that the superior court had jurisdiction to vary the order of transfer by directing the plaintiff within one week from service of this order to lodge the necessary documents with the registrar of the county court to complete the transfer, the costs to be in the discretion of the county court. *David* v. *Howe*, 53 L. J., Ch. 1053; 27 Ch. D. 533; 50 L. T. 753; 32 W. R. 844.

Redemption Suit against Registrar of County Court—Transfer to Court of adjoining District.]—When a redemption suit is commenced in the court of chancery against the registrar of the county court, within the jurisdiction of which the property dealt with by the suit lies, an order may properly be made under 30 & 31 Vict., c. 142, s. 8, to transfer the suit to the county court of the adjoining district, as the word action in 19 & 20 Vict., c. 108, s. 21, includes suit. *Lunford* v. *Gudgeon*, 40 L. J., Ch. 514; L. R. 6 Ch. 359; 19 W. R. 577.

Winding-up.]—See *Reg.* v. *East Stonehouse County Court Judge*, 65 L. T. 730.

E. PRACTICE.

1. PARTIES.

The Crown.]—The prerogative of the crown to remove into the court of exchequer a cause in another court touching the crown revenues is not affected by the 9 & 10 Vict., c. 95. *Mountjoy* v. *Wood*, 1 H. & N. 58; 2 Jur. (N.S.) 452.

Corporations and Companies.]—A corporation may be sued in a county court. *Taylor* v. *Crowland Gas and Coke Co.*, 11 Ex. 1; 3 C. L. R. 865; 24 L. J., Ex. 233; 1 Jur. (N.S.) 358; 3 W. R. 368.

In such an action the corporation may be deemed to dwell at the place where it carries on business. *Ib.* S. P., *Adams* v. *G. W. Ry.*, 6 H. & N. 404; 30 L. J. Ex. 124; 3 L. T. 631; 9 W. R. 254.

Paupers.]—A judge of a county court has power to allow parties to sue in formâ pauperis. *Chinn* v. *Bullen*, 8 C. B. 447; 7 D. & L. 297; 19 L. J., C. P. 42; 14 Jur. 201.

Joinder of Plaintiffs—Action under Employers' Liability Act, 1880.]—Ord. III, r. 1 of the County Court Rules, 1889, does not authorise the joinder of the legal personal representatives of persons, whose deaths are alleged to have resulted from the same act of negligence, as plaintiffs in an action to recover compensation, the cause of action in respect of the death of each person being separate. *Carter* v. *Rigby*, 65 L. J., Q. B. 537; [1896] 2 Q. B. 113; 74 L. T. 744; 44 W. R. 566; 60 J. P. 581—C. A.

Joinder of Husband as Plaintiff]—The judge of the sheriff's court in London has no power to amend a summons issued upon a judgment recovered in a plaint by a single woman, by adding the name of a man whom she had married subsequently to obtaining the judgment. *Reg.* v. *Pearce*, 2 B. & S. 531; 32 L. J., M. C. 75; 9 Jur. (N.S.) 647; 7 L. T. 597; 11 W. R. 235; 9 Cox, C. C. 258.

Non-joinder of Wife as Plaintiff.]—A married woman advanced 250*l*. upon the security of a deposit of title-deeds of real estate. Her husband died, and she married a second time. Shortly after the second marriage her husband borrowed money upon a deposit of the deeds. Subsequently she separated from her husband, and a deed was then executed, whereby he released to his wife all his interest in her real and personal estate. The husband became bankrupt, and his assignee, having paid off the second mortgage, obtained possession of the deeds. Upon the death of the first mortgagee the bankrupt's assignee filed a plaint in the county court, making the mortgagee's executors the only defendants, and claiming to be paid the 250*l*., or in default that the property might be sold. The judge, overruling an objection taken that the wife was a necessary party, made the order prayed:—Held, that she was a necessary party and that the case must stand over in the county court, with liberty to the plaintiff to amend his plaint by adding parties. *Robinson* v. *O'Kell*, 22 L. T. 399.

Change of Parties—Assignee of Judgment Debt—Judgment Summons.]—By Ord. XXV. r. 9, of the County Court Rules of 1889, where any change has taken place after judgment by death or otherwise in the parties entitled to take proceedings to enforce the judgment, the party alleging himself to be entitled to execution must apply to the judge or registrar for leave to issue execution accordingly. An assignee of a judgment debt took out a judgment summons under s. 5 of the Debtors' Act, 1869, in the name of the judgment creditor, without having previously obtained leave under the above rule:—Held, that the assignee of the judgment having failed to comply with Ord. XXV, r. 9, the county court judge had no jurisdiction to hear the summons. *East End Building Society* v. *Slack*, 60 L. J., Q. B. 359.

2. PROCEEDINGS BEFORE TRIAL.

a. Notice of Action.

Sufficiency of Notice of Action.]—A lessee of a tithe commutation rent-charge having distrained on an occupier, the occupier gave notice of action as under 5 & 6 Vict., c. 54, s. 19, "for entering upon my premises at," &c., "on the 11th day of March instant, and then and there seizing two heifers belonging to me, and continuing on my premises for several days; and also for that you, against my will and consent, on the 17th day of March instant, did at," &c.,

"then and there seize, sell and drive away and remove from my premises at," &c., "aforesaid, three heifers belonging to me." The action was brought in a county court, and the following particulars of demand were stated:—1. For unlawfully entering the plaintiff's premises, and continuing thereon, seizing and distraining three cattle of the plaintiff, under colour of a distress. 2. For unlawfully selling three other cattle of the plaintiff's, not distrained. And, 4. For continuing on the plaintiff's premises, and proceeding to sell the plaintiff's cattle, after an abandonment of distress:—Held, that evidence might be given of the fourth particular; for that, if any notice was necessary of the cause of action referred to in the fourth particular, the notice given comprehended such cause. *Howard* v. *Remer*, 2 El. & Bl. 915; 23 L. J., Q. B. 60; 2 W. R. 55.

b. Plaint and Summons.

Causes of Action.]—Separate plaints may be issued in the county court for two or more causes of action, which would require to be stated in distinct counts, though they might be included in the same declaration. *Wickham* v. *Lee*, 12 Q. B. 521; 18 L. J., Q. B. 21; 12 Jur. 628.

In Action transferred from High Court by Consent.]—When an action has been commenced in a superior court, and afterwards it has been agreed between the parties that it shall be brought into the county court under 19 & 20 Vict. c. 108, s. 23, no jurisdiction is given to the county court judge to try such action in the county court without the usual preliminaries, but the action must be commenced again in the county court by summons and plaint. *Pearce* v. *Winkworth*, 28 L. T. 710.

Executors and Administrators.]—After judgment of assets quando acciderint on a plea of plene administravit in a county court, the proper method of proceeding for assets received by the defendant since plea pleaded is not by a suggestion of a devastavit, but by a summons, stating the judgment quando, and suggesting assets after plea pleaded. *Ellis* v. *Watt*, 7 D. & L. 299; 8 C. B. 614; 19 L. J., C. P. 113.

Default Summons—Assignee of Debt.]—Semble, per Cave, J., that the summary procedure by default summons in the county court is not available to the assignee of a debt. *Reg.* v. *Pontypool County Court Judge*, 63 L. J., Q. B. 702; 10 R. 356; 71 L. T. 17.

Issue of Summons by Leave.]—Before county court r. 42 (1856), a summons issued by leave of the court need not have stated on the face of it that it was so issued. *Waters* v. *Handley*, 6 D. & L. 88.

—— **Form of Affidavit.**]—In applying for leave to issue a default summons in a county court for service out of the jurisdiction to recover a claim exceeding 5*l.* the affidavit in support of the application need not contain a statement that the defendant does not follow any of the occupations specified in Ord. V. r. 10 of the County Court Rules, 1889. *Gordon* v. *Evans*, 63 L. J., Q. B. 329; [1894] 1 Q. B. 248; 9 R. 129; 70 L. T. 70; 42 W. R. 193—C. A.

Service of Summons—Proof of where Notice to Defend.]—It is not necessary for a plaintiff to prove personal service on a defendant of a summons to obtain judgment by default in schedule B, 30 & 31 Vict., c. 142, on the hearing of an action brought in a county court for goods sold in the way of his trade, when the defendant has given notice to defend. *Davis* v. *Pearce*, L. R. 5 C. P. 435; 22 L. T. 441; 18 W. R. 736.

—— **Sufficiency.**]—The proof of the service of a summons is entirely a question for the discretion of the judge of the county court; and where such discretion has been exercised, the court will not interfere. *Zohrab* v. *Smith*, 2 B. C. Rep. 231; 5 D. & L. 635; 17 L. J., Q. B. 174; 12 Jur. 603. S. P., *Waters* v. *Handley*, 6 D. & L. 88.

It is the cause of action, and not the sufficiency of the service of the summons, which gives a county court its jurisdiction to hear a given cause. *Ib.*

In a suit in a county court the summons and judgment order were served at a wrong place, so that the defendant knew nothing of the cause until his goods were taken in execution; but the judgment on which the execution proceeded was given on proof made to the satisfaction of the judge that the summons had been duly served. The county court having refused to set aside the proceedings unless the defendant would undertake to appear and defend the cause on the merits, and also to bring no action against the plaintiff or any officer of the court with reference to any proceedings in the cause:—Held, that no prohibition lay, as the county court had followed the provisions of 9 & 10 Vict. c. 95, s. 80. *Robinson* v. *Lenaghan*, 2 Ex. 333; 5 D. & L. 713; 17 L. J., Ex. 174; 12 Jur. 399.

—— **Action of Ejectment—Delivery to Bailiff "Forty clear Days at least before Return Day"—Power to Waive.**]—In an action of ejectment properly brought in the county court, the summons must be delivered to the bailiff forty clear days at least before the return-day, under Ord. VIII. r. 7 of the County Court Rules, 1875, and the judge of the county court has no power to waive this condition even where, though the bailiff has not received the summons forty days, he has yet served it on the defendant thirty-five days before the return-day as required by the latter part of the same rule. If under such circumstances the judge proceeds to hear the case, the defendant not consenting, the high court, on appeal by the defendant, will set aside the judgment. Semble, such a case is not matter of prohibition. *Barker* v. *Palmer*, 8 Q. B. D. 9; 45 L. T. 480; 30 W. R. 59.

—— **Waiver.**]—A defendant who resided out of the jurisdiction of the county court was served with a summons on the part of the plaintiff, dated the 3rd of January, 1850, calling on him to appear before that court on the 25th January, 1850. The defendant was served at the same time with an order of the judge at that court, dated the 30th October, 1847, giving the plaintiff leave to issue a summons: it did not appear whether any plaint had been issued before the making of that order. On the 19th January the defendant left a notice with the clerk, stating that he intended to rely on the Statute of Limitations as a bar to the action. The court refused an application of the defendant for a prohibition to prevent the judge from proceeding in the suit,

because, assuming it to be doubtful whether the order was valid, and authorised the summoning the defendant, the latter, by taking the step of serving the notice, relying on the Statute of Limitations, had waived the right of examining into the regularity of the process by which he had been summoned to appear. *Jones* v. *James*, 1 L. M. & P. 65 ; 19 L. J., Q. B. 257.

Action in rem—Warrant of Arrest addressed to High Bailiff—Executed by Clerk—Effect of.]—A warrant of arrest issued in an action in rem, instituted for collision, in the City of London Court, and directed to the high bailiff of the said court and others the bailiffs thereof, is not duly executed if executed by a clerk in the bailiff's office who is not a bailiff, and hence the master of the vessel so arrested is not guilty of contempt of court in removing her. *The Palomares*, 52 L. T. 57 ; 5 Asp. M. C. 343.

Semble, if the warrant had been addressed to the clerk as an officer of the court, it might, under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, s. 23, have been duly served by him. *Ib.*

Construction and Sufficiency of Summons.]—The summons and particulars of a plaintiff's demand should not be construed too strictly, but should have a reasonable construction. *Stanclife* v. *Clarke*, 7 Ex. 439 ; 21 L. J., Ex. 129 ; 16 Jur. 430.

What should be considered in such case is, whether an inaccuracy in them could have misled the defendant as to the nature of the plaintiff's demand. *Ib.*

An erroneous reference to the statute, under which the action has been brought, does not operate as a valid objection to the proceedings ; it being the duty of the court to take notice of the proper statute. *Thorn* v. *Chinnock*, 1 Man. & G. 216 ; 1 Sc. (N.R.) 138 ; 8 Dowl. P. C. 585 ; 9 L. J., C. P. 263.

A summons, stating that the defendant was summoned to answer a claim of the plaintiff to recover 40*l.* 10*s.*, and the particulars being :—"To sinking a shaft at," &c. ; "Cr.—Cash on account, —*l.*" &c., making the balance the same as the sum claimed, shows a sufficient ground of action, without stating that the shaft was sunk for the defendant, or further disclosing how he was sought to be made liable for it. *Wedlake* v. *Sargent*, 15 Jur. 1134.

A summons in the following terms :—"For that your wife assaulted the wife of the plaintiff, and maliciously caused the plaintiff to be wrongfully charged with stealing, and to be detained in custody, whereby the plaintiff was put to expenses in producing witnesses and other persons in clearing the plaintiff's wife from the malicious assault and charge." Particulars were annexed in terms similar to the summons, claiming 10*l.* for damages :—Held, that this was an action for a malicious prosecution, and the county court had no jurisdiction. *Jones* v. *Currey*, 2 L., M. & P. 474 ; 20 L. J., Q. B. 438 ; 15 Jur. 610.

Amendment of.]—A county court judge has power at the trial to amend the particulars filed with the plaint. *Doughty* v. *Firbank*, 48 L. T. 531, n.

But where a county court judge, at the hearing of a plaint, of his own accord, and against the consent of the defendant, amended the particulars, by reducing the claim to 50*l.*, and gave judgment for the plaintiff for that amount, the court granted a prohibition. *Hill, In re*, 10 Ex. 726.

A plaintiff entered two plaints in a county court of which he was bailiff. By the particulars in one plaint he claimed 5*l.* for an assault, and by the particulars in the other he claimed 5*l.* for a fine in respect of the same assault upon him as bailiff. A certiorari having issued to remove these plaints, on the ground that they consisted of a claim arising out of the same transaction, and exceeding 5*l.*, and which had been split into two :—Held, that the latter plaint was only an informal mode of claiming the fine imposed by 9 & 10 Vict. c. 95, s. 114, for assaulting an officer in the execution of his duty ; and therefore the claim did not, in fact, exceed 5*l.*, and consequently that the certiorari was improperly issued. *Box* v. *Green*, 9 Ex. 503 ; 2 C. L. R. 528 ; 23 L. J., Ex. 219.

—— **Matter beyond Jurisdiction.**]—If the particulars of a plaintiff's claim, served on a defendant with the summons, do not disclose a matter of complaint within the jurisdiction of the county court, the judge cannot amend the particulars so as to turn the complaint into one over which he has cognizance, and he has no power to hear and decide on the case. *Hopper* v. *Warburton*, 32 L. J., Q. B. 104 ; 7 L. T. 722 ; 11 W. R. 384.

Therefore particulars attached to a county court summons as follows : "To damages sustained by me by reason of your making a false charge of stealing a tobacco pouch and silk pocket handkerchief, at the Clerkenwell police court, and loss of character, 50*l.* :" do not disclose a cause of action for false imprisonment, but rather for malicious prosecution or slander, and the judge has no power to amend them by substituting the words "false imprisonment." *Ib.*

—— **Name and Capacity of Defendant.**]—On the 30th March, 1848, a plaint was entered in a county court, wherein E. F. was plaintiff, and H. T., executor of F. W. Taylor, defendant. On the 3rd April the defendant was served with a summons numbered A. 3967, dated 30th March, in which he was summoned as executor of W. Thompson. The cause of action arose on the 9th April, 1842. At the hearing on the 14th April, 1848, the defendant objected to any evidence being given against him, except as executor of W. Thompson. The judge held the summons a nullity ; and, on the application of the plaintiff, directed a fresh summons to be issued, numbered and dated as the first summons, summoning defendant as executor of F. W. Taylor :—Held, that the judge was right. *Foster* v. *Temple*, 5 D. & L. 655 ; 17 L. J., Q. B. 230 ; 12 Jur. 654.

c. Defences, Counterclaims, and Payment into Court.

Tender of Payment of Damages—Time for.]—Tender of payment of damages by way of defence to an action in a county-court cannot be made after the question of liability has already been determined by judgment. *The Recepta, Gordon* v. *Francis*, 62 L. J., P. 118 ; [1893] P. 255 ; 1 R. 644 ; 69 L. T. 252 : 41 W. R. 561 ; 42 W. R. 73 ; 7 Asp. M. C. 359—C. A.

Notice of Special Defence—Want of Notice under Employers' Liability Act, 1880.]—A

defence to an action under the Employers' Liability Act, 1880, that the plaintiff has failed to give notice of injury within the six weeks required by s. 4 is a special defence under a statute, and a defendant cannot avail himself of such defence (no adjournment being asked for) unless he has filed the five-days notice required by Ord. X. r. 10 of the County Court Rules, 1889. *Conroy* v. *Pearcock*, 66 L. J., Q. B. 425; [1897] 2 Q. B. 6; 76 L. T. 465; 45 W. R. 502; 61 J. P. 310.

Counterclaims.]—Under ss. 89 and 90 of the Judicature Act, 1873, county courts may give effect to counterclaims relating to matters beyond the jurisdiction of the court, by way of defence to, and to the extent of, the plaintiff's claim, but such courts have no power to award to a defendant, in respect of such counterclaim, damages in excess of the claim. *Davis* v. *Flagstaff Silver Mining Co. of Utah*, 47 L. J., C. P. 503; 3 C. P. D. 228; 38 L. T. 769; 26 W. R. 431—C. A.

Payment into Court—Detinue]—Money may be paid into court in detinue in a county-court. *Taylor* v. *Addyman*, 13 C. B. 309; 22 L. J., C. P. 94; 17 Jur. 461.

Payment into Court with Denial of Liability—Effect of.]—The defendant in an action in a county-court paid money into court, stating at the same time in a memorandum addressed to the registrar that the payment was made "without prejudice to the defendant's defence to this action and while denying the plaintiff's cause of action":—Held, that the payment into court was not an admission of liability, and that the defendant was entitled to dispute his liability at the hearing. *Harper* v. *Davis*, 56 L. J., Q. B. 444; 19 Q. B. D. 170; 36 W. R. 77.

The County Court Rules, 1886, embody the results of the decision in *Berdan* v. *Greenwood* (3 Ex. D. 251), and apart from the notice the defendant was entitled to pay money into court and afterwards to dispute his liability at the hearing.—Per Wills, J. *Ib.*

—— **Costs.**]—Where the defendant in an action in the county court pays money into court with a denial of liability, and the plaintiff does not take the money out, but goes on with his action and recovers no more than the amount paid in, the defendant is entitled to the costs of the action. The practice of the high court is, by s. 164 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), to be followed in county courts, where there is nothing to the contrary or inconsistent therewith in the County Court Rules. *Wood* v. *Leetham*, 61 L. J., Q. B. 215.

Payment into Court without Denial of Liability—Effect of.]—In an action brought in a county court for work and labour done, the claim contained several items: the defendants paid money into court without denying liability:—Held, that the payment into court was an admission of some liability but not that something was due on every item of the account. *Stevenson* v. *Berwick Corporation* (1 Q. B. 154) followed. *Hennell* v. *Davies*, 62 L. J., Q. B. 220; [1893] 1 Q. B. 367; 5 R. 209; 68 L. T. 220; 41 W. R. 284.

Payment into Court—Time—Return Day.]—By the County Court Rules, Ord. IX. r. 11, a defendant must pay money into court, if he desires to do so, at least five clear days before the "return day." A summons in the action was issued out of the B. County Court on the 14th March, and was returnable on the 12th April. On the 1st April the action was transferred to the M. County Court, and the return day in that court was the 15th April. On the 8th April the defendants paid money into court:—Held, that the 15th April was the "return day," and that the payment into court on the 8th April was therefore not too late. *Stevens* v. *Hounslow Burial Board*, 61 L. T. 839; 38 W. R. 236; 54 J. P. 309.

d. Transfer to High Court.

Certiorari—Application, how made.]—An application under 9 & 10 Vict. c. 95, s. 121, to remove a cause from the county court into a superior court, ought to have been made to a judge at chambers, and not to the court. *Bowen* v. *Evans*, 5 D. & L. 193; 3 Ex. 111; 18 L. J., Ex. 38. S. P., *Robertson* v. *Womack*, 19 L. J., Q. B. 367.

The application may, however, be ex parte. *Symonds* v. *Dimsdale*, 6 D. & L. 17; 2 Ex. 533.

Service of Writ—Sufficiency.]—The delivery of a writ of certiorari to a person acting as clerk in the public office of the county court is a sufficient delivery to the judge; but such service is not sufficient for the purpose of an attachment against the judge for disobedience. *Brookman* v. *Wenham*, 2 L. M. & P. 233; 20 L. J., Q. B. 278; 15 Jur. 249.

Where the writ has not been delivered to the judge personally, he should, semble, be ruled to return it before proceedings are taken by way of attachment against him. *Ib.*

Bond for security for costs—Corporation]—Where in a plaint in a county court the plaintiff claims more than 5*l.* damages for a tort, and the defendant (a corporation) seeks to have the case tried in a superior court, under the 19 and 20 Vict. c. 108, s. 39, and tenders to the registrar a bond executed by it and two sureties, the registrar's duty is only to inquire into the sufficiency of the sureties; and he cannot refuse to receive the bond, on the ground that the defendant, by law, is incapable of executing a valid bond. *Young* v. *Brompton, &c., Waterworks Co.*, 1 B. & S. 675; 31 L. J., Q. B. 14; 8 Jur. (N.S.) 176; 5 L. T. 310; 10 W. R. 57.

Discovery in Action of Ejectment Transferred.]—An action for ejectment, commenced in the county court, was transferred to the high court under s. 3 of the County Courts Act, 1865. After transfer, but before delivery of any statement of claim, the plaintiff moved for discovery and production of documents under Ord, XXXI. r. 12, R. S. C., 1875:—Held, that after transfer the proceedings must be regulated by the practice of the high court, and that the plaintiff was not entitled to discovery before delivery of a statement of claim. *Davies* v. *Williams*, 49 L. J., Ch 352; 13 Ch. D. 550; 42 L. T. 469; 28 W. R. 223.

Transfer to High Court—Winding-up Petition.—The high court has jurisdiction to order

the transfer of a winding-up petition from the county court to itself, notwithstanding that the petition has been opened in the county court. *East Dulwich Building Society, In re*, 39 W. R. 32.

Transfer to High Court—Winding-up.]—See *Laxon & Co., In re*, 62 L. J., Ch. 79; [1892] 3 Ch. 31; 2 R. 7; 67 L. T. 584; 40 W. R. 614. *Real Estates Co., In re*, 62 L. J., Ch. 213; [1893] 1 Ch. 398; 3 R. 192; 68 L. T. 24; 41 W. R. 157.

Employers' Liability Act — Removal into Superior Court.]—Sect. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort" where the claim exceeds 5*l.* to a stay of proceedings upon certain conditions as to giving security for the amount claimed, and the costs of trial in one of the superior courts of common law:—Held, that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that Act must be brought in a county court. *Reg.* v. *City of London Court Judge* or *Claxton* v. *Lucas*, 54 L. J., Q. B. 330; 14 Q. B. D. 905; 52 L. T. 537; 33 W. R. 700—C. A. Affirming 49 J. P. 407.

An action to recover damages for personal injuries occasioned through the negligence of a fellow servant of the plaintiff's having been brought in the county court, under the Employers' Liability Act, 1880, the plaintiff obtained a conditional order to have it removed into a superior court, the plaintiff's wages were 60*l.* a year, and he claimed 180*l.* damages. There was medical evidence showing that he had sustained serious and permanent injury, and it was admitted that more than 50*l.* might reasonably be awarded; but there were not any other special circumstances shown in support of the application:—Held, that the county court would have power to award damages exceeding 50*l.*, and for any amount within the statutory limit of three years' wages, and per Dowse, B. (diss. Andrews, J.), that no sufficient grounds were shown for the removal of the action from the county court. *M'Evoy* v. *Waterford Steamship Co.*, 16 L. R. Ir. 291.

In an action commenced in the civil bill court to recover damages for the death of the plaintiff's late husband, who had died from injuries sustained while employed as second mate and pilot on board a steamer of the defendants, and also in superintendence of the loading and discharging of cargo, the plaintiff applied to move the action into the superior court:—Held, that it did not sufficiently appear from the plaintiff's affidavit, which described the employment of the deceased as above stated, that the deceased was a workman within the meaning of the Employers' Liability Act, 1880, and that the application should therefore be refused. It lies upon the party making such application to show distinctly that the case comes within the statute. *Hanrahan* v. *Limerick Steamship Co.*, 18 L. R. Ir. 135.

Equity Matters—Transfer to Chancery Division—Administration Action—Assets exceeding £500.]—A plaint was instituted in the county court for the administration of the estate of a testator, alleging (as the plaintiff then believed to be the fact) that the estate was worth less than 500*l.* Previously to the hearing, notice was given by the defendant to the plaintiff that the estate was worth more than 500*l.*, and at the hearing this was proved to be the case. The judge made an order transferring the suit to the court of chancery:—Held, that he was right in so doing. *Birks* v. *Silverwood*, 41 L. J., Ch. 638; L. R. 14 Eq. 101; 27 L. T. 18.

A county court plaint alleged that the subject-matter of the suit was less than 500*l.* in value, but upon the suit coming on for hearing it was proved that the value exceeded 500*l.*, whereupon the county court judge, acting under s. 14 of the County Courts Act, 1867, dismissed the plaint with costs:—Held, that he ought to have directed the suit to be transferred to the court of chancery, under the County Courts Act, 1865. s. 9. Sect. 14 of the Act of 1867 applies only to actions and suits relating to matters over which the county courts have no jurisdiction. *Thomson* v. *Flinn*, 43 L. J., Ch. 256; L. R. 17 Eq. 415; 29 L. T. 829; 22 W. R. 293.

—— **Objection to Order for Service out of Jurisdiction — Untenable in County Court — Allowed after Transfer.**]—An action commenced in the county court, in which the summons was by order served on the defendant out of jurisdiction, was, for lack of jurisdiction (the estate which it was sought to administer exceeding 500*l.*), transferred to the high court. An objection, in respect of the service out of jurisdiction, which had been raised by the defendant in the county court, but not decided, was again raised in the high court:—Held, that though, if the action had remained in the county court, the objection could not, having regard to Ord. LI. r. 2 of the County Court Rules 1889, have been successfully urged, yet the defendant, having throughout objected to the jurisdiction, ought to have an opportunity of showing in the high court that the action was one which could not be prosecuted there. *Wood* v. *Middleton*, 66 L. J., Ch. 149; [1897] 1 Ch. 151; 75 L. T. 480; 45 W. R. 184.

The defendant, after having given notice to the plaintiff's solicitor that the objection would be raised when the case came on for trial in the county court, had answered interrogatories:—Held, that there had been no waiver of the right to raise the objection in the high court. *In.*

—— **Proceedings carried on till only Small Sum remaining in Court—Discretion to Refuse Transfer—Assets exceeding £500.**]—In an administration action commenced in a county court the gross assets of the testator exceeded 500*l.*; the proceedings were carried on in the county court, no party objecting, and the only sum remaining in court to the credit of the action was 58*l.*; no application had been made to vary the registrar's certificate:—Held, that the county court judge was right in refusing to direct the action to be transferred to the chancery division under s. 68 of the County Courts Act, 1888. *Reg.* v. *Ramsey County Court Judge*, or *Prangnell* v. *Prangnell*, 62 L. J., Q. B. 346; 5 R. 275.

—— **One Defendant only resident in District.**]—When plaint had been filed in a county court against five defendants, of whom one only, who was in the plaintiff's interest, had a resi-

dence in the county court district, all the others being resident in other districts, the plaint was ordered to be transferred to the court of chancery. *Baker* v. *Wait*, 39 L. J., Ch. 204 ; L. R. 9 Eq. 103 ; 21 L. T. 632 ; 18 W. R. 185.

—— **Costs in County Court.**] — After an order by a county court to transfer a cause to the court of chancery, the jurisdiction of the county court is gone, and an order by it that the plaintiff should pay costs was discharged without prejudice to any order the court of chancery might make as to the costs. *Hares* v. *Lea*, L. R. 10 Eq. 683 ; 22 L. T. 776 ; 18 W. R. 1083.

When a plaintiff commences a suit in the county court, which at the hearing is transferred to the high court of justice because the subject-matter exceeds in amount 500*l*., the plaintiff, though he succeeds and obtains the general costs of the suit, must pay the costs of the hearing before the county court. *Ward* v. *Wyld*, 5 Ch. D. 779 ; 37 L. T. 68 ; 25 W. R. 866.

e. Demand of Jury.

Special Jury.]—A special jury, as such, cannot be had in the county court. *Armitage, Ex parte ; Learoyd, In re*, 17 Ch. D. 13 ; 44 L. T. 262 ; 29 W. R. 772.

Action on Admiralty side.]—Sect. 101 of the County Courts Act, 1888, does not confer a right upon the plaintiff or the defendant in an action on the admiralty side of a county court under s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, to have the case tried by a jury. *The Theodora*, 66 L. J., P. 50 ; [1897] P. 279 ; 76 L. T. 627 ; 46 W. R. 157.

Notice of Demand of Jury—Fifteen Clear Days before "Return-day."—Under Ord. XXXIX. (*b*), r. 4 of the County Court Rules, 1875, notice of demand for a jury in actions brought under the Employers' Liability Act, 1880, must be given to the registrar of the court "fifteen clear days at least before the return-day":—Held, that "return-day" in the above rule meant the day originally fixed for the hearing as distinguished from the day of actual hearing. *Reg.* v. *Leeds County Court Registrar*, 55 L. J., Q. B. 365 ; 16 Q. B. D. 691 ; 54 L. T. 873 ; 34 W. R. 487.

By 9 & 10 Vict. c. 95, ss. 70, 71, and County Court Rule 104, notice of demand of a jury must be made and five shillings paid to the registrar of the court three clear days before the day originally fixed for the hearing ; and if a notice has not been given in due time, and the hearing is adjourned to a subsequent day, the party cannot demand a jury as of right ; but it is in the judge's discretion, under r. 105, whether he will allow the jury to be summoned or not. *Fletcher* v. *Baker*, 43 L. J., Q. B. 112 ; L. R. 9 Q. B. 370 ; 30 L. T. 675 ; 22 W. R. 646.

Second and Subsequent Trials.]—The right of parties to actions for more than 5*l*. in a county court to a trial by jury is not limited to the original trial of the cause, but extends to every subsequent trial. *Reg.* v. *Harwood*, 1 B. C. C. 144 ; 22 L. J., Q. B. 127 ; 17 Jur. 87 ; 1 W. R. 195. S. P., *Sparrow* v. *Reed*, 5 D. & L. 633 ; 2 L. C. Rep. 240 ; 17 L. J., Q. B. 183.

3. Trial and Judgment.

County Courts Act, 1888, ss. 88—93.

Appearing or Defending by Solicitor.]—It is a question of fact for a county court judge alone to determine whether an attorney, appearing for a party to a suit in the county court, is "an attorney acting generally in the action for such party," as required by 15 & 16 Vict. c. 54, s. 10. *Bookham* v. *Potter ; Rogers, Ex parte*, 37 L. J., C. P. 276 ; L. R. 3 C. P. 490 ; 18 L. T. 479 ; 16 W. R. 806.

Semble, per Bovill, C. J., an attorney who acts generally in the action for the party is not deprived of his right to appear for such party in the county court merely by his being a clerk to another attorney. *Ib.*

It is for the county court judge to decide upon the facts whether or not any attorney appearing at the trial comes within 15 & 16 Vict. c. 54, s. 10, and if there is any evidence upon which he can form an opinion, the court will not interfere with his judgment. *Reg.* v. *Spooner ; Shreeve, In re*, 18 L. T. 325.

A solicitor, whose position is merely that of clerk to another solicitor, although he is in the latter's permanent and exclusive employment, and, in the course of his duty, has had the management of the business of a client of his employer who is a party to an action or matter, and has advised him thereon, is not "a solicitor acting generally in the action or matter," so as to be entitled as of right to audience in a county court on behalf of such party. *Reg.* v. *Oxfordshire County Court Judge*, 63 L. J., Q. B. 689 ; [1894] 2 Q. B. 440 ; 10 R. 381 ; 70 L. T. 874 ; 42 W. R. 603 ; 58 J. P. 752.

—— **Bankruptcy—Examination of Debtor—Authority in writing necessary.**]—The Bankruptcy Act, 1883, s. 17, sub-s. 4, enacts with reference to the public examination of the debtor under that act, "that any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs, and the causes of his failure":—Held, that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof, is the creditor's representative within the meaning of that sub-section and is therefore not entitled so to question the debtor without being authorised in writing, and producing his authority if required by the court to do so. *Reg.* v. *Greenwich County Court Registrar*, 54 L. J., Q. B. 392 ; 15 Q. B. D. 54 ; 53 L. T. 902 ; 33 W. R. 671 ; 2 Morrell, 175—C. A.

Adjournment of Trial—Consent of Judge.]—Rule 26 of Ord. XXXVII. of the County Court Rules, 1875, which enables parties to a county court action, "at any time before the action is called on, by consent and without payment of any trial fee, to postpone the trial to such subsequent court as the judge shall direct," does not enable such parties to adjourn the trial without the consent of the judge ; and therefore where, after a cause has been adjourned by the judge, the parties by agreement amongst themselves further adjourn the trial without the sanction of the judge, he has jurisdiction to hear and dispose of the cause as if there had been no such further adjournment. *Morgan* v. *Rees*, 50 L. J., Q. B. 491 ; 6 Q. B. D. 508 ; 44 L. T. 133 ; 29 W. R. 345—C. A.

Striking out Cause.]—The effect of striking out a cause is not the same in the county court as in the superior court; in the former it is equivalent to a disposal of the cause. A cause having been struck out, on the plaintiff's non-appearance, a rule requiring the judge to re-enter it was refused. *Jennings* v. *London General Omnibus Co.*, 30 L. T. 640; 22 W. R. 757.

Power to determine Case in Absence of Plaintiff after Adjournment.]—Upon the hearing of a plaint in the county court the case was adjourned by the judge for the attendance of a witness whom the parties had not intended to call. Upon the adjournment the defendants appeared, but neither the plaintiff nor the witness appeared, and the judge directed judgment to be entered for the defendants with costs:—Held, that the county court judge had no jurisdiction to hear and determine the case in the absence of the plaintiff, but should have ordered it to be struck out under s. 79 of the County Courts Act, 1846. *Jordan* v. *Jones*, 44 J. P. 800.

Non-appearance of Defendant — Default Summons and Notice to Defend.]—The jurisdiction of a registrar of a county court under s. 90 of the County Courts Act, 1888, to enter up judgment in actions on contract where the defendant does not appear at the hearing, applies to default summonses and to cases in which notice of intention to defend has been given. *Hooper* v. *Hill*, 63 L. J., Q. B. 598; [1894] 1 Q. B. 659; 9 R. 332; 70 L. T. 224; 42 W. R. 394—C. A.

Nonsuit.]—The judge of a county court may nonsuit a plaintiff in all cases in which a judge of a superior court may do so. *Robinson* v. *Lawrence*, 7 Ex. 128; 2 L. M. & P. 673; 15 Jur. 1087.

A plaintiff has a right to be nonsuited at any time before the jury has delivered their verdict: or, if the cause is tried by a judge alone, at any time before the judge has delivered his judgment. *Stancliffe* v. *Clark*, 7 Ex. 439; 21 L. J., Ex. 129; 16 Jur. 430. S. P., *Outhwaite* v. *Hudson*, 7 Ex. 380; 21 L. J., Ex. 151; 16 Jur. 430.

Upon the trial of a plaint before a county court judge and a jury, after the completion of the plaintiff's case and during the hearing of the defendant's witnesses, the judge discharged the jury, and, notwithstanding the repeated protests of the plaintiff and his attorney, the judge, without the plaintiff's consent, directed a nonsuit to be entered:—Held, upon a rule, obtained under 19 & 20 Vict. c. 108, s. 43, calling upon the judge to proceed with the trial of the cause, that the judge ought not to have nonsuited the plaintiff without his consent, but that, as the judge had acted judicially, the court had no power to afford the plaintiff any remedy upon this rule. *Kershaw* v. *Chantler*, 26 L. T. 474.

An action was brought in a county court in the names of two executors in respect of a claim accruing to their testatrix. One of the executors executed a release the day before the trial. Counsel for the plaintiffs proposed to call the executor who had executed the release for the purpose of eliciting from him whether or not it had been fraudulently obtained, but without alleging the existence of fraud in fact. The judge refused to permit the executor to be examined for that purpose, and the plaintiffs were non-suited. On appeal the court set aside the non-suit. *Robinson* v. *Vernon*, 7 C. B. (N.S.) 231.

See also *Lawford* v. *Partridge*, ante, col. 906; *Poyser* v. *Minors*, infra, col. 949; and *Davis* v. *G. E. Ry.*, infra, col. 950.

Pendency of another Action for same Cause no Answer.]—A plaint was levied in a county court. On the hearing the defendant objected to the judge entertaining the matter, on the ground of a suit pending for the same cause of action in a superior court. The judge, however, refused to dismiss the plaint, but made an order for payment within one week after the cause in the superior court should be decided. The plaintiff discontinued the action in the superior court, which being afterwards proved to the satisfaction of the judge, a judgment summons was taken out, and served upon the defendant. Upon the face of this summons it appeared the amount claimed was 22*l.* 7*s.* 4*d.*; and an order was made rescinding the previous order, and directing payment of that sum, with 1*l.* 10*s.* 2*d.* costs:—Held, first, that it not appearing that the plaint was, in substance, for the same cause of action as in the superior court, the jurisdiction of the judge was not ousted. *Byrne* v. *Knipe*, 5 D. & L. 659; 9 B. C. Rep. 329; 18 L. J., Q. B. 33; 12 Jur. 1075.

Held, secondly, that the judge had power in the exercise of his discretion, to postpone the payment until after the decision in the superior court, and rescind the previous order. *Ib.*

Held, thirdly, that it sufficiently appeared that the amount claimed by the judgment summons did not exceed the sum of 20*l.*, exclusive of costs, and was therefore within the jurisdiction of the county court; and that a writ of prohibition would not lie. *Ib.*

A plaint in a county court for 20*l.* for rent: the defendant appeared, and pleaded the pendency of another action in the exchequer upon a promissory note, the consideration for giving which was the rent:—Held, that as they were not for the same cause of action eo nomine, the jurisdiction of the county court was not ousted. *Ib.*

A. proceeded by plaint in a county court, to recover 20*l.* for damage done to his fields by some lime-kilns of the defendant, from the 10th November, 1843, to the 30th October, 1849. That cause having been removed by certiorari into a superior court, on the ground that the lime-kilns were of greater value than 20*l.*, and that the defendant's property in them would be destroyed if the plaintiff was to succeed, he commenced a second plaint in the county court for 5*l.* for the same cause of action, laying the period of the injury to be from the 10th of November, 1843, to the 30th November, 1849:—Held, that no prohibition lay, and concessum that no certiorari lay. *Edwards* v. *Rogers*, 1 L. M. & P. 197; 19 L. J., Ex. 149; 14 Jur. 91.

The jurisdiction of a county court is not ousted by the pendency of an action for the same cause in a superior court. *M'Murray* v. *Wright*, 11 W. R. 34.

It is no answer to an ejectment in a county court that another ejectment for the same cause is pending in a superior court. *Williamson* v. *Bissill*, 7 H. & N. 391; 31 L. J., Ex. 131; 8 Jur. (N.S.) 42; 5 L. T. 321; 10 W. R. 109.

Proof of Particulars—Action for Dilapida-

tions.]—In an action for dilapidations the plaintiff must prove his particulars of demand in the same manner as in an action for goods sold and delivered. *Smith* v. *Douglas*, 16 C. B. 31; 3 C. L. R. 752.

Committal of Witness.]—A county court judge sitting in bankruptcy summoned a person to attend and give evidence under s. 96 of the Bankruptcy Act, 1869; this summons was disobeyed, and the judge thereupon made an order for the committal of the person so summoned:—Held, that the remedy for disobedience to the summons was not confined to that prescribed by s. 96, but that the judge had power, under s. 66 (which gives judges of county courts, for the purposes of the act, all the powers and jurisdiction of judges of the high court of chancery), to make the order for committal. *Reg.* v. *Croydon County Court Judge*, 53 L. J., Q. B. 545; 13 Q. B. D. 963; 51 L. T. 102; 33 W. R. 68—C. A.

See also ante, col. 913.

Right of Defendant to sum up Evidence.]—An action remitted from the queen's bench division to a county court was tried before the county court judge with a jury. After the defendant's evidence had closed, his counsel claimed to address the jury, but the judge refused to allow it. The jury having given a verdict for the plaintiff the defendant applied for a rule nisi for a new trial on the ground that his counsel ought to have been allowed to sum up the evidence:—Held, that as the right claimed did not exist at common law, and s. 18 of the Common Law Procedure Act, 1854, which gave such a right in the superior courts, did not apply to county courts, there was no ground for interfering with the practice of any county court in which the defendant was not allowed to sum up the evidence. *Dymock* v. *Watkins*, 10 Q. B. D. 451; 48 L. T. 393; 31 W. R. 331—C. A.

Withdrawal of a Juror upon Terms—Terms not complied with.]—An action of trespass to land was sent for trial to a county court under 30 & 31 Vict. c. 142, s. 10. The cause came on for trial before a jury, but before the trial was completed the parties agreed that a juror should be withdrawn, and that the judge should say what should be done between them. At the next meeting of the court, the judge was ready to pronounce his opinion, but the defendant, without assigning any reason, withdrew his consent, and the judge consequently did not give any decision:—Held, that the withdrawal of a juror had not, under the circumstances, put an end to the action, because the defendant had not performed his part of the arrangement under which the plaintiff consented to such withdrawal: and the court made absolute a rule calling upon the judge of the county court to appoint a day for a rehearing. *Norburn* v. *Hilliam*, 39 L. J., C. P. 183; L. R. 5 C. P. 129; 22 L. T. 67; 18 W. R. 602.

Proof of Proceedings in.]—The modern county courts are courts of record without records, and the mode of proving what occurred on a trial in one of those courts is, to call a person who was present who can speak as to the particular matter or fact. *Harmer* v. *Bean*, 3 Car. & K. 307.

A minute of the proceedings of a county court, made by the clerk, pursuant to this provision, is conclusive evidence of them, even though the judge gives evidence to the contrary. *Dews* v. *Ryley*, 2 L. M. & P. 544; 11 C. B. 434; 20 L. J., C. P. 264; 15 Jur. 1159.

The clerk's book, or a certified copy of entries from such book, is the best, and therefore the only evidence of proceedings in a county court. *Reg.* v. *Rowland*, 1 F. & F. 72.

In a declaration on a replevin bond it was alleged that A. (the plaintiff in replevin) levied his plaint in a county court against the present plaintiff, and that it was adjudged that A. should take nothing by his plaint. The defendant pleaded nul tiel record. Issue was joined on this plea, and the plaintiff produced an entry from the county court book, in which the entry was as to the plaint "struck out for want of jurisdiction, on the ground of a disputed title having been sworn to":—Held, that this entry did not support the averment. *Tubby* v. *Stanhope*, 5 D. & L. 781; 5 C. B. 790; 17 L. J., C. P. 190; 12 Jur. 357.

And see EVIDENCE.

Entering Judgment—Refusal of Judge to receive Verdict.]—A plaintiff brought an action in a county court to recover 6*l.* 10*s.* for wine supplied. At the trial he was nonsuited, but at the next court, having brought a fresh action, he obtained a verdict. A new trial was granted, and the jury was discharged without being able to agree upon a verdict. The action was tried a fourth time, when the jury returned a verdict as follows:—"In the absence of any order in writing for the wine, we find a verdict for the plaintiff." The judge refused to receive the verdict, and ordered the jury to retire and reconsider it. They said they had considered all the evidence, that their unanimous opinion was that there should be a verdict for the plaintiff, and that it was of no use their retiring. The judge refused to receive the verdict, and discharged the jury:—Held, that a rule nisi might be granted, calling upon the judge, the registrar and the defendant to shew cause why the verdict should not be received and entered upon the minutes, why judgment should not be given for the plaintiff, and why execution should not issue thereupon. *Jardine* v. *Smith*, 8 W. R. 464.

—— Action of Tort—Refusal to enter after Death of Plaintiff.]—An action for an assault was heard in the county court, and the judge took time to consider his judgment; before he delivered it the plaintiff died, and upon an application to the judge to deliver judgment nunc pro tunc, he declined to do so, holding that the action had abated. Upon an application for a rule to direct the judge to enter judgment, or to allow the administrator to enter a suggestion of the death, and go on with the action:—Held, that the court could not interfere, the judge having decided a question before him within his jurisdiction. *Henry* v. *Mason*, 1 L. T. 295.

Altering Judgment]—A county court judge cannot, except by consent or after a new trial, alter a judgment which he has formally given. *Irving* v. *Askew*, 39 L. J., Q. B. 118; L. R. 5 Q. B. 208; 18 W. R. 467.

Amending Judgment.] — Where a judgment correctly sets forth the meaning of the county court judge, he has no jurisdiction to alter it. *The Recepta, Gordon* v. *Francis*, 62 L. J., P. 118; [1893] P. 255; 1 R. 614; 69 L. T. 252; 41 W. R. 561; 42 W. R. 73; 7 Asp. M. C. 359.

Rescinding Judgment.]—In a plaint the defendants pleaded the Statute of Limitations, but without giving the notice required by the rule of the county courts. The plaintiff required an adjournment in order to answer the plea, which was granted, and the case adjourned to a subsequent day. On that day the case came on for hearing, and the defendants obtained a judgment in their favour, which was entered by the clerk in the book kept for that purpose. The defendants then left the court. Some days afterwards they received notice that the judge had rescinded his judgment, and that the case was adjourned for further hearing. They attended on the day named, and protested against any further hearing. The judge, however, overruled their objection, and gave judgment for the plaintiff, on the ground that the Statute of Limitations on the former occasion had been improperly pleaded :—Held, that the judge had no power to rescind his former decision in the absence of the defendants, and that he had therefore acted without jurisdiction. *Jones* v. *Jones*, 5 D. & L. 628.

Detinue — Order for delivery of Specific Chattel.]—In an action of detinue brought in the county court, the county court judge has jurisdiction to make an order for the delivery by the defendant of the specific chattel wrongfully detained, without giving him the option of paying its assessed value as an alternative. *Winfield* v. *Boothroyd*, 54 L. T. 574 ; 34 W. R. 501.

Order that Debt be Paid by Instalments—Notice to Defendant.]—Where a defendant is adjudged to be indebted to the plaintiff in a certain sum, and the judge at the same time goes on to order that the debt be paid by instalments, such order is part of the judgment, of which the defendant is bound to take notice, without service. *Robinson* v. *Gell*, 12 C. B. 191 ; 21 L. J., C. P. 155 ; 16 Jur. 615. S. P., *Ely* v. *Moule*, 2 L. M. & P. 799 ; 5 Ex. 918 ; 20 L. J., Ex. 29 ; 14 Jur. 1070.

Effect of Judgment — Interest]—A county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17. *Reg.* v. *Essex County Court Judge*, 56 L. J., Q. B. 315 ; 18 Q. B. D. 704 ; 57 L. T. 643 ; 35 W. R. 511 ; 51 J. P. 549—C. A.

—— **As Barring subsequent Action.**]—By Ord. XVI. r. 17, of County Court Orders, 1875, "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." Such rule is a copy of Ord. XLI. r. 6, of the Judicature Orders, and was made by a committee of county court judges, with the approval of the lord chancellor, under the authority of s. 32 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), which authorises such county court judges with such approval to frame rules and orders "for regulating the practice of the courts and forms of proceedings therein :"—Held, that unless r. 17 of the County Court Orders was ultra vires, a judgment of nonsuit in a county court, not appealed against nor set aside, was a bar to an action by the plaintiff for the same debt in the superior court. *Poyser* v. *Minors*, 50 L. J., Q. B. 555 ; 7 Q. B. D. 329 ; 45 L. T. 33 ; 29 W. R. 773—C. A.

Held, also (Bramwell, L.J., dissenting), that r. 17 was not ultra vires, but was covered by the authority given to the committee of county court judges by the County Courts Act, 1856, s. 32. *Ib.*

On the 2nd of July, 1877, the plaintiff suffered judgment of nonsuit in an action, brought by him in the City of London Court, to recover damages from the defendants for non-delivery of goods by them as carriers, and subsequently, on the 1st of October, 1877, brought another action against the defendants for the same cause in the mayor's court, to the declaration in which latter action the defendants pleaded (inter alia) as follows :—"That after the passing of the Judicature Act, 1873, and the subsequent act amending the same, and further enacting in the like behalf, to wit, on the 2nd of July, 1877, the plaintiff sued the defendants, in respect of the same cause of action as that in respect of which he now sues in the City of London Court, and judgment of nonsuit was given against him in the said court in that suit ; and the defendants submit that the plaintiff ought not to bring his present suit, or to be heard in his present suit after the determination by judgment of nonsuit, as aforesaid" :—Held, that by Ord. XVI. r. 17, of the County Court Rules, 1875, the judgment of nonsuit in the city of London court, in the absence of any direction by the judge of that court to the contrary, had the effect of a verdict for the defendants, and was a bar and an answer to the subsequent action for the same cause in the mayor's court. *Davis* v. *G. E. Ry.*, 39 L. T. 635.

—— **Estoppel by.**]—A county court judgment precludes a party from raising in another court a material question determined against him by such judgment. *Flitters* v. *Allfrey*, 44 L. J., C. P. 73 ; L. R. 10 C. P. 29 ; 31 L. T. 878 ; 23 W. R. 442.

The plaintiff was tenant to the defendant and sued his landlord for trespass to the demised premises. The landlord pleaded that he entered the premises by virtue of a magistrate's warrant under the Small Tenements Act (1 & 2 Vict. c. 74), for rent due as for a weekly tenancy. The tenant replied that the landlord had sued him for rent in respect of the same tenancy in the county court, where it was decided that the tenancy was yearly and not weekly, and judgment was entered for the tenant. The landlord having rejoined nul tiel record, upon production of the record it appeared that the claim was for 1*l.* 9*s.* for rent of a cottage, and that judgment was for the tenant :—Held, that the landlord was concluded by the county court judgment. *Ib.*

A., hired by B. as servant in husbandry from the 1st August, 1858, sued B. in a county court for discharging her from his service on the 7th September without reasonable cause, and the judge gave a decision for B. In May, 1859, A. took out a summons before justices against B. to recover a quarter's wages :—Held, that the matter for the consideration of the justices was the same identical matter which had been decided by the judge of the county court, viz., whether the discharge was wrongful and without just cause ; and therefore the decision of the county court was conclusive between the parties. *Routledge* v. *Hislop*, 5 El. & El. 549 ; 29 L. J., M. C. 90 ; 6 Jur. (N.S.) 398 ; 2 L. T. 53 ; 8 W. R. 363.

To a declaration the defendant pleaded, by way of estoppel, that he sued the plaintiff in a county court for a debt, and the plaintiff then attempted to establish as a set-off the claim for which he now sued; and that judgment was given against him as to that set-off. The plaintiff replied that he had not given any notice of his intention to rely on the set-off, in accordance with 9 & 10 Vict. c. 95, s. 76, and r. 17; and that the defendant did not consent to his setting off the debt:—Held, that the replication was a good answer to the plea of estoppel, since it showed that there had been no decision in the county court by which the plaintiff was concluded. *Stanton* v. *Styles*, 1 L. M. & P. 575; 5 Ex. 578; 19 L. J., Ex. 336.

—— **Judgment by Consent—Mistake as to Facts — Subsequent Proceedings to Enforce Order.**]—Where an order of a county court, good upon the face of it, declaring that a defendant has committed an offence under ss. 3 and 10 of the Rivers Pollution Prevention Act, 1876, by permitting sewage matter to flow into a river, and requiring him to construct such sewage works as may be necessary, is drawn up by consent, the defendant is estopped in a subsequent action brought to recover penalties for breach of the order from showing that the part of the river comprised in the order was in fact tidal water, and that therefore the order with respect to such part was beyond the jurisdiction of the court, even though at the time of consenting to the order the defendant was unaware that such part of the river was in fact tidal water. *Ribble Joint Committee* v. *Croston Urban Council*, 66 L. J., Q. B. 384; [1897] 1 Q. B. 251; 45 W. R. 348.

4. Arbitrations.

An allegation in a plea that the plaintiff and defendant mutually referred the action in the county court and all matters in difference is supported by proof of an order of reference made by the judge of the county court under the powers given him by 9 & 10 Vict. c. 95, s. 77, by consent of the plaintiff and defendant. *Roper* v. *Levy*, 7 Ex. 55; 2 L. M. & P. 621; 21 L. J., Ex. 28.

Appeal from Refusal to Set Aside Award.]—An action in a county court having been referred by the judge to an arbitrator, under 9 & 10 Vict. c. 95, s. 77, and the arbitrator's award having been entered up as the judgment, an application was made to the judge to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction by taking into consideration matters not referred to him. The judge having refused this application:—Held, that the court of appeal had no jurisdiction, under 13 & 14 Vict. c. 61, s. 14, to entertain an application on appeal from the judge to set aside the award. *Mayer* v. *Farmer*, 47 L. J., Ex. 760; 3 Ex. D. 235; 26 W. R. 760.

An order, referring a cause to a judge of a county court, was obligatory on the judge, and he had no option of declining the reference. *Cummins* v. *Birkett*, 3 H. & N. 156; 27 L. J., Ex. 216; 4 Jur. (N.S.) 212; 6 W. R. 366. *See* 21 & 22 Vict. c. 74, s. 5.

5. Enforcing Judgment.

Suing on in Superior Courts.]—An action is not maintainable in a superior court on a judgment of a county court, but such judgment is final and complete, and a bar to an action for the original consideration in any other court. *Austin* v. *Mills*, 2 C. L. R. 411; 9 Ex. 288; 23 L. J., Ex. 40; 18 Jur. 16; 2 W. R. 107. S. P., *Berkeley* v. *Elderkin*, 1 El. & Bl. 805; 22 L. J., Q. B. 281; 17 Jur. 1153; 1 W. R. 305.

An action lay upon a judgment of the ancient common law county court. *Williams* v. *Jones*, 13 M. & W. 628; 2 D. & L. 680; 14 L. J., Ex. 145.

Before 19 & 20 Vict. c. 108, s. 27, the county courts might try actions on judgments of the superior courts. *Winsor* v. *Dunford*, 12 Q. B. 603; 18 L. J., Q. B. 14; 12 Jur. 629.

And where a plaintiff sued in a county court on a judgment of a superior court, and obtained an order for payment by instalments, some of which had been paid, he could not resort to the process of the superior court to enforce the judgment of the county court. *Jones* v. *Jenner*, 25 L. J., Ex. 319; 2 Jur. (N.S.) 574; 4 W. R. 651.

Removal into Superior Courts.]—A judgment of a county court is not removable into a superior court for the purpose of issuing execution thereon. *Moreton* v. *Holt*, 10 Ex. 707; 3 C. L. R. 348; 24 L. J., Ex. 169; 1 Jur. (N.S.) 215; 3 W. R. 207.

But by 19 & 20 Vict. c. 108, s. 49, it may be removed under certain circumstances and conditions.

Aided in Equity.]—A judgment of a county court will be aided against the equitable estate of the debtor. Execution having been issued on a judgment in the county court, and nothing recovered, the debtor's only property being an equitable interest in leaseholds in the hands of trustees in trust to pay him an annuity thereout, the creditor filed a bill for payment of the debt out of the leaseholds in aid of the judgment of the county court:—Held, that he was entitled to such relief. Semble, the aid of a court of equity to enforce the judgment of a county court is different from an action on such judgment in a superior court of law. *Bennett* v. *Powell*, 3 Drew. 326; 3 Eq. Rep. 1023; 24 L. J., Ch. 736; 1 Jur. (N.S.) 719; 3 W. R. 618, 640.

If a plaintiff in a county court, having obtained a judgment for debt and costs, receives payment of the debt only, he may, under 9 & 10 Vict. c. 95, s. 94, require the clerk of the county court to issue execution against the debtor's goods for the costs only, and a mandamus to issue execution in such case is properly directed to the clerk, not to the judge. *Reg.* v. *Fletcher*, 2 El. & Bl. 279; 21 L. J., Q. B. 310; 17 Jur. 179.

But before applying to the court for a mandamus, application should be made to the judge of the county court to order the clerk to issue such execution. *Christchurch Overseers*, *Ex parte*, 2 L. M. & P. 660.

A plaintiff in a county court suit obtaining judgment by default of appearance, and execution thereon, is within the protection of the County Court Acts. *Gayton* v. *Bayman*, 1 F. & F. 675.

Where a writ of fi. fa. has issued irregularly on the goods of a defendant under an order of a county court, the remedy is to apply to the county court to stay proceedings. *Herman* v. *Sheldry*, 2 W. R. 455.

Landlord's Claim for Rent under Executions.]—Under 19 & 20 Vict. c. 108, s. 75, a landlord

cannot claim his rent, where a bailiff takes in execution, upon the demised premises, the goods of a stranger; for that enactment only applies where the levy is made on the goods of the tenant. *Foulger* v. *Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154; 1 L. T. 481; 8 W. R. 279. S. P., *Beard* v. *Knight*, 8 El. & Bl. 865; 27 L. J., Q. B. 359; 4 Jur. (N.S.) 782; 6 W. R. 226.

Stay of Execution—Judgment over £20—"Sickness or other Sufficient Cause."]—The discretionary power conferred by s. 153 of the County Courts Act, 1888, on the judge to stay execution if the defendant is unable "from sickness or other sufficient cause" to pay a debt recovered against him, applies only to causes ejusdem generis which would prevent him exercising his industry, and so acquiring means to pay. Mere proof of inability to pay is not sufficient to enable the judge to exercise his discretion. *Attenborough* v. *Henschell*, 64 L. J., Q. B. 255; [1895] 1 Q. B. 833; 15 R. 294; 72 L. T. 192; 43 W. R. 283; 59 J. P. 150.

Ejectment—Warrant of Possession—Land outside District.]—Although the plaintiff and defendant in an action of ejectment both reside within the jurisdiction of the county court, if property sought to be recovered is situate without the jurisdiction, a warrant of possession cannot be executed. *Ellis* v. *Peachey*, 5 D. & L. 673; 18 L. J., Q. B. 137; 13 Jur. 564.

Warrant of Execution—Goods in Foreign District—Negligence of High Bailiff.]—The jurisdiction given by s. 115 of the County Courts Act, 1846, to a county court judge, enabling him to order a bailiff to compensate a plaintiff who has suffered damage by his neglect, connivance, or omission in levying an execution can only be exercised by him against the bailiffs of his own court. Execution was issued in a county court, and the warrant was sent for execution to a foreign county court, and the high bailiff of such court was guilty of negligence in levying under it:—Held, that the judge of the home court had no power under s. 115 to order the high bailiff of the foreign court to pay damages to the plaintiff, who had been injured by his negligence, and that the high bailiff of the foreign court was entitled to a prohibition. *Reg.* v. *Shropshire County Court Judge*, or *Rogers*, 57 L. J., Q. B. 143; 20 Q. B. D. 242; 58 L. T. 86; 36 W. R. 476.

Enforcement of Order by Attachment.]—Under the Judicature Act, 1873, s. 89, a county court has, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereto. *Martin* v *Bannister*, 48 L. J., Q. B. 676; 4 Q. B. D. 491; 28 W. R. 143—C. A.

Interlocutory Order.]—The power of a county court under the Judicature Act, 1873, s. 89, in actions within its jurisdiction to enforce obedience to its orders by committal, extends to interlocutory as well as final orders. *Richards* v. *Cullerne*, 7 Q. B. D. 623—C. A.

Attachment of Debts.]—Salary, payable quarterly, and not due until a future date, is not a debt "due, owing, or accruing," and cannot be attached under Ord. XXIV. r. 4, of the County Court Rules, 1875. *Hall* v. *Pritchett*, 47 L. J., Q. B. 15; 3 Q. B. D. 215; 37 L. T. 671; 26 W. R. 95.

A defendant having recovered judgment in the high court against B., the plaintiff, who had previously obtained judgment against the defendant in the county court, issued and served upon B. a summons in the county court calling upon him to shew cause why the judgment obtained against him by the defendant should not be attached, and giving notice that he was not to pay the amount of the judgment to the defendant, or otherwise. Before the summons came on for hearing the sheriff, under a fi. fa., seized the goods of B. under the defendant's judgment, and B. paid the amount of the judgment to the sheriff under protest. The county court judge refused to make any order upon the summons:—Held, that the judge was right, for B. had not done wrong in paying the amount of the judgment to an officer of the court, and was not bound to apply at chambers for his protection either before or after the execution. *Turnbull* v. *Robertson*, 47 L. J., C. P. 294; 38 L. T. 389; 26 W. R. 557.

Discovery in Aid of Execution.]—*See* EXECUTION.

Committal Order under Debtors Act, 1869—Nature of.]—A commitment by a judge of a county court on a judgment summons is in the nature of a qualified execution, and not of a punishment for contempt. *Dakins, Ex parte*, 16 C. B. 77; 3 C. L. R. 602; 24 L. J., C. P. 131; 1 Jur. (N.S.) 378.

—— **Open Court.**]—By s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), orders for committal of defaulting debtors must be made by a county court judge in open court. *Kenyon* v. *Eastwood*, 57 L. J., Q. B. 455.

A county court judge sat, for the purpose of hearing summonses for committal under the provisions of s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and for all business except jury cases, in a small room which he also used at other times as his private room; it communicated with a larger room, where was the usual raised bench and jury-box, by a door which was kept open during the hearing of these summonses, and the names of the parties were, if necessary, called in the larger room. The public had access to the smaller room as well as the larger:—Held, that orders for committal made under these circumstances were not made in open court, and that they could not be enforced. *Ib.*

—— **Non-appearance of Debtor.**]—A county court judge has jurisdiction to make a committal order under the Debtors Act, 1869, notwithstanding the non-appearance of the debtor; and a prohibition will not be granted to restrain the proceedings thereunder upon the ground that the debtor had not an opportunity of being heard as to his ability to pay. *Pitcher* v. *Bourn* (10 Times L. R. 245) doubted and disapproved. *Johnstone* v. *Kiernan*, 10 R. 313.

—— **Fresh Summons on Adjournment.**]—A defendant was summoned, and appeared at a county court on the 11th January, and, judgment having been given against him, he was ordered to pay the debt forthwith: this he refused to do, and he was then examined by the judge as to the disposal of his property, when it appeared to the

judge that he had made a gift, delivery or transfer of his property, with intent to defraud his creditors. The matter was adjourned, at the defendant's request, till the 18th of January, to enable him to produce evidence; but he did not appear on the 18th, nor produce evidence, nor give any excuse for not doing so; whereupon the judge ordered him to be committed for forty days:—Held, that a fresh summons, requiring him to appear on the 18th, was not necessary, and that the proceedings were regular. *Purdy, Ex parte*, 1 L. M. & P. 118; 9 C. B. 201; 19 L. J., C. P. 222; 14 Jur. 332. S. P. and *S. C.*, 1 L. M. & P. 16; 19 L. J., M. C. 95.

—— **Judgment over £20.**]—Upon an application under 9 & 10 Vict. c. 95, the county court had jurisdiction, though the judgment exceeded 20*l*. *Byrne* v. *Knipe*, 2 B. C. Rep. 321; 5 D & L. 659; 18 L. J., Q. B. 33; 12 Jur. 1075.

—— **Enforcing Judgment of High Court.**]—A county court judge has power to enforce the order or judgment of the high court, where the high court has made no order for payment by instalments, by directing payment by instalments of the amount due under such order or judgment, and to commit the debtor in default. But where the high court has made an order for payment by instalments the county court has no power to vary that order. *Addington, Ex parte, Ires, In re*, 55 L. J., Q. B. 246; 16 Q. B. D. 665; 54 L. T. 877; 34 W. R. 593; 3 Morrell, 83.

—— **Form of Order—Minute in Registrar's Book.**]—On the hearing of a judgment summons in a county court the judge committed the defendant but suspended the order. The only written document which had been drawn up was in the books of the county court, in the form given in the schedule to the County Court Rules, 1886, among the forms of books which, by Ord. II. r. 2, the registrar is directed to keep, headed "Book H.—Summonses for Commitment, Interpleader, and Minutes of Orders thereon." The defendant applied for a prohibition on the ground that the order did not show on its face the ground on which it was issued, as required by s. 5, sub-s. 1 (*a*), of the Debtors Act, 1869:—Held, that the minute of the order in Book H. (which did not show on its face the ground on which the order was issued) was not the order within the meaning of the Debtors Act, but that, as the order, if it were afterwards drawn up as directed by Ord. XXV. r. 33, of the County Court Rules, 1886, would sufficiently comply with the act, the application for a prohibition must be refused. *Harris* v. *Slater*, 57 L. J., Q. B. 539; 21 Q. B. D. 359; 37 W. R. 56.

—— **Order in Default of Payment on Future Day.**]—A party ordered to pay a sum recovered against him in a county court, who has made default, and upon being examined upon a judgment summons shews no sufficient excuse for such default, may be committed to prison forthwith; but if the judge orders him to pay the money at a future day, or in default to be committed, and the party again makes default, he cannot be committed without being examined as to the cause of such second default. *Abley* v. *Dale*, 10 C. B. 62; 1 L. M. & P. 626; 20 L. J., C. P. 33; 14 Jur. 1069.

An order by a judge on a judgment summons on a defendant to pay a sum on a future day, or to be imprisoned for thirty days, is bad. *Dews* v. *Ryley*, 11 C. B. 434; 20 L. J., C. P. 264; 15 Jur. 1159.

—— **Order on Debt Scheduled on Discharge under Insolvent Debtors Act.**]—A defendant against whom a judgment was given in the county court, having been arrested at the suit of a creditor other than the plaintiff obtained his discharge under the Insolvent Debtors Act, 1 & 2 Vict c. 110, s. 75, the judgment of the plaintiff being inserted in his schedule. Having been afterwards committed by the county court judge, under 9 & 10 Vict. c. 95, s. 99, for non-payment of the plaintiff's debt:—Held, that he was not entitled to be discharged. *Somers, Ex parte*, 16 C. B. 539; 24 L. J., C. P. 185; *George* v. *Somers*, 11 Ex. 202; 24 L. J., Ex. 247. S. P., *Christie, Ex parte*, 4 E. & B. 714; 24 L. J., Q. B. 144.

—— **Local Situation of Gaol—Time calculated from Taking into Custody.**]—A party was committed under 8 & 9 Vict. c. 127, by an order under the hand of a judge of an inferior court for the term of forty days to the common gaol for the confinement of debtors under judgment and in execution of the superior courts of justice within the county of Middlesex, in which he was then residing:—Held, that it was not necessary that the gaol in which he was imprisoned should be locally situate within the county of Middlesex; that the forty days were to be calculated from the time the party was taken into custody and not from the order; that the warrant need not be under seal; and that the committal being in the absence of the party did not vitiate it. *Bowdler, In re*, 12 Q. B. 612; 17 L. J., Q. B. 243.

—— **Form of Warrant.**]—A warrant of commitment stating that "it appeared to the satisfaction of the judge, that the defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery or transfer of his property, with intent to defraud his creditors; and thereupon the judge, by a certain order, did adjudge," &c., not being in the nature of a conviction, is not bad for stating in the alternative the mode by which the offence was committed. *Purdy, Ex parte*, 1 L. M. & P. 118; 9 C. B. 201; 19 L. J., C. P. 222; 14 Jur. 332. S. P. and *S. C.*, 1 L. M. & P. 16; 19 L. J., M. C. 95.

—— **Issue of Warrant—Lapse of Time.**]—A warrant of commitment for contempt for non-appearance on a judgment summons was regular, though issued more than six months after the date of the judge's order, notwithstanding that, by a rule of practice, a warrant was to be current only for two months after its date. *O'Neil, Ex parte*, 10 C. B. 57; 1 L. M. & P. 737; 20 L. J., C. P. 69.

A defendant arrested under a warrant of commitment of a county court, within three months from the day of its date, might lawfully be detained under such arrest after the expiration of the three months, notwithstanding a former rule of court provided that "warrants of commitment, whenever issued, shall bear date on the day on which the order for commitment is made, and shall continue in force for three calendar months from such date, and no longer." *Hayes* v. *Keene*, 12 C. B. 233; 21 L. J., C. P. 204; 16 Jur. 976.

—— **Second Order for Same Default.**] -A defendant in a county court having made default in payment of 20*l.* due under a judgment, an order was made to commit him to prison. He was, however, never arrested or imprisoned under the order, which according to Ord. XXV. r. 33, of the County Court Rules, 1886, expired when a year had elapsed from its date:—Held, upon motion for prohibition, that as no arrest nor imprisonment had ever taken place upon this order before its expiration, and as the defendant was still in default, the county court judge had power to make a second order of commitment. *Reg.* v. *Stonor*, or *Brompton County Court Judge*, 57 L J., Q. B. 510; 59 L. T. 669.

A judgment debtor having made default in payment of the judgment debt which had been recovered against him in the county court, and which he had been ordered to pay forthwith, the county court judge made an order for his commitment to prison for forty days. The debtor was arrested thereon, but was subsequently discharged on the ground of his being privileged at the time of such arrest, as a witness returning from the sessions. The debtor was again, and whilst the order for committal was still in force, summoned upon a judgment summons, and a second order for his committal for the same default in not paying the judgment debt was made by the county court judge:—Held, that the judge had no power to make such second order, as the first had not been executed. *Horsnail* v. *Bruce*, 42 L. J., C. P. 140; L R. 8 C. P. 378; 28 L. T. 705; 21 W. R. 597.

Held, also, by Bovill, C.J., and Brett, J., that where a judgment debt is not payable by instalments there is no power under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, to commit the debtor more than once for default in not paying such debt. *Ib.*

When a judgment debtor refuses or neglects to pay the judgment debt which he has been ordered to pay in one sum, and not by instalments, there is no power under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, to commit him to prison more than once, although after a first committal it is proved he has the means of paying the sum in respect of which he still makes default. *Evans* v. *Wills*, 45 L. J., C. P. 420; 1 C. P. D. 229; 34 L. T. 679; 24 W. R. 883

Judgment for a debt and costs was given to B., and an order made to pay by instalments. B. having failed to pay the instalments, a judgment summons issued, upon which he was examined, and committed for seven days, upon the ground that he had the means of satisfying the judgment, and refused to do so. He was subsequently summoned, and committed two several times for forty days each, upon the same ground:—Held, that the judge of a county court has power to commit for a default of the same kind toties quoties a default is committed. *Boyce, In re*, 2 El. & Bl. 521; 22 L. J., Q. B. 393; 17 Jur. 715; 1 W. R. 409.

—— **Execution of Warrant after Payment of Debt.**]—S. obtained judgment against the plaintiff for a debt, which was ordered to be paid to the clerk of the court; and the amount not being paid, a summons was issued to the plaintiff to show cause why he had not paid. Upon default of appearance, the judge ordered the plaintiff to be committed seven days, or until he should be discharged by due course of law. In pursuance of that order, the clerk made out a warrant, upon which was indorsed the amount of the debt. The plaintiff was arrested under the warrant after he had paid the amount of the debt to S., who communicated that fact by letter to the clerk:—Held, that the order and warrant were in force at the time of the arrest, notwithstanding the payment of the debt and the letter to the clerk, and therefore the arrest was legal. *Davis* v. *Fletcher*, 2 El. & Bl. 271; 22 L J., Q. B. 429; 17 Jur. 894; 1 W. R. 367.

—— **Remedy for Wrongful Commitment.**]—Where a prisoner was wrongly committed under 8 & 9 Vict. c. 127, s 1, for making default in the payment of an instalment of a debt, a habeas corpus was obtained in the court of common pleas, and upon the return to it the court ordered the discharge of the prisoner. *Kinning, Ex parte*, 10 Q. B. 730; 16 L J., Q. B. 257.

In an action for false imprisonment, the defendant pleaded that he issued a summons against the plaintiff in a county court for debt; that the summons was personally served upon him; that he did not appear, and that it was adjudged that he should pay the debt by instalments; that a minute of the judgment was served upon him, and that the instalments were not paid; that a judgment summons was then obtained, and served upon him; that he did not appear, and was committed by the judge to prison. The evidence was, that the defendant having a debt due from J., entered a plaint against him in a county court by his right name, which was an entirely different name from the plaintiff's, and that he served the plaintiff with the several proceedings which were all directed against J. by name, under the belief that the plaintiff was J.; that J. never appeared in court; that the plaintiff uniformly stated that he was not J., and on the service of each proceeding gave notice of the mistake; but that the defendant directed the officer to take the plaintiff:—Held, that as the proceedings were against J. by name, and were intended to be against him, and were served upon the plaintiff only by reason of a mistaken supposition that he was J., the plea was not proved. *Wulley* v. *M'Connell*, 13 Q. B. 903; 19 L. J., Q. B. 162; 14 Jur. 193.

6. Interpleader.

County Courts Act, 1888, ss. 156, 157.

Claim to Goods seized—Neglect of Claimant to comply with Conditions—Sale by Bailiff—Validity of Purchaser's Title.]—Where a claim is made to goods taken in execution under the process of the county court, but the claimant fails to comply with any of the conditions laid down in s. 156 of the County Courts Act, 1888, the bailiff is bound under that section to sell the goods, and the purchaser of such goods acquires a valid title to them, notwithstanding that the claimant, subsequent to such sale, proves that he was entitled to the goods. *Goodlock* v. *Cousins*, 66 L. J., Q. B. 360; [1897] 1 Q. B. 558; 76 L. T. 313; 45 W. R. 369—C. A.

—— **Bailiff need not ask Claimant to Comply with Conditions.**]—Under Ord. XXI. r. 1, of the County Court Orders and Rules, 1875, it is not necessary for the high bailiff, before selling goods seized in execution and claimed, to request the claimant to deposit the amount of the value of the goods or possession money, and, if no

such deposit be made, the high bailiff is entitled under 19 & 20 Vict. c. 108 (the County Courts Act, 1856), s. 72, to sell the goods without first applying for an interpleader summons under 30 & 31 Vict. c. 142 (the County Courts Act, 1867), s. 31. *Cramer* v. *Matthews*, or *Davies* v. *Wise*, 50 L. J., Q. B. 651; 7 Q. B. D. 425; 45 L. T. 26; 29 W. R. 804.

Interpleader Summons—Effect of Issue.]—The officer of a county court who has seized goods in execution is not required to retire from possession because an interpleader summons has been issued. *Summers, Ex parte*, 2 C. L. R. 1284; 18 Jur. 522; 2 W. R. 477.

Particulars of Claim—Sufficiency.] — By a rule of practice of the county courts the claimant in an interpleader is required, five clear days before the day appointed for hearing the summons, to deliver to the bailiff, or leave at the office of the registrar, a particular of the goods alleged to be his property, and also the grounds of his claim. Goods and money which had been seized under an execution upon a county court judgment were claimed by W., who delivered to the registrar a particular describing them as "the goods and money seized by virtue of the warrant." In the grounds of claim it was stated that the goods were the property of the claimant, and were at the time of the seizure in his possession. This particular was held insufficient by the judge, who refused to go further into the case, and made an order in favour of the execution creditors with costs:—Held, by Kelly, C.B., and Amphlett, B., that the particular was sufficient; by Bramwell and Cleasby, BB., that it was insufficient. *Richardson* v. *Wright*, 44 L. J., Ex. 230; L. R. 10 Ex. 367; 23 W. R. 678.

A notice by a claimant that the goods "are and were my own property, and not the property of R.," was held not to comply with a rule of practice requiring the delivery of particulars of goods alleged to be the property of a person claiming under 9 & 10 Vict. c. 95, s. 118, and of the grounds of his claim. *Tanner, Ex parte; Cullum* v. *Ross, In re*, 19 L. J., Q. B. 318; 14 Jur. 696. *S. C.*, nom. *Reg.* v. *Chilton*, 15 Q. B. 220.

The grounds of the claim need not appear on the face of them to be valid; and therefore a claim to certain goods, stating that they had been assigned to the claimant by deed, is sufficient, although it does not appear that the deed was good as against creditors. *Reg.* v. *Richards*, 2 L. M. & P. 263; 20 L. J., Q. B. 351; 15 Jur. 358.

Goods having been seized under an execution issued out of a county court, were claimed by a third party, who delivered particulars of his claim. The judge of the county court having refused to adjudicate upon the claim, on the ground that the particulars did not distinguish that portion of the goods seized to which the claimant was entitled:—Held, that he should have determined what part the claimant was entitled to, and given judgment accordingly. *Reg.* v. *Stapylton*, 21 L. J., Q. B. 8; 15 Jur. 1177.

—— **Claimant's Address.**]—The decision of a judge with respect to the sufficiency of the statement of the claimant's address is not conclusive, but subject to review. *Hardy* v. *Walker; M'Fee, Ex parte*, 9 Ex. 261; 2 C. L. R. 278; 23 L. J., Ex. 57.

A particular, in which a claimant's address was stated as Elizabeth-street, Islington, whereas in fact it was Elizabeth-terrace, Islington, though erroneous, is not calculated to mislead, and is therefore sufficient within the meaning of the rule of the county court. *Ib.*

—— **Amendment—Judge bound to Adjudicate on Merits.**]—Where a summons has issued on an interpleader claim, the judge is bound to adjudicate upon it; and if the claimant has not delivered a sufficient particular, or not delivered it in the time required by the rule of court, the judge should either amend the particular, or order a new summons to issue, so that he may determine the case on the merits. *Beswick* v. *Boffey*, 9 Ex. 315; 2 C. L. R. 558; 23 L. J., Ex. 89; 2 W. R. 156.

Power of Judge to Adjudicate on Damages—Subsequent Actions for Damages.]—When an interpleader summons has been issued under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 31, the county court judge has power to adjudicate upon any special damages to which the claimant of the goods seized may be entitled, arising out of the execution; and, whether such damages are claimed before him or not, no action in respect of them can be maintained by the claimant. *Death* v. *Harrison*, 40 L. J., Ex. 26; L. R. 6 Ex. 15; 23 L. T. 495.

Where goods are seized under an execution issued on a judgment in a county court and sold, and an interpleader summons is taken out at the instance of the high bailiff, under the County Courts Act, 1867, s. 31, the county court judge has power to adjudicate upon the damages, to which the claimant of the goods may be entitled, arising out of the execution, although the goods have been sold, and therefore are no longer in the control of the county court; and any action against the officers of the court for wrongfully depriving the plaintiff of his goods will be stayed; but an action against the purchasers of the goods from the officers of the county court will not be stayed. *Hills* v. *Renny*, 49 L. J., Ex. 710; 5 Ex. D. 313; 42 L. T. 610; 29 W. R. 328—C. A.

—— **Trespass.**] — Quære, whether a county court judge has jurisdiction on an interpleader summons, besides adjudging in favour of the claimant as to the right to the goods, to give damages for breaking and entering his house or premises, or for special damage arising from the taking of the goods. *Mercer* v. *Stanbury*, 25 L. J., Ex. 316; 4 W. R. 649.

But the superior court will not, on motion in an action for such trespass, where it does not appear that the judge has exercised such jurisdiction, stay the action or even strike out of the declaration such part as relates to the taking of the goods, and the special damage laid as resulting therefrom. *Ib.*

Since 30 & 31 Vict. c. 142, s. 31, a plaintiff who makes his claim in a county court to goods, without, at the same time, making a claim to damages, cannot afterwards, and subsequently to the adjudication and order of the judge, take proceedings against either the party at whose instance the warrant of execution was issued, or the bailiff who executed it, to recover damages for the trespass to his premises, or for any other

injury arising out of the execution of the county court process. *Death* v. *Harrison*, 40 L. J., Ex. 26; L. R. 6 Ex. 15; 23 L. T. 495.

Upon an interpleader summons, the judge decided that the goods seized were the goods of the claimant, but no complaint had been made before him as to the breaking and entering the house of the claimant. The claimant afterwards brought an action against the bailiff of the court for breaking and entering his house and taking his goods, under colour of a warrant of execution, and recovered damages, whereupon the bailiff applied for a rule to stay proceedings, upon the ground that a claim had already been made and adjudicated upon in respect of the same cause of action. The court refused to interfere. *Foster* v. *Pritchard*, 2 H. & N. 151; 26 L. J., Ex. 215; 5 W. R. 610.

Brewing utensils, hops, &c., having been seized under a warrant of execution against the goods of A., were claimed by B. On the 5th of October the bailiff caused an interpleader summons to be issued, calling on the parties to appear on the 18th, when the claim would be adjudicated upon. The judge decided that the goods were the property of B. The goods having been given up, B. commenced an action against the execution creditor for damages, for wrongfully depriving him of the possession of the goods, by means whereof he was prevented from carrying on his trade as brewer, alleging special damage. The court refused to interfere to stay the proceedings at the instance of the defendant. *Jones* v. *Williams*, 4 H. & N. 706; 28 L. J., Ex. 324.

Goods were seized in the house of J., under a warrant of execution from a county court. In an action against M., J. claimed the goods. The judge of the county court, on an interpleader summons, adjudicated that they belonged to M. J. then sued the officer who had seized in the Queen's Bench, for entering his premises and seizing the goods:—Held, that a judge might stay the action in the Queen's Bench, it not being shown that there was any cause of complaint besides that of entering the premises to seize the goods. *Jessop* v. *Crawley*, 15 Q. B. 212; 19 L. J., Q. B. 319; 14 Jur. 697.

Where an interpleader summons, in respect of goods taken in execution, has been decided in favour of the claimant, an action may afterwards be brought for breaking and entering the premises in which the goods were seized. *Cater* or *Chater* v. *Chignell*, 15 Q. B. 217; 19 L. J., Q. B. 520; 14 Jur. 697.

The 9 & 10 Vict. c. 95, s. 118, applies to claims made in respect of trespasses committed upon the claimant's house in the course of seizing the goods, as well as in respect of the goods seized. *Tinkler* v. *Hilder*, 7 D. & L. 61; 4 Ex. 187; 18 L. J., Ex. 429; 13 Jur. 684.

Finality of Decision as to Costs.]—A judge, having refused to hear an interpleader summons, and ordered money to be paid out of court, with costs, to be paid by the claimant, on the ground of the insufficiency of the particulars, a rule was obtained calling on the county court judge to hear the summons. No cause being shown, the court made the rule absolute, ordering the costs of the rule to abide the event of the interpleader issue, and discharging the claimant from the costs of the county court. *Whitehead* v. *Proctor*, 3 H. & N. 532. *See next case.*

The authority given by 19 & 20 Vict. c. 108, s. 43, and 21 & 22 Vict. c. 74, s. 4, to the superior courts to grant a rule calling upon the judge of a county court, or an officer of such court, to show cause why they should not do an act relating to their respective offices, does not confer any jurisdiction to interfere with an order of the judge of the county court as to costs. *Churchward* v. *Coleman*, 35 L. J., Q. B. 57; L. R. 2 Q. B. 18.

A county court judge gave judgment on an interpleader issue for the execution creditor, with costs. The court, upon appeal, reversed the judgment, and ordered a new trial; holding that the whole judgment, including that part of it which related to the costs, was thereby reversed. *Gage* v. *Collins*, 36 L. J., C. P. 144; L. R. 2 C. P. 381; 15 W. R. 568.

Action by Bailiff for Costs.]—Proceedings were taken by way of interpleader, respecting a claim to goods taken in execution by the high bailiff of the court, and the judge dismissed the claim, and ordered the costs of the interpleader proceedings to be paid by the claimant. The bailiff afterwards sold the goods, and paid the amount of the levy into court, and the same was subsequently received by the execution creditor:—Held, that the bailiff had no right of action for his costs of interpleader against the execution creditor. *Bloor* v. *Huston*, 15 C. B. 266; 3 C. L. R. 222; 24 L. J., C. P. 26; 1 Jur. (N.S.) 256; 3 W. R. 113.

Appeal.]—Where a landlord appears upon the hearing of an interpleader summons, he, as well as the execution creditor and the claimant, has a right of appeal. *Wilcoxon* v. *Searby*, 5 H. & N. 202; 29 L. J., Ex. 154; 1 L. T. 481; 8 W. R. 279.

An appeal lies where the value of the goods claimed against the execution creditor exceeds 20*l.*, though the execution is for a sum less than 20*l.*, and the claimant, to prevent the goods from being sold, has paid such sum. *Vallance* v. *Nash*, 2 H. & N. 712; 27 L. J., Ex. 142; 4 Jur. (N.S.) 431; 6 W. R. 227.

Certiorari.]—A certiorari does not lie to remove interpleader proceedings in a county court. *Summers, Ex parte*, 18 Jur. 522.

7. New Trial.

Power of Judge to Grant.]—The power to grant new trials conferred upon the judges of county courts by s. 93 of the County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the judge may think fit, but subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon judges of the Supreme Court. *Murtagh* v. *Barry*, 59 L. J., Q. B. 388; 24 Q. B. D. 632; 38 W. R. 526.

—— **When Notice Insufficient.**] — Ord. XXVIII., r. 1, of the County Court Rules, 1875, provides that a person applying for a new trial in a county court shall give the opposite party seven clear days' notice in writing of his intention so to apply. A notice was given by the defendant to the plaintiffs by letter on the 8th November, stating that he would apply on the 12th November for a new trial. The plaintiffs refused to accept this notice as being too short, and did not attend at the hearing on the 12th. The fact that the plaintiffs objected to the

notice was brought before the judge, who, however, made an order for a new trial. The plaintiffs applied for a prohibition to restrain the judge from hearing the case on the new trial:—Held, that a prohibition ought not to be granted, as the proper proceeding to have been adopted would have been to have made an application to the judge to set aside the order for a new trial as irregular. *Jones* (*Trustees*) v. *Gittins*, 51 L. T. 599.

The discretionary power to grant a new trial by 9 & 10 Vict. c. 95. s. 9, is not interfered with by the county court rule. which is merely a directory rule of practice. *Carter* v. *Smith*, 4 El. & Bl. 696; 3 C. L. R. 848; 24 L. J., Q. B. 141; 1 Jur. (N.S.) 279; 3 W. R. 235.

Therefore, notwithstanding the omission to give the seven days' notice required by such rule, the judge has jurisdiction to entertain an application for a new trial. *Ib.*

—— **Action struck out for want of Jurisdiction.**]—A county court judge struck a case out under s. 14 of the County Courts Act, 1867, for want of jurisdiction, but subsequently, being of opinion that his decision as to jurisdiction was erroneous, ordered a new trial:—Held, that he had power to order a new trial in such a case. *Lister* v. *Wood*, 23 Q. B. D. 229; 37 W. R. 738; 53 J. P. 773—C. A.

Agreement to accept Verdict of Majority of Jury.]—On the trial of an action in a county court the parties agreed to accept the verdict of the majority of the jury, but afterwards the unsuccessful party applied for and obtained a new trial on the ground that the finding of the jury was against the weight of evidence:—Held, that the county court judge had power to entertain the application, and was within his jurisdiction in holding that the consent of the parties meant no more than that they agreed to treat the verdict of the majority as equivalent to an unanimous verdict. *Groom* v. *Shuker*, 69 L. T. 293.

Second Application.]—After a judge of a county court has heard and refused an application for a new trial, the judgment of the court is final, and the judge has no power upon a subsequent application on another court day to grant a new trial. *G. N. Ry.* v. *Mossop*, 17 C. B. 130; 25 L. J., C. P. 22; 2 Jur. (N.S.) 21; 4 W. R. 116.

A county court judge who, on the verdict of a jury being given at the trial of an action, hears an application for a new trial and refuses to grant it on the grounds then assigned, but gives leave to the applicant to make another application at a later date on fresh materials, is not functus officio with respect to the action so as to have no jurisdiction to entertain the second application and grant a new trial if he thinks fit. *G. N. Ry.* v. *Mossop* (17 C. B. 130), distinguished. *Moxon* v. *London Tramways Co.*, or *Reg.* v. *Greenwich County Court Judge*, 60 L. T. 248; 37 W. R. 132—C. A.

Objection to Second Hearing in County Court.]—The provisions in 19 & 20 Vict. c. 108, s. 39, and Ord. IX. r. 5, County Court Rules, 1875, enabling a defendant in the county court to a claim exceeding 20*l.* in contract or 5*l.* in tort, to object to the trial taking place in the county court, on giving notice five clear days before the "return day," do not apply to the case of a second trial. Where, therefore, a new trial of an action had been, on the application of a defendant, granted by the county court judge:—Held, that the defendant could not, under the above statute, take objection to the new trial being had in the county court. *Campbell* v. *Fairlie*, 49 L. J., Q. B. 445.

And see PRACTICE (NEW TRIAL).

8. COSTS.

County Courts Act, 1888, ss. 113—119.

Where Action struck out for want of Jurisdiction.]—Before 30 & 31 Vict. c. 142, s. 14, where a judge of a county court had no jurisdiction, he had no right to award costs. Consequently a judge had formerly no jurisdiction to award costs to a defendant when it appeared that title to land came in question. *Lawford* v. *Partridge*, 1 H. & N. 621; 26 L. J., Ex. 147; 3 Jur. (N.S.) 271; 5 W. R. 295.

The 9 & 10 Vict. c. 95, s. 79, giving power to the judge to award costs in cases of failure of proof on the part of the plaintiff, did not apply where the case was out of the jurisdiction of the court, but only where there was a failure of proof in cases within the jurisdiction. *Ib.*

And s. 88, in like manner, only applied to cases within the jurisdiction of the county court. *Ib.*

Plaint entered by Solicitor—Signature of Particulars.]—In order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is not sufficient. *Reg.* v. *Cowper*, or *Croydon Deputy County Court Judge*, 59 L. J., Q. B. 265; 24 Q. B. D. 533; 62 L. T. 583; 38 W. R. 408—C. A.

—— —— **Clerk authorised to sign Solicitor's Name.**]—A claimant's particulars in an interpleader issue in a county court were signed by his solicitor's clerk with the name of his solicitor:—Held, that they were properly signed by the solicitor within the provisions of the County Court Rules, 1889, and that the claimant was entitled to the costs of the particulars. *Reg.* v. *Cowper* (24 Q. B. D. 60, 533) distinguished. *France* v. *Dutton*, 60 L. J., Q. B. 488; [1891] 2 Q. B. 208; 64 L. T. 793; 39 W. R. 716.

Semble, that where a plaintiff in a county court claims an amount exceeding 20*l.*, but recovers a sum under 5*l.*, he is only entitled to costs upon the lower scale. But where a plaintiff claims more than 20*l.*, and the defendant succeeds, he is entitled to costs upon the higher scale. *Clifton* v. *Furley*, 7 H. & N. 783; 31 L. J., Ex. 170; 10 W. R. 358.

Admission of Truth of Plaintiff's Particulars—C. C. R. 1889, Ord. IX. rr. 4 & 5.]—In order that a defendant may rely on Ord. IX. rr. 4 and 5, to deprive a successful plaintiff of the costs of the hearing at the trial, the admission made by him must be clean and clear, and such a one that it dispenses with any proof on behalf of the plaintiff. *Pincott* v. *Letts*, 77 L. T. 160.

Certificate on Higher Scale—Grounds for

Giving.]—In awarding costs on the higher scale to a successful party under s. 5 of the County Courts Salaries Act, 1882, it is not sufficient for the judge to certify that the action involved a question of character:—Quære, whether the court will inquire into the sufficiency of the grounds of a certificate so framed. *Reg.* v. *City of London Court Judge*, 56 L. J., Q. B. 79; 18 Q. B. D. 105; 55 L. T. 736; 35 W. R. 123.

A certificate under s. 5 should follow the language of the section—Per Stephen, J. *Ib.*

A county court judge has no power to order costs to be taxed on the 100*l.* scale when there is a less amount claimed in the action, unless he certify that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons or of general or public interest. The reservation of the powers, rights, and privileges of the judge of the City of London Court in s. 35 of the County Court Act, 1867, does not confer upon him any greater power over costs than that given to judges of county courts. *Howard* v. *Graves*, 52 L. T. 858.

—— **Less than £20 recovered — Discretion.**]—Ord. L. r. 20, of the County Court Rules, 1889, by which a county court judge is empowered to give costs on the higher scale in actions where the claim exceeds 20*l.* and the plaintiff recovers a sum not exceeding 20*l.*, is not rendered ultra vires by, nor is it inconsistent with the s. 119 of the County Courts Act, 1888, which allows a county court judge to award costs on the higher scale in the three classes of actions there specified. *King* v. *Charing Cross Bank*, 59 L. J., Q. B. 24; 62 L. T. 42; 38 W. R. 287.

—— **Certificate signed on day subsequent to Order.**]—Ord. L. r. 8, of the County Court Rules, 1889, provides that "where a judge certifies under s. 119 of the County Courts Act, 1888, the certificate shall be entered at the end of the minutes of the court of the day on which it is given, and shall be signed by the judge." The judge made an order for costs on the higher scale, but omitted to give the certificate required by s. 119 of the County Courts Act, 1888, on the same day. On a subsequent day he signed a certificate, which was entered at the end of the minutes of the court of the day on which he made the order:—Held, that he was not prevented from adopting this course by the provisions of Ord. L. r. 8. *Badcock* v. *Hunt*, 38 W. R. 255.

Witnesses not called—General Rule.]—A county court judge cannot lay down a general practice that only the costs of such witnesses who have been called at the trial shall be allowed, and that if it be desired to have witnesses allowed who have not been called application is to be made to him; such practice being contrary to the provisions of Ord. L. r. 16, of the County Court Rules. *The Cashmere*, 59 L. J., P. 57; 15 P. D. 121; 62 L. T. 814; 38 W. R. 623; 6 Asp. M. C. 515.

Counsel — Refresher — Adjournment for want of Time.]—Where a county court is held from day to day, it rests with the judge to say whether the sittings shall be one continuous sitting or a succession of several sittings, so that when a case which appears in the list is not reached on one day, but is heard in its turn on another day, a refresher may be allowed by order of the judge as upon an adjournment for want of time under item 78 in the scale of costs of the County Court Rules, 1889. *Heap* v. *Peart*, [1891] 1 Q. B. 110; 39 W. R. 95.

—— **Fee for Travelling Expenses—No Local Bar—Case lasting more than one Day.**]—In a taxation of costs in a county court the item No. 86 of the higher scale of costs which is allowable to counsel where there is no local bar in or within twenty miles of the court town, can only be allowed once in the same case, although counsel engaged may have been present on more than one occasion. *Atkinson* v. *Carlisle Corporation*, 65 L. J., Q. B. 331; [1896] 1 Q. B. 393.

Taxation—Scale of Costs in Actions under £10.]—The Appendix to the County Court Rules, 1886, contains a scale of costs as between solicitor and client where the amount recovered exceeds 2*l.* and does not exceed 10*l.*, and provides that no other costs are to be allowed where the amount claimed does not exceed 10*l.*, unless the judge certifies under s. 5 of the County Courts (Costs and Salaries) Act, 1882. The plaintiff having commenced an action in a county court for 10*l.*, consulted solicitors with reference to it, who after taking various steps to investigate the claim recommended a settlement, which the plaintiff refused to accept. The solicitors then returned the papers to the plaintiff, who proceeded with the action in person:—Held, that upon the taxation of the solicitors' bill for the services rendered by them, it was a question for the master whether the solicitors had, in fact, acted in the conduct of the action, and that if they appeared to have so acted, they could recover no other costs than those specified in the appendix. *Emanuel and Co., In re* (9 Q. B. D. 408) considered. *Dod. Longstaffe and Co., In re; Lamond, Ex parte*, 57 L. J., Q. B. 503; 21 Q. B. D. 242; 59 L. T. 467.

—— **Taxation between Solicitor and Client—Less than £10 Recovered.**]—See *Langlois and Biden, In re*, 60 L. J., Q. B. 123; [1891] 1 Q. B. 349; 63 L. T. 816; 39 W. R. 181—C. A.

—— **Action by Solicitor against Client—Action remitted.**]—See *Boydell* v. *Millar*, 60 L. J., Q. B. 251; 64 L. T. 299; 39 W. R. 335.

Right of Unqualified Practitioner to Recover.]—A person not duly qualified as a solicitor, who nevertheless acts for parties in an action in the county court and does solicitor's work for them, is not entitled to recover his expenses and fees from those for whom he acts, the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, having enacted that none but duly qualified solicitors shall be entitled to do so. *Verlander* v. *Eddolls*, 51 L. J., Q. B. 55; 45 L. T. 543; 30 W. R. 104. *And see* SOLICITOR.

Equitable Jurisdiction — Administration Action.]—A county court judge is not bound by the rule in equity which prevailed before the Judicature Acts,—that the plaintiff in an administration suit, properly brought, was entitled to his costs out of the estate. The judge

has, by virtue of 9 & 10 Vict. c. 95, s. 88, and 28 & 29 Vict. c. 99, s. 21, an absolute discretion over such costs, and may therefore order the plaintiff to pay the costs of the action, and no appeal will lie against his order. *Cooper* v. *Busbridge* (16 L. T. 5) discussed. *Plumb* v. *Craker*, 55 L. J., Q. B. 116; 16 Q. B. D. 40; 55 L. T. 404.

In estimating the value of an estate of a testator for the purpose of ascertaining whether costs are to be paid on the higher or lower scale, the value of the estate at the death of the testator is to be looked at, although the costs of a suit to get in part of the assets may reduce that amount. *Steward* v. *Nurse*, 43 L. J., Ch. 384.

—— **Taxation in Chancery Division.**]—By the combined operation of the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, and the Judicature Act, 1873, s. 16, as modified by the County Courts Act, 1856, s. 36, the costs as between solicitor and client in a county court action in which the claim exceeds 20*l.* may be taxed in the High Court of Justice: consequently, the costs as between solicitor and client in a county court administration action may be taxed in the Chancery Division. *Worth, In re*, 50 L. J., Ch. 262; 18 Ch. D. 521; 44 L. T. 462; 29 W. R. 371.

See also *Pain* v. *Bowden*, 65 L. J., Q. B. 530; [1896] 2 Q. B. 301; 75 L. T. 102; 45 W. R. 48.

—— **Action for Specific Performance.**]—A suit for specific performance of sale of leasehold property for 150*l.*, subject to rent of 92*l.* 10*s.* and covenant to keep insured, is a proper case to allow full costs notwithstanding 30 & 31 Vict. c. 142. *Carpmael* v. *Carvell*, 18 W. R. 513.

—— **Foreclosure.**]—The statutes conferring equitable jurisdiction on the county courts do not in any way prohibit or restrict a plaintiff from instituting proceedings in the Court of Chancery; and a plaintiff who institutes such proceedings is entitled to his usual costs. *Brown* v. *Rye*, 43 L. J., Ch. 228; L. R. 7 Eq. 343; 29 L. T. 872.

Where, therefore, a suit was instituted in the Court of Chancery for foreclosure of a mortgage for 50*l.*:—Held, that the plaintiff was entitled to the usual costs of a mortgagee who sues in that court. *Ib.*

A mortgagor received an advance of 900*l.* from a building society, and conveyed to the society property to secure the payment by him of 900*l.* and interest in 120 instalments (amounting together to 1,275*l.*), and also of certain fines and charges in the event of his failing to pay the instalments. A decree for redemption was made, the costs of the suit to be added to the security:—Held, that as the sum originally advanced was less than 1,000*l.*, the costs must be taxed on the lower scale, and that the fines and charges which might be incurred could not for this purpose be considered as added to the sum advanced. *Cotterell* v. *Stratton*, 43 L. J., Ch. 573; L. R. 9 Ch. 514; 30 L. T. 589; 22 W. R. 607.

Held, also, that the scale of taxation was not dependent on the amount due when the bill was filed. *Ib.*

In a suit to enforce a charge or a lien for an amount under 1,000*l.* against the purchasers of real estate for an account of the amount due, and for a receiver and sale, the costs ought to be taxed upon the lower scale. *Paddon* v. *Winch*, 44 L. J., Ch. 568; L. R. 20 Eq. 449; 32 L. T. 794; 23 W. R. 787.

In a suit instituted on behalf of infants by their next friend in a county court, the judge, in the absence of the necessary undertaking by the plaintiff to be answerable for costs, dismissed the plaint:—Held, that the plaint ought to have been allowed to stand over until the requisite undertaking had been duly signed and annexed to it. *Williams* v. *Williams*, 16 L. T. 581.

When a plaintiff commences a suit in the county court, which at the hearing is transferred to the High Court of Justice because the subject-matter exceeds in amount 500*l.*, the plaintiff, though he succeeds and obtains the general costs of the suit, must pay the costs of the hearing before the county court. *Ward* v. *Wyld*, 5 Ch. D. 779; 37 L. T. 68; 25 W. R. 866.

Reviewing.]—A superior court has no power to direct a county court judge to order a review of taxation of costs. *Clifton* v. *Furley*, 7 H. & N. 783; 31 L. J., Ex. 170; 10 W. R. 358.

Execution for.]—A plaintiff who has recovered a judgment for debt and costs in a county court, and has received the debt out of court, is entitled to have a writ of execution issued for the costs; and the court will grant a mandamus to the clerk of the county court, commanding him to issue such writ of execution. *Reg.* v. *Fletcher*, 2 El. & Bl. 279; 21 L. J., Q. B. 310; 17 Jur. 179.

Costs on Appeal.]—*See cases*, post, col. 983, et seq.

Costs of Returning Officer at Elections.]—*See* ELECTION LAW.

F. APPEAL.

County Courts Act, 1888, ss. 120—125.

1. IN WHAT CASES.

The County Courts Act, 1875, s. 6, which gives an appeal from county courts by way of motion instead of special case, is limited in its application to those matters in which appeals previously existed. *Cousins* v. *Lombard Deposit Bank*, 45 L. J., Ex. 573; 1 Ex. D. 404; 35 L. T. 484; 25 W. R. 116.

"Determination of the Court"—Judgment pro formâ.]—A divisional court has no jurisdiction to hear a motion to set aside a judgment entered by a county court judge pro formâ in order to expedite an appeal, such entry of judgment not being a determination or direction of a county court within the meaning of the 14th section of 13 & 14 Vict. c. 61. *Chapman* v. *Withers*, 58 L. T. 24.

Application to County Court under s. 22 of the Friendly Societies Act, 1875.]—By s. 22 of the Friendly Societies Act, 1875, disputes between members of a friendly society and the society or its officers are to be decided in manner directed by the rules of the society, and by sub-s. (*d*), "where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to

the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute":—Held, that the application to the county court contemplated by sub-s. (*d*) must be taken to be an application in the form of an action commenced in the county court, and not a reference to the county court judge sitting as an arbitrator, and that there was an appeal from the decision upon such application to the high court. *Wilkinson* v. *Jagger*, 57 L. J., Q. B. 254; 20 Q. B. D. 423; 58 L. T. 487; 36 W. R. 169; 52 J. P. 533.

Under Companies Act, 1867.]—An appeal on a matter of discretion, and not on a point of law only, lies to the divisional court, because the appeal to a vice-chancellor under the Companies Act, 1867, is by the Judicature Act transferred to the high court. *Andrew* or *Jones* v *Swansea Cambrian Benefit Building Society* 50 L. J., Q. B. 428; 44 L. T. 106; 29 W. R. 382; 45 J. P. 507.

Decision under Agricultural Holdings Act, 1883.]—An appeal lies from a decision of a county court judge in the matter of a dispute heard and determined by him under s. 46 of the Agricultural Holdings Act, 1883, under the general powers of appeal contained in s. 13 of the County Courts Act, 1867. *Hamm* v. *King*. 57 L. T. 367; 51 J. P. 804.

Garnishee Order.]—Under 13 & 14 Vict. c. 61, s. 14, there was no appeal from a garnishee order under the County Court Rules, 1875, as it was not a decision in an "action" or "cause" within the meaning of the County Courts Acts. *Mason* v. *Wirral Highway Board*, 48 L. J., Q. B. 679; 4 Q. B. D. 459; 27 W. R. 676.

Committal Order.]—The appeal given by 13 & 14 Vict. c. 61, applies only to judgments of county courts, and not to orders of committal under s. 99 of 9 & 10 Vict. c. 95. *Blowers* v. *Rackham*, 20 L. J., Q. B. 397; 15 Jur. 758.

Assault on Bailiff in Execution of his Duty—Fine Imposed by Judge.]—There is no right of appeal from an order of a county court judge, made under s. 48 of the County Courts Act, 1888, imposing a fine for an assault upon a bailiff of the court while engaged in the execution of his duty. *Lewis* v. *Owen*, 63 L. J., Q. B. 233; [1894] 1 Q. B. 102; 10 R. 59; 69 L. T. 861; 42 W. R. 254; 58 J. P. 263.

Committal for Contempt.]—The superior court will decline to exercise any appellate jurisdiction over the county court in matters of fine or committal for contempt, except where there is no reasonable evidence of any contempt having been committed, and the liberty of the subject requires protection. *Reg.* v. *Jordan*. 36 W. R. 589.

30 & 31 Vict. c. 142, s. 13—Pending Proceedings.]—This enactment affects only the mode of procedure, and therefore applies to actions pending at the time when the act came into operation. *Ruthbone* v. *Munn*, 9 B. & S. 708; 18 L. T. 856.

A case was heard in the sheriff's court of the city of London on the 26th of July, 1867, before a deputy sitting for the judge, and judgment was reserved. The judge, on the 30th August, 1867, read the judgment of his deputy, but in order to give the defendant an opportunity of appealing under the above provision, which was to come into operation on 1st January, 1868, postponed the formal delivery of the judgment until that day. The judgment was delivered on the 1st January, 1868, and leave to appeal given by the judge:—Held, that the judgment of the deputy was the judgment of the court: that the judge had power to postpone the formal delivery of it; and that the judgment in the case was not actually delivered until the 1st of January, 1868. *Ib.*

Before 30 & 31 Vict. c. 42, s. 35, the Sheriff's Court in the City of London was not a county court within the 28 & 29 Vict. c. 99, s. 18, and consequently there was no appeal under the act from the judge of the Sheriff's Court to the Vice-Chancellor. *Harper* v. *Pole*, 36 L. J., Ch. 375; L. R. 3 Eq. 752; 16 L. T. 50; 15 W. R. 502. S. P. *Gardner* v. *Cachar Co.*, 36 L. J., Ch. 432

Interlocutory Order — Point of Law.] — There is a right of appeal under s. 120 of the County Courts Act, 1888, from the determination of a county court judge in point of law or equity, although the decision or order appealed from was not given or made at the trial of the action. *How* v. *L. & N. W. Ry.*, 61 L. J., Q. B. 358; [1891] 2 Q. B. 496; 66 L. T. 398; 40 W. R. 44; 56 J. P. 56.

—— —— **Order of County Court Judge for New Trial.**]—Although an appeal to the high court lies, under s. 120 of the County Courts Act, 1888, against an order of the county court judge granting a new trial, on the ground that his decision is wrong in point of law, no such appeal lies where the order is made solely on the ground that the verdict is against the weight of evidence. *Ib.*

—— **Refusal to Grant New Trial.**]—An appeal lies to the High Court from the refusal of a county court judge to grant a new trial. Dictum in *How* v. *L. & N. W. Ry.* ([1891] 2 Q. B. 497), disapproved. *Pole* v. *Bright*, 61 L. J., Q. B. 139; [1892] 1 Q. B. 603; 65 L. T. 748; 40 W. R. 95.

No appeal lies from the decision of a county court judge refusing to grant a new trial when applied for on the ground solely of the verdict being against the weight of evidence. *Wilton* v. *Leeds Forge Valley Co.*, 32 W. R. 461.

—— **Equitable Jurisdiction.**]—An appeal lies from an order made in an interlocutory proceeding, by a judge of a county court, by virtue of the equitable jurisdiction conferred by the County Courts Act, 1865. *Jones* v *Long*, 57 L. J., Q. B. 298; 20 Q. B. D. 564; 58 L. T. 787; 36 W. R. 315; 52 J. P. 468—C. A.

—— **Taxation.**]—The County Courts Act, 1888, gives a right of appeal to the high court in all interlocutory matters, and the principle of the cases which have decided that an appeal lies from the order of a county court judge granting or refusing to grant a new trial is equally applicable to the case of an appeal on a question of taxation. *Gilson* v. *Kilner*, 69 L. T. 310.

Amount of Claim.]—No appeal will lie where the amount sought by the plaint to be recovered is under 20*l*. *Blowers* v. *Rackham*, 20 L. J., Q. B. 397; 15 Jur. 758.

It lies from a county court if the claim is for a sum above 20*l* and not exceeding 50*l*, though the verdict is for an amount under 20*l* *Harris* v *Dreesman*, 9 Ex 485, 2 C L R 498, 23 L J Ex 210

In order to determine whether the amount of the damages recoverable in an action brought in a county court is below or above 20*l* so as to determine the right to appeal against the decision it is not the sum mentioned in the plaint to which the court of appeal will look but the sum which might have been lawfully recovered under the plaint *Mayer* v *Burgess* 4 El & Bl 655 24 L J, Q B 67 1 Jur (N S) 473

When the claim as shown by the particulars exceeds 20*l*, the plaintiff cannot, by abandonment of the excess at the trial deprive the defendant of his right of appeal *North* v *Holroyd*, 37 L J, Ex 42, L R 3 Ex 69, 17 L T 57

Before the 17 & 18 Vict c 16 no appeal lay under the 13 & 14 Vict c 61 s 17 from the decision of the judge in an action where the amount of the claim exceeded 50*l* but where jurisdiction was given by agreement of the parties *Groves* v *Janssens* 9 Ex 481 2 C L R 505, 23 L J Ex 91, 2 W R 192

—— **Counterclaim exceeding £20**]—An appeal will lie from the decision of a county court judge on a counterclaim for an amount exceeding 20*l*, even although the claim does not exceed that amount *Smith* v *Gill*, 65 L J Q B 556, [1896] 2 Q B 166

—— **Ejectment—Annual Value under £20—Appeal without Leave**]—No appeal lies to the high court, without leave from the decision of a judge of a county court in actions for the recovery of tenements, whether the parties be landlord and tenant or otherwise, or whether the title to such premises be in question or not, where the yearly rent or value thereof does not exceed 20*l* *Shrewsbury (Earl)* v *Garfield* 60 L J, Q B 765

—— **Replevin — Proof of Value of Goods Seized**]—In an action of replevin, where the right of appeal from the county court is disputed on the ground that the value of the goods seized does exceed 20*l* (Semble per Wright, J), there should be an appraisement with an affidavit of value *Smith* v *Enright*, 63 L J, Q B 220, 69 L T. 724

Interpleader—Amount not exceeding £20]—An appeal does not lie even by leave of the judge from the decision of the county court in proceedings in interpleader, where neither the money claimed nor the value of the goods or chattels claimed or of the proceeds thereof, exceeds 20*l* *Collis* v *Lewis*, 57 L J, Q B 167, 20 Q B D 202, 57 L T 716, 36 W R 472

—— **Less Amount than £20 deposited**]—Where in an interpleader proceeding in a county court the claimant deposits the amount of the value of the goods claimed as fixed by appraisement under s 72 of the County Courts Act, 1856, he cannot, if the amount so deposited be less than 20*l*, claim to appeal under s 68 of the act on the ground that the value of the goods was over 20*l*, and that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment *White* v *Milne*, 58 L T 225

Right of Appeal where Damages claimed]—In an interpleader proceeding under s 157 of the County Courts Act 1888 the value of the goods claimed was less than 20*l*, and the claimant claimed damages exceeding 20*l*, against the high bailiff and the execution creditor At the hearing the judge gave judgment for 15*l* for the claimant against the execution creditor, and did not grant leave to appeal — Held, that the execution creditor had no right of appeal under s 120, which provides that there shall be no right to appeal in proceedings in interpleader where the money claimed, or the value of the goods and chattels claimed, or of the proceeds thereof does not exceed 20*l*, unless the judge shall grant leave to appeal *Lumb* v *Teal*, 58 L J, Q B 298, 22 Q B D 675, 60 L T 451

—— **Before 17 & 18 Vict c 16**]—Before the 17 & 18 Vict c 16 no appeal lay upon an interpleader summons *Fraser* v *Fothergill*, 14 C B 295, 23 L J, C P 53 5 P, *Besant* v *Boffey* 9 Ex 315, 2 C L R 503, 23 L J, Ex 89, 2 W R 156

—— **Under 19 & 20 Vict c 108, s 68**]—An appeal on proceedings in interpleader under the 19 & 20 Vict c 108 s 68 lay when goods seized under a plaint exceeded 20*l*, although the claim was for a sum less than 20*l* *Vallance* v *Nash*, 2 H & N 712 27 L J, Ex 142, 4 Jur (N S) 31, 6 W R 227

Question of Law raised at the Trial]—It is a condition precedent to the right to appeal under s 6 of the County Courts Act, 1875 that the question of law upon which it is desired to appeal should have been raised before the county court judge at the trial *Clarkson* v *Musgrave*, 51 L J, Q B 525, 9 Q B D 386, 31 W R. 47

Under the provisions of s 120 and the following clauses of the County Courts Act, 1888 (51 & 52 Vict c 43), there is no right of appeal from a county court except upon a question of law raised and submitted to the county court judge at the trial *Clarkson* v *Musgrave* (9 Q B D 386) approved *Smith* v *Baker* 60 L J, Q B 683, [1891] A C 325 65 L T 467, 40 W R 392, 55 J P 660—H L (E)

Where a county court judge decides a case without a jury an appeal lies, if it appears that he decided according to an erroneous view of the law, notwithstanding that there is evidence which would support his finding. *Robins* v. *Todd*, 6 W R 466

A judge having stated a case in so confused a manner that the court could not discover whether or not he meant to present a question of law for their decision the case was remitted to him for amendment in this respect *L & N. W Ry* v *Grace*, 2 C B (N S) 555

Upon the case coming back, it clearly appeared to involve no question of law The court dismissed the appeal, without costs *Ib*

—— **Judge's Notes.**]—In an action brought in the Huntingdon county court to recover the value of a horse killed upon the appellant company's railway, the question of law was raised as to whether there was evidence of negligence

to go before the judge, no note of the question of law being raised was made by the judge — Held that the court could not entertain the question, it not appearing upon the notes that such question was raised before the county court judge *G E Ry* v *Giddens* 44 J P 284

Semble per Hawkins, J, that the notes should have been referred back to the judge for the question to be noted, and if he had refused a rule should have been obtained to compel him to amend his notes *Ib*

An appeal lies by motion under 38 & 39 Vict c 50 s 6 from the decision of a county court judge on a point of law if it appears from the judge's note that such point was one which was decided by him in deciding the case whether such point was taken in argument before him or not *Seymour* v *Coulson* 49 L J Q B 604, 5 Q B D 358, 28 W R 664—C A

It is not a condition precedent to the right of appeal that the judge should have been requested at the trial to take a note *Seymour* v *Coulson* 49 L J Q B 604, 5 Q B D 358, 28 W R 664—C A

See post, col 981

—— Decision that Evidence to go to Jury—Witnesses for Defence]—The plaintiff having closed his case it was submitted by the advocate on the part of the defendant, that there was no evidence to go to the jury The judge deciding that there was evidence was offered on the part of the defendant and a verdict was ultimately found for the plaintiff The defendant did not by calling witnesses preclude himself from appealing, on the ground that the judge had ruled erroneously *G N Ry* v *Rimell* 18 C B 575

—— Improper Rejection of Evidence—Substantial Wrong]—The provisions of Ord XXXIX of the Rules of the Supreme Court 1883 r 6 apply to motions for new trials in county court cases made on appeal under the provisions of the County Court Act, 1875 (38 & 39 Vict c 50) s 6 A new trial will not be granted in such a case, on the ground of the improper rejection of evidence unless some substantial wrong or miscarriage has been occasioned *Shapcott* v *Chappell*, 53 L J, Q B 77, 12 Q B D 58, 32 W R 183

—— Law mixed with Fact]—Where an appeal is made against the determination of a county court on a point of law, the case should separate the facts and law *Cauley* v *Parnell*, 12 C B 291, 20 L J, C P 197, 15 Jur 908

Though questions as to fact, as well as of law, are in contest before the judge without a jury, an appeal will lie if the court can see from the facts of the case as stated that the judge in order to arrive at his judgment must have decided a question of law in a particular way *Ib*

—— From Refusal to enter Verdict or Grant New Trial]—On the trial of a cause before the judge of a county court and a jury, the jury found a special verdict, on which the judge entered the verdict for the defendant, giving leave to the plaintiff to move to enter a verdict or for a new trial The application was subsequently made and refused The plaintiff has a right of appeal from the decision of the judge in refusing to enter a verdict or grant a new trial *Foster* v *Green*, 6 H & N 793, 30 L J, Ex. 253

—— In equity cases]—To give ground for an appeal from a county court in equity cases there must be a misapplication by the judge of the principles of equity to the facts which he finds *Hill* v *Peirse* 25 W R 275

The question whether certain conversations amount in equity to a contract between the parties to them is not a mere question of fact, but is one the decision of which by a county court judge may be made the subject of an appeal In such a case the judge should with the case on the appeal send up all the evidence adduced at the hearing before him *Williams* v *Williams*, 37 L J Ch 834

On an appeal from a county court no question will be entertained which is not submitted by the case as signed by the judge *Wallis* v *Evans*, 44 L J Ch 319 L R 19 Eq 547 32 L T. 360, 23 W R 466

No Appeal on Question of Fact]—There is no appeal upon a question of fact *East Anglian Ry* v *Lythgoe* 2 L M & P 221 10 C B 726, 20 L J C P 84 15 Jur 400

Where a defendant who had been articled clerk to a railway company under an agreement determinable by three months notice or payment of three months salary, was dismissed without such notice or salary on the ground of misconduct, and claimed to set off the amount of such quarter's salary in an action brought against him in the county court by the company for money received to their use —Held that the decision as to whether the company was justified or not in so dismissing the defendant, could not be reviewed, and that the judge did right in law in allowing such set off to be made as under the agreement, the amount became a debt upon the defendant's dismissal *Ib*

—— Grant of New Trial on Ground of Excessive Damages]—Where a county court judge applies the right rule of law to the consideration of the question whether the verdict of a jury is against the evidence and grants a new trial on the ground that the damages are excessive no appeal lies to the high court under s 120 of the County Courts Act 1888 against his decision, as such decision whether right or wrong is upon a question of fact and not of law *Howe* v *L & N W Ry* 61 L J, Q B 365 [1892] 1 Q B 391, 66 L T 398, 40 W R 292—C A

—— Decision against Weight of Evidence]—A party aggrieved cannot move against a decision of a judge on the ground of its being against the weight of evidence *Cousins* v. *Lombard Banl*, 1 Ex D 404

Observations of Judge]—The observations made by the judge in delivering judgment do not legitimately form part of the case upon appeal, and cannot be referred to either as finding a fact, or as giving a reason for the judgment *East Anglian Ry* v *Lythgoe*, 2 L M & P 221, 10 C B 726, 20 L J, C P 84 15 Jur. 400. S P, *Ward* v *Riddifer*, 6 W. R 326.

Leave of Judge—Discretion as to Terms.]—A county court judge having given a defendant leave to appeal, but subject to a condition that he should pay the plaintiff's costs of the appeal

in any event, and should also, in case the appeal was unsuccessful, pay the costs of the trial upon the higher scale,—the divisional court held that it had no power to interfere with the discretion vested in him by 30 & 31 Vict. c. 142, s. 13. *Goodes* v. *Clut*, 13 Q. B. D. 694.

Mistake of Registrar.]—Assuming that the registrar, acting under s. 90 of the County Courts Act, 1890, which gives him power in actions of contract to enter up judgment for the plaintiff on the non-appearance of the defendant, makes a mistake in not requiring proof of the debt being due, or in striking out a set-off and counter-claim, this is a matter for appeal, and is no ground for prohibition. *Hooper* v. *Hill*, 63 L. J., Q. B. 598; [1894] 1 Q. B. 659; 9 R. 332; 70 L. T. 224; 42 W. R. 394.

In Remitted Actions.]—*See* cases, ante, cols. 927, 932.

2. Practice on Appeal.

a. Parties.

Death of Respondent.]—If, on an appeal from a county court the respondent dies before the appeal is heard, the appellant will be allowed to proceed with his appeal on giving notice to the representatives of the deceased respondent, or if no such notice can be given, upon giving notice to the parties interested. *Hemming* v. *Williams*, 40 L. J., C. P. 270; L. R. 6 C. P. 480; 24 L. T. 755.

Death of Parties pending Appeal—Jurisdiction of High Court to add Legal Representatives.]—Where, on an appeal being brought from a county court, one of the parties dies after the entry of the appeal, the High Court has jurisdiction to give leave to add the personal representative of the party so dying, and the application need not be made to the county court. *Blakeway* v. *Patteshall*, [1894] 1 Q. B. 247.

b. Mode of and Time for.

In formâ pauperis—Proceedings on Crown side of the Queen's Bench Division.]—Appeals from inferior courts, although under Ord. LIX. r. 4, they are to be entered in the crown paper, are not proceedings on the crown side of the Queen's Bench Division within Ord. LXIII. r. 1; and therefore the court has jurisdiction to allow appellants from such courts to appeal in formâ pauperis. *Mulleneisen* v. *Coulson* (21 Q. B. D. 3), distinguished. *Clements* v. *L. & N. W. Ry.*, [1894] 2 Q. B. 482; 9 R. 223; 42 W. R. 338; 58 J. P. 816—C. A.

Appeal by Motion—Appeal by Special Case abolished.]—All appeals from county courts to the Queen's Bench Division of the High Court must, since the Crown Office Rules, 1886 (Ord LIX. rr. 10 et seq.), be by notice of motion, notwithstanding the 13 & 14 Vict. c. 61, ss. 14, 15, which gave an appeal by special case *Reg.* v. *Kettle*, 55 L. J., Q. B. 470; 17 Q. B. D. 761; 54 L. T. 875; 34 W. R. 776.

The effect of Ord. LII. of the Rules of the Supreme Court, 1883, is to repeal so much of s. 6 of the County Courts Act, 1875, as requires appeals from county courts to be made ex parte, in the first instance. And it is now necessary to give notice of motion under that order before moving the Queen's Bench Division on appeal from a decision of a county court judge. *Harris* v. *Galpin*, 47 J. P. 727.

Under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, the power of appealing by motion applies to all actions where leave to appeal may be given, as well as to actions where such leave is unnecessary. *Turner* v. *G. W. Ry.*, 46 L. J., Q. B. 226; 2 Q. B. D. 125; 35 L. T. 809.

Rivers Pollution.]—An appeal from a county court on the merits under s. 11 of the Rivers Pollution Prevention Act is by s. 124 of the County Courts Act, 1888, brought within the operation of s. 120 of the latter Act. *Kirkheaton Local Board* v. *Ainley*, 61 L. J., Q. B. 812; [1892] 2 Q. B. 274; 67 L. T. 200; 41 W. R. 99; 57 J. P. 36—C. A.

Notice of Appeal—Time of.]—The ten days allowed for notice of appeal from a county court must run from the time of the judge's decision, and are not prolonged by any subsequent application to him. *Hemming* v. *Blanton*, 42 L. J., C. P. 158; 21 W. R. 636.

When upon the trial of an action in a county court, with a jury, the judge, upon a special finding of the jury, directed the verdict to be entered for the defendant; but upon application of the plaintiff's attorney, reserved leave for the plaintiff to move to enter a verdict for the plaintiff, or for a new trial, and notice of the application was afterwards given; the plaintiff's right of appeal is to be reckoned from the day the motion was refused, and not from the day of trial. *Foster* v. *Green* 7 H. & N. 793; 30 L. J., Ex. 263.

Extension of Time—Discretion.]—The court has a discretion under Ord. LIX. r. 16, to extend the time for appealing from a county court, and such discretion is not to be exercised loosely, but according to the circumstances of each particular case. *Reg.* v. *Kettle* (17 Q. B. D. 761) and *Collins* v. *Paddington Vestry* (5 Q. B. D. 368) explained. *Cusack* v. *L. & N. W. Ry.*, 60 L. J., Q. B. 208; [1891] 1 Q. B. 347; 64 L. T. 45; 39 W. R. 244; 55 J. P. 341—C. A.

Post-dating Judgment.]—A county court judge cannot, by allowing his judgment to be post-dated, extend the time prescribed by s. 6 of the County Courts Act, 1875, for appeal by motion, beyond the eight days after the ruling, order, direction, or decision complained of shall have been actually made or given. *Wilberforce* v. *Sowton*, 48 L. J., C. P. 28; 39 L. T. 474.

A written judgment having been delivered by the county court judge on the 18th of April in favour of the defendant, the plaintiff's counsel applied to the judge to adjourn the case further, in order to enable him to move by way of appeal, under s. 6 of the County Courts Act, 1875, after the Easter vacation. The judge accordingly added to his judgment, "If I have the power to do so, I will allow the judgment to be treated as delivered on this day fortnight," and the judgment was entered as dated on the 2nd May. Within eight days from that day the plaintiff moved under s. 6, and obtained a rule nisi:—Held, that the motion was too late. *Ib.*

Time for—From Judgment, not from Refusal of New Trial.]—In an action tried in the county court an appeal will not lie against the decision

of the county court judge on an application for a new trial; so that the time within which the unsuccessful party in the county court may appeal to the Queen's Bench Division begins to run from the date of the judgment at the trial, and not from the date of the judge's decision on the application for a new trial. *McHardy* v. *Liptrott*, 56 L. J., Q. B. 459; 19 Q. B. D. 151.

Where an application for a new trial was made to a county court judge within two days of the original trial, and he took a fortnight to consider and then refused to grant a new trial, and a rule nisi for a new trial was obtained from the high court within two days of such refusal:—He'd, that such rule was obtained out of time, as the eight days for appealing began to run from the day of the original trial, and not from the refusal of the county court judge. *Morris* v. *Lowe*, 34 W. R. 45.

—— **From Verdict, not from Judgment.**]—When the finding of a jury in a county court is complained of, the twenty-one days within which an appeal may be entered is to be calculated from the time when the verdict was given, although the judgment upon it was not given until a subsequent day. *Rawnsley* v. *Lancashire and Yorkshire Ry.*, 35 W. R. 771.

Waiver.]—The provision in the 13 & 14 Vict. c. 61, s. 14, as to notice of appeal and security for costs by a party appealing from a county court, is not a condition precedent to the superior court having jurisdiction to hear the appeal, but is a matter of procedure entirely for the benefit of the respondent and which may be waived by him. *Parkgate Iron Co.* v. *Coates*, 39 L. J., C. P. 317; L. R. 5 C. P. 634; 22 L. T. 658; 18 W. R. 928.

Parties to an appeal from a county court may waive the limit of thirty days from the determination or direction intended to be appealed from, and their consent to the signature of the case for appeal by the county court judge is sufficient evidence of such waiver. *Ward* v. *Raw*, L. R. 15 Eq. 83; 27 L. T. 601; 21 W. R. 116.

A judge is bound, on the application of an appellant who has complied with the requirements of 13 & 14 Vict. c. 61, s. 14, to settle and sign a case for appeal, though presented to him for that purpose at a court subsequently to that holden next after twelve clear days from the day on which judgment was pronounced; the effect of the county court rule being not to take away the right of appeal on a failure to comply with the rule, but merely to subject a non-complying appellant to execution, notwithstanding the appeal. *Hacking* v. *Lee*, 2 El. & El. 906; 29 L. J., Q. B. 204; 6 Jur. (N.S.) 952; 8 W. R. 495.

In Equity Matters.]—The general orders of the Court of Chancery do not apply to county court appeals. *Cheesewright* v. *Thorn*, 38 L. J., Ch. 615; 20 L. T. 152.

Under the Rules, Orders, and Forms for Regulating the Practice of the County Courts, 1867, an order to stay proceedings in a county court pending an appeal from a decree on a plaint in equity will be made by the Court of Chancery without any previous application having been made to the judge who pronounced the decree. *Ib.*

Service of Notice — On London Agent or Country Solicitor.]—In an action commenced in the high court the address for service mentioned on the writ was the address of certain London solicitors, agents for the plaintiff's solicitor. The action was remitted to a county court, and on the particulars which were duly lodged with the registrar and a copy of which was served upon the defendant's solicitors, the address for service was stated to be that of the plaintiff's country solicitor. After the action had been heard and judgment had been delivered in the plaintiff's favour, a notice of appeal on the part of the defendant was, on the last day for service of appeal, served upon the London agents, whose names appeared upon the writ:—Held, that the service was bad, on the ground that the address for service indorsed on the particulars was substituted for the address for service indorsed upon the writ. *Malley* v. *Shepley*, 62 L. J., Q. B. 31; 5 R. 73; 68 L. T. 294; 41 W. R. 63, 302.

Semble, that in the case of an appeal from a county court where the solicitor to the respondent carries on business in the country, service of the notice of motion upon the London agent of the solicitor is not sufficient service to satisfy Ord. LIX. r. 12. *Powell* v. *Thomas* [1891], 1 Q. B. 97; 63 L. T. 812; 39 W. R. 224.

In appeals from county courts where the solicitor for the respondent carries on business in the country, the notice of appeal should be served within the proper time upon the respondent's solicitor, and not on the solicitor's London agent. *Powell* v. *Thomas* ([1891] 1 Q. B. 97) followed. *Jackson* v. *Margrett*, 5 R. 181; 68 L. T. 91; 41 W. R. 267.

c. Security for Costs.

Rules of Supreme Court, 1883—Order LIX., Rule 14.

If it appears to the court that there is reasonable ground for the appeal, the court will not order the appellant to give security for the costs of the appeal merely on the ground that he has no visible means of paying the respondent's costs should the appeal fail. *Pritchett* v. *Poole*, 76 L. T. 472.

The court will not as a rule require security for the costs of an appeal from the county court where leave to appeal has been unconditionally given by the judge of the county court. *Society of Apothecaries, Ex parte*, 38 W. R. 478.

Appeal in formâ pauperis.] — Security for costs will not be ordered to be given by a party who, having appeared in formâ pauperis in the county court, is appealing therefrom to the high court. *Biggs* v. *Dugnall*, 64 L. J., Q. B. 221; [1895] 1 Q. B. 207; 15 R. 252.

Infant's Next Friend.] — The plaintiff, an infant, brought an action in the county court, and sued by his next friend. Judgment was given for the defendants with costs, but they were unable to obtain payment owing to the next friend's insolvency. The plaintiff appealed from the judgment. On an application by the defendants for an order that the next friend should give security for the costs of the appeal:—Held, that by rules of supreme court, 1883, Ord. LIX., r. 17, which applies the provisions of Ord. LVIII., r. 15, to appeals from county courts, there was power to make an order, and as the next friend was in-

solvent, and was prosecuting the appeal for the benefit of another person, she must give security. *Swain* v. *Follows*, 56 L. J., Q. B. 310; 18 Q. B. D. 585; 56 L. T. 335; 35 W. R. 408.

Practising Attorney Surety.]—It is no ground for striking out a case, that in giving security for the costs of the appeal, a practising attorney was one of the sureties, contrary to the rule of practice of the county courts. *Carr* v. *Stringer*, 4 Jur. (N.S.) 439, n.

Non-compliance with Order—Effect.]—Notice of appeal from the decision of a county court was duly given, and the registrar fixed a day for the execution of the bond by the appellants and the sureties. Upon the appointed day two of the three appellants attended before the registrar, but the sureties were not present, nor had the bond been prepared. The bond was subsequently prepared, and was executed by all the necessary parties but one, six days after the day originally fixed, and by that one seven days after that day. The respondent never waived the delay in the execution of the bond:—Held, that the requisite security had not been given by the appellants in due time, and that the appeal could not be heard. *Dowdeswell* v. *Francis* or *Francis* v. *Dowdeswell*, 43 L. J., C. P. 248; L. R. 9 C. P. 423; 30 L. T. 607; 22 W. R. 755.

The court cannot entertain an appeal where the condition of giving security for the costs of appeal (or for the amount of the judgment in the case of the defendant) has not been strictly complied with. *Norris* v. *Carrington*, 16 C. B. (N.S.) 10.

The power of appeal against a judgment of a county court is subject to security as well as notice of appeal being given within ten days; and if such condition is not complied with, the court will not hear the appeal. *Stone* v. *Dean*, El. Bl. & El. 504; 27 L. J., Q. B. 319; 4 Jur. (N.S.) 534; 6 W. R. 602.

A strict compliance with 13 & 14 Vict. c. 61, s. 14, which requires that an appellant shall within ten days after the determination of the case give security for the costs of the appeal, will be enforced, unless it has been waived by the conduct of the respondent, or the default has been occasioned by no act of the appellant. *Blenkairne* v. *Statter*, 31 L. T. 413.

Sufficiency.]—The court will not refuse to hear an appeal against the determination of a county court, although the security for costs, required under 13 & 14 Vict. c. 61, s. 14, has not been completed within ten days after the determination, if the appellant has done all that he could be reasonably expected to do, by giving, within the ten days, notice of his appeal and of the names of the sureties whom he proposes, such sureties being ultimately found sufficient, and the bond being executed, although not within the ten days. *Waterton* v. *Baker*, 9 B. & S. 23; 37 L. J., Q. B. 65; L. R. 3 Q. B. 173; 17 L. T. 468; 16 W. R. 358.

An interpleader summons having been determined against the claimant on the 16th of November, he, on the same day, gave notice of appeal, and tendered a bond with sureties to the registrar; on the 19th of November he gave notice of the proposed sureties to the plaintiff. The plaintiff requiring further information as to the sufficiency of the sureties, and the claimant having been unable to obtain a definite answer from the plaintiff as to whether or not he objected to the sureties, the registrar, on the 17th of January, fixed the 21st of January for the execution of the bond, and gave notice to the plaintiff to make his objection, if any, on that day. The plaintiff did not appear, and the bond was then executed with the original sureties:—Held, that although the security had not been completed until after the ten days, yet, as the appellant had done all he could to perfect it within that time, and the delay was caused by the plaintiff, the appellant had complied with the requirements of s. 14 and the county court rule 134 of 1867, and was entitled to have his appeal heard. *Ib.*

A defendant against whom judgment had been recovered on the 17th January, on the 22nd gave a notice of appeal, in which were set forth the grounds of appeal; and on the 23rd entered into a bond with a surety for the costs of the appeal, and for the amount of the judgment; on the 24th he withdrew the notice of appeal, and gave another, stating new grounds of appeal:—Held, that the bond given on the 23rd was sufficient, and that it was competent to the court to entertain the appeal. *Daniels* v. *Charsley*, 11 C. B. 739; 21 L. J., C. P. 37; 15 Jur. 1161. S. P. *Robinson* v. *Lawrence*, 7 Ex. 128; 2 L. M. & P. 573; 21 L. J., Ex. 36; 15 Jur. 1087.

Memorandum of Deposit.]—At the hearing of a plaint before a county court judge he nonsuited the plaintiff, who gave due notice of appeal, and deposited the amount fixed by the registrar, who gave a receipt for it to the plaintiff, stating it to be received to abide the event of the appeal. The parties could not agree on a statement of facts, and the plaintiff applied to the judge to settle and sign the case, but the judge refused on the ground that no memorandum of the deposit, with the conditions on which it was deposited, was approved by the registrar, left with him and signed by the party or his attorney in accordance with 19 & 20 Vict. c. 208, s. 71:—Held, that the statute had been substantially complied with, and that the giving of such memorandum was not a condition precedent to the right to appeal. *Walters* v. *Coghlan*, 42 L. J., Q. B. 20; L. R. 8 Q. B. 61; 27 L. T. 712; 21 W. R. 444.

A party desirous of appealing having given notice of appeal, within ten days deposited with the registrar a sum equal to the amount for which he was required to give security, for which the registrar gave an acknowledgment, but did not deposit a written memorandum setting forth the conditions on which the money was deposited:—Held, that the want of such memorandum was no objection to the hearing of the appeal. *Griffin* v. *Colman*, 4 H. & N. 265.

On Appeal to Court of Appeal — Staying Appeal on Non-payment of Deposit.]—A county court judge refused an application by the defendants to sign a case on appeal from his decision. The defendants, on application to a divisional court, obtained a rule nisi calling upon the county court judge to show cause why he should not sign a case. Cause having been shown, the rule was discharged with costs. The defendants gave notice of appeal, whereupon the respondents, including the county court judge, moved that the defendants might be ordered to give security for costs:—Held, that, the taxed costs already occasioned not having been paid, and the statement that the appellants were not capable of making

such payment not having been contradicted, the appeal must be stayed until the payment into court of a deposit of 20*l.* as security for costs. *Clarke* v. *Roche*, 46 L. J., Ch. 372 ; 36 L. T. 78 ; 25 W. R. 309—C. A.

d. Hearing.

Judge's note—Application for at Trial Condition Precedent to hearing of Appeal.]—An application to the judge of a county court at the trial of any action for a note on any point of law, and of the facts in evidence relating thereto, and of his decision thereon, is, under the terms of s. 120 of the County Courts Act, 1888, the condition precedent for any appeal from such decision being heard. The power of the high court, under Ord. LIX. r. 8 of the rules of the Supreme Court, 1883, to admit any evidence or statement of what occurred other than such notes of the judge, only comes into operation when such an application has been made at the trial but no notes of the judge are forthcoming. *Cook* v. *Gordon*, 61 L. J., Q. B. 445.

—— **When Judge is Bound to take Note.**]—A county court judge is only bound to take a note when a question of law is raised and he is asked to take a note of that question of law ; then it is his duty to take a note of the question of law raised, and of the evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter. If there be more questions of law than one, the request to take a note must be made in respect of each. *Reg.* v. *City of London Court Judge*, 70 L. T. 595.

—— **Request for "at the Trial."**]—38 & 39 Vict. c. 50, prescribing a mode of appeal by motion from the county court, by s. 6 enacts that "at the trial or hearing" of the cause "the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause :"—Held, that the request for a note must be made during or immediately at the end of the trial or hearing of the cause ; and, therefore, that a request not made until an hour and a half after judgment given was too late. *Pierpoint* v. *Cartwright*, 5 C. P. D. 139 ; 42 L. T. 259 ; 28 W. R. 583.

"At the trial" does not mean before the last word of the judgment has been actually delivered (as an opportunity must be afforded to the parties of taking exception to the judge's ruling), but before the trial has substantially come to an end. *Ib.*

Taken without Request.]—Where, at the trial of a cause in the county court without a jury, the judge in fact took a note of the evidence, but was not required to make a note of any question of law raised at the trial, or of the evidence in relation to it :—Held, that the unsuccessful party could not appeal by motion, under 38 & 39 Vict. c. 50, s. 6, though he applied for a copy of the judge's notes immediately after the judgment, and his ground of appeal was that there was no evidence to warrant the decision of the judge. *Rhodes* v. *Liverpool Commercial Investment Co.*, 4 C. P. D. 425.

—— **Dispensing with.**]—At the hearing of a motion on appeal from a county court, the court may, if it thinks fit, dispense with a copy of the judge's notes. *Morgan* v. *Davies*, 3 C. P. D. 260 ; 39 L. T. 60 ; 26 W. R. 816.

—— **Compiled after Trial.**]—Notes compiled by the judge of a county court after the trial from evidence wholly on affidavits were, being in court, received in the Court of Appeal, although request to take notes had been made to the judge during the trial. *Hill* v. *Perssé*, 25 W. R. 275.

—— **Duty of Appellant to supply Copies.**]—Ord. LIX. r. 13, which makes it the duty of the Master of the crown office, upon the entry of an appeal from an inferior court, to apply to the judge of the inferior court for a copy of his notes, is repealed by s. 121 of the County Courts Act, 1888, and it is now the duty of the appellant, as a condition precedent to the appeal being heard, to furnish the court with a copy of the notes. *McGrah* v. *Cartwright*, 58 L. J., Q. B. 331 ; 23 Q. B. D. 3 ; 60 L. T. 537 ; 37 W. R. 619—D.

—— **Appeal Confined to Points taken at Trial.**]—On an appeal from a county court, no question will be entertained which is not submitted by the case as signed by the judge. *Williams* v. *Evans*, 44 L. J., Ch. 319 ; L. R. 19 Eq. 547 ; 32 L. T. 359 ; 23 W. R. 466.

The parties are bound by the case as it is stated for the opinion of the court, and cannot travel out of it. *Watson* v. *Ambergate Ry.*, 15 Jur. 448.

Only such objections can be raised as were taken at the trial. *Ib.*

No Note of Evidence taken—Order for Examination of Witnesses before Divisional Court.]—When no note of what occurred in the county court has been taken, a divisional court has, upon appeal, jurisdiction under Ord. LIX. r. 8 to order that the witnesses examined in the court below should be examined on the hearing of the appeal ; but care ought to be taken to prevent fresh evidence being given, so that such appeal should not become practically a new trial. *The Crescent ; Great Northern Steamship Fishing Co.* v. *The Crescent (Owners)*, 62 L. J., P. 63 ; 1 R. 613 ; 68 L. T. 556 ; 41 W. R. 533 ; 7 Asp. M. C. 297—C. A.

In an admiralty appeal from a county court, where there are no shorthand writer's notes of the evidence, and no notes taken by the judge of the county court available for the purpose of appeal, the high court (admiralty division) will order the appeal to be heard on viva voce evidence. *The Confidence ; The Susan Elizabeth*, 40 L. T. 201.

Fresh Evidence—Application for.]—An application to allow fresh evidence to be adduced at the hearing of an admiralty appeal from an inferior court may be made to a single judge of the admiralty division. *The Eclipse*, 14 P. D. 71 ; 6 Asp. M. C. 409 ; 60 L. T. 899.

e. Order on Appeal.

Nonsuit.]—Where judgment has been given for the plaintiff, the court has power to order a nonsuit to be entered. *Fuller* v. *Clevereley*, 17 Jur. 736.

Power of High Court to enter Judgment.]—In an appeal from a county court in an action for damages, the court has power to give judgment for the plaintiff for the sum claimed, if satisfied upon the whole of the evidence before the county court judge, that judgment ought to be so entered, although judgment had been given by the county court judge for the defendant. *King* v. *Oxford Co-operative Society*, 51 L. T 94.

The plaintiff, who held a mortgage for 4,600*l.* upon lands belonging to one F., agreed to make him a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the 46*l.*:—Held, that this was negligence for which the defendant was liable: and that, in the absence of evidence to reduce the amount, the 46*l.* so paid was the proper measure of damages.—Upon appeal by motion under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, the court has power to order judgment to be entered—the former provision in that respect (13 & 14 Vict. c. 61, s. 14) not being repealed or varied by s. 6 of 38 & 39 Vict. c. 50, which only gives an additional mode of procedure. *Whiteman* v. *Hawkins*, 4 C. P. D. 13; 39 L. T. 629; 27 W. R. 262.

In a case of an appeal from a county court, when the county court judge refused to go into the evidence and dismissed the plaint on other grounds, the court of chancery, after hearing the appeal, decided that the county court judge was wrong in dismissing the plaint on the grounds on which he did so, went into the evidence and decided the case, reversing the decision of the county court judge without referring the case back to him on the evidence, and made the defendant pay the costs on both occasions. *Booth* v. *Turle*, L. R. 16 Eq. 182; 21 W. R. 721.

Power of High Court to assess Damages.]—Where a county court judge has nonsuited a plaintiff and the high court holds that such nonsuit was wrong, the high court has power to fix a nominal sum for damages which the county court judge should have fixed. *Churchward* v. *Johnson*, 54 J. P. 326.

Decision may be upheld on different Grounds.]—A judgment of the county court may on appeal be upheld on other grounds than those on which the county court judge proceeded, if they appear and are admitted on his notes. *Chapman* v. *Knight*, 49 L. J., C. P. 425; 5 C. P. D. 308; 42 L. T. 538; 28 W. R. 919.

Whole Case to be Decided.]—The court of appeal is to pronounce judgment on the whole case, and is not confined to answering the questions formally submitted for its decision. *Stancliffe* v. *Clarke*, 21 L. J., Ex. 129; 16 Jur. 430.

f. Costs.

Time for Application.]—An application for costs of an appeal from a county court will not be entertained unless made at the time the appeal is disposed of. *G. N. Ry.* v. *Taylor*, 35 L. J., C. P. 210; L. R. 1 C. P. 430; 12 Jur (N.S.) 600.

General Rule.]—On appeal from a county court the court has jurisdiction to allow a successful appellant the costs of the appeal as well as those of the suit in the county court, and as a general rule, will do so. *Ashby* v. *Sedgwick*, 42 L. J., Ch. 355; L R. 15 Eq. 245; 28 L. T. 185; 21 W. R. 455.

Where an appeal is brought from a county court, the court will exercise its discretion as to awarding costs to the successful party. *Mountney* v. *Collier*, 2 El. & Bl. 100; 22 L. J., Q. B. 126, n; 17 Jur. 503; 1 W. R. 179.

It is a universal and an inflexible rule of practice to give the successful party on an appeal from a county court the costs of the appeal. *Liedeman* v. *Schultz*, 14 C. B. 38; 2 C. L. R. 87; 18 Jur. 44 n. S. P., *Gibbon* v. *Gibbon*, 13 C. B. 205; 22 L J., C. P. 135 n; 17 Jur. 416.

The rule laid down that the successful party ought to have his costs of appeal, is not inflexible, and may be relaxed in cases of vexation. *Outhwaite* v. *Hudson*, 7 Ex. 380; 21 L. J., Ex. 151; 16 Jur. 430.

Where an appeal is brought from a county court, the court of Common Pleas, on reversing the judgment and granting a new trial, holds that it has power to reverse the judgment as to the costs of the first trial below. *Gage* v. *Collins*, 36 L. J., C. P. 144; L. R. 2 C. P. 381; 15 W. R. 568.

Upon an appeal from a decision of the sheriffs' court, London, or from a county court, on the ground of misdirection. the successful party, whether appellant or respondent, is entitled to his costs, unless there are some special or exceptional circumstances which take the case out of this general rule. *Schroder* v. *Ward*, 13 C. B. (N.S.) 410; 32 L. J., C. P. 150; 9 Jur. (N.S.) 1056; 7 L. T 825; 11 W. R. 427. S. P., *Foster* v. *Smith*, 18 C. B. 161; 4 W. R. 495.

Where a new trial is ordered on the ground of misdirection, the court will not give costs to the appellant. *Gee* v. *Lancashire and Yorkshire Ry.*, 6 H. & N. 211; 30 L. J., Ex. 11; 6 Jur. (N.S.) 1118; 3 L. T. 328; 9 W. R. 103.

—— **Interpleader.**]—In an interpleader proceeding on the application of the sheriff, the claimant, if successful. is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order. The incidence of such charges is a matter of law and a proper subject of appeal from a county court to the High Court under the County Courts Act, 1850 (13 & 14 Vict c. 61), s. 14. *Goodman* v. *Blake*, 19 Q. B. D. 77; 57 L. T. 494.

No Costs where Leave Granted without Jurisdiction.]—When an appeal from a county court is struck out on the ground that the order giving leave to appeal has been granted by a judge at chambers without jurisdiction, the court of appeal has no power to grant costs to the party who appears to show cause against it. *Brown* v. *Shaw*, 1 Ex. D. 425.

Quære, as to the jurisdiction of the court as to costs where an appeal is struck out without argument for want of jurisdiction. *Fraser* v. *Fothergill*, 14 C. B. 295; 23 L. J., C. P. 53.

No Note by Judge—Cost of Shorthand Notes.]—On an appeal from a county court when the judge has taken no note the court will allow as costs of the appeal the costs of a transcript of the material parts of shorthand writer's notes of the evidence and of the summing-up of the county court judge. *Barber* v. *Burt*, 63 L. J., Q. B. 700; [1894] 2 Q. B. 437; 10 R. 397; 71 L. T. 295; 42 W. R. 572.

The charge for a copy of a shorthand writer's notes of the proceedings in a county court may be allowed as part of the costs of an appeal. *Sawyer, Ex parte; Bowden, In re*, 45 L. J., Bk. 56; 1 Ch. D. 698; 33 L. T. 759; 24 W. R. 375.

County Court Scale, except as to Proceedings in High Court.]—On an appeal to a superior court from the decision of a county court, the master is bound by the scale of costs issued by the county court judges, except as to proceedings in the superior court; e. g., the master is bound by such scale as to the costs of preparing the case on appeal and delivering copies thereof. *Horsfall* v. *Swan Bank and Brickworks Co.*, 17 W. R. 119.

Paying out Security.]—Where the appellant has paid money into the court as security for the costs of the appeal, and the court of appeal decides in favour of the appellant, the court, in addition to allowing the costs of appeal, will order the money to be paid out to him. *Kelly* v. *Webster*, 16 Jur. 838.

Imposing Condition as to payment of Costs by Appellant.]—The court, in giving a railway company leave to appeal, declined to impose on them the condition of paying the costs in any event, a practice of which the court expressed their disapproval. *Ashenden* v. *L. B. & S. C. Ry.*, 42 L. T. 586.

g. Appeal to Court of Appeal.

An appeal will lie, under s. 19 of the Judicature Act, 1873, from a judgment of a divisional court refusing to order a county court judge to settle and sign a case on appeal under the county courts acts and rules. *Clarke* v. *Roche*, 36 L. T. 727—C. A. S P., *Crush* v. *Turner*, 47 L. J., Ex. 639; 3 Ex. D. 303; 38 L. T. 595; 26 W. R. 673—C. A.

The Appellate Jurisdiction Act, 1876, s. 20, does not take away the power of appeal to the court of appeal if leave be given as required by s. 45 of Judicature Act, 1873. *Crush* v. *Turner*, 47 L. J., Ex. 639; 3 Ex. D. 303; 38 L. T. 595; 26 W. R. 673—C. A.

From Refusal of Divisional Court to grant leave.]—The court of appeal has no jurisdiction to hear an appeal under s. 19 of the Judicature Act, 1873, against the refusal of a divisional court, under s. 45, to grant leave to appeal from their decision on a judgment of a county court. *Kay* v. *Briggs*, 58 L. J., Q. B. 182; 22 Q. B. D. 343; 60 L. T. 775; 37 W. R. 291—C. A.

The Judicature Act, 1894, by s. 1, sub-s. 5, gives a right of appeal from a refusal of a divisional court to give leave to appeal from the decision of that court on an appeal from a county court, the decision in *Kay* v. *Briggs* (22 Q. B. D. 343) not being applicable to the terms of that sub-s.; but such leave will only be given by the court of appeal in cases where it seems to be clear that injustice will otherwise be done. *Hawkins* v. *G. W. Ry.*, 14 R. 360—C. A.

Action remitted for Trial to County Court under 30 & 31 Vict. c. 142, s. 10.]—Where a cause has been remitted for trial before a county court under s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), it becomes a county court cause, and the determination of a divisional court, on appeal from the decision of the county court judge, is within s. 45 of the Judicature Act, 1873, and therefore final, unless special leave to appeal be given. *Bowles* v. *Drake*, 51 L. J., Q. B. 66; 8 Q. B. D. 325; 45 L. T. 576; 30 W. R. 333—C. A.

19 & 20 Vict. c. 108, s. 26.]—Where an action brought in the superior court was, after issue joined, remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, the action still remained in the superior court, and an appeal to the court of appeal lay without special leave from the refusal of a divisional court to grant a new trial. *Babbage* v. *Coulburn*, 52 L. J., Q. B. 50; 16 L. T. 515—C. A.

To Court of Appeal in Admiralty Matter.]—*See* SHIPPING.

G. ORDER TO JUDGE OR OFFICER TO DO HIS DUTY.

1. In what Cases.

Qualified Refusal.]—The court will not grant an order, under 19 & 20 Vict. c. 108, s. 43, to compel a county court judge to do his duty, unless it appears that he has absolutely refused to act in some matter wherein he ought to have acted. *Irving* v. *Askew*, 20 L. T. 584.

A mere qualified or temporary refusal, as by suggesting an adjournment, with a view to an arrangement, is no ground for issuing such an order, which, being of the same nature as a mandamus, is to be governed by similar rules. *Ib.*

Finding of no Jurisdiction on Facts.]—A writ of mandamus will not issue to the judge of an inferior court unless he has refused to exercise the duty which the writ seeks to compel him to perform. Where, therefore, on the hearing of a plaint in a county court, the judge, having heard the evidence as to the jurisdiction, decided that the cause of action did not arise within his jurisdiction, and non-suited the plaintiff:—Held, that he had heard the cause, and that a writ of mandamus would not issue to compel him to hear it, his decision being final. *Kernot* v. *Bailey*, 4 W. R. 608.

Where a judge has entered upon the hearing of a plaint, and, from the evidence adduced before him, has decided that he has no jurisdiction to adjudicate between the parties, a mandamus would not lie commanding him to hear and determine it, even although he might be wrong in point of law. *Milner, In re*, 15 Jur. 1037.

Holding of no Jurisdiction in Law.]—Contra, if, in a case in which he has jurisdiction he refuses to hear it, upon the mistaken notion that he has no jurisdiction to do so in respect of some preliminary matter. *Ib.*

Indirect Appeal.]—The court will not grant a rule to compel a judge to do his duty when he has acted under a particular impression as to a

point of law in a case involving a small amount, and the effect of granting a rule would be to give the party moving an indirect appeal when the statute has forbidden a direct one. *Brown* v. *Taylor*, 18 L. T. 657.

Where a judge in fact took a note of the evidence, but was not required to make a note of any question of law, or of the evidence in relation to it, after an appeal by motion had been rejected upon that ground, a rule calling on the county court judge to state and sign a special case, under 13 & 14 Vict. c. 61, s. 15, was refused. *Rhodes* v. *Liverpool Commercial Investment Co*, 4 C.P.D. 425.

To Hear Witnesses.]—To enable the court to interfere under 19 & 20 Vict. c. 108, s. 43, the county court judge must have refused to exercise the jurisdiction vested in him; but where upon his refusal to hear certain witnesses tendered by the plaintiff, the plaintiff elected to be nonsuited:—Held, that the court had no power to command him to hear them, as the nonsuit, whilst it stood, left the judge no case upon which he could act. *Fortescue* v. *Paton*, 3 L. T. 268; see also *Kershaw* v. *Chantler*, 26 L. T. 474, ante, col. 945.

To Review Taxation.]—A superior court has no power under 19 & 20 Vict. c. 108, s. 43, to direct a county court judge to order a review of taxation of costs. *Clifton* v. *Furley*, 7 H. & N. 783; 31 L. J., Ex. 170; 10 W. R. 358.

To Remove Petition from File.]—An insolvent filed his petition in a county court, and obtained an order for protection from process until the day appointed for his first examination. On that day his attorney applied to the county court judge for leave to withdraw the petition, on the ground that the date on which it was presented did not appear upon it. The application was opposed by several creditors, and the county court judge refused it, and adjourned the examination of the insolvent sine die:—Held, that as the judge had adjudicated upon the matter, the court had no power, under 19 & 20 Vict. c. 108, s. 43, to order him to remove the petition from the file, or dismiss it, or name a day for the hearing. *Corbett, In re*, 4 H. & N. 452; 28 L. J., Ex. 254.

To Sign Note or to Hear Case.]—A request to a county court judge, at the commencement of the trial, and before any specific question of law has been raised, that he should take a note of the evidence, as it was an important case and might go to the superior court, is not a sufficient request within the meaning of s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50); and therefore a note which the judge afterwards took, and which he stated was an incomplete one, and not such as he would have taken if he had been requested to take a note of any specific question of law and of the evidence in relation thereto, is not a note taken under that section which the court will order him to sign. *Morgan* v. *Rees* or *Reiss*, 50 L. J., Q. B. 491; 6 Q. B. D. 508; 44 L. T. 133; 29 W. R. 345—C. A.

In an action for negligence, the judge of a county court found for the plaintiff, but in giving judgment stated that he could readily imagine that the evidence given as to the negligence of a third person was true, and that, except for the conduct of the third person, the accident would not have occurred. In these circumstances a rule nisi, obtained by the defendant, calling on the judge to state the fact in the case for appeal, or to set out the evidence of such other negligence, was made absolute. *Harrison* v. *Williams*, 6 W. R. 655.

In an administration suit in a county court, the judge decreed a sale, to be carried out by the plaintiff, of a deceased testator's property, and declared that one of the defendants was not a trustee under the will. The defendants wished to appeal, and a case was duly settled under the county courts Acts and orders. After some months' delay the judge fixed a day for the case to be presented to him for signature, but the defendants did not receive notice of this until too late to present the case on that day. On the case being presented for signature a short time afterwards, the judge declined to sign it:—Held, that the defendants were entitled to an order directing the judge to sign the case. *Clark* v. *Roche*, 36 L. T. 727.

To order Cause to be re-entered.]—The High Court of Justice has no power to order a county court judge to re-enter a cause in his list. *Morgan* v. *Rees*, 50 L. J., M. C. 27; 29 W. R. 213.

To vary Order as to Costs.]—The authority given by 19 & 20 Vict. c. 108, s. 43, and 21 & 22 Vict. c. 74, s. 4, to the superior courts to grant a rule calling upon the judges and officers of county courts to show cause why they should not do acts relating to their respective offices, does not confer any jurisdiction to interfere with an order of the judge of a county court as to costs. *Churchward* v. *Coleman*, 36 L. J., Q. B. 57; L. R. 2 Q. B. 18.

To Registrar to issue Summons under Bills of Exchange Act, 1855.]—The Registrar of a county court declined to issue a summons under the Bills of Exchange Act, 1855, and the plaintiff applied to the High Court, under s. 131 of the County Courts Act, 1888, for an order calling upon him to show cause why such act should not be done:—Held, that this was the proper course to adopt, and that an application to the county court judge would have been futile, since, having no cause before him, he had no jurisdiction over the registrar. *Reg.* v. *Southampton County Court Registrar*, 61 L. J., Q. B. 706.

2. PRACTICE.

Party—Solicitor denied right of audience.]—Query, whether a solicitor, when his right of audience has been denied to him, is "a party" within the meaning of s. 43 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), and is therefore entitled to apply to the superior court for a rule to compel the county court judge to give him audience. *Reg.* v. *Greenwich County Court Registrar*, ante, col. 944.

—— Judge of City of London Court.]—By the operation of 30 & 31 Vict. c. 142, ss. 34, 35, the city of London court is made a county court for all purposes, and all the county court acts apply to it; and consequently, the proper mode of proceeding against the judge of the London court is by rule under 19 & 20 Vict. c. 108, s. 43; and the proviso in s. 35, reserving all rights and privileges of the judge, has no application to the case. *Blades* v. *Lawrence*, 43 L. J., Q. B. 133; L. R. 9 Q. B. 374; 30 L. T. 378; 22 W. R. 643.

To whom Application should be made.]—An application, under 21 & 22 Vict. c. 74, s. 4, for an order directing a county court judge to sign a case on appeal, should be made to the superior court, and not to a single judge thereof. *Clarke* v. *Roche*, 35 L. T. 705; 25 W. R. 309.

Irregularity in Application.]—Judgment having been given in a county court, the plaintiff proposed to appeal. In consequence of delays in settling it, the case agreed to by both parties was not presented to the judge for his signature till nearly six months after the day when judgment was given. No security for costs of the appeal had been given. The judge refused to sign the case. Thereupon a summons was issued by a judge at chambers in pursuance of the 19 & 20 Vict. c. 108, s. 43, to compel him to do so; but no affidavit of the facts was sworn till two days after the summons issued. On the hearing of the summons the county court judge did not attend, and an order was made that he should sign the case. The order having been served upon him and disobeyed:—Held, first, that assuming that the summons ought not to have issued, except on an affidavit, the want of such affidavit was an irregularity only. *Furber* v. *Sturmy*, 3 H. & N. 521; 27 L. J., Ex. 453; 4 Jur., (N.S.) 956; 6 W. R. 625.

Held, secondly, that after the order had been served and disobeyed, and the rule for an attachment obtained, it was too late for the county court judge to object that the case was incorrectly stated, or that the summons had issued improperly. *Ib.*

Held, thirdly, that the order that the county court judge should sign the case was rightly made. *Ib.*

Delay in Application.]—A judge of a county court directed a jury that the plaintiff was entitled to a verdict, but only for nominal damages; they, however, returned a verdict for 10*l.*; the judge then directed it to be entered for 1*s.* More than a year afterwards the court was moved for a rule calling upon the judge to enter a verdict pursuant to the finding of the jury:—Held, that the application was too late. *Coke* v. *Jones*, 7 Jur. (N.S.) 545; 4 L. T. 306; 9 W. R. 618.

Appeal to Court of Appeal.]—An appeal will lie, under s. 19 of the Judicature Act 1873, from a judgment of a divisional court refusing to order a county court judge to settle and sign a case on appeal under the county courts acts and rules. *Clarke* v. *Roche*, 36 L. T. 727.

The right to appeal from an order of a divisional court, discharging a rule for an order on a county court judge to hear an action, is not taken away because s. 44 of 19 & 20 Vict. c. 108, which substitutes such rule for a mandamus to the county court judge, enacts that, where any superior court shall have refused such rule, no other superior court shall grant it. *Morgan* v. *Rees*, 6 Q. B. D. 508—C. A.

H. PROHIBITION.

1. In what Cases.

Improper Reception of Evidence.]—The court will not issue a prohibition to a county court, on the ground that the judge has received improper evidence in a cause before him. *Dunford, In re*, 12 Jur. 361. S. P., *Winsor* v. *Dunford*, 12 Q. B. 603; 18 L. J., Q. B. 14; 12 Jur. 629.

Mistake in Law or Fact in Matter within Jurisdiction]—The court will not issue a prohibition to a county court where, having jurisdiction, the judge has wrongly decided a point of law. *Rayner, Ex parte*, 5 C. B. 162; 5 D. & L. 342; 17 L. J., C. P. 16; 11 Jur. 1018.

Prohibition will not lie to a county court, however erroneous its decision, where there is jurisdiction. *Norris* v. *Carrington*, 16 C. B. (N.S.) 396.

The court will not grant a writ of prohibition to restrain a judge from proceeding in a plaint where evidence respecting title to land is given, unless such question of title is material to the decision of the case. *Morton* v. *Grand Junction Canal Co.*, 6 W. R. 543.

The court refused a prohibition to restrain the judge from proceeding in a plaint before him, where the plaint on the face of it stated a matter within his jurisdiction, and the facts were contested on which the question of jurisdiction arose, which the judge was at liberty to inquire into, and his decision on the merits being founded on the very point on which the question of jurisdiction arose. *Joseph* v. *Henry*, 1 L., M. & P. 388; 19 L. J., Q. B. 369; 15 Jur. 104.

A defendant was sued in a county court in the double capacity of executor of A. and administrator of B. On the trial he objected that the plaintiffs ought to elect in which capacity they proceeded against him, and further, that there was no evidence that the attorney who appeared in support of the claim had been duly authorised by the plaintiffs, who were the guardians of the poor of a parish, to bring the action, under 5 & 6 Vict. c. 57, s. 17. The judge overruled both objections, and gave judgment against the defendant generally:—Held, assuming the decision to be correct, that, as the judge acted within his jurisdiction, such objections afforded no ground for a prohibition. *Lirden and Munster Union* v. *Southgate*, 10 Ex. 201; 23 L. J., Ex. 316.

A judge of a county court, notwithstanding an admission by the plaintiff that a plea of judgment recovered in another court for the same debt was true, gave judgment for the plaintiff. The court refused to grant a rule nisi for a prohibition, the question decided being within the jurisdiction of the judge. *Rayner, Ex parte*, 5 C. B. 162; 5 D. & L. 342; 17 L. J., C. P. 16; 11 Jur. 1018.

—— **New Trial for alleged Misconduct of Jury.**]—Prohibition will not lie where a county court judge has granted a new trial on the ground of the misconduct of the jury, although there was no evidence to warrant him in so doing, if the subject of the action and the application for a new trial were within his competence and jurisdiction. *Moxon* v. *London Tramways Co.* or *Reg.* v. *Green ech County Court Judge*, 60 L. T. 248; 37 W. R. 132—C. A. Affirming 57 L. J., Q. B. 446.

—— **Erroneous Construction of Statute.**]—In 1843, B., being a trader owing debts amounting in the whole to less than 300*l.*, obtained an order for protection under 5 & 6 Vict. c. 116. The debts specified in the schedule to his petition exceeded 200*l.*, and remained unpaid in 1851,

when, having incurred fresh debts, exceeding 200*l.*, he petitioned the county court for protection. The judge decided that the debts incurred at the time of the order for protection in 1843 were not to be taken into account, and therefore B. was entitled to protection as a trader owing debts amounting in the whole to less than 300*l.*, within 5 & 6 Vict. c. 116, s. 1 :—Held, that the construction of the statute in this respect was a matter within the jurisdiction of the county court judge, and therefore, if erroneous, a prohibition could not issue. *Bowen, In re*, 15 Jur. 1196.

Matter Outside Jurisdiction.]—Where the parties to a plaint appeared before the judge, and consented to a reference, without objecting to the want of jurisdiction, but one of them, during the progress of the reference, objected to the jurisdiction of the arbitrators, on the ground that title to land came in question, and the arbitrators proceeded with the reference :—Held, that he was nevertheless entitled to a prohibition. *Knowles* v. *Holden*, 24 L. J., Ex. 223.

A party who objects that the county court has no jurisdiction to determine a plaint, does not acquiesce in the jurisdiction of that court, or waive his right to a writ of prohibition by obtaining from the judge the statement of a case for the opinion of a superior court. *Jackson* v. *Beaumont*, 11 Ex. 300 ; 24 L. J., Ex. 301 ; 3 W. R. 521.

A total want of jurisdiction cannot be cured by the assent of the parties. *Jones* v. *Owen*, 5 D. & L. 669 ; 18 L. J., Q. B. 8 ; 13 Jur. 261.

—— **Effect of 13 & 14 Vict. c. 61.**]—The 13 & 14 Vict. c. 61, s. 14, giving a right of appeal, or s. 16, disallowing a writ of certiorari to remove judgments or orders, does not take away the writ of prohibition in cases where the county court is acting without jurisdiction. *Pears* v. *Wilson*, 2 L. M. & P. 515 ; 20 L. J., Ex. 381 ; 15 Jur. 932.

Where an objection is taken to the jurisdiction of the judge of a county court he ought to enter it on the proceedings, in order that a superior court may see if there is ground for a prohibition. *Ib.*

Since 19 & 20 Vict. c. 108, s. 42.]—Under the 19 & 20 Vict. c. 108, s. 42, the doctrine that prohibition as to cases in county courts is taken away from the superior courts, must depend upon the question whether the prohibition should go or not. *Lawford* v. *Partridge*, 1 H. & N. 621 ; 26 L. J., Ex. 147 ; 3 Jur. (N.S.) 271 ; 5 W. R. 295.

Before that Statute.]—A writ of prohibition to restrain a judge of a county court from further proceeding, in a matter over which he had no jurisdiction, was a writ as of right. *Jackson* v. *Beaumont*, 11 Ex. 300 ; 24 L. J., Ex. 301 ; 5 W. R. 521.

Where a writ of prohibition was issued out of the Petty Bag Office of the Court of Chancery, in vacation, upon an ex parte affidavit, without leave of the court or judge, and disclosed no sufficient ground of prohibition on the face of it, the court set it aside on motion under the 12 & 13 Vict. 109, s. 39. *Still* v. *Booth*, 1 L. M. & P. 440.

A writ of prohibition issued out of the Court of Chancery is a proceeding within the meaning of 12 & 13 Vict. c. 109, s. 39, and a motion to set such writ aside may be made in either of the superior courts at Westminster. *Baddeley, In re*, 4 Ex. 504 ; 7 D. & L. 210 ; 19 L. J., Ex. 44.

It is no answer to such motion that the attorney of the applicant has not entered his name and address in a book at the Petty Bag Office, pursuant to 12 & 23 Vict. c. 109, s. 44. *Ib.*

Ejectment—Value of Premises.]—At the trial of an ejectment, the judge, after hearing contradictory evidence as to the annual value of the premises, decided that it did not exceed 20*l.*, and gave judgment for the defendant :—Held, that the court would not grant a prohibition to restrain the county court from proceeding with the cause upon affidavits, suggesting that the decision of the judge was against the weight of evidence. *Milner, In re*, 15 Jur. 1037.

False Imprisonment—Damages for Malicious Prosecution.]—On a plaint in a county court for false imprisoment, the evidence was that the defendant directed the police to arrest the plaintiff on a charge of felony, which the police accordingly did. The charge was unfounded in fact : the judge of the county court, in his judgment, used expressions indicating that he gave damages in respect of the unfounded charge of felony :—Held, that the cause of action alleged in the plaint being one over which the judge had jurisdiction, and the evidence having proved it, prohibition would not lie, even on the assumption that the judge, in estimating the damages, erroneously took into consideration matters, the subject of an action for malicious prosecution, and therefore not within his jurisdiction. *Chivers* v. *Savage*, 5 El. & Bl. 697 ; 25 L. J., Q. B. 85 ; 2 Jur. (N.S.) 137 ; 4 W. R. 117.

Loss of Time—Malicious Prosecution.]—A plaintiff sought to recover "17*l.* 12*s.* 6*d.*, being for moneys paid for loss of time and attendance before magistrates upon a complaint and information of W. on behalf of the defendants." The plaintiff having been summoned before the magistrates for riding in a railway carriage without having paid his fare, the summons was dismissed with costs, and the action was brought to recover the expenses occasioned by such summons :—Held, that the plaint was in substance a plaint for a malicious prosecution, and that an order for a prohibition was properly made. *Hunt* v. *North Staffordshire Ry.*, 2 H. & N. 451 ; 5 W. R. 731.

Excessive Execution.]—It is no ground for a prohibition to a county court, that under process from that court to levy a sum within its jurisdiction, the officer has seized property to a greater amount. *Summers, Ex parte*, 2 C. L. R. 1284 ; 18 Jur. 522 ; 2 W. R. 477.

Committing Discharged Debtor.]—After recovery of a judgment for a debt against a defendant in a county court, he petitioned for and obtained his discharge under the Insolvent Debtors Act, and inserted the debt in the schedule. On a judgment summons he pleaded his discharge ; but the judge, notwithstanding, made an order for payment of the debt by instalments, and afterwards, on default, for his committal to prison :—Held, that although the defendant, who had been imprisoned, might be entitled to his discharge, it was at most an error

in the exercise of his powers on the part of the judge, and not an excess of jurisdiction, and that therefore prohibition would not lie. *Still* v. *Booth*, 1 L. M. & P. 440; 19 L. J., Q. B. 521; 15 Jur. 577.

Irregular Service of Summons.]—In an action of ejectment properly brought in the county court, the summons must be delivered to the bailiff forty clear days at least before the return day under Ord. VIII. r. 7 of the County Court Rules, 1875, and the judge of the county court has no power to waive this condition even where, though the bailiff has not received the summons forty days, he has yet served it on the defendant thirty-five days before the return day as required by the latter part of the same rule. If under such circumstances the judge proceeds to hear the case, the defendant not consenting, the high court, on appeal by the defendant, will set aside the judgment. Semble, such a case is not matter of prohibition. *Barker* v. *Palmer*, 51 L. J., Q. B. 110; 8 Q. B. D. 9; 45 L. T. 480; 30 W. R. 59.

Issuing Fresh Summons.]—An application for a plaint was correctly made, and the plaint itself was correctly entered against the defendant, as executor of F. W. Taylor, but the summons described him as executor of W. Thompson. At the hearing, the judge, upon it being represented to him that the statute of limitations would intervene to bar the claim, directed a fresh summons to issue, bearing the same date and number as the first:—Held, that the court would not interfere with the course taken by the judge. *Foster* v. *Temple*, 5 D. & L. 655; 17 L. J., Q. B. 230; 12 Jur. 654.

Amending Particulars.]—A prohibition issued to a county court judge, where he, of his own authority, and without the consent of the plaintiff, amended the particulars, with a view, by reducing the plaintiff's demand below 50*l.*, to give the county court jurisdiction. *Hill* v. *Swift*, 10 Ex. 726; 3 C. L. R. 724; 24 L. J., Ex. 137; 1 Jur. (N.S.) 167; 3 W. R. 171.

Irregular Execution.]—The Court of Queen's Bench will not grant a writ of prohibition to the judge of a county court to restrain him from executing a fi. fa. which has issued irregularly on the goods of a defendant under an order of the county court. The remedy is to apply to the court itself out of which the execution issued to stay proceedings. *Herman* v. *Sheldrey*, 2 W. R. 455.

2. PRACTICE.

By whom issued—Judge of Admiralty Division.]—A judge of the Admiralty Division being a judge of the High Court has jurisdiction to grant a writ of prohibition. *The Receptu*, *Gordon* v. *Francis*, 62 L. J., P. 118; [1893] P. 235; 1 R. 644; 69 L. T. 252; 41 W. R. 561; 7 Asp. M. C. 359.

—— Judge in Chambers.]—An application for a writ of prohibition to a county court may be made to a judge sitting at chambers, notwithstanding Ord. LIX. r. 8*a*, of the Rules of the Supreme Court, December, 1888, which provides that "every application for a prohibition to a county county . . . . shall be brought by notice of motion." *King* v. *Charing Cross Bank*, 59 L. J., Q. B. 24; 24 Q. B. D. 27; 62 L. T. 42; 38 W. R. 287.

Time of Issue—After Judgment.]—A prohibition may issue after judgment in a county court for an excess of jurisdiction not appearing on the face of the proceedings there. *Marsden* v. *Wardle*, 3 El. & Bl. 695; 2 C. L. R. 1707; 23 L. J., Q. B. 263; 18 Jur. 578; 2 W. R. 455.

If the question of title to an office is not raised on the hearing of a plaint, but the party is taken to be duly appointed, the court will not afterwards grant a writ of prohibition. *Stevenson* v. *Stickle*, 13 Jur. 1103.

—— After Execution.]—After execution has been awarded in a county court, and the defendant's goods have been taken, but not sold, a prohibition will go to restrain that court from proceeding further, if it appears upon affidavit, though not on the face of the proceedings, that title to corporeal hereditaments came in question in the cause, so that the judge had no jurisdiction. *Marsden* v. *Wardle*, 3 El. & Bl. 695; 2 C. L. R. 1707; 23 L. J., Q. B. 263; 18 Jur. 578; 2 W. R. 455.

Where a warrant of possession was executed on the 6th June, and a rule nisi was obtained for a writ of prohibition on the 5th, which was served on the judge of the county court, upwards of 200 miles from London, on the 7th:—Held, that the applicant was not too late. The court made the rule absolute for a writ of prohibition, inserting a clause for restitution. *Jones* v. *Owen*, 5 D. & L. 669; 18 L. J., Q. B. 8; 13 Jur. 261.

A plaint having been brought in a county court, at the hearing, on the 11th of September, 1862, the defendants excepted to the jurisdiction, on the ground that the matter was a dispute between members of a friendly society, which, by the rules of the society, was to be settled by a committee of the society, and that the county court had therefore no jurisdiction by reason of 18 & 19 Vict. c. 63, s. 40. The judge overruled the objection, and gave a verdict for the plaintiff. Between the 20th and 24th of September notices were served on the plaintiff and his attorney, and on the judge and registrar of the court, of the defendant's intention to apply for a prohibition. On the 8th of October the defendants were served with an order from the court to pay debt and costs; and on the 10th of October one of them paid the amount to the registrar, to avoid an execution. On the same day a summons was taken out on behalf of the defendants, calling on the plaintiff and the judge to show cause why a prohibition should not issue. This summons was served on the 13th of October, being returnable on the 14th, when it was adjourned to the 24th; on the 16th of October the money was paid out of court by the registrar to the plaintiff's attorney. The matter having been referred to the court on the 24th of October:—Held, that the application had been delayed too long, and that on that ground a prohibition ought not to issue. *Denton* v. *Marshall*, 1 H. & C. 654; 32 L. J., Ex. 89; 9 Jur. (N.S.) 337; 7 L. T. 689; 11 W. R. 268.

Judgment having been given in a county court for the plaintiff, execution issued, and a levy was made on the defendant's goods; but, before the sale a writ of prohibition was moved for:—Held, that the defendant was not too late. *Kimpton* v. *Willey*, 1 L. M. & P. 280; 19 L. J., C. P. 269; 14 Jur. 762.

—— **Interpleader**]—Where a county court judge decides that the particulars of a claim in an interpleader are not sufficient under the county court rules, and refuses on that ground to hear the claimant, a prohibition lies to stay the further proceedings under the execution if the particulars ought to have been held sufficient *Hardy* v *Walker, McFee Ex parte*, 9 Ex 261, 2 C L R 278 23 L J Ex 57

After Nonsuit with Costs to Defendant]—Where a county court judge has taken time to consider as to nonsuiting a plaintiff, on the ground of want of jurisdiction by reason of the title to land coming in question, and a prohibition issued before he had decided and he then nonsuited the plaintiff, and awarded costs of nonsuit to the defendant the rule for a writ of prohibition was made absolute *Lawford* v *Partridge*, 1 H & N 621 26 L J, Ex 147 3 Jur (N S) 271, 5 W R 295

Form of Rule—Statement of Grounds]—It is not necessary that the grounds for issuing a prohibition should appear in the rule or order for a prohibition *Ebersfield* v *Yeaman* 4 C B (N S) 418 6 W R 445

Service of Rule]—Where a rule for a prohibition to a county court was directed to be served on the plaintiff and on the judge service on the judge and the attorney of the plaintiff in the county court is insufficient *Massey* v *Burton*, 3 Jur (N S) 1108

Appeal to Court of Appeal]—An appeal lies from the decision of the divisional court on an application for a prohibition to a county court, for s 42 of 19 & 20 Vict c 108 relates to procedure only and does not enact that the judgment of the divisional court shall be final *Burton* v *Titchmarsh* 49 L J Ex 573, 49 L T 610 28 W R 821—C A

An appeal lies without leave from the decision of a Divisional Court upon an application for a prohibition to a county court *Lister* v *Wood*, 23 Q B D 229 37 W R 738, 53 J P 773—C A

An appeal lies to the Court of Appeal from the refusal of the High Court to grant a writ of prohibition to a county court Sect 132 of the County Courts Act, 1888, only applies to proceedings in the high court, and prevents repeated applications for writs of prohibition being made to more than one divisional court or one judge *The Recepta, Gordon* v *Frances*, 62 L J, P 118, [1893] P 253, 1 R 644, 69 L T 252, 41 W R 561, 42 W R 73, 7 Asp M C 359—C A

J S.

COURT.

A GENERAL PRINCIPLES AS TO

B ASSIZES

C CHANCERY JURISDICTION

D INFERIOR COURTS.

1 *General Principles*, 1004

2 *Particular Cases*

a Liverpool Court of Passage, 1008

b Palatine Court of Lancaster, 1010

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3 *Officers* *See* PUBLIC OFFICER

E COUNTY COURT—*See* COUNTY COURT

F MAYOR'S COURT—*See* MAYOR'S COURT

G ADMIRALTY—*See* SHIPPING

H BANKRUPTCY—*See* BANKRUPTCY

I DIVORCE—*See* HUSBAND AND WIFE

J ECCLESIASTICAL — *See* ECCLESIASTICAL LAW

K OF APPEAL—*See* APPEAL

L JURISDICTION OVER FOREIGNERS ETC—*See* INTERNATIONAL LAW

A GENERAL PRINCIPLES AS TO

Power of Crown to Establish]—Though the crown by its prerogative may establish courts to proceed according to common law yet the crown cannot create any new court to administer any other law *Natal (Bishop), In re*, 3 Moore, P C (N S) 115 12 Jur (N S) 353, 12 L T 188, 13 W R 549

Act committed in Foreign Country]—In order that an action may lie between parties in this country in respect of an act committed in a foreign country, the act must be one which if committed in this country would be actionable, and one which is not innocent according to the law of the country where it was committed, but it is not necessary that it should be the subject of civil proceedings in that country The rule laid down in *Phillips* v *Eyre* (40 L J, Q B 28, L R 6 Q B 1) and *The M Moxham* (46 L J P 17 1 P D 107) applied *Machado* v *Fontes*, 66 L J, Q B 542, [1897] 2 Q B 231, 76 L T 588, 45 W R 565—C A

Foreign Land—Action for Trespass to]—An action for damages for trespass to land situated in a foreign country, founded on a disputed claim of title to such land, cannot be tried in the courts of this country *British South Africa Co* v. *Companhia de Moçambique*, 63 L J, Q B 70, [1893] A C 602, 6 R 1, 69 L T 604—H L. (E)

Jurisdiction—Acquiescence or Consent does not give]—A total want of jurisdiction cannot be cured by the assent of the parties *Jones* v. *Owen*, 5 D & L 669, 18 L J, Q B 8, 13 Jur. 261 S P, *Foster* v *Usherwood*, 47 L J, Ex. 30, 3 Ex D 3, 37 L T 389, 26 W R 94, *Buse* v *Roper*, 41 L T 457, *Wellesley* v. *Withers*, 4 El & Bl 759, 3 C L R 1187, 24 L J, Q B 134, 1 Jur (N S) 706

The court has no power to allow service of a writ of summons out of the jurisdiction upon a person domiciled in Scotland or Ireland, even though the parties have agreed that the court shall have jurisdiction to do so *British Wagon Co* v *Gray*, 65 L J, Q B 75, [1896] 1 Q. B. 35, 73 L T 498, 44 W R 113—C A.

No consent can give the court jurisdiction if a condition which goes to the jurisdiction is not

fulfilled *Reg* v *Esser JJ*, 64 L J M C 39 [1895] 1 Q B 38, 14 R 90, 71 L T 832, 43 W R 183, 59 J P 68—C A

Where by consent of both parties the venue was laid in L —Held that no objection could afterwards be taken to the venue notwithstanding it ought, under an act of parliament, to have been laid in S *Furnival* v *Stringer* 1 Bing (N C) 68 4 M & Sc 578, 5 L J C P 344

Acquiescence or consent does not give to a court a jurisdiction of which the court is not possessed *Bischoffsheim Ex parte Aylmer In re*, 57 L J, Q B 168 20 Q B D 262 36 W R 231 S P, *Reg* v *Shropshire County Court Judge* 57 L J Q B 143 20 Q B D 248, 58 L T 86 36 W R 476 *Ready* v *Idlum*, 19 W R 135

—— **Waiver by taking Step**]—When plaintiff and defendant both resided out of the county palatine of Lancaster and the cause of action arose also wholly outside the county, and a writ of summons issued out of the court of common pleas at Lancaster was sent to the defendant's attorney in Staffordshire who gave an undertaking to appear and afterwards did appear —Held that the service could not be set aside as any irregularity had been waived by the appearance *Oulton* v *Radcliffe* 43 L J C P 87 L R 9 C P 189 30 L T 22 22 W R 372

On a bill for satisfaction of an annuity payable out of rents and for a sum secured by bond and mortgage the defendant having by his answer set up equitable encumbrances as a defence and examined witnesses in support of it —Held that it was too late to set up an objection to the jurisdiction on the ground that the plaintiff's remedy was at law *Williams* v *Brown* C P Coop 360

Filing a cross bill prevents any objection to the jurisdiction *Burgess* v *Wheate* 1 Eden 190 1 W Bl 121

If, in an ecclesiastical court a party is cited as resident within the jurisdiction and appears and pleads without objection he cannot afterwards put that fact in issue and in such case an intervener is not at liberty to raise an objection to the jurisdiction on that ground *Chichester* v *Donegal*, 6 Madd 375

No appearance or answer will give a jurisdiction to a limited court *Green* v *Rutherforth* 1 Ves sen 471 *Penn* v *Baltimore*, 1 Ves sen 446

Inherent Jurisdiction as to Costs]—Where an Act of Parliament gives jurisdiction to a court to determine questions but the act is silent as to costs, the court has inherent jurisdiction to order a person who wrongly puts it in motion to pay the costs of his application *Pringle* v *Secretary of State for India* 58 L J., Ch 815, 40 Ch D 288, 60 L T 796—C A.

B ASSIZES

Circuit]—A circuit is continuous from its commencement to its termination *Oxfordshire (Sheriff), In re*, 2 Car & K 200 S P *Anon*, Salk 8

Time during which Assizes Continue]—Although, by contemplation of law, the whole time during which assizes continue at one place is considered for some purposes as one legal day, yet the particular day on which a conviction actually took place may be proved when necessary *Whitaker* v *Wisbey*, 12 C B 44 21 L J., C P 116 16 Jur 411

Therefore, where a convicted felon made a bonâ fide assignment of goods after the commission day of the assizes, but before the day on which he was actually convicted —Held, that the assignee could prove the actual day of the conviction although the record mentioned only the commission day and that the assignment was valid *Ib*

Commissions of Oyer and Terminer]—In commissions of oyer and terminer while the whole body of the justices named in the commission constitutes the court of oyer and terminer, each judge sitting under it represents the court, so that whatever takes place before a single judge is considered as done constructively before the whole court *Leeson* v *Reg* 10 B & S 404, 38 L J M C 97 I R 4 Q P 394 20 L T 485 18 W R 251

Jurisdiction of Judges]—A judge of assize has authority to order the court room or any part of it to be cleared if quiet is not preserved in it and the sheriff is bound to execute his orders and to preserve quiet and if instead of that he incites his friends to disturb such orders he is guilty of the contempt but a rule issued by him and posted up in the court at the wall of the court while the judge was sitting —Held such a contempt *Surrey (Sheriff) In re* 2 F & F 230

Quarter Sessions—How they are affected by]—The authority of courts of quarter sessions, whether for a county or a borough is not in law either determined or suspended by the coming of the judges into the county and their commission of assize oyer and terminer and general gaol delivery although generally speaking, it would be inconvenient and improper that courts of quarter sessions for counties should be held concurrently with the assizes for the same counties *Smith* v *Reg* 13 Q B 738 18 L J M C 207

Warrant of Commitment for Contempt by]—A court of assize being a superior court a warrant of commitment for contempt need not set out the particulars of the contempt *Fernandez, Ex parte* 6 H & N 717, 7 Jur (N S) 529, 4 L T 296 9 W R 539 S P 10 C B (N S) 3, 30 L J C P 321 7 Jur (N S) 571 4 L T 324 9 W R 832

Clerk of]—Though the clerk of assize and clerk of arraigns act as officers of, and are subject to the control of the court, and their names are inserted in the commissions of oyer and terminer the court stated that there never was an instance of their acting under the commission, and that they had no authority to decide on any question *Milward* v *Thatcher*, 2 Term Rep 83

—— **Fees of**]—By 19 Geo 3, c 74, s 30, the clerk of assize on each circuit was entitled to receive a certain fee for every person convicted of a transportable offence (except petty larceny), and sentenced to transportation, hard labour or confinement in the house of correction, and for persons capitally convicted, who afterwards received the king's pardon on condition of being transported or imprisoned *Fleetwood* v *Finch*, 2 H. Bl 220.

—— **Liability of.**]—If a clerk of assize draws an indictment with unnecessary prolixity, he may be ordered to pay the extra expense. *Rex* v. *Bury*, 1 Leach, C. C. 201. S. P., *Rex* v. *May*, 1 Doug. 193.

C. CHANCERY JURISDICTION.

Principles Governing.]—The jurisdiction of the court of chancery cannot be taken away unless by express words. *Byrne* v. *Byrne*, Fl. & K. 435. Affirmed 2 Dr. & War. 71; 1 Con. & L. 189; 4 Ir. Eq. R. 621.

The jurisdiction of the court of chancery can only be taken away by express words or words creating a necessary implication to that effect. *Att.-Gen.* v. *Dublin Corporation*, 1 Bli. (N.S.) 312.

The jurisdiction of the court of chancery is not ousted by a limited statutory jurisdiction conferred upon another court, and is properly invoked where the purposes for which the limited jurisdiction is conferred are at an end, or where the limited jurisdiction is not equal to the comprehension of the matter in dispute or can only be exercised on terms destructive of the right claimed. *Troup* v. *Ricardo*, 4 De G. J. & S. 489; 34 L. J., Ch. 91; 10 Jur. (N.S.) 1161; 11 L. T. 399; 13 W. R. 147.

The Court of session has no power to alter, vary, or discharge any order of the court of chancery made under the jurisdiction of the great seal, which is as much the great seal of Scotland as of England. *Bute* (*Marquis*) v. *Stuart*, 2 Giff. 582. Affirmed on appeal, 4 Macq. H. L. 19; 9 H. L. Cas. 440; 7 Jur. (N.S.) 1129; 4 L. T. 182; 9 W. R. 722.

Bill may be brought to foreclose lands in mortgage out of jurisdiction of court, if persons be in the jurisdiction. *Anon.*, 1 Salk. 404.

The court has no jurisdiction to restrain a trespass which does not amount to waste. *Turner* v. *Ringwood Highway Board*, 18 W. R. 424.

The court of chancery has no jurisdiction to direct the restoration of the interior of a church to its former condition, from which it has been altered. *Cardinall* v. *Molyneux*, 4 De G. F. & J. 117; 7 Jur. (N.S.) 854; 4 L. T. 605.

No equity can be founded on an allegation that a court, legally constituted, is not properly competent to decide questions within its jurisdiction, and where the legislature have given jurisdiction to a court provided by the act, and has made its decision final; if any inconvenience arises from the legal exercise of the jurisdiction, the legislature alone can supply a remedy. *Barnsley Canal Co.* v. *Twibell*, 7 Beav. 19; 13 L. J., Ch. 434.

The object of the control which this court has over the ecclesiastical courts, by means of the writ of habeas corpus, is to keep those courts within the jurisdiction which the law has assigned to them, and not to correct any error into which they may fall in the exercise of it; and, therefore, objections taken to a significavit, upon the ground that it did not sufficiently show that the defendant had been regularly cited, and upon the further ground that the Ecclesiastical Court was not, according to its own practice, authorised to proceed to judgment upon the merits against a party who had never appeared, were overruled. *Baines, In re*, Cr. & Ph. 31; 10 L. J., Ch. 108; 4 Jur. 1194. And see *S. C.* at law, 5 Jur. 337.

Before the court of chancery will interfere to correct a judgment in a customary court, it must be shown, first, that there is no remedy elsewhere; and, secondly, that an error has been committed against conscience. Semble, that the jurisdiction is to direct the court below to review its decision. *Plunkett* v. *Burlington* (*Lord*), 1 Jur. 375.

The stat. 6 & 7 Will. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions an appeal to the quarter sessions. This would not deprive a party aggrieved of his right to apply for the interference of a court of equity, if he was in other respects entitled to that interference. *Beaufort* (*Duke*) v. *Neeld*, 12 Cl. & F. 248; 9 Jur. 813.

The court of chancery will not entertain a suit to enforce the making or repairing railway accommodation works, unless recourse has been had in the first instance to justices, where by act of parliament they have jurisdiction in the matter. *Hood* v. *North-Eastern Ry.*, 40 L. J., Ch. 17; L. R. 11 Eq. 116; 23 L. T. 433; 19 W. R. 266.

A court of equity will not interfere in every breach of contract, nor although a party may be entitled to large damages. Exceptions in cases of specific performance, or irreparable damage. *Weale* v. *West Middlesex Waterworks*, 1 Jac. & Walk. 370; 21 R. R. 183.

Equity will not, under pretence of a trust, or any of its own notions, suffer a party to evade a beneficial law. *Att.-Gen.* v. *Hindley*, 1 Eq. Abr. 131.

The court will not interfere on behalf of a plaintiff, who claims relief, not through direct equities of his own, but indirectly through the equities of other parties, on which equities those parties themselves do not insist. *Roberts* v. *Bozon*, 3 L. J. (O.S.) Ch. 113.

This court, when it can consistently with the instrument executed by the parties, will do that which is the highest equity, make an equality between parties who stand in the same relation, but it cannot do that contrary to the plain meaning of a deed. *Hulme* v. *Chitty*, 9 Beav. 437; 10 Jur. 323.

The absence of a remedy for a supposed wrong, in another place, is not of itself any reason for this court assuming a jurisdiction on the subject. The case must be such as to bring it properly within the jurisdiction of this court, on other grounds. *Ryves* v. *Wellington* (*Duke*), 9 Beav. 579; 15 L. J., Ch. 461; 10 Jur. 697.

A court of equity will not interfere on points of morals, except when they are mixed up with the administration of civil rights in property. *Gartside* v. *Outram*, 26 L. J., Ch. 113; 3 Jur. (N.S.) 39; 5 W. R. 35.

A court of equity will not declare future rights which may never arise, but leaves them to be determined when they come into possession. *Murray* v. *Moyers*, 16 Ir. Ch. R. 520.

An existing interest, whether present, vested, or contingent, however future and remote it may be, if it be a present interest, the party representing it has a right to file a bill to have the share secured; but the mere expectation of a future event happening, which may give an interest, confers no such right. *Davis* v. *Angell*, 8 Jur. (N.S.) 1024; 10 W. R. 722. *See* Ord. XXV. r. 5.

When there is a remedy at law, and a correspondent remedy in equity, supplementing that of the common law, and the legal remedy is subject by statute to a limit in point of time, a

court of equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit as to time. *Knox* v. *Gye*, 42 L. J., Ch. 234; L. R. 5 H. L. 656.

A bill to enforce a right springing from a statutory engagement is analogous to a bill for specific performance, and the plaintiff must come into court with clean hands. *Fisher* v. *Tully*, 47 L. J., P. C. 59; 3 App. Cas. 627; 38 L. T. 236.

The law moulds itself to the wants and varying exigencies of mankind: but the principles of the law do not vary, though they may be modified in their application to new cases as they arise. *Ejerton* v. *Brownlow* (*Earl*), 4 H. L. Cas. 1; 23 L. J., Ch. 348; 18 Jur. 71.

—— **Mistake.**]—Where money is paid out of court through the erroneous order of the court, the party who receives it, and is called upon to refund, is not liable to pay interest upon it. *Small* v. *Attwood*, 3 Y. & Coll. 105.

A. borrowed from B. 1,000*l*., to secure which A., and W., as his surety, in 1841 mortgaged to B. their reversionary third shares of a fund in court. B. obtained a stop order. In February, 1846, B., on his marriage, assigned the debt to trustees, who did not obtain a new stop order, nor was notice of the assignment given to W. In December, 1846, C., who was the general solicitor of B., presented a petition on A.'s behalf, setting out the mortgage in such a way as not to show that W. was merely a surety, and containing a statement that 500*l*. had been paid to B. by A. in part discharge of the debt, and praying for payment out of court of A.'s share. C. instructed counsel to appear and consent for W. and B., and the order was made without the knowledge of either W. or B., or B.'s trustees:—Held, that the share of the surety was liable for any deficiency of the primary security not attributable to the default of the creditor, and that the fact of the deficiency being occasioned by the act of the Court of Chancery made no difference. *Wheatley* v. *Bastow*, 7 De G. M. & G. 261; 24 L. J., Ch. 727; 1 Jur. (N.S.) 1124; 3 W. R. 540.

—— **Abuse of Process.**]—The court has sufficient authority, when the occasion requires its exercise, to prevent parties converting its own rules, and the sanctions employed to enforce them, into the means of injustice. *Sutfield* (*Lord*) v. *Bond*, 10 Beav. 146.

Proceedings by a creditor under the 1 & 2 Vict. c. 110, s. 8, with a view to making the alleged debtor a bankrupt in default of his satisfying the demand, will not be interfered with in a court of equity on the ground merely of an allegation that such proceeding is dictated purely by fraud and malice, and that no debt is in fact due. *Pim* v. *Wilson*, 2 Ph. 653; 17 L. J., Ch. 428; 12 Jur. 781.

The court will not refuse to entertain a suit for the execution of the trusts of a settlement, where the settled fund actually exists, merely on the ground that the settled fund is so small as to be of no importance to the cestui que trust, and that the settlement was really made to raise a different question (which the court would not have directly determined) by a side wind. Nor will the court allow such a question to be evaded by a counter settlement. *Gurney* v. *Gurney*. 1 Hem. & M. 413; 32 L. J., Ch. 456; 9 Jur. (N.S.) 514; 8 L. T. 380; 11 W. R. 659.

But, semble, the court would not entertain such a suit at the instance of a stranger, nor if it appeared to have been instituted with a malicious motive. *Ib.*

Matters infra dignitatem.] — Defendant having, in two numbers of a periodical work of theatrical criticism, inserted detached extracts to extent of six or seven pages of a farce, the property of plaintiff, containing forty pages interspersed with criticisms, a bill for perpetual injunction and account of profits of the numbers, which amounted not to 3*l*., was dismissed with costs. *Whittington* v. *Woodler*, 2 Swan. 428. See also *Bailey* v. *Taylor*, 1 Russ. & M. 73; Taml. 295; 8 L. J. (O.S.) Ch. 49.

A bill of interpleader, by tenant against landlord and others, if the whole rent actually due is less than 10*l*. will be dismissed. *Smith* v. *Target*, 2 Anstr. 530. But see *Crawford* v. *Fisher*, 1 Hare, 136; 11 L. J., Ch. 273; 6 Jur. 576.

Court will not entertain suit for value under 10*s*. per annum. *Townly* v. *Osney*, Cary, 74; *Almy* v. *Pyecraft*, Cary, 103.

Suit for rent of 10*s*. per annum dismissed. *Knighton* v. *Allen*, Cary, 80.

Suit for 6*l*. dismissed. *Harbar* v. *Kempester*, Cary, 83.

Suit dismissed, on oath that lands under 10*s*. per annum. *Morgan* v. *Richards*, Cary, 85, 112.

Suit for poor of parish, though under 40*s*., entertained. *Parrot* v. *Purlet*, Cary, 103.

Bill in equity lies for recovering ancient quit rents, though very small, as 2*s*. or 3*s*. per annum; and if proved to be constantly paid, the court will decree payment, or will direct an issue to try whether any and what rent is issuing out of all or any of the lands in the bill. *Cocks* v. *Foley*, 1 Vern. 359.

A bill to restrain waste, the damage proved being 7*l*. 16*s*., is beneath the dignity of the court, and will be dismissed with costs at the hearing. *Lambert* v. *Lambert*, 2 Ir. Eq. R. 210.

By a canal act, the owners of steam-engines on the banks were empowered to lay pipes and take water from the canal for the purpose of condensing steam. In 1830 K. built a steam-engine, and laid pipes to the canal, with the cognisance of the canal company, and used the water for the purpose of raising as well as condensing steam, till the year 1847, when disputes arose, and an action was brought by the company, who recovered 1*s*. damages. K. continued to take the water, and the company filed their bill, praying that he might be restrained. K., by his answer, alleged and produced evidence that the company were aware, when the mill was built, that the water would be used for raising steam:—Held, that the smallness of the damage would not prevent the court from interfering, and that the court would not compel the company to bring other actions, but that there was so much evidence of acquiescence that the court would not interfere on motion. *Rochdale Canal Co.* v. *King*, 2 Sim. (N.S.) 78; 20 L. J., Ch. 675; 15 Jur. 962.

A. sold a piece of land to B., and covenanted for quiet enjoyment. Afterwards, A. raised the level, by three inches, of a brook running past B.'s grounds, through his, A.'s, property:—Held, that this was not a proper subject of complaint for the interference of a court of equity. *Ingram* v. *Morecraft*, 33 Beav. 49.

The court cannot speculate on the damages which a jury might have given for the breach of

—— **Liability of.**]—If a clerk of assize draws an indictment with unnecessary prolixity, he may be ordered to pay the extra expense. *Rex* v. *Bury*, 1 Leach, C. C. 201. S. P., *Rex* v. *May*, 1 Doug. 193.

C. CHANCERY JURISDICTION.

Principles Governing.]—The jurisdiction of the court of chancery cannot be taken away unless by express words. *Byrne* v. *Byrne*, Fl. & K. 435. Affirmed 2 Dr. & War. 71 : 1 Con. & L. 189 ; 4 Ir. Eq. R. 621.

The jurisdiction of the court of chancery can only be taken away by express words or words creating a necessary implication to that effect. *Att.-Gen.* v. *Dublin Corporation*, 1 Bli. (N.S.) 312.

The jurisdiction of the court of chancery is not ousted by a limited statutory jurisdiction conferred upon another court, and is properly invoked where the purposes for which the limited jurisdiction is conferred are at an end, or where the limited jurisdiction is not equal to the comprehension of the matter in dispute or can only be exercised on terms destructive of the right claimed. *Troup* v. *Ricardo*, 4 De G. J. & S. 489; 34 L. J., Ch. 91 ; 10 Jur. (N.S.) 1161 ; 11 L. T. 399 ; 13 W. R. 147.

The Court of session has no power to alter, vary, or discharge any order of the court of chancery made under the jurisdiction of the great seal, which is as much the great seal of Scotland as of England. *Bute* (*Marquis*) v. *Stuart*, 2 Giff. 582. Affirmed on appeal, 4 Macq. H. L. 49 ; 9 H. L. Cas. 440 ; 7 Jur. (N.S.) 1129 ; 4 L. T. 182 ; 9 W. R. 722.

Bill may be brought to foreclose lands in mortgage out of jurisdiction of court, if persons be in the jurisdiction. *Anon.*, 1 Salk. 404.

The court has no jurisdiction to restrain a trespass which does not amount to waste. *Turner* v. *Ringwood Highway Board*, 18 W. R. 424.

The court of chancery has no jurisdiction to direct the restoration of the interior of a church to its former condition, from which it has been altered. *Cardinall* v. *Molyneux*, 4 De G. F. & J. 117; 7 Jur. (N.S.) 854; 4 L. T. 605.

No equity can be founded on an allegation that a court, legally constituted, is not properly competent to decide questions within its jurisdiction, and where the legislature have given jurisdiction to a court provided by the act, and has made its decision final: if any inconvenience arises from the legal exercise of the jurisdiction, the legislature alone can supply a remedy. *Barnsley Canal Co.* v. *Twibell*, 7 Beav. 19 ; 13 L. J., Ch. 434.

The object of the control which this court has over the ecclesiastical courts, by means of the writ of habeas corpus, is to keep those courts within the jurisdiction which the law has assigned to them, and not to correct any error into which they may fall in the exercise of it ; and, therefore, objections taken to a significavit, upon the ground that it did not sufficiently show that the defendant had been regularly cited, and upon the further ground that the Ecclesiastical Court was not, according to its own practice, authorised to proceed to judgment upon the merits against a party who had never appeared, were overruled. *Baines, In re*, Cr. & Ph. 31 ; 10 L. J., Ch. 108 ; 4 Jur. 1194. And see *S. C.* at law, 5 Jur. 337.

Before the court of chancery will interfere to correct a judgment in a customary court, it must be shown, first, that there is no remedy elsewhere ; and, secondly, that an error has been committed against conscience. Semble, that the jurisdiction is to direct the court below to review its decision. *Plunkett* v. *Burlington* (*Lord*), 1 Jur. 375.

The stat. 6 & 7 Will. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions an appeal to the quarter sessions. This would not deprive a party aggrieved of his right to apply for the interference of a court of equity, if he was in other respects entitled to that interference. *Beaufort* (*Duke*) v. *Neeld*, 12 Cl. & F. 248 ; 9 Jur. 813.

The court of chancery will not entertain a suit to enforce the making or repairing railway accommodation works, unless recourse has been had in the first instance to justices, where by act of parliament they have jurisdiction in the matter. *Hood* v. *North-Eastern Ry.*, 40 L. J., Ch. 17 : L. R. 11 Eq. 116 : 23 L. T. 433 ; 19 W. R. 266.

A court of equity will not interfere in every breach of contract, nor although a party may be entitled to large damages. Exceptions in cases of specific performance, or irreparable damage. *Weale* v. *West Middlesex Waterworks*, 1 Jac. & Walk. 370 ; 21 R. R. 183.

Equity will not, under pretence of a trust, or any of its own notions, suffer a party to evade a beneficial law. *Att.-Gen.* v. *Hindley*, 1 Eq. Abr. 131.

The court will not interfere on behalf of a plaintiff, who claims relief, not through direct equities of his own, but indirectly through the equities of other parties, on which equities those parties themselves do not insist. *Roberts* v. *Bozon*, 3 L. J. (O.S.) Ch. 113.

This court, when it can consistently with the instrument executed by the parties, will do that which is the highest equity, make an equality between parties who stand in the same relation, but it cannot do that contrary to the plain meaning of a deed. *Hulme* v. *Chitty*, 9 Beav. 437 ; 10 Jur. 323.

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The court cannot speculate on the damages which a jury might have given for the breach of

an agreement, nor on the damage caused to property by failure of a sale: therefore the specific performance of an agreement of hereditaments, where the consideration money is 50*l.*, is not too small a matter for the jurisdiction of the court. The exercise of the jurisdiction is discretionary in the court; but the discretion is not arbitrary, but must be exercised according to the circumstances of the case. *Bennett* v. *Smith*, 16 Jur. 421.

The court will not refuse to entertain a suit for the execution of the trusts of a settlement, where the settled fund actually exists, merely on the ground that the settled fund is so small as to be of no importance to the cestui que trust, and that the settlement was really made to raise a different question (which the court would not have directly determined) by a side wind. Nor will the court allow such a question to be evaded by a counter settlement. *Gurney* v. *Gurney*, 1 Hem. & M. 413; 32 L. J., Ch. 456; 9 Jur. (N.S.) 514; 8 L. T. 380: 11 W. R. 659.

Although the sum recovered in a suit was only 9*l.*, yet it was held that the suit was sustainable, inasmuch as the plaintiff, when he filed his bill, might have been justified in supposing that a larger sum would be recovered, and the defendant, who knew the amount, had not given any information respecting it. *Beckitt* v. *Bilbrough*, 8 Hare, 188; 19 L. J., Ch. 522; 14 Jur. 238.

The assignee of a policy of marine insuance for 5,400*l.*, to which no interest attached, filed his bill against one of the underwriters to recover the premium of 3*l.*:—Held, that the suit was not a suit to establish a general right within the exception of Gen. Ord. IX. r. 1. as to the subject-matter of suits under the value of 10*l.* *Hoskins* v. *Holland*, 44 L. J., Ch. 273; 23 W. R. 477.

A suit against a company and one its directors, impeaching dealings with them by its funds, was commenced by the plaintiff on behalf of himself and all other shareholders. The plaintiff was a holder of shares to a very small value, which he admitted that he had purchased with the sole view of qualifying himself to institute the proceedings. Shortly after the commencement of the suit resolutions were passed at a meeting of the company for its voluntary winding-up, and its assets were sold to a new company. Answers being put in and excepted to, and the exceptions ripe for hearing, a motion, by the defendants, to stay proceedings or take the bill off the file, on the ground of the plaintiff's admitted object in becoming a shareholder of the insignificant value of his interest, and of the winding-up of the company, was refused. *Seaton* v. *Grant*, 36 L. J., Ch. 638; L. R. 2 Ch. 459; 16 L. T. 758; 15 W. R. 602.

An action in the high court claiming relief which, before the Judicature Act, could have been given only in the court of chancery, cannot now be maintained if the subject-matter is below 10*l.* in value. The old rule of the court of chancery in this respect still remains in force. *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith*, 55 L. J., Ch. 744; 30 Ch. D. 387; 52 L. T. 839; 34 W. R. 217—C. A. [By Rules of Supreme Court, 1883, the Chancery Consolidated General Orders of 1860 are repealed.]

See also PRACTICE (STAYING PROCEEDINGS).

—— **Practice.**]—On motion to set aside proceedings, as infra dignitatem, on affidavit that demand does not exceed 40*s.*, court will not inquire into amount, if affidavit be put in, on showing cause that the demand exceeds that sum, but will at once discharge rule with costs. *Branker* v. *Massey*, 2 Price, 8.

Where suit is below dignity of court, it will be dismissed without going into merits. *Owens* v. *Smith*, 2 Comb. 715.

Though defendant has not demurred to a bill as being too trifling for the court to entertain, yet he may take advantage of the objection at the hearing, for a bill may have been so drawn as to have prevented a demurrer. *Brace* v. *Taylor*, 2 Atk. 253.

In a suit in Ireland for 6*l.* 1*s.* 5*d.* for tithes:—Held, that the bill might have been demurred to, or would have been dismissed at the hearing, on account of the smallness of the demand. *Disney* v. *Taaffe*, 1 Dr. & Wal. 94; Sau. & Sc. 105.

D. INFERIOR COURTS.

1. GENERAL PRINCIPLES.

Limits of Jurisdiction.]—Where an act establishes a court for a particular part of the United Kingdom, the true construction of it is, that everything which is to be done under the authority of the court is to be done within the jurisdiction of the court, unless the act either in express terms or by necessary implication enacts that it may be done out of the jurisdiction. *O'Loghlen, Ex parte*, 40 L. J., Bk. 28; L. R. 6 Ch. 406; 23 L. T. 878; 19 W. R. 459.

A court of limited jurisdiction cannot give itself jurisdiction by finding any facts; it has no jurisdiction beyond what the legislature has given it. *Rorke* v. *Errington*, 7 H. L. Cas. 617, 632; 5 Jur. (N.S.) 1227.

By an act of parliament, jurisdiction was given to a local court of record to try actions of debt where "the sum or damages sought to be recovered shall not exceed 50*l.*":—Held, that the court, in addition to the sum of 50*l.* claimed as a debt, had the power to award a further sum for the purpose only of giving costs. *Joule* v. *Taylor*, 2 L. M. & P. 615; 7 Ex. 58; 21 L. J., Ex. 31.

An act of parliament, after giving jurisdiction in trespass, to the amount of 50*l.*, to a court previously having jurisdiction in actions on the case to the amount of 40*s.* only, proceeded to except slander from the actions cognizable by the court, in which jurisdiction beyond 50*l.* might be conferred by consent:—Held, that jurisdiction in slander to the amount of 50*l.* was given by the act. *Furrow* v. *Hague*, 3 H. & C. 101; 33 L. J., Ex. 258; 10 Jur. (N.S.) 638; 10 L. T. 534; 12 W. R. 868.

Effect of Non-User.]—Where a court lawfully possesses a jurisdiction for the benefit of the subject, in the administration of justice, mere non-user does not take it away. *Att.-Gen. (Isle of Man)* v. *Cowley*, 12 Moore, P. C. 27; 7 W. R. 713.

A grant by royal charter empowered the steward and suitors of a manor to hold a court for the determination of civil suits, and there had been a non-user of the court for fifty years (except for the purpose of levying fines and suffering recoveries):—Held, that the court being established for the public benefit, the words of permission in the charter were obligatory; and that the right of determining suits was not lost by the non-user. *Rex* v. *Havering-*

atte-Bower, 5 B. & Ald. 691 ; 2 D. & R. 176, n. ; 24 R. R. 532.

When a charter was granted to a corporation to hold a court for the trial of causes, the disuse of that court for 200 years, and the want of funds to hold it, are no answer to a rule for a mandamus commanding the corporation to hold it. *Rex* v. *Wells Corporation*, 4 D. P. C. 562.

Statement of Cause of Action.]—A declaration in an inferior court must allege every fact to have taken place within the jurisdiction of the court. *Waddock* v. *Cooper*, 2 Wils. 16.

In an action on a judgment of an inferior court, the declaration is bad if it does not contain an averment that the cause of action arose within the jurisdiction of the court below ; it is not enough to allege that the plaintiff recovered his damages within that jurisdiction. *Read* v. *Pope*, 1 C. M. & R. 302 ; 4 Tyr. 403 ; 3 L. J., Ex. 342.

A declaration stated that the defendant was indebted to the plaintiff within the jurisdiction of the county court for the wages of and due and owing to the plaintiff within the jurisdiction, as the servant of the defendant. Admitted, that this was a sufficient allegation of the cause of action having accrued within the jurisdiction. *Chitty* v. *Dendy*, 3 A. & E. 319 ; 4 N. & M. 842 ; 1 H. & W. 169 ; 4 L. J., K. B. 195.

A declaration in an inferior borough court stated, that the defendant, within the jurisdiction of the court, was indebted to the plaintiff for goods bargained and sold, and for goods sold and delivered, and for money lent, and for money paid, and for money found to be due from the defendant to the plaintiff on an account then stated between them, which several moneys were to be then and there paid on request :—Held, that it did not sufficiently appear that the cause of action accrued within the jurisdiction. *Cook* v. *M'Pherson*, 8 Q. B. 1030 ; 15 L. J., Q. B. 283 ; 10 Jur. 1052.

In an action brought in the court of Kingston-upon-Hull, the declaration stated that the defendant was indebted to the plaintiff, within the jurisdiction of the court, for freight due and payable from the defendant to the plaintiff for the carriage of goods from Marseilles to Kingston-upon-Hull, and there delivered to the defendant, within the jurisdiction aforesaid, at the defendant's request :—Held, that it sufficiently appeared that the delivery only was the consideration for the promise, and that the cause of action and the consideration were within the jurisdiction of the court. *Kemp* v. *Clark*, 12 Q. B. 647 ; 17 L. J., Q. B. 305 ; 12 Jur. 676.

A plaintiff declared on a judgment obtained in the ancient common law county court against the defendant :—Held, that it was not necessary to state in the declaration that the defendant resided within the jurisdiction of the county court, or that he was duly summoned. *Williams* v. *Jones*, 2 D. & L. 680; 13 M. & W. 628; 14 L. J., Ex. 145.

A declaration in an inferior court cannot be amended by showing that the cause of action accrued within the jurisdiction. *Spencer* v. *Hagiadur*, 5 D. & L. 66; 2 B. C. Rep. 125; 11 Jur. 948.

Removal to Superior Court.]—On the removal of a cause by habeas corpus, from an inferior to a superior court, if the plaintiff declares de novo, he is not bound to declare in the same form of action as that in the inferior court. *Bowerbank* v. *Walker*, 2 Chit. 517.

Section 222 of the Common Law Procedure Act, 1852 (as to amending pleadings), applies to all pleadings pleaded in the superior courts, whether the action was originally commenced there or not. *Messiter* v. *Rose*, 13 C. B. 162 ; 22 L. J., C. P. 78.

Pleas to the Jurisdiction.]—A plea in abatement to the jurisdiction of the court must point out another court before which the matter is cognisable. *Spooner* v. *Juddow*, 4 Moore, Ind. App. 353 ; 6 Moore, P. C. 257. S. P., *Rex* v. *Johnson*, 6 East, 583 ; 2 Smith, 591 ; 8 R. R. 550 ; *Mostyn* v. *Fabrigas*, Cowp. 172.

Plea to jurisdiction must show what court has jurisdiction. *Derby* (*Earl*) v. *Athol* (*Duke*), Dick. 129 ; 1 Ves. 202.

Plea by a Hindoo of Arcot, to the jurisdiction of the recorder's court at Bombay, defective, in not pointing out another court of competent jurisdiction. *Moodeliar* v. *Rex*, 3 Knapp, 348.

A plea against the jurisdiction of the court must show what court has the proper jurisdiction. *Arcot* (*Nabob*) v. *East India Co.*, 3 Bro. C. C. 292. And see *S. C.*, 1 Ves. J. 371. See *Bean* v. *Teed*, 8 L. J. (o.s.) Ch. 34.

Plea to jurisdiction of a general court must show where it is : not so of inferior court. *Sodor and Man* (*Bishop*) v. *Derby* (*Earl*), 2 Ves. 337.

A plea in bar, if well founded, is sufficient without pointing out the court in which the suit ought to have been brought. *Spooner* v. *Juddow*, 4 Moo. Ind. App. 353 : 6 Moo. P. C. 257.

—— **Whether Essential.**]—An objection to the jurisdiction, although not raised in the pleadings, was allowed to be taken at the hearing, the state of the law on the question of jurisdiction having been unsettled at the time of filing the bill. *Stone* v. *Thomas*, 39 L. J., Ch. 168 ; L. R. 5 Ch. 219 ; 22 L. T. 359 ; 18 W. R. 385.

If the cause of action does not arise within the jurisdiction, the defendant must avail himself of it by plea in the court below ; or if not alleged in the plaint to be within the jurisdiction, it will be bad on writ of error or false judgment. *Rowland* v. *Veale*, Cowp. 20.

Where an act, establishing a court of requests, provided that "no action or suit for any debt not amounting to 40*s*., and recoverable by virtue of this act, shall be recovered against any person in any other court," but contained no express enactment that a defendant sued elsewhere for such a debt might avail himself of the objection by plea, the proper mode of doing so is, nevertheless, by plea ; and if the defendant omits to plead the statute in an action for a larger sum, and judgment passes against him for a sum under 40*s*., the court will not enter a suggestion on the record. *Reynolds* v. *Talmon*, 2 Q. B. 644 ; 11 L. J., Q. B. 94.

A statute, regulating the proceedings of a court baron, enacted that if it shall appear to the judge before whom any action may be tried, that the cause of action is one over which the court baron has jurisdiction, then, unless the judge shall certify there was a probable cause of action for a sum beyond that amount, the plaintiff shall not recover, but be nonsuited :—Held, that such statute need not be specially pleaded ; and therefore, that an under-sheriff, upon its being proved at the trial of a cause that it was one over which the court baron had jurisdiction, was right in nonsuiting the plaintiff. *Hilliard*

v. *Webster*, 6 Man. & G. 983; 7 Scott (N.R.) 903; 8 Jur. 425.

Where a court of requests had jurisdiction over the cause of action, and the statute by which it was constituted gave the defendant leave to plead the matter specially, then upon such plea being pleaded, and the jury finding a verdict for the defendant upon it, the entry of a suggestion upon the roll was unnecessary. *Kennedy* or *King* v. *Walford*, 7 Scott (N.R.) 433; 1 D. & L. 796; 6 Man. & G. 690; 13 L. J., C. P. 38; 7 Jur. 994.

If the court has not a general jurisdiction, it must be pleaded in abatement, and cannot be taken advantage of under the general issue. *Mostyn* v. *Fabrigas*, Cowp. 172; *Rex* v. *Johnson*, 6 East, 583; 3 Smith. 591; 8 R. R. 550.

A local act, for making and maintaining a railway in Ireland, enabled the directors to make calls from the proprietors, and, in case of neglect or refusal to pay the same, enacted, that it should be lawful for the company, or for the directors, to sue for and recover the same in any of her Majesty's courts of record in Dublin by an action of debt. In an action for calls against a proprietor, he pleaded to the jurisdiction of the court, that, by virtue of the act, he was liable to be sued in her Majesty's courts of record in Dublin, and not elsewhere:—Held, that the plea, though in form a plea of abatement, disclosed matter in bar to the action, which, upon demurrer to the plea, might be taken advantage of by the defendant. *Dundalk Western Ry.* v. *Tapster*, 1 G. & D. 657; 1 Q. B. 697; 10 L. J., Q. B. 186; 5 Jur. 699.

Pending Proceeding.]—If another suit is pending in an inferior court it cannot be pleaded, as if it is a replevin suit depending in the county court. *White* v. *Wilks*, 2 Wils. 87.

The court of the mayor of the borough of Liverpool is an inferior and not a superior court; and, therefore, a plea, that there is another action depending for the same cause in that court, is no answer to an action in a superior court. *Laughton* v. *Taylor*, 6 M. & W. 695; 8 D. P. C. 776.

Estoppel by Judgment.]—Where a plaintiff sued his steward in an inferior court for 4,000*l*., which was a less sum than he knew to be due to him, upon the final investigation of the defendant's accounts, and upon judgment by default verified for 3,400*l*. only:—Held, upon a plea of judgment recovered in answer to a second action for the balance due, that the plaintiff was concluded by the action brought in the inferior court. *Williams* v. *Bagot* (*Lord*), 5 D. & R. 719; 3 B. & C. 772; 27 R. R. 482.

No Jurisdiction—Validity of Proceedings.]—Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create any necessity for an appeal. *Att.-Gen.* v. *Hotham* (*Lord*), Turn. & R. 219; 3 Russ. 415.

The superior court will not give effect to the judgment of an inferior court if it appears, under the proceedings, that a jurisdiction to adjudicate upon the subject was not acquired when the judgment was given. *Thompson* v. *Sheil*, Fl. & K. 53; 3 Ir. Eq. R. 135.

Summons—Custom.]—A custom in an inferior court for a plaintiff, in an action of debt, to issue a summons and attachment on the same day, returnable on the same day, and at the return of those writs without either of them having been personally served on the defendant, and without the defendant having appeared, to declare and afterwards to sign judgment by default, is bad in law. *Williams* v. *Bagot* (*Lord*), 5 D. & R. 719; 3 B. & C. 772; 27 R. R. 482.

Plaint before Cause of Action.]—It is no ground of objection, after verdict on a judgment of an inferior court, that the plaint was levied before the cause of action accrued. *Bishop* v. *Kaye*, 3 B. & Ald. 605.

Jurisdiction as to Amount of Counter-claim.]—When an action has been brought in an inferior court and a counter-claim is set up which is beyond the jurisdiction of the court, the court has power to deal with such counter-claim to the extent of the amount of the plaintiff's claim, and no further. *Davis* v. *Flagstaff Silver Mining Co.*, 47 L. J., C. P. 503; 3 C. P. D. 228; 38 L. T. 769; 26 W. R. 431—C. A.

Application of Rules of Supreme Court to.]—The provisions of s. 89 of the Judicature Act, 1873, which enable inferior courts to grant in all causes of action within their jurisdiction such relief, redress, or remedy, or combination of remedies, in any proceeding as the high court could grant, do not enable an inferior court to apply the provisions of the Rules of the Supreme Court to proceedings in the inferior court. *Pryor* v. *City Offices Co.*, 52 L. J., Q. B. 362; 10 Q. B. D. 504; 48 L. T. 698; 31 W. R. 777—C. A.

New Trial.]—Inferior courts have, generally speaking, no right to grant new trials without the aid of a statutory power to do so. *G. N. Ry.* v. *Mossop*, 17 C. B. 130; 25 L. J., C. P. 22; 2 Jur. (N.S.) 21; 4 W. R. 116.

An inferior court cannot grant a new trial, except on the ground of fraud or irregularity in obtaining the verdict. *Rex* v. *Oxford Corporation*, 3 N. & M. 877.

2. Particular Cases.

a. Liverpool Court of Passage.

Power to make Rules—Security for Costs.]—By 6 & 7 Will. 4, c. 135, s. 4, the assessor of the Liverpool Court of Passage may make rules and regulations concerning the practice and costs of the court. The assessor made a rule that in frivolous and vexatious actions the registrar should have power to order the plaintiff to give security for the defendant's costs:—Held, that the statute did not give power to make such a rule, and the rule was invalid. *Reg.* v. *Liverpool Corporation*, 56 L. J., Q. B. 413; 18 Q. B. D. 510; 56 L. T. 314; 35 W. R. 475.

—— Summary Judgment.]—Under s. 6 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, the assessor of the Court of Passage, Liverpool, has power to make general rules and orders for regulating the practice and procedure of the Admiralty jurisdiction of that court:—Held, that a rule conferring on the registrar of the court a power of summary judgment similar to that exercised under Ord. XIV. of the Rules of the Supreme Court, 1883, was

invalid. *Fellows* v. "*Lord Stanley*" (*Owners*), [1893] 1 Q. B. 98; 5 R. 115; 67 L. T. 857; 41 W. R. 253; 7 Asp. M. C. 298. *But see* 56 & 57 Vict. c. 37.

Adoption of Rules of Supreme Court.]—The provisions of Ord. XIV. of the Rules of the Supreme Court are not applicable to the Liverpool Court of Passage. *Spelman* v. *The Empire, Liverpool*, or *Spelman, Ex parte*, 64 L. J., Q. B. 640; [1895] 2 Q. B. 174; 14 R. 499; 73 L. T. 165; 43 W. R. 609—C. A.

The rules of the Court of Passage do not give that court the jurisdiction in interpleader contained in Ord. LVII. r. 8, of the Rules of the Supreme Court, 1883, and even if rules had been framed to that effect they could not give such a jurisdiction, and they would be in that respect ultra vires. The power to decide summarily without consent questions in interpleader is not a "rule of law" within the meaning of s. 91 of the Judicature Act, 1873. *Speers* v. *Daggers*. 1 Cab. & E. 503.

Distribution of Salvage Awarded by High Court—Injunction.]—Injunction issued by the Admiralty Division to restrain one of the officers of a tug, to which an award of 3,500*l.* had been made in a salvage action in the high court, from proceeding with an action for distribution of salvage instituted by him in the Liverpool Court of Passage against the owners of the tug. *The Theresa*, 11 R. 681; 71 L. T. 342; 7 Asp. M. C. 505.

Interpleader—Protection of Officers.]—Officers of the court are not protected in the case of process executed under an interpleader order made without jurisdiction, though good on the face of it, if such order was obtained on their own application. The relief or remedy, the power to grant which is conferred on superior courts by s. 89 of the Judicature Act, 1873, only refers to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as interpleader. *Speers* v. *Daggers*, supra.

New Trial—Appeal from.]—An appeal on an application for a new trial from the Liverpool Court of Passage is to the Court of Appeal, and not to the Divisional Court. *Anderson* v. *Dean*, 63 L. J., Q. B. 668; [1894] 2 Q. B. 222; 9 R. 418; 70 L. T. 830; 42 W. R. 472—C. A.

—— **Practice.**]—In moving in the Court of Exchequer for rules for a new trial or to enter a nonsuit in cases tried in the Liverpool Court of Passage, a rule to show cause was not granted unless either the counsel moving was present at the trial, or the assessor's notes were produced with an affidavit verifying the assessor's signature. When cause is shown, the assessor's notes must be produced with a similar affidavit. *Welsh* v. *Mercer*, 42 L. J., Ex. 52; L. R. 8 Ex. 71; 28 L. T. 358.

A copy of the notes taken by the judge at the trial of a cause in the Passage Court of Liverpool is not needed in order to support a motion in a superior court for a new trial; and such motion may, according to the established practice, be made by counsel who did not appear in the court below. *Bridge* v. *Daine*, 29 L. T. 477.

b. Palatine Court of Lancaster.

Administration—Intestacy—Grant de bonis non to Nominee of Duchy.]—Where an intestate had died leaving no known relatives, and his estate had been partly administered by his widow, who died leaving a will, the court made a grant de bonis non to the nominee of the Duchy of Lancaster, who was the residuary legatee of the widow. *Award, In goods of*, 11 P. D. 75; 56 L. T. 673.

Service of Writ out of Jurisdiction—Leave to Issue.]—Ord. II. r. 4. of the Chancery of Lancaster Rules, which provides that "no writ of summons for service out of the jurisdiction . . . . . shall be issued without the leave of the court or Vice-Chancellor," applies to all writs for service out of the jurisdiction of the Palatine Court, whether the person to be served is or is not within the jurisdiction of the high court. Accordingly, leave of the Vice-Chancellor, or court, of the county palatine for issue of the writ out of the jurisdiction must be obtained before making application to the court of appeal under 17 & 18 Vict. c. 82, s. 8. for leave to serve the writ upon a person out of the jurisdiction of the Palatine Court, but within the jurisdiction of the high court. *Walker* v. *Dodds*, 57 L. J., Ch. 206; 37 Ch. D. 188; 58 L. T. 291; 36 W. R. 133—C. A.

Upon application ex parte by the plaintiff in a suit in the court of chancery of the county palatine of Lancaster, the lords justices of the High Court of Chancery, under the powers given to them by the Court of Chancery of Lancaster Act, 1854, ordered that service of the claim in the suit should be effected upon one of the defendants out of the jurisdiction of the said county palatine; and directed such order to be drawn up by one of the registrars of the High Court of Chancery. *Waltham* v. *Goodyear*, 7 De G. M. & G. 76; 24 L. J., Ch. 587; 1 Jur. (N.S.) 197.

Transfer to High Court.]—The fact of questions of legal difficulty arising in a suit instituted in the court of chancery of the county palatine of Lancaster is not sufficient reason for transferring it to the High Court of Chancery. *Waltham* v. *Goodier*, 3 W. R. 352.

Persons who had assigned property in trust for their creditors brought an action in the court of the county palatine against the trustees and a purchaser from them, for accounts, and to impeach the sale, alleging fraudulent dealings by the trustees and a collusive sale at an undervalue. The property was within the jurisdiction of the palatine court, and all the parties resided within it at the time of the sale; but one of the trustees, whose conduct was especially impeached, had since gone to reside out of the jurisdiction of that court. By leave of the court of appeal, service on him out of the jurisdiction of the palatine court was effected. He then applied to transfer the action to the high court. The other defendants, except a defendant having a very small interest concurrent with that of the plaintiffs, supported the application:—Held, without laying down any general rule, that the applicant being the principal defendant, no sufficient reason was shown in this case for obliging him to defend the action in the county palatine, and that it ought to be transferred to the high court.

Cooke v. *Smith*, 44 Ch. D. 72; 62 L. T. 712—C. A.

The sole defendant in an action commenced in the court of chancery of the county palatine of Lancaster resided out of the jurisdiction. On the 15th June the court of appeal, on the ex parte application of the plaintiff, gave the plaintiff leave to serve the writ out of the jurisdiction of the palatine court, on the plaintiff undertaking to consent to a transfer of the action to the high court of justice in case an application for such transfer should be made by the defendant. On the defendant subsequently applying for a transfer, the court of appeal made the order, and ordered the plaintiff to pay (in any event) the costs incurred in obtaining the order. *Watmough, In re, Serjeeson* v. *Belve*, 24 Ch. D. 280; 49 L. T. 220; 32 W. R. 101—C. A.

—— **Fund Paid in under Trustee Relief Act.**]—A fund had been paid by trustees into the court of chancery of the county palatine of Lancaster under the Trustee Relief Act. A person claiming to be entitled to the fund, and to whom notice of the payment in had been given, resided out of the jurisdiction of that court, and applied to the court of appeal under s. 8 of 17 & 18 Vict. c. 82, for a transfer of the matter to the chancery division of the high court, and a transfer of the fund to the Paymaster-General. No step had been taken by the applicant in the palatine court:—Held, that the applicant was not a "party proceeding" in the matter within the meaning of the section, and that the court had no jurisdiction to order the fund to be transferred. *Heywood, In re*, 38 L. T. 292—C. A.

Jurisdiction.]—The court of chancery of the county palatine of Lancaster has not, as to land and personal estate within its jurisdiction, power to appoint a new trustee in the place of a trustee who is of unsound mind, but who has not been so found by inquisition. *Ormerod, In re*, 28 L. J., Ch. 55: 4 Jur. (N.S.) 1289; 7 W. R. 71.

The power to appoint new trustees in the place of trustees of unsound mind, but not so found by inquisition, is by the Trustee Acts given, not to the court of chancery, but to the Lord Chancellor, or other the persons intrusted with the care of lunatics. *Ib.*

The principle under which the jurisdiction in personam of the old court of chancery extends, in effect, to property wherever situate, applies to the chancery court of the county palatine of Lancaster. *Longdendale Cotton Spinning Co., In re*, 8 Ch. D. 150; 38 L. T. 776; 26 W. R. 491.

Therefore, where the defendants in an action in the chancery court of the county palatine of Lancaster were within, but their property was beyond, the boundary of the local jurisdiction:—Held, that the jurisdiction of that court was the jurisdiction in personam of the old court of chancery within the boundary, and therefore that the palatine court could exercise jurisdiction over the property, and could enforce any order in the action by applying to the supreme court under the Court of Chancery of Lancaster Act, 1854, s. 7, and Judicature Act, 1873, s. 18, sub-s. 2, and motion by the defendants to stay the action for want of jurisdiction refused with costs. *Ib.*

The Vice-Chancellor of the county palatine has no jurisdiction to grant an injunction restraining proceedings in the high court. *Alison, In re, Johnson, In re*, 47 L. J., Ch. 755; 8 Ch. D. 1; 38 L. T. 304; 26 W. R. 450—C. A.

The jurisdiction of the palatine court is co-ordinate with that of high court. *Ib.*

In 1874, a petition was presented in the court of the county palatine of Lancaster, for a guardian and maintenance of two infants, who were entitled for life to a very large property under their great-grandfather's will. Their mother and another were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied from time to time by the court. In 1877, the mother, as next friend of the infants, obtained in the high court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. The summons was not served on the other guardian, but he heard of it, and by the direction of the Vice-Chancellor of the county palatine took out a summons for direction in the palatine court. On the summons being attended the Vice-Chancellor expressed strong disapprobation of the conduct of the mother in taking out the summons in the high court, took an undertaking, which she voluntarily offered, not to proceed further with the summons in the high court, and made a reference to the registrar as to revising the allowances for maintenance. Soon afterwards, the mother, as next friend of the infants, applied to the Vice-Chancellor of the county palatine to discharge the undertaking and to stay proceedings in the palatine court. This application having been refused, the mother, as next friend of the infants, appealed:—Held, that, although the high court had full jurisdiction to appoint guardians and order maintenance, notwithstanding the previous orders made by the palatine court, such jurisdiction ought not to be exercised unless some special ground was shown, inasmuch as it was better for the infants that their maintenance and education should remain under the direction of the judge who had directed them for three years, and was fully acquainted with the case; and that the proceedings in the palatine court ought not to be stayed. *Ib.*

Held, also, that as the Vice-Chancellor of the county palatine had no jurisdiction to grant an injunction to restrain proceedings in the high court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged. *Ib.*

Staying Proceedings.]—A person who has obtained a creditor's order for administration of a testatrix's estate in the palatine court of the Duchy of Lancaster, and who is neither a party to a suit in the high court for the same purpose, nor has proved his debt under an administration order therein made subsequently to the order in the palatine court suit, is a mere stranger to the high court suit, and a motion made by a person so circumstanced in the high court suit to stay proceedings therein, on the ground of the order made in the palatine court suit, was refused, with costs, upon the ground of his being such stranger. *Yates, In re, Bradley* v. *Stelfox*, 3 De G. J. & S. 402.

The fact of an administration decree having been obtained in the court of chancery of the county palatine of Lancaster is not a ground for staying proceedings for the administration of the same estate, where a portion of the estate is

situate beyond the jurisdiction of the Lancaster court. *Wynne* v. *Hughes*, 28 L. J., Ch. 283 ; 5 Jur. (N.S.) 165 ; 7 W. R. 197.

On appeal, the court ordered all the proceedings in the suit to be stayed, the plaintiff to have the conduct of the suit in the court of limited jurisdiction, the plaintiff appearing in that court for that purpose. *S. C.*, 28 L. J., Ch. 485.

Injunction — Appeal.] — An injunction was granted by the lords justices, as the court of appeal from the chancery court of Lancaster, against a person out of the jurisdiction of that chancery court. *Downes* v. *Jackson*, 14 W. R. 907.

Rules as to Costs.]—Under the Judicature Act, 1873, s. 91, which enacts that the several rules of law enacted and declared in this act shall be in force and receive effect in all courts whatsoever in England so far as the matters to which such rules relate shall be respectively cognisable by such courts : Ord. LV. (under the Judicature Act, 1875) is applied to proceedings in the court of passage of the borough of Liverpool ; and a plaintiff who recovers a shilling damages in an action for slander tried by a jury in that court is entitled to his costs unless the judge before whom the action was tried has ordered otherwise. *King* v. *Hawkesworth*, 48 L. J., Q. B. 484 ; 4 Q. B. D. 371 ; 41 L. T. 411 ; 27 W. R. 660.

Costs—Patent Action—Power over.]—At the trial of an action in the palatine court to restrain the infringement of a patent, the Vice-Chancellor held that the patent was invalid in consequence of a claim being made which was bad, and dismissed the action with costs. The defendant had delivered particulars of objections, and the Vice-Chancellor stated that he was of opinion that the defendants should have the costs of their witnesses who attended to support the particulars of objections, though they had not been called. On taxation, the registrar disallowed these costs, but the Vice-Chancellor overruled his objection :—Held, that the discretion of the court of chancery and the palatine court with reference to costs was not taken away by Lord Cairns' Act and Sir John Rolt's Act in the cases which those acts enabled those courts to try, and that these courts ought not to follow by analogy a rule which applied to courts having no discretion as to costs, and therefore the Vice-Chancellor had power to give these costs of the particulars of objections to the defendant without a certificate under s. 43 of the Patent Law Amendment Act, 1852. *Parnell* v. *Mort.* 29 Ch. D. 325 ; 53 L. T. 186 ; 33 W. R. 481—C. A.

—— **Refreshers—Copies of Correspondence.**]—The amount of the refreshers allowed to counsel in cases in the palatine court is in the discretion of the taxing-master, and he is not bound by Ord. LXV. r. 27, sub-s. 48, of the Rules of the Supreme Court. Where a case depended very much on the terms used in correspondence conducted in French between the plaintiffs inter se and the defendants inter se, the court refused to overrule the decision of the judge who heard the case, affirming the decision of the taxing-master, allowing the costs of copies of the correspondence in French as well as of the English translation for the use of counsel. *Ebrard* v. *Gassier*, 55 L. T. 741—C. A.

Judgment by Default—Setting Aside.]—According to the true construction of Ord. XXXIII. r. 21, of the Rules of the Palatine Court of Lancaster, a party against whom judgment has been given by default must make application to set it aside within six days if the court be then sitting, and, if it be not then sitting, on the next day on which the court shall be sitting to hear such motions. An application for extension of time by a party who desires to apply to set aside a judgment made against him by default, may be made at the time when he makes the application to set aside the judgment, if the action is still pending. *Bradshaw* v. *Warlow*, 55 L. J., Ch. 852 ; 32 Ch. D. 403 ; 54 L. T. 438 ; 34 W. R. 557 —C. A.

Appeal from.]—Ord. LVIII. of the Rules of Court, 1875, applies to appeals from the court of the county palatine of Lancaster as well as to appeals from the high court of justice, and the time for appealing is now regulated by r. 15 of that order, and is no longer governed by the General Orders of 1855 regulating appeals from the court of the county palatine. *Lee* v. *Nuttall*, 48 L. J., Ch. 616 ; 12 Ch. D. 61 ; 41 L. T. 4 ; 27 W. R. 805—C. A.

Section 1 of the Supreme Court of Judicature (Procedure) Act, 1894, which enacts that no appeal shall lie, without the leave of the judge appealed from or of the court of appeal, from any interlocutory order, applies to appeals from the palatine court. The court of appeal will not generally give leave to appeal from an interlocutory order, unless it sees that if it does not interfere some injustice will be done. *Dowson* v. *Drosophore Co.*, 12 R. 138—C. A.

The 30 & 31 Vict. c. 64. for the dispatch of business in the court of appeal in chancery, does not enable one of the lords justices sitting alone to act as a court of appeal from the court of chancery of the county palatine of Lancaster. *Kershaw* v. *Vickers*, 37 L. J., Ch. 488 ; L. R. 3 Ch. 513 ; 16 W. R. 772. S. P. *Jones* v. *Kilshaw*, 37 L. J., Ch. 277 ; 17 L. T., 485 ; 16 W. R. 295.

c. Stannaries Court.

See also MINES AND MINERALS.

The stannary court is a court of law, but not of equity. *Trelawny* v. *Williams*, 2 Vern. 483.

The equitable jurisdiction of the vice-warden of the Stannaries of Cornwall depends upon the principles of equity as administered in the court of chancery. *Vice* v. *Thomas*, 4 Y. & Coll. 538.

Lands in Cornwall.]—Prince of Wales may file an English information of intrusion by his attorney-general, for land parcel of Duchy of Cornwall. *Att.-Gen.* v. *St. Aubyn*, Wightw. 169.

A surrender to the use of the will is not necessary to support a devise of lands, parcel of the ancient Duchy of Cornwall, the tenure wherof was originally a holding from seven years to seven years, but which has in time become a holding to the tenant, his heirs, and assigns, subject to a fine at the end of every seven years, and to forfeiture on non-payment. *Usticke* v. *Peters*, 4 Kay & J. 437 ; 4 Jur. (N.S.) 1271.

Under a devise of all the testator's lands to A. in fee, followed by a devise of his duchy lands to B. for life, the reversion expectant upon B.'s life estate in the duchy lands passes to A. *Ib.*

Appeal from Order of Vice-Warden—Deposit by Appellant as Security.]—Notwithstanding that the appellate jurisdiction of the Lord Warden of the Stannaries has, by the Judicature Act, 1873, been transferred to the court of appeal, the requirements of the Stannaries Act, 1869, s. 32, as to the deposit by the appellant of 20*l.* in the hands of the registrar of the stannaries court prior to appealing, are still in force. *West Devon Great Consols Mine, In re*, 57 L. J., Ch. 850; 38 Ch. D. 51; 58 L. T. 61; 36 W. R. 342—C. A.

Winding-up—Order for Inspection of Documents.]—The practice of the stannaries court is the same as that of the high court of justice, that the mere fact of a petition is not enough to justify an order for inspection of books. But if grounds are shown, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection. The right of inspection under the 22nd section of the Stannaries Act, 1855, is personal to the shareholder, and does not extend to his solicitors or agents. *West Devon Great Consols Mine, In re*, 27 Ch. D. 106; 51 L. T. 841; 32 W. R. 890—C. A.

d. Other Courts.

Salford Hundred Court.]—Section 7 of the Salford Hundred Court of Record Act, 1868, enacts that "no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the court shall have jurisdiction for all purposes":—Held, that the defendant against whom judgment had been recovered in the Salford Hundred court, he not having pleaded to the jurisdiction, could not have a writ of prohibition on the ground of want of jurisdiction, inasmuch as the above-mentioned section, under the circumstances, conferred jurisdiction on the Salford Hundred court. *Oram* v. *Brearey* (2 Ex. D. 346), overruled. *Chadwick* v. *Ball*, 54 L. J., Q. B. 396; 14 Q. B. D. 855; 52 L. T. 949—C. A.

A defendant in an action in the Salford Hundred court may obtain a writ of prohibition notwithstanding that he has not pleaded to the jurisdiction, although the act regulating the procedure in that court enacts that "no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded, the court shall have jurisdiction for all purposes." *Oram* v. *Brearey*, 46 L. J., Ex. 481; 2 Ex. D. 346; 36 L. T. 475; 25 W. R. 695.

Hundred Court.]—The hundred court was derived out of the ancient common law county court. *Hallet* v. *Byrt*, 5 Mod. 254.

Upon a nonsuit in the hundred court before appearance there were no costs allowed, and, if given, a writ of false judgment lay. *Simpson* v. *Merville*, 1 Shower, 47.

A hundred court at common law could not have a levari facias, but by custom it might. *Ib.*

Tolzey Court—Bristol—Foreign Attachment.]—An attachment of the goods of the defendant in an action of debt in the Tolzey court of Bristol is only a process to compel the appearance of the defendant, and does not make the plaintiff a secured creditor within the meaning of s. 16, sub-s. 5 of the Bankruptcy Act, 1869. The effect of an attachment of the goods of the defendant in an action of debt in the Tolzey court is the same as that of a foreign attachment in the Mayor's court. *Sear, Ex parte, Price, In re*, 51 L. J., Ch. 448; 17 Ch. D. 74; 44 L. T. 887.

City of London Court—Jurisdiction—Employment within the City.]—The plaintiff, a resident of Manchester, issued a default summons in the City of London Court against the defendant, who was employed as a merchant's clerk within the City of London, but who resided elsewhere:—Held, that the Judge of the City of London court had, under the London (City) Small Debts Extension Act, 1852, s. 39, jurisdiction to deal with the summons, and that that act, with the exceptions of five sections relating to procedure and to costs in actions for small sums, was still in force, and, although modified as to the position of the judge, and assimilated in its procedure in many ways to the county court, was neither in fact nor by implication repealed by the County Courts Acts of 1867 and 1888. *Kutner* v. *Phillips*, 60 L. J., Q. B. 505; [1891] 2 Q. B. 267; 64 L. T. 628; 39 W. R. 526; 56 J. P. 54.

Manorial Courts.]—The bailiff and burgesses of an ancient borough had from time immemorial been lords of the manor and owners of the guildhall within the borough, and by a charter of Philip and Mary, power was granted to them to hold manor courts in the guildhall twice in every year, "as of ancient time had been used": and until 1810 such courts had been immemorially held: in that year, commissioners under an inclosure act awarded to H. all the manor, with the rights, members, courts, view of frankpledge, excepting to the bailiffs and burgesses the guildhall:—Held, that this exception did not exclude the new lord's right to hold his manor courts in the guildhall. *Rex* v. *Ilchester Corporation*, 4 D. & R. 324; 2 B. & C. 764; 2 L. J. (o.s.) K. B. 147.

The Court of Queen's Bench is not a court of error or appeal from a manorial court. *Reg.* v. *Old Hall (Manor)*, 10 A. & E. 248; 2 P. & D. 515; 8 L. J., Q. B. 243; 3 Jur. 168.

Court of Hustings.]—The lord mayor of London is not the sole judge of the court of hustings, for by the constitution of that court it may be held by six aldermen in his absence. *Markwick* v. *London*, 2 Bro. P. C. 409.

A writ of error upon a judgment given in the sheriff's court only lies to the court of hustings in London. *Markwick* v. *London*, 2 Bro. P. C. 409.

Ely—Palatine Court.]—The bishop of Ely has not a palatinate jurisdiction within the isle, though exercising jura regalia there. *Grant* v. *Bagge*, 3 East. 128; 6 R. R. 569.

Borough Court.]—A court had, from time immemorial, been holden before the steward and portreeve of a borough, or their sufficient deputy or deputies, and a court was holden before the deputy of the steward and portreeve:—Held, that both these offices might be held by the same person, and that the appointment of the deputy by the person so holding them was sufficient. *Green* v. *Davies*, 3 B. & Ald. 60.

Court Leet—Jurisdiction.]—The offence of selling a loaf of bread short of weight is not within the jurisdiction of a court leet. *Colebrooke* v. *Elliott*, 3 Burr. 1859.

An amercement at a court leet for a private

injury to the lord is illegal, though there be a custom to warrant it. *Wood* v. *Lovatt*, 6 Term Rep. 511.

A custom to swear the jurors at one court leet to inquire and return their presentments at the next court is bad in law. *Davidson* v. *Moscrop*, 2 East. 36; 6 R. R. 373.

Court Baron—Jurisdiction.]—A court baron cannot be legally held without two free suitors. *Rumsey* v. *Walton*, 4 Term. Rep. 446, n. And see *Holroyd* v. *Breare*, 2 B. & Ald. 473; 21 R. R. 361.

In the record of a judgment of a court baron, it was stated that the court was held "before W. K., steward of the court, and W. U. and G. M., and others, free suitors of the court": —Held, first, that it was not necessary to state that W. K. was steward of the manor. *Brown* v. *Gell*, 2 C. B. 861; 3 D. & L. 823; 15 L. J., C. P. 187; 10 Jur. 666.

Held, secondly, that the style of the court thus stated was correct. *Ib.*

Held, thirdly, that it was sufficient to state the names of two of the suitors only. *Ib.*

—— **Abolition and Revival.**]—By 2 & 3 Vict. c. 85, the old court baron of the honour of Pontefract, in the county of York, was abolished, and a new court was substituted in its place. By 9 & 10 Vict. c. 95, and an order in council made in pursuance of that act, the new court was abolished:—Held, that according to the true construction of the several acts the old court was not revived, and consequently that a replevin obtained out of that court was void. *Hellawell* v. *Eastwood*, 6 Ex. 295; 20 L. J., Ex. 154.

Ancient County Courts.]—An action could not be brought in a county court unless both the defendant resided and the cause of action arose within the county, i.e., within the jurisdiction of the court. *Welsh* v. *Troyte*, 2 H. Bl. 29.

The plaintiff might sue in a superior court for a debt under 40*s.* if he could not sue in any inferior court. *Busby* v. *Evaron*, 8 Term Rep. 235.

A. became indebted to B. in a sum not exceeding 40*s.* for the carriage of a parcel of goods: and in a month afterwards incurred another debt to B. not exceeding 40*s.* for the carriage of a second parcel. A. brought two actions in the county court for the respective debts:—Held, that the causes of action were distinct, and that A. was entitled to sue separately on each demand, and the court refused a prohibition. *Rex* v. *Herefordshire (Sheriff)* 1 B. & Ad. 672.

When a demand exceeding 40*s.* appeared on the face of the declaration, the county court had no jurisdiction; and the particulars (which were returned as part of the proceedings) could not be resorted to in order to shew that, in reality, the demand was below 40*s.* *Dempster* v. *Purnell*, 3 Man. & G. 375; 4 Scott (N.R.) 30; 1 D. (N.S.) 168; 11 L. J., C. P. 33.

Court of Requests—Jurisdiction.]—A party who merely originated a suit by stating his case to a court of requests, and proceeded to execution of the judgment of the court, was not guilty of trespass, though the proceedings were erroneous, or without jurisdiction. *Carratt* v. *Morley*, 1 Q. B. 18; 1 G. & D. 275; 10 L. J., Q. B. 259; 6 Jur. 259.

But such of the commissioners of the court as were parties to the adjudication were liable in trespass, if the court had not jurisdiction; and jurisdiction could not be inferred from the mere fact that they acted in a manner which required it to justify their proceedings. *Ib.*

If the warrant of the court was correct, or even substantially good, the officer who executed it was not guilty of trespass; but if it was defective in describing the court by the proper name and style, it did not protect the officer. *Ib.*

In an action against commissioners of a court of requests and their officer for taking goods, they justified, alleging, that, at a court holden by them pursuant to statute, the plaintiff committed a contempt, and thereupon the commissioners imposed a fine upon him, and issued their warrant to the officer to levy it, by virtue of which he seized the goods. It was proved that the commissioners were acting in their jurisdiction, and that a conviction and warrant produced were signed by them; and in proof of the contempt and the proceedings thereupon, the conviction of the plaintiff and the warrant to levy the fine were put in:—Held, that although the plea stated as a substantive fact that the plaintiff had been guilty of a contempt, and not merely that he had been convicted, the fact of contempt could not be inquired into; for the allegation of it might be rejected as unnecessary, as the conviction and warrant were pleaded, and these appearing to have issued from a competent jurisdiction, were conclusive of the facts stated in them. *Aldridge* v. *Haines*, 2 B. & Ad. 395.

The judge of the Belper court of requests, erected by an act of parliament, had no power to alter at one court, without consent, a judgment in favour of the defendant into a judgment of nonsuit, pronounced by mistake at another; and if he did, and the plaintiff proceeded in a second plaint for the same cause of action, the latter proceedings were a nullity. *Webster* v. *Mason*, 8 D. P. C. 705; 4 Jur. 720.

The Bath court of requests had no jurisdiction over a claim for loss of time in attending the revising barrister's court made by a voter against an objector. *Roberts* v. *Hunby*, 3 M. & W. 120; 6 D. P. C. 82. *S. C.*, sub. nom. *Reg.* v. *Bath Court of Requests*, 7 L. J., Ex. 45.

Nor had the Westminster court of requests in similar proceedings. *Soames* v. *Rawlings*, 2 C. M. & R. 744; 4 D. P. C. 501; 1 Tyr. & G. 46; 1 Gale, 299; 5 L. J., Ex. 55.

—— **Service of Process.**]—An act establishing a court of requests, enacted that the mesne process might be served on the debtor, either personally, or by leaving the same at his dwelling-house, lodging, shop, place of abode, or other place of dealing or trading:—Held, that it was sufficient to leave the process at a lodging where the wife of the debtor was living, though the debtor himself, a seafaring man, was absent on a voyage, and had been so absent for six months and that such service of process was not so contrary to natural justice as to render the judgment and execution obtained thereupon void. *Culverson* v. *Melton*, 2 M. & Rob. 200; 4 P. & D. 445; 12 A. & E. 753; 10 L. J., Q. B. 31; 4 Jur. 1130. J. M.

COURT FEES.

See PRACTICE.

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COVENANT.

[By A. H. BITTLESTON.]

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9. *In Indentures of Apprenticeship.—See* Apprentice.

See also Deed and Bond; and Executor and Administrator.

I. FORM OF.

Definition of.]—An agreement under hand and seal is a covenant. *Holles* v. *Carr*, 3 Swan. 647.

But the word "covenant" in an agreement may be construed to mean a contract not under seal in order to effectuate the intention of the parties. *Hayne* v. *Cummings*, 16 C. B. (N.S.) 421; 10 L. T. 341; 10 Jur. (N.S.) 773. *Brookes* v. *Drysdale*, infra.

Signature not necessary.]—Signature is not necessary to deeds; and the Statute of Frauds has no operation as to them. *Areline* v. *Whisson*, 4 Man. & G. 801; 12 L. J., C. P. 58.

To a declaration upon an indenture of lease, by the lessor against an assignee of the lessee, a plea, that the indenture was not signed by the lessor, or by any agent authorised in writing, is, therefore, bad. *Ib.* S. P., *Cherry* v. *Heming*, 4 Ex. 631. See *Cooch* v. *Goodman*, 2 G. & D. 159; 2 Q. B. 580; 11 L. J., Q. B. 225.

What amounts to.]—By a marriage settlement P. gave, granted, and confirmed to S. and her assigns during her life, in an event, which happened, a yearly rent charge, charged and chargeable upon certain manors of which he, P., or any person in trust for him, was seised or entitled for an estate of inheritance, at law or in equity, subject to certain charges thereon. P. also "covenanted, granted, and agreed" with S. that she might distrain and enter in the usual way for arrears. He also "granted, bargained, sold, and demised" the property to trustees for a term of years to secure the rent charge. By a decree in another cause the interest of P. in the property was held to amount only to a life estate. In a suit to administer P.'s estate, S. put in a claim as a creditor against P.'s estate for the amount of the arrears of the annuity:—Held, that upon the terms of the settlement there was a covenant which S. could enforce against the personal estate of P. *Monypenny* v. *Monypenny*, 3 De G. & J. 572; 28 L. J., Ch., 303; 5 Jur. (N.S.) 253; 7 W. R. 276. Affirmed, 9 H. L. Cas. 114; 31 L. J., Ch. 269.

Every obligation which on a fair construction of the language of a deed is imposed on one of the parties thereto amounts to an express covenant by him to perform that obligation. But the language must clearly show an intention that there should be an agreement between the covenantor and the covenantee to do or not to do the particular thing referred to. *Cadogan and Hans Place Estate, In re, Willis, Ex parte*, 73 L. T. 387.

An agreement for the sale, by the defendant to the plaintiff, of a public-house contained a clause by which the plaintiff was to take the lease held by the defendant, "subject to the performance of the covenants thereby reserved and contained, such covenants being common and usual in public-houses." It subsequently appeared that the defendant's lease contained a proviso or condition in these words, "Provided always, that these presents are upon this express condition, and all and every underlease, deed of assignment, &c., which shall be made and executed during the term, shall be left with the solicitor of the ground landlord within two months of its date for the purpose of registration, and a fee of one guinea paid for such registration," and the plaintiff refused to complete the purchase and sought to recover back his deposit:—Held, that whether the clause in question amounted strictly to a covenant or not, it was included under that term in the agreement between the plaintiff and the defendant, the word being used generally.

Brookes v. *Drysdale*, 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

Held, also, that the clause amounted to a covenant in the strict sense of the word. *Ib.*

The recital, in a deed, of an agreement between the parties to the deed, amounts to a covenant, if there is nothing in the rest of the deed to show an intention in the parties not to be bound by the terms of such agreement. *Farrall* v. *Hilditch*, 5 C. B. (N.S.) 840; 28 L. J., C. P. 221; 5 Jur. (N.S.) 962; 7 W. R. 409. S. P., *Lay* v. *Mottram*, 19 C. B. (N.S.) 479.

A deed between the plaintiffs and a railway company, after reciting that the company was desirous of being supplied with 350,000 railway sleepers, and that the plaintiffs were willing to supply them according to the terms of a specification and tender, contained a covenant by the plaintiffs that they would supply the sleepers within the time specified, as and when, and in such quantities, and in such manner, as the engineer of the company, by order in writing, from time to time, or at any time within the period limited by the specification, should require. The specification stated that the number of sleepers required was 350,000; that one-half would have to be delivered in 1847, and the remainder by Midsummer, 1848. The deed also contained provisoes that the engineer might vary the times of delivery; that the company should retain 2,000*l.* in their hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered; and that the contract might be put an end to upon default made by the plaintiffs, or upon their bankruptcy or insolvency:—Held, that there was a covenant on the part of the company to take the whole number of 350,000 sleepers. *G. N. Ry.* v. *Harrison*, 12 C. B. 576; 22 L. J., C. P. 49; 16 Jur. 565—Ex. Ch.

To create a covenant in a deed, the word "covenant" need not be specifically introduced. Where it was agreed that A. should transfer his business to B. and C., and the deed between the parties contained a recital that it had been agreed between A., B., and C., that the whole of the debts of A. should be paid by B. & C.:—Held, that an action of covenant was maintainable against B. and C. for non-payment of the debts due from A. *Saltoun* v. *Houstoun*, 1 Bing. 433; 2 L. J., C. P. (O.S.) 93; 25 R. R. 665.

Where a lease of mines contained a recital of an agreement by the lessee to pull down an old mill and build another, and also a covenant to keep such new mill in repair and to so leave it at the end of the term:—Held, that this amounted to a covenant to build the mill. *Sampson* v. *Easterby*, 9 B. & C. 505; 4 M. & Ry. 422. Affirming 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105. See also *Knight* v. *Gravesend Waterworks Co.*, col. 1054; and cf. *Sharp* v. *Waterhouse*, col. 1056; *James* v. *Cochrane*, and *Rashleigh* v. *S. E. Ry.*, col. 1053.

If, looking at the whole deed, it contains, whether in the way of covenant, provision, or exception, a clear agreement to do any act, an action of covenant may be maintained in respect of such agreement. *Saltoun* v. *Houstoun*, 1 Bing. 433; 2 L. J. (O.S.) C. P. 93; 25 R. R. 665.

No precise form of words is necessary to constitute a covenant; it is enough, if the intention of the parties mutually to contract is apparent from the general scope of an instrument under seal, more especially where it commences with the words "it is hereby agreed by and between the said parties in manner following." *Wood* v. *Copper Miners Co.*, 7 C. B. 906; 18 L. J., C. P. 293.

A declaration stated, that a railway company demised to the plaintiff refreshment-rooms at Swindon, for ninety-nine years, at the annual rent of a penny; and that the plaintiff covenanted to complete, to keep in repair, and to insure the same; and the company covenanted that, in case the refreshment-rooms should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plaintiff on certain terms. That it was declared to be the intention of the company, and the understanding of the plaintiff, that all trains carrying passengers, not being goods, express or special trains, should stop at Swindon for refreshment of passengers, for about ten minutes; and that the company engaged not to do any act which should have an effect contrary to that intention. The breach assigned was that, whilst the Swindon station was used as the regular and general place of stoppage for refreshment for passengers, the company caused trains containing passengers to pass Swindon without stopping for the refreshment of passengers for about ten minutes, and caused several trains to stop for a short and an unreasonable time; that is to say for a minute, the time not being sufficient to enable the passengers to obtain any refreshment:—Held, that the declaration of the intention of the company, coupled with the rest of the deed, amounted to a covenant by them, that, so long as they made Swindon the general place of stoppage for refreshment they would cause the trains to stop there for ten minutes; and that the breach was well assigned, although it was not stated that any passengers wanted refreshment, or had given notice thereof. *Rigby* v. *G. W. Ry.*, 14 M. & W. 811; 15 L. J., Ex. 60; *S. C.* (in equity), 10 Jur. 488.

Where, in a deed between A. and B., B. acknowledges that he owes so much money to A., such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay appears upon the face of the deed. *Courtney* v. *Taylor*, 6 Man. & G. 851; 7 Scott (N.R.) 749; 12 L. J., C. P. 330.

Secus, where the acknowledgment appears to have been made solely for a collateral purpose. *Ib. Jackson* v. *L. & North-Western Ry.*, 47 L. J., Ch. 303; 7 Ch. D. 573; 37 L. T. 664; 26 W. R. 513. *Marryat* v. *Marryat*, 28 Beav. 224; 29 L. J. Ch. 665; 6 Jur. (N.S.) 572; 2 L. T. 531; post, col. 1050.

A. being indebted to B. on simple contract, gave a promissory note for the amount, and executed a deed, by which, after reciting the debt and the note, he, as further security, charged certain property with the payment of it, and agreed to execute such a mortgage of the property, with all powers, covenants and clauses incidental thereto, as B. should require:—Held, that the deed converted the debt into a specialty debt. *Saunders* v. *Milsome*, L. R. 2 Eq. 573; 15 W. R. 2; 14 L. T. 788.

On an assignment by way of settlement of a reversionary interest in trust funds, the settlor covenanted that he and all persons claiming through him would, upon the request of the trustees of the settlement, do all acts necessary for further assuring the premises to the trustees. The settlor afterwards obtained possession of the premises, and died, after applying the same for

his own use :—Held, that the trustees were entitled to prove for the amount of the settled funds, as for a specialty debt. *Dickson, In re, Blackburn* v. *Dickson*, 40 L. J., Ch. 707 ; 12 L. R. Eq. 154 ; 25 L. T. 118.

Cf. *Isaacson* v. *Harwood*, L. R. 3 Ch. 225 ; *Holland* v. *Holland*. L. R. 4 Ch. 449 ; and *Borrowes* v. *Borrowes*, Ir. R. 6 Eq. 368 ; post, cols. 1049, 1050, 1052.

See also DEED AND BOND.

II. CONSTRUCTION OF COVENANTS.

1. GENERALLY.

A covenant is to be construed most strongly against the covenantor. *Warde* v. *Warde*, 16 Beav. 103.

Covenant against acts of particular persons extends to illegal as well as to legal acts. *Fowle* v. *Welsh*, 1 B. & C. 29 ; 2 D. & R. 133 ; 1 L. J., (O.S.) K. B. 17 ; 25 R. R. 291.

Not to Sue.]—A covenant not to sue, arrest, implead or prosecute a debtor, his goods, chattels, lands or tenements, on account of a debt, extends to the issuing of a commission, which is a species of suit and proceeding against the goods of the bankrupt. *Small* v. *Marwood*, 9 B. & C. 300 ; 4 M. & Ry. 181 ; 7 L. J. (O.S.) K. B. 197.

See also DEED (RELEASE).

To Devise.]—A., being seised of real estates, limited part of them to the uses of his marriage settlement, and covenanted with the trustees, that in case of there being issue of such marriage, he would, by will or otherwise, devise all his real estates, and also all his personal estate and effects whatsoever, amongst the children of that and a former marriage, share and share alike :—Held, that this covenant applied only to such real and personal estate of which A. might die seised or possessed, and that it did not prevent him from disposing, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement. *Needham* v. *Kirkman*, 3 B. & Ald. 531.

A., upon the marriage of B., his daughter, covenanted with her husband C., by deed or will to give and bequeath unto B. one full equal eighth part or share (that being an equal share with his other children) of all the real and personal estate of which he should die seised or possessed. B. died in the lifetime of A. A. having in his lifetime made some disposition of property in favour of a son, by will devised and bequeathed his real and personal estate for the benefit of his widow and some of his surviving daughters :—Held, that C. had not any cause of action against the executors of A. *Jones* v. *How*, 9 C. B. 1 ; *S. C.* (in equity), 19 L. J., Ch. 324.

A covenant to bequeath a sum of money, constitutes a specialty debt against the covenantor's estate, and is not satisfied by the mere insertion of such a bequest in his will. *Graham* v. *Wickham*, 1 De G., J. & S. 474 ; 9 Jur. (N.S.) 702 ; 8 L. T. 679 ; 11 W. R. 1009.

A. covenanted that his executors should invest a certain sum in the three per cents., in the corporate name of the vicar of W., in the corporate names of the churchwardens of W., and in the corporate name of the archdeacon of C., in trust to pay 10*l.* per annum to the parish school, and the remainder in charities. In an action on the covenant against the executors, held, that there was nothing contrary to law in the covenant ; nor did it appear to be impossible to be performed, although it may be questionable whether churchwardens are corporations, except for particular parochial purposes. *Tuffnell* v. *Constable*, 3 N. & P. 47 ; 7 A. & E. 798 ; 1 W. W. & H. 113 ; 7 L. J., Q. B. 106 ; 2 Jur. 79.

To Pay.]—A covenant by a party, that, so long as he should continue and be in the actual receipt of the profits of a rectory, he would pay a yearly sum during the life of the rector, by two half-yearly payments, must be construed as a covenant for the payment of such yearly sum whilst the covenantor is in receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits. *Come* v. *Jones*, 2 Chit. 700.

A. having covenanted, on purchasing an estate, to discharge a legacy mistakenly supposed to be a charge on the estate, is liable in an action on his covenant to the purchaser for not paying the amount covenanted to the representatives of the supposed legatee, whose interest had never been vested, although the purchaser could not become liable in respect of the legacy. *Hodgson* v. *Wood*, 2 H. & C. 649 ; 33 L. J., Ex. 76 ; 10 Jur. (N.S.) 591.

A declaration stated, that the plaintiff sold certain letters-patent to the defendants, who covenanted to pay 840*l.* by instalments : provided, that if within twelve months they should disapprove of the patent, and of their disapprobation and intention to sell it, they should give notice to the plaintiff, the payment of the instalments should be suspended ; and if the defendants should within six months after notice sell the patent, and retaining to themselves 240*l.*, pay over the surplus to the plaintiff, the covenant for payment of the entire sum should cease. But if the defendants, having given such notice, should neglect or refuse to observe all the other matters or things in the proviso, the covenant for payment of 840*l.* should stand. Averment, that the defendants gave due notice of their disapprobation, and of their intention to sell, and that the defendants had not sold the letters-patent. Breach, non-payment of the instalments. Plea, that the defendants were ready and willing and endeavoured to sell the letters-patent, but that no bonâ fide sale could be effected :—Held, that the defendants, not having sold the letters-patent, were liable to pay the instalments. *Cherry* v. *Heming*, 2 Ex. 557 ; 17 L. J., Ex. 305.

By an agreement between A. B. and C. D. and E. F. (two of the provisional directors of a company and promoters of a bill in parliament for making a railway), after reciting that it was proposed to carry the line close to A. B.'s park, and through his land, from which bill A. B. had dissented, A. B. covenanted that he would accede to the bill ; and in consideration of the assent given by A. B. to the bill, C. D. and E. F. covenanted with him that in the event of the bill being passed, the company should pay him for so much of the land as should be intersected by the railway at the rate of 120*l.* per acre ; and secondly, that they should pay him 3,000*l.* in compensation for the general damage which the line of railway should or might do to the mansion, park, and estate, including therein the crossing of the road near the entrance of the park, the lowering

of the road, the obstruction of views, the expense of temporary residence during the progress of the works, the depreciation in value as a residence, the additional expense in the cultivation of the farms by the alteration of the roads, and all other damage to be done to the mansion and park. Then followed a covenant by A. B. for conveyance of the land on tender to him of 120*l.* per acre, and 3,000*l.*:—Held, per Parke, B., and Platt, B., that upon the passing of the act, C. D. and E. F. were bound by their covenant to pay A. B. 3,000*l.*, although the railway had not been constructed, nor had any actual damage been done to the land; per Pollock, C.B., contra, that the taking of the land or damage done thereto, was a condition precedent to such payment. *Bland* v. *Crowley*, 6 Ex. 522; 6 Railw. Cas. 756; 20 L. J., Ex. 218.

Where a party covenants to pay money "immediately upon demand," the word "immediately" must receive a reasonable construction, so as to allow the debtor time to procure the money; and if the demand is not made by the creditor himself, to inquire into the authority of the person making it to receive the money. *Toms* v. *Wilson*, 4 B. & S. 442; 32 L. J., Q. B. 382; 10 Jur. (N.S.) 201; 8 L. T. 799; 11 W. R. 952—Ex. Ch. *Moore* v. *Shelley*, 52 L. J., P. C. 35; 8 App. Cas. 285; 48 L. T. 918—P. C.

And see BILLS OF SALE (PUTTING IN FORCE).

A declaration stated that A., patentee of machinery for making pipes, granted to B. and his assigns, the exclusive licence to manufacture iron pipes, yielding a royalty of so much for every ton of iron pipes made or sold by B. or his assigns, to be paid within twenty-one days of the end of each quarter, B. covenanting for himself and assigns to render an account in writing, within seven days of the end of each quarter, of the amount manufactured, and to pay, within twenty-one days, the sum which should appear due on the face of the account; that B. transferred his interest in the licence to the plaintiff, who transferred it to M. and R. in trust for the defendants, who were to carry on business as the Welded Iron Tube Company; that the defendants covenanted with the plaintiff to perform the covenants made from B. to A. in the first deed; that the Patent Welded Iron Tube Company made iron tubes, in pursuance of the licence, whereby royalties became due to the plaintiff:—Held, that the declaration was good, although it did not directly aver that any iron pipes were made by B. or his assigns, and that the covenant to render an account was only availing to and did not control the preceding covenant to be implied from the words "to be paid." *Bower* v. *Hodges*, 13 C. B. 765; 1 C. L. R. 807; 22 L. J., C. P. 194; 17 Jur. 1057.

—— **Discretion of Trustees.**]—A deed, after reciting that A. was desirous of securing the payment after his death of the several annuities and the gross sum thereinafter specified, to the several persons thereinafter named, contained a covenant by A. with trustees that if B. should attain the age of twenty-one, either in the lifetime or after the death of A., then the heirs, executors, or administrators of A. should at such time after his death, or after the day on which B. should attain the age of twenty-one, whichever should last happen, as the trustees or the survivors or survivor of them should in their or his uncontrolled discretion think fit, and either in one sum or from time to time in various sums pay to B., or for his use or benefit, any sum not exceeding 300*l.*, without any deduction or abatement whatever. The covenant, as originally drawn, was an absolute covenant for the payment of 300*l.*, but was altered by the direction of the covenantor at the time when he executed the deed. The sum of 300*l.* was the only gross sum mentioned. The trustees proposed to exercise their discretion by paying B. 5*l.*, and expressed their intention of not exercising it further for his benefit:—Held, that the discretion of the trustees was confined to the time at which the sum or sums was or were to be paid to B., and that he was entitled to the full sum of 300*l.* *Palmer* v. *Newell*, 25 L. T. 892.

—— **"Or" in its Disjunctive Sense.**]—The sureties for a railway company covenanted to pay to the trustees for the clearing committee, under the Railway Clearing Act, 1850, such balances and sums as, from time to time, should be settled and adjusted by the secretary of such committee as due from the company, or should be settled or determined by such secretary as the amount to be from time to time contributed to the funds of the clearing system by the company: or should, in case of difference respecting the accounts of the clearing system, be declared by such committee to be the balance or sum payable by the company to the committee; or should in any way become a debt due by the company to the committee pursuant to the act; or should by such secretary be demanded of the company by a written demand in the form given in the schedule to the act; and reciting that it was of paramount importance that the adjustment of such accounts by the clearing system should not be disputed, and should be indisputable, it was, by the deed, declared and agreed that the sureties were not to be at liberty to dispute the amount which should be so settled and adjusted by such secretary, as due from the company to such committee, or which should be settled and determined by such secretary, as the amount to be contributed to the funds of the clearing system by the company; and which should be decided by the clearing committee to be the balance or sum payable by the company; or the amount which should, as aforesaid, be demanded by the secretary; and every such amount should be payable and forthwith paid by the sureties, notwithstanding any error or alleged error in law, in principle, or in fact, and no plea or defence should be admissible, or evidence be necessary or required, in any action or proceedings under the deed which should be admissible or required against the company under the act:—Held, that, construing the words of the covenant according to their obvious and ordinarily reasonable meaning, the demand of the secretary, made in accordance with the terms of the covenant, was alone sufficient to entitle the trustees to sue the sureties for the amount so demanded, it being the manifest intention of the parties that such demand should be conclusive in the matter; and also that the word "or," prefixed to the several alternative clauses in the deed of covenant was meant to have its usual meaning as a disjunctive conjunction, and could not therefore be read in a conjunctive sense as "and." *Benson* v. *Dunn*, 23 L. T. 848.

—— **Covenant by Two—Notice to One.**]—The

defendant and M. covenanted with the plaintiff that they would, upon receiving six months' notice in writing, pay to the plaintiffs two several sums of money. Notice to pay one of the sums was given to the defendant only:—Held, that the notice ought to have been given to both the covenanting parties, and that a notice to the defendant only was insufficient. *Moul* v. *Moul*, 29 L. T. 844.

To Permit.]—Covenant to permit passenger by ship to stow baggage in a particular part of the hold:—Held, that this imported a prior request by the passenger. *Corbyn* v. *Lesler*, 6 Car. & P. 32; 10 Bing. 275; 3 M. & Scott, 751.

That Executors should Assign Residue of Lease.]—A., being possessed of a lease for years, covenanted in a deed for making a family provision, that, if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue to B.; A. afterwards purchased the reversion in fee, and died:—Held, that A. did not, by the terms of the covenant, intend to preclude himself from purchasing the fee, and therefore his executors were not liable upon that covenant. *Williamson* v. *Butterfield*, 2 Bos. & P. 63.

As to Notice from Engineer—Sufficiency of.]—A declaration stated that the plaintiff agreed to construct sewers, lay pipes, build engine-houses, &c.; but the defendant would not suffer him to complete them. Plea, that it was covenanted that the defendant's engineer should have power to direct the way in which various portions of the work should be done, and if it should appear to him that they were not properly executed, and with due expedition, it should be lawful for him to give notice to the plaintiff to alter any improper, or to supply proper materials and labour, and with due expedition to proceed therewith; and if the plaintiff should, within seven days, fail to comply, the engineer might take the work out of his hands; that the engineer gave notice to the plaintiff to supply proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; and that the plaintiff for seven days refused to comply, whereupon the engineer took the work out of the plaintiff's hands. Replication, that the notice to the plaintiff was to supply all proper and sufficient materials and labour for the due prosecution of the work, and with due expedition to proceed therewith:—Held, that the notice was sufficiently specific. *Pauling* v. *Dover Corporation*, 10 Ex. 753; 24 L. J., Ex. 128.

To Build New House.]—A lease contained a covenant on the part of the lessees to build a new house and premises on the site of the demised messuage, which they covenanted to pull down:—Held, first, that the covenant did not involve any obligation to erect the new house in the same manner and in the same style and shape, and with the same elevation as the old building. *Low* v. *Innes*, 4 De G. J. & S. 286.

Held, secondly, that even if it did, the implication would have been rebutted in the case before the court, inasmuch as the covenant stipulated that the new house and premises should be suitable for a purpose to which the old building was not applied. *Ib.*

The lease contained an agreement that such of the windows and lights in the new house and premises as occupied the site of ancient lights were to be considered as and should have all the rights of ancient lights:—Held, that this was merely an agreement between the parties, amounting to an engagement by the lessees that, so far as they were concerned, and so far as they were owners of the adjoining property, the lights of the windows of the new house which should occupy the site of ancient lights should have the character of ancient lights; and that the extent of the covenant must be limited to such rights and such estate and interest as the landlords themselves might possess in the adjoining land. *Ib.*

The lease also contained a provision that certain entrances from the demised messuage and the yard in its rear into an adjoining court and gateway, and the right of carriage way in respect of the messuage through such court, should be preserved:—Held, that the covenant must be construed with reference to the right of way, and the user of the right of way, which had existed as far back as could be traced by evidence in respect of the demised premises. *Ib.*

2. Joint and Several.

What is Joint.]—A covenant with two and every of them is joint, though the two are several parties to the deed. *Southcote* v. *Hoare*, 3 Taunt. 87; 12 R. R. 600.

Where the words of a covenant are expressly joint, it will be so construed, although the interest may be several, and vice versâ; but where the words are ambiguous in this respect, they may be construed to be joint or several according to the interest. *Sorsbie* v. *Park*, 12 M. & W. 146; 13 L. J., Ex. 9.

Where a demise is joint, and the covenants upon which an action is brought are made jointly with both lessors, the cause of action is joint, and both covenantees must sue, although as between themselves their interest may be separate. *Foley* v. *Addenbrooke*, 3 G. & D. 64; 4 Q. B. 197; 12 L. J., Q. B. 163; 7 Jur. 234.

The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only, and therefore the representatives of all the tenants in common must join in suing for a breach. *Thompson* v. *Hakewell*, 19 C. B. (N.S.) 713; 35 L. J., C. P. 18; 11 Jur. (N.S.) 732; 13 L. T. 989; 14 W. R. 11.

But where, subsequently to a demise by one only, the reversion has passed to several as tenants in common, each can sue separately for breach of a covenant running with the land. *Roberts* v. *Holland*, 62 L. J., Q. B. 621; [1893] 1 Q. B. 665; 5 R. 370; 41 W. R. 494.

A covenant with tenants in common, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, to repair, is a joint and not a several covenant; so that an action on it must be brought by all the tenants in common, or the survivors or survivor of them. *Bradburne* v. *Botfield*, 14 M. & W. 559; 14 L. J., Ex. 330.

In consideration of 300*l.*, T. D. and R. D. severally and respectively, and for their several and respective heirs, executors, and administrators, granted, covenanted, and agreed, to and with L. and B., their heirs, executors, administrators, and assigns, to pay to L. and B., their executors, &c.,

one annuity or clear yearly sum of 30*l.* in the shares and proportions following, viz. of 15*l.*, being one moiety of the annuity, unto L., his executors, &c., and 15*l.*, the remaining moiety, unto B., his executors, &c., to be respectively paid quarterly. The powers, for better securing the payment of the annuity contained in the deed, were all given to L. and B. jointly, and the deed also contained a joint power of attorney to them to enter up joint judgment; and a joint power was granted to them to dispose of the reversion of a close of land, with a joint power of attorney to sell certain stock; and the annuity was redeemable, on seven days' notice in writing being given, by the payment to L. and B. of 307*l.* 10*s.* and all arrears of the annuity. In an action by L. against T. D. to recover arrears of the annuity:—Held, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that L. could not sue alone. *Lane* v. *Drinkwater*, 1 C. M. & R. 599; 5 Tyr. 40; 3 D. P. C. 223; 4 L. J., Ex. 32.

By an indenture of lease, reciting that L. had agreed to take premises of C., and that R. should enter into the covenant after-mentioned for securing payment of the rent, it was witnessed, that in consideration of the covenants after-mentioned on the part of L. to be performed, and particularly of the covenant thereinafter entered into by R., C., at the request of R., demised to L., &c. And L. and R. covenanted to C. that they would pay him the rent on the appointed days; and that L., his executors, &c., should and would keep the premises in repair. There were other covenants similarly framed to this last for matters to be performed by L., and a proviso for re-entry if the rent should be in arrear, or if L., his executors, &c., should not perform the covenant in the indenture contained, on his and their part to be performed; and there was a covenant by C. to L. for quiet enjoyment, L., his executors, &c., paying the rent and performing the covenants in the indenture before contained:—Held, that R. was jointly bound with L. by the covenant to repair, as well as the covenant to pay rent. *Copland* v. *Laporte*, 3 A. & E. 517.

In a lease to two joint tenants, the tenants covenanted for themselves, their heirs, executors, administrators, and assigns, that they, or some or one of them, would pay rent and also would repair at his and their own expense:—Held, a joint covenant. *Levy* v. *Sale*, 37 L. T. 709.

A covenant to and with A., his executors, administrators, and assigns, and to and with B., and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, is a joint covenant to A. and B., in which they have a joint legal interest, although the benefit is for A. only; and therefore, on the death of A., the right of action survives to B., and A.'s administrator cannot sue on the covenant. *Anderson* v. *Martindale*, 1 East, 497; 6 R. R. 334.

Not a principle of equity, that every joint covenant shall be considered as if it were joint and several. *Sumner* v. *Powell*, 2 Mer. 30; Turn. & R. 423; 16 R. R. 136.

Joint covenant of indemnity not extended in equity beyond its legal operation, there being no ground on which to infer mistake in the nature of the instrument. and no previous equity entitling the covenantee to a several indemnity from each of the covenantors. *Ib.*

When the obligation exists only by virtue of the covenant, its extent is to be measured only by the words of the covenant; different, where the obligation is independent of the particular contract, as in the cases of partnership debts, bonds, &c. *Ib.*

By Partners.]—The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners:—Held, that the covenant is not to be considered in equity as a joint and several covenant. *Ib.*

A firm of three dissolved partnership, one of them retiring. By the deed of dissolution the two continuing partners covenanted for themselves, their heirs, &c., that they or one of them should pay the outgoing partner certain specified sums:—Held, that this only constituted a joint liability at law, and could not be otherwise construed in equity; and a demurrer to a creditor's bill, filed by the outgoing partner against the executrix of one of the covenantors. who died before the other, was allowed. *Wilmer* v. *Currey*. 2 De G. & Sm. 347; 12 Jur. 847.

Where premises were leased to A. and B., in co-partnership, and upon the death of one, his executors continued to carry on the business on the premises:—Held, that the covenants in terms joint were not to be considered several as well as joint, so as to render the deceased's estate liable for breaches of covenant after his death. *Clarke* v. *Bickers*, 14 Sim. 639; 9 Jur. 678.

What is Several.]—A covenant with the part-owners of a ship, and their several and respective executors, to pay money, to accrue for the hire of the ship, for freight of goods, and for compensation for the use of the ship's tackle, to the covenantees, their and every of their several and respective executors, at a certain banking-house, in such parts and proportions as were set against their several and respective names, is a several covenant, and cannot be sued upon by the covenantees jointly. *Servante* v. *James*, 5 M. & Ry. 299; 10 B. & C. 410; 8 L. J. (o.s.) K. B. 64.

What is Joint and Several.]—In a lease of a colliery, the two lessees covenanted jointly and severally, with the lessor, in manner following, viz. &c.; then followed several other covenants, after which was a covenant that moneys due should be accounted for and paid by the lessees, their executors, &c., not saying, "and each of them":—Held, that this and the former covenants were several as well as joint. *Northumberland* (*Duke*) v. *Errington*, 5 Term Rep. 522; 2 R. R. 666.

The rule as to joint and several covenants is one merely of construction; and parties may, by apt words, convenant severally, although there is a joint interest. If the words are capable of two constructions, then the legal construction will depend upon the nature of the interest. *Keightley* v. *Watson*, 3 Ex. 716; 18 L. J., Ex. 339.

And see post—VII. Action on.—2. b. Joint and Several (col. 1071).

3. ABSOLUTE, OR SUBJECT TO QUALIFICATION, CONDITION, OR ALTERNATIVE.

Qualified—Right to Assign.]—A covenant by the assignor of certain shares in a patent right, that he had good right, full power and lawful authority, to assign and convey the shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have over the same:—Held, that the generality of the former words of the covenant was not restrained by the latter. *Hesse* v. *Stevenson*, 3 Bos. & P. 565.

An assignor of a lease covenanted that he had not at any time done or suffered any act or thing whereby the premises intended to be assigned could be impeached or affected in title or estate; and that for and notwithstanding any such act or thing the lease was a good, valid and subsisting lease, and not forfeited, surrendered, or become void; and that he had in himself good right, full power and authority, to grant, assign, transfer and set over the same to the assignee in manner aforesaid; then followed a covenant for further assurance by the assignor, and all persons claiming under him:—Held, that the general words, that the assignor had full power to grant, assign, and set over, were restrained by the preceding part of the covenant, and therefore that such covenant was confined to the act of the assignor alone. *Foord* v. *Wilson*, 2 Moore, 592; 20 R. R. 554.

—— **Right to Convey.**]—Covenants in an indenture of sale, that the covenantors are seised of a good estate in fee-simple, and have good right to convey, are qualified and restricted by a subsequent covenant for quiet enjoyment by them, their heirs, or other persons claiming under them. *Milner* v. *Horton*, M'Clel. 647.

A., after granting premises in fee to B., and after warranting the same against himself and his heirs, covenanted that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and that he had full power to convey the same; he then covenanted for himself, his heirs, executors and administrators, to make a cartway, and that B. should quietly enjoy without interruption from himself or any person claiming under him; and lastly, that he, his heirs, and assigns, and all persons claiming under him, should make further assurance:—Held, that the intervening general words "full power to convey," were either part of the preceding special covenant or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. *Browning* v. *Wright*, 2 Bos. & P. 13; 5 R. R. 521.

Where a settlor, in the settlement executed on the marriage of his son, enters into absolute covenants for title with the father of the lady, and lower down in the same deed enters into qualified covenants for title to the same lands with the trustees of the settlement. Semble, that the latter covenants restrain the generality of the former, although entered into with different persons. *Martyn* v. *Macnamara*, 2 Con. & L. 541; 4 Dr. & War. 111.

A father, seised of lands under a lease for three lives, by a deed reciting that he was seised in fee, or of some other sufficient estate of inheritance, conveyed them, upon the marriage of his son, in strict settlement, by words applicable to lands held in fee simple; and the father and son covenanted that the lands should continue, remain, and be for ever thereafter to the uses of the settlement, and that free from all former gifts, grants, titles, and incumbrances made or suffered by the father and son, or either of them:—Held, first, that these two covenants, for quiet enjoyment and freedom from incumbrances, were so connected, grammatically, that the general words of the former were limited and contracted by the restrictive expressions in the latter. *Thompson* v. *Thompson*, Ir. R. 6 Eq. 113. And see *Robinson* v. *Ommanney*, 52 L. J., Ch. 440; 23 Ch. D. 285; 49 L. T. 19; 31 W. R. 525.

Held, secondly, that, in the absence of evidence of fraudulent intention on the part of the settlor, the error in the recital did not amount to such misrepresentation as would entitle the eldest son of the marriage to compensation out of his grandfather's assets. *Ib.*

By an indenture reciting a power vested in A. B. to dispose of premises, and that C. D. had contracted to purchase them, A. B. appointed and conveyed them to the use of C. D., and his heirs and assigns, and covenanted that the power in A. B. was then in force and not executed: and also that he, A. B., then had in himself good right, title, power, and authority to limit and appoint, and to grant, bargain, sell, &c., the premises to the said uses; and also that the premises should be held and enjoyed to the said uses, without the let or interruption of A. B., or any claiming under or in trust for him; and also for further assurance by A. B. and all so claiming:—Held, that the second covenant was absolute, for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words, either in the second covenant itself, or in preceding or subsequent ones, to connect it with them. *Smith* v. *Compton*, 3 B. & Ad. 189; 1 L. J., K. B. 43.

—— **To Pay—Not to Sue.**]—A. agreed to purchase an estate from B. for 46,000*l.*, and covenanted to pay the purchase-money by instalments at the times and subject to the provisoes, and in the manner thereinafter expressed, that is to say, 168*l.* on every 24th of June and the 24th of December until 1884, the first instalment to be paid on the 24th of June, 1855, and that in case either of the instalments should not be paid upon the day appointed, or within one month after, A. would pay B. interest to be computed from the 24th June or the 24th December, as the case might be, upon which the instalment should have become payable; provided that no instalment payable pursuant to the covenant should be recoverable or capable of being enforced, nor should any proceedings for that purpose be commenced until after the expiration of one month from the day upon which the same should have become payable:—Held, that the proviso that no action should be brought for a month did not operate merely as a covenant not to sue, but that the effect was to extend the period for payment for one month, and therefore that no action was maintainable until the month had expired. *Foley* v. *Fletcher*, 3 H. & N. 769; 28 L. J., Ex. 100; 5 Jur. (N.S.) 342; 7 W. R. 141.

—— **Effect of word "Whilst."**]—A lessor, after a demise of premises, with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself whilst the same should remain

there, paying half the expenses of the repairs." The words "whilst," &c., reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant, though he removes it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump. *Rhodes* v. *Bullard*, 7 East, 116; 3 Smith, 173.

—— **Extent of Covenant to pay Royalties on Coal.**]—A lessee of a coal mine, who covenants to pay a certain share of all such sums of money as the coal should sell for at the pit's mouth, is not liable under that covenant to pay to the lessor any part of the money produced by sale of the coals elsewhere than at the pit's mouth. *Clifton* v. *Walmesley*, 5 Term Rep. 564. S. P., *Gerrard* v. *Clifton*, 1 Bos. & P. 524; 7 Term Rep. 676.

—— **Reservation of Right to Work for Coal.**]—A. conveyed to B. in fee a messuage, buildings, yards, gardens, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the lands and hereditaments, with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains necessary for working the coal; except as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead:—Held, that the seller thereby reserved to himself the right to dig coals under the messuage, buildings, and homestead, and within 150 yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains, within 150 yards of the messuage or buildings, or within the homestead. *Bowler* v. *Walley*, 15 East, 444.

—— **By Lessee Under-letting, to Enforce Covenants by his Lessor.**]—A railway company leased to R. refreshment-rooms, with a covenant, that certain trains should stop there: R. demised the premises to G. That lease, after reciting the deed by which the premises were demised to R., contained a covenant that R. would, during the continuance of the term, do all such acts and things as should be necessary and proper for enforcing the fulfilment and performance of the covenants for giving G. the full benefit and advantage of the refreshment-rooms, as fully as if G. was the assignee of the covenants, and that it should be lawful for G., in the name of R., to bring, commence or prosecute any action, suit or other proceeding whatsoever, for enforcing the fulfilment and performance of the covenants on the part of the company, or for recovering damages and compensation for the non-performance or non-fulfilment of the covenants, or any of them, G. indemnifying R. from and against all costs, charges and expenses to be incurred or defrayed in or about any such action, suit or other proceeding. G. entered upon the premises, but by order of the company express trains passed the station where the premises were without stopping, in consequence of which G. sustained a loss. Of this breach of covenant R. had due notice, and was thereupon requested by G. to file in his own name, and at his own risk and costs, a bill in chancery, to restrain the company from directing or permitting, except in particular cases, express trains from passing the refreshment-rooms without stopping for the prescribed time:—Held, that, assuming filing such bill to be a necessary and proper act, R. was bound to file such bill, and that the latter stipulation, empowering G. to sue in the name of R., did not limit or qualify the general covenant, and, therefore, he was liable for not filing such bill. *Rigby* v. *G. W. Ry.*, 4 Ex. 220; 18 L. J., Ex. 404.

—— **By Lessee to Repair.**]—A general covenant to repair and a covenant to repair within three months after notice from the lessor are separate and independent covenants, and a right of re-entry attaches for a breach of the former, though no notice is given under the latter. *Baylis* v. *Le Gros*, 4 C. B. (N.S.) 537; 4 Jur. (N.S.) 513. S. P., *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520; *Wood* v. *Day*, 7 Taunt. 646; 1 Moore, 389.

And the giving of a notice "to repair in accordance with the covenants," or "forthwith," is no waiver of a breach of the general covenant, so that ejectment can be brought before the expiration of three months, though the notice has been given. *Few* v. *Perkins*, 36 L. J., Ex. 54; L. R. 2 Ex 92; 16 L. T. 62; 15 W. R. 713. *Roe* d. *Goatly* v. *Paine*, supra.

But the giving of a notice to repair in three months is a waiver of a breach of the general covenant. *Doe* d. *Morecroft* v. *Meux*, 4 B. & C. 606; 1 Car. & P. 346; 7 D. & R. 98; 4 L. J. (O.S.) K. B. 4. S. P., *Doe* d. *De Rutzen* v. *Lewis*, 5 Ad. & E. 277; 6 N. & M. 764; 5 L. J., K. B. 217.

A covenant by a lessee to repair at all times (as often as need or occasion should require), "and at farthest within three months after notice," is one entire covenant, the former part of which is qualified by the latter. *Horsfall* v. *Testar*, 1 Moore, 89; 7 Taunt. 385.

Conditional—To Pay.]—By a deed, which recited that the defendant was executor of the will of B., and that the plaintiff and his brothers were entitled each to a legacy of 3,000*l.*; and that the assets were insufficient to satisfy the legacies; and that the plaintiff had lately entered into a partnership, and had thereupon undertaken to pay two sums of money, on the 15th March and on the 15th December; and that the plaintiff and his mother had requested the defendant to advance the plaintiff those sums out of the estate before those days; the defendant covenanted that he would, on on before those days, pay to the plaintiff, "by and out of the assets of B. deceased," the sums required; and the plaintiff, in consideration thereof, agreed that he would, on the 1st November, execute a release and indemnity to the defendant, in respect of all matters connected with the will; and that in case the plaintiff's share of and in the assets of B., should not amount to the sum to be advanced, the plaintiff would pay the defendant the difference, and indemnify him against all loss, and against all actions by other legatees, by reason of the payment to him; and the plaintiff's mother, upon the same consideration, agreed to release to the defendant the payment of part of an annuity due to her under the will:—Held, that notwithstanding the words "by and out of the assets," the covenant of the defendant was absolute, and not contingent or conditional upon the existence of assets at the days appointed for the payment of the money. *Bain* v. *Kirk*, 18 L. J., Q. B. 83; 13 Jur. 559.

The directors of a mining company agreed by deed to purchase a mine, the purchase-money to be paid within twelve months by instalments "out of the moneys to be raised by the company," with a proviso, that, in case they should not have received the deposits from the shareholders, so as to enable them to pay the money by the time

stipulated for, the directors should be allowed a further time of six months; and they covenanted that they would, out of the payments so to be made by the subscribers or shareholders in the company, pay the purchase-money, according to the terms and at the times before specified, subject to the proviso:—Held, that this was a personal undertaking on the part of the directors to pay at the expiration of the additional six months. *Hancock* v. *Hodgson*, 4 Bing. 269; 12 Moore, 504; 5 L. J. (O.S.) C. P. 170.

By a deed of separation, after reciting an agreement by the husband to allow the wife 250*l.* out of his salary as a searcher of his Majesty's customs, the husband covenanted generally to pay her 250*l.* per annum during her life; the covenant is controlled by the recital, and dismissal from the office of searcher justifies non-payment of the annuity. *Hesse* v. *Albert*, 3 M. & Ry. 406.

Where a party covenanted that so long as he should continue and be in actual receipt of the profits of a rectory, he would pay a yearly sum during the life of the rector, by two half-yearly payments:—Held, a covenant for the payment of such yearly sum, whilst he is in receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits *Combe* v. *James*, 2 Chit. 700.

A railway company promoting in parliament a bill for the extension of their line, which, if made, would go through the lands of the plaintiff, covenanted with him, "that, in the event of the proposed bill passing in the then session of parliament, the company should, before entering upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding 43 acres, which the company might, under the powers of their act, require and take for the purpose of their undertaking; and that, in addition to the purchase-money, the company should pay to the plaintiff, before they should enter upon any part of the land, 7,100*l.* as landlord's compensation for the damage arising to his estate by severance in respect of the lands, not exceeding 43 acres, to be taken by them":—Held, that the company was not liable to pay either of these sums, unless they entered upon some part of the lands. *Gage* v. *Newmarket Ry.*, 21 L. J., Q. B. 398; 16 Jur. 1136; 18 Q. B. 457.

In a deed by which A. assigned to B., for a term of years, an exclusive licence to use a patent, after covenants for payment of sums in the nature of royalties, there was the following clause: "that if it shall happen in any year during the term that the royalties or sums of money covenanted to be paid shall not amount to 2,000*l.*, then B. shall within fourteen days after the expiration of any year in which it shall so happen, pay to A. such a sum of money as with the royalties will amount to 2,000*l.* for that year; or if B. shall at any time make default in payment of such sum within the time appointed for payment, then it shall be lawful to and for A., by writing signed by him, and indorsed on the deed or a duplicate thereof, to declare that the deed, and the licence and power thereby granted, shall cease and determine":—Held, that this was not an absolute covenant by B. to pay 2,000*l.* a year during the term, but only empowered A. to put an end to the grant upon non-payment of that sum. *Tielens* v. *Hooper*, 5 Ex. 830; 20 L. J., Ex. 78.

Alternative.]—A covenant by a lessee of a farm that he would consume on the premises the crops grown thereon; but that in case he should sell any of the crops, which he should be at liberty to do, he would bring to the premises an equivalent amount of manure, is an alternative covenant, and not an absolute covenant followed by a proviso. *Richard* v. *Bluck*, 6 D. & L. 325; 6 C. B. 437.

4. Dependent or Independent.

Generally.]—Where a covenant is part only of the consideration on one side, it is an independent covenant and not a condition precedent. *Carpenter* v. *Cresswell*, 4 Bing. 409; 1 M. & P. 66; 6 L. J. (O.S.) C. P. 27; 29 R. R. 587.

Where, in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action for the penalty by A. against B., on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant, which goes to the whole consideration. *St. Albans* (*Duke*) v. *Shore*, 1 H. Bl. 270.

Where anything is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done. *Campbell* v. *Jones*, 6 Term Rep. 571; 3 R. R. 263.

But it is otherwise where the covenants are independent of each other. *Ib.*

If one party covenants to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant. *Bone* v. *Eyre*, 2 W. Bl. 1312. *S. C.* nom. *Boone* v. *Eyre*, 1 H. Bl. 273, n.; 2 R. R. 768.

But where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. *Ib.*

If one covenants with another to do a certain act in consideration of a reward, and the other prevents the stipulated thing from being literally performed, and accepts of an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms may be averred. *Hotham* v. *East India Co.*, 1 Dougl. 272.

Where a deed contains two covenants which cannot both be performed, they are dependent covenants. *Hemans* v. *Picciotto*, 1 C. B. (N.S.) 646; 26 L. J., C. P. 163; 5 W. R. 322.

To Pay Captain of Whaler a Percentage.]—The captain of a South Sea whaler covenanted with the defendant that he would proceed to the fishery and procure a cargo of sperm oil, or as great a proportion as might be, under all circumstances, within his power to obtain; would return to London, and at his own cost deliver the cargo; would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same; and would not smuggle or trade, or permit anyone on board to do so. The defendant covenanted, on performance of the before-mentioned terms and conditions on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo:—Held, that the captain's covenants were independent, and that the performance of them was not a condition precedent to an action on the defendant's covenant. *Stavers* v.

Curling, 3 Bing. (N.C.) 355 : 3 Scott, 740 : 2 Hodges, 237 ; 6 L. J., C. P. 41.

Covenant to erect Buildings within certain Time.]—A. covenanted to build a house for B., and finish it on or before a certain day, in consideration of a sum of money, which B covenanted to pay A. by instalments, as the building should proceed. The finishing the house is not a condition precedent to the payment of the money, but the covenants are independent : A. therefore may maintain an action against B. for the whole sum, though the building was not finished at the time appointed. *Terry* v. *Duntze*, 2 H. Bl. 389 ; 3 R. R. 423.

In an action against sureties on an indenture, in which the principal covenanted that for a certain sum he would, "on the execution of these presents," commence and forthwith erect, and in three months complete, certain works to the satisfaction of the engineer of the plaintiff, and complete it by a certain day, or pay so much a day as liquidated damage for delay beyond that time, and the sureties covenanted that he should perform his covenants, and that on his default they would pay the plaintiff such sum of money (as liquidated damages) as the engineer should adjudicate to be reasonable :—Held, that the principal was bound to commence so soon as he had executed the deed, although the plaintiff had not executed it. *Northampton Gas Light Co.* v. *Parnell*, 15 C. B. 630 ; 3 C. L. R. 409 ; 24 L. J., C. P. 60 ; 1 Jur. (N.S.) 211 ; 3 W. R. 179.

A declaration stated that the plaintiff demised a dwelling-house and premises to the defendant, and the defendant covenanted that he would expend 100*l.* in substantial improvements of, and additions to, the dwelling-house under the direction and with the approbation of a competent surveyor, to be named by and on the part of the plaintiff. Breach, that the defendant did not expend the money on substantial improvements of and additions to the dwelling-house, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the plaintiff, but neglected and refused so to do, although the plaintiff was always ready and willing to appoint a competent surveyor to approve of such substantial improvements and additions :—Held, that the breach was bad, for that the appointment of a surveyor was a condition precedent to the defendant's liability to expend the 100*l.* *Coombe* v. *Green*, 11 M. & W. 480 ; 2 D. (N.S.) 1023 ; 12 L. J., Ex. 291. S. P., *Lawton* v. *Sutton*, 9 M. & W. 795 ; 11 L. J., Ex. 314 ; *Hunt* v. *Bishop*, 8 Ex. 675 ; 22 L. J., Ex. 337.

A declaration stated that the defendant covenanted that she would, within eighteen months from the date of the deed, erect certain buildings, "the whole of which were to be left to the superintendence of the plaintiff and the defendant's son." The breach was, that though the eighteen months had expired, the defendant had not erected the buildings :—Held, that the declaration was good, although it contained no averment that the plaintiff was ready and willing to superintend the erection of the buildings, for that the covenant to erect the buildings was an absolute covenant ; and the clause respecting the superintendence merely granted the liberty for the parties to superintend, but did not impose any duty, so as to make the superintendence a condition precedent or concurrent. *Jones* v. *Cannock*, 3 H. L. Cas. 700 ; 5 Ex. 713 ; 19 L. J., Ex. 371—Ex. Ch.

Covenant to supply Goods.]—By an agreement under seal, after reciting that the plaintiff had erected a factory and works on land belonging to the defendants, for the purpose of carrying on the manufacture of patent fuel, and that the defendants had made advances to the plaintiff, towards their erection, and had agreed to grant a lease of the land and buildings to the plaintiff, "and to enter into certain other arrangements for the supply of coal for the manufactory and otherwise, on the terms and conditions thereinafter mentioned," it was agreed that the defendants should grant a lease of the land and buildings to the plaintiff for the term of twelve years from the 25th March last, at a peppercorn rent, and that immediately on such lease being granted, the plaintiff should mortgage the same to the defendants as a security for their advances ; that all the coal consumed and used by the plaintiff for the purpose of his manufacture during the term should be bought of the defendants, provided that they could and should supply him with the quantity that should from time to time be required by him, or to such extent as they could supply, and that they should charge for the same a certain price, and no more ; and that the plaintiff should use and consume no other coal at the factory during the term than that which was bought and purchased of the defendants, except in the event of the plaintiff requiring more coal than they could and should supply him with ; that they should not be compelled to supply more than 500 tons per week ; and that in case they should, from some substantial cause, be unable to supply small coal to the extent agreed upon, the defendants should give to the plaintiff six months' notice of the same, and the plaintiff should then be at liberty to obtain his supply from any other source ; that in the lease to be granted there should be covenants by the plaintiff not to use the premises for any other purpose than for the manufacture of patent fuel ; and that the agreement, to be determinable as aforesaid, should continue for the term of twelve years. In an action for breach of the implied covenant by the defendants in the agreement to supply 500 tons of coal to the plaintiff weekly :—Held, first, that the granting of the lease by the defendants was not a condition precedent to the plaintiff's right to the coal. *Wood* v. *Copper Miners Co.*, 14 C. B. 428 ; 2 C. L. R. 1735 ; 23 L. J., C. P. 209 ; 1 Jur. (N.S.) 65.

Held, secondly, that the inability of the defendants to supply the coal did not exonerate them from liability on the covenant, unless the six months' notice had been given according to the agreement. *Ib.*

Held, thirdly, that the covenant of the defendants was limited to the supply of coal for the purpose of the patent fuel manufacture. *Ib.*

A railway company covenanted with the defendant to purchase, and the defendant covenanted to supply, all the coke required by the company for working their lines, the company to take and the defendant to supply, for seventeen years, 550 tons of coke per week at B. and 100 tons per week at C., at least. If the company should require more coke, it engaged to take the same from the defendant, and if the consumption should be materially diminished, the company was to give three months' notice to the defen-

dant :—Held, that the covenant by the company to take all it required was not a condition precedent to the defendant's liability to supply, but that the covenants were independent. *Eastern Counties Ry.* v. *Philipson*, 16 C. B. 2 ; 24 L. J., C. P. 140.

A gas company covenanted with a vestry to supply the parish with gas, and to light the lamps in the public streets and places every night at sunset, and keep them alight till sunrise, and to pay a penalty of 2*s.* 6*d.* upon each lamp for every day upon which they were neglected to be lighted, the vestry covenanting, on the performance of the before-mentioned terms and conditions on the part of the company, to pay them 4*l.* 10*s.* per annum for each lamp :—Held, that the covenants of the company were independent, and that the performance of them was not a condition precedent to an action on the covenants of the vestry. *London Gas Light Co.* v. *Chelsea Vestry*, 8 C. B. (N.S.) 215 ; 2 L. T. 217 ; 8 W. R. 416.

By a deed of the 19th of December, 1837, in consideration of 258.629*l.* 10*s.* 6*d.*, the plaintiff covenanted to make and complete a portion of a railway, and to provide bars or rails and chairs, on or before the 1st of May, 1840 : and by another deed of the 23rd of March, 1839, in consideration of 15,000*l.*, the plaintiff covenanted that he, being provided by the defendants with railway bars or rails and chairs for temporary and permanent use, would complete the portion of the railway, and the line of the permanent railway, on or before the 1st of June, 1840, provided, that, if plaintiff should not complete the railway by the 1st of June, 1840, he should pay to the defendants 3,000*l.* for the 1st of June, and the like sum for every succeeding day, until the whole should have been completed, but so that the total amount to become forfeitable should not exceed 15,000*l.* Breach, that the defendants detained from and did not pay plaintiff 20,000*l.*, parcel of the sum due to the plaintiff. Plea, that 7,500*l.* is parcel of the 15,000*l.* agreed to be retained by defendants ; that plaintiff did not complete the railway on or before the 1st of June, 1840, nor until twenty-four days after, whereby plaintiff became liable to pay to defendants 3,000*l.* for the 1st day of June, and the like sum for every such succeeding twenty-four days during which the railway remained incomplete, by reason of which defendants deducted and retained 7,500*l.* out of the moneys payable by them to plaintiff. At the trial it was proved that plaintiff did not finish the railway until twenty-four days after the 1st of June, but that defendants had not provided plaintiff with the bars, rails and chairs in sufficient quantity to enable him to complete it by that day. The judge told the jury that defendants were bound, as a condition precedent to their right to deduct the 7,500*l.*, to furnish plaintiff with such bars, rails and chairs :—Held, that that was a misdirection ; that the covenants were independent ; and that the furnishing of the bars, rails and chairs was not a condition precedent to the right of defendants to make the deduction ; and that the only question being, whether the railway was completed on the 1st of June, the plea was established. *Macintosh* v. *Midland Counties Ry.*, 14 M. & W. 548 ; 3 Railw. Cas. 780 : 14 L. J., Ex. 338.

Covenant for Sale of Land.]—A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on the day, and on failure to pay 21*l.* :—Held, that they were dependent covenants, and that A. could not recover the 21*l.* without showing a conveyance on his part, or a tender of one. *Goodison* v. *Nunn*, 4 Term Rep. 761.

On an agreement for the sale of lands, the vendee covenanted to pay the purchase-money on a day certain, for and as the consideration of such sale and purchase, with interest from a day certain to the time of the completion of the purchase :—Held, that the covenant by the vendee was an independent covenant, and that the vendor might recover the purchase money without tendering a conveyance. *Mattock* v. *Kinglake*, 2 P. & D. 343 ; 10 A. & E. 50 ; 8 L. J., Q. B. 215 ; 3 Jur. 699.

A. covenanted to sell to B. a schoolhouse, and to convey the same to him on or before the 1st of August, 1797, and to deliver up the possession to him on the 24th of June, 1796 ; and in consideration thereof, B. covenanted to pay A. 120*l.* on or before the said 1st of August, 1797 :—Held, that the covenant to convey, and that for the payment of the money, were dependent covenants ; and that A. could not maintain an action for the 120*l.*, without averring that he had conveyed, or tendered a conveyance, to B. *Glazebrook* v. *Woodrow*, 8 Term Rep. 366 ; 4 R. R. 700.

A deed executed by the plaintiff and defendant, after reciting that a company had been formed for constructing a railway which would pass through the plaintiff's estate, and that an application to parliament for an act of incorporation was pending, contained a covenant by the defendant, that within six months from the time of the passing of the proposed bill, and before the company should enter upon, take or use the estate, except for setting out and ascertaining the land required, the defendant should pay to the plaintiff 4,000*l.* for the purchase of the estate. There was also a covenant, that, on payment by the defendant of the 4,000*l.*, and interest from the expiration of six months after the passing of the bill to the day of payment of that sum, the plaintiff should convey to the defendant so much of the estate as should be required for the construction of the railway :—Held, that the covenant to pay the purchase-money and that to convey the property were independent covenants. *Sobthorp* v. *Brunel*, 3 Ex. 826.

By an indenture between A. and B. and his wife, of one part, and D. and E. of another part, it was recited that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he, F., giving sureties, namely the said D. and E., for payment of an annuity to B.'s wife ; and it was witnessed that in consideration of the covenants thereinafter entered into by A. and B. and his wife, and of 10*s.*, the said D. and E., and each of them, covenanted with A. and B. to pay the annuity. There followed covenants by A. and B. severally for quiet enjoyment, and for executing an assignment to F. when required. In an action brought by A. and B. for breach of the covenant to pay the annuity :—Held, that the covenant to pay the annuity and those for quiet enjoyment and for assigning were not mutual and dependent. *Rose* v. *Poulton*, 2 B. & Ad. 822 ; 1 L. J., K. B. 5.

Covenants in Deed of Apprenticeship.]—To an action on an indenture of apprenticeship for a breach of covenant by the master in not

instructing the apprentice and providing him with food and lodging, he pleaded that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service, whereupon he dismissed him.—Held, that the covenants in the indenture were independent covenants, and consequently the plea was bad. *Phillips* or *Philps* v. *Clift*, 4 H. & N. 168; 28 L. J., Ex. 153; 5 Jur. (N.S.) 74; 7 W. R. 295.

Covenant as to Cultivation of Farm.]—By an indenture a plaintiff covenanted with the defendant to deliver up a farm on a certain day, and in the meantime to cultivate it on the four-course system, and that on the surrender he would deliver up an agreement to be cancelled, and would surrender all his unexpired term and interest in the farm: and if the defendant required, he would at any time afterwards execute any deed for further assurance; and the defendant covenanted that if the plaintiff did deliver up the farm, and in the meantime cultivate the farm on the four-course system, and perform and keep all and singular other covenants, the defendant would upon the delivering up of the farm, pay for the manure:—Held, that the delivering up of the agreement was not a condition precedent to the plaintiff's right to sue on the covenant to pay for the manure. *Newson* v. *Smythies*, 3 H. & N. 840; 28 L. J., Ex. 97.

To give Bond.]—A. entered into a contract with B., by which A. was forthwith to bring a vessel alongside a particular wharf, and within seven days of his doing so, B. was to pay 1,000*l*., a further sum of 2,000*l*. in twenty-one days afterwards, and 2,000*l*. on the ship arriving at the Nore. Certain penalties were to be payable by A. for non-performance of the specified acts. There were several other stipulations, and after all came a covenant by which "for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties which he might incur under these presents, A. and two responsible sureties were, within ten days from the execution of these presents, to execute a bond to B. in the penal sum of 5,000*l*." There was a covenant in exactly similar terms on the part of B. The giving of the bond was not to prejudice their mutual rights and liabilities under the agreement:—Held, that the covenant to give the bonds was a condition precedent, so that, on B.'s refusal to allow A. to ship the cable, A., who had not given his bond, could not maintain an action for damages in respect of such refusal. *Roberts* v. *Brett*, 11 H. L. Cas. 337; 34 L. J., C. P. 241; 11 Jur. (N.S.) 377; 12 L. T. 286; 13 W. R. 587.

The covenants to give the bonds were not mutual and dependent. The fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract. *Ib.*

Sale of Surgical Practice—Covenant to Introduce Patients.]—A declaration stated that the plaintiff and the defendant agreed to enter into partnership as surgeons, until the 1st of January, 1846, for certain considerations therein mentioned; and that it was agreed that the plaintiff should, after the 1st of January, 1846, introduce the defendant to the patients as his successor in business, and use his best endeavours to establish him in it, in consideration whereof the defendant covenanted to pay a further sum of 50*l*., on the 25th of March, 1846, in addition to another sum covenanted to be paid. Breach, non-payment of the 50*l*. A plea, that, after the 1st of January, 1846, and before the 25th of March, 1846, the plaintiff refused to introduce the defendant as the plaintiff's successor, wherefore the defendant refused to pay the 50*l*., is bad, as the introduction to the patients was an independent covenant, and not a condition precedent to the payment of the 50*l*. *Judson* v. *Bowden*, 1 Ex. 162; 17 L. J., Ex. 172. S. P., *Cutler* v. *Bower*, 11 Q. B. 973; 17 L. J., Q. B. 217; 12 Jur. 721.

Sale of Coal Mine—Pro Rata Payment.]—A declaration stating that the plaintiff conveyed all the coals and mines of coal within and under certain premises to the defendant; that the defendant covenanted to pay 40*l*. for every statute acre of coal which should be found, and that he would, till the consideration-money should be paid, pay 40*l*. annually by half-yearly instalments commencing from the date of the deed, whether a whole acre should have been gotten in any such year or not, and that, at the time of making the deed, there had been, and still was, coal within and under the premises, and that two half-yearly instalments were in arrear, is good, and the finding of coal is not a condition precedent to the payment. *Jowett* v. *Spencer*, 1 Ex. 647; 17 L. J., Ex. 367—Ex. Ch.

In Partnership Dissolution Deed.]—By indenture of dissolution of a partnership, the defendant, in consideration of the covenant therein contained on the part of the plaintiff, assigned to the plaintiff certain shares in a foreign gas company, which by the deed were recited to pass by the delivery of the certificates, and covenanted with him for further assurance; and by the same indenture the plaintiff, in consideration of such assignment, covenanted to indemnify the defendant against certain partnership debts. Upon the execution of the deed the certificates of the shares were handed over to the plaintiff, but certain formal acts required to be done by the law by which the company was regulated, before the property in the shares could be effectually vested in the plaintiff, were not performed:—Held, that inasmuch as, upon the construction of the whole deed, the plaintiff's covenant of indemnity and the defendant's covenant as to the shares were legally independent of each other, a breach of the covenant of indemnity by the plaintiff, subsequent to the execution of the deed, did not constitute a ground of defence to a bill by the plaintiff for the specific performance by the defendant of the covenant for further assurance, by performing the formal acts necessary to be done in order effectually to vest the property of the shares in the plaintiff. *Gibson* v. *Goldsmid*, 3 Eq. R. 106: 24 L. J., Ch. 279; 1 Jur. (N.S.) 1; 3 W. R. 79.

In Marriage Settlement.]—When the fathers of intended husband and wife mutually covenanted to settle certain property in consideration of intended marriage, and of performance of covenant of the other party, but in the recitals the intended covenants were each of them spoken of without reference to the other, and the covenants for the title were also in form independent:—Held, on a suit by one of the children of the marriage, that the covenants were not dependent on each other; but it was said by the court, that

covenants in marriage articles might be made dependent on each other, if the intention were clearly expressed. *Lloyd* v. *Lloyd*, 8 Sim. 7; 5 L. J., Ch. 191.

In Separation Deed.]—Covenants in a separation deed, by which respectively the husband has covenanted to pay an annuity to a trustee for the wife, and the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore a breach of the covenant that a wife shall not molest the husband, is not an answer to an action for the annuity. *Fearon* v. *Aylesford (Earl)*, 54 L. J., Q. B. 33; 14 Q. B. D. 792; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A.

5. Repugnant.

Proviso as to Personal Liability.]—A plaintiff covenanted with A., B., C., D., churchwardens and overseers of a parish, to do work and repairs; and A., B., C., D., in consideration thereof, for themselves and their successors, covenanted with the plaintiff, that they, the churchwardens and overseers, their successors and assigns, should and would pay the plaintiff 1,169*l.*, at certain times specified. The deed contained a proviso, that nothing therein contained should extend, or be construed to extend, to any personal covenant, or affect A., B., C., D., or any of them, in their private capacity:—Held, that the proviso was void, as repugnant to the covenant, and that the churchwardens and overseers were personally liable on it. *Furnivall* v. *Coombes*, 6 Scott (N.R.) 522; 5 Man. & G. 736; 12 L. J., C. P. 265; 7 Jur. 399. S. P., *Uthwatt* v. *Elkins*, 13 M. & W. 772; 14 L. J., Ex. 131.

A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid. *Williams* v. *Hathaway*, 6 Ch. D. 544.

By two contemporaneous building contracts made in 1868 between a builder of the one part, and C., vicar of the parish of St. Pancras, and A., incumbent of an ecclesiastical district within the parish, of the other part; after reciting that, under an act creating the district, C., or the vicar for the time being of St. Pancras, in conjunction with A., or the incumbent for the time being of the district, were to apply a fund, payable to them by a railway company, in building a church and parsonage for the district: it was witnessed that in consideration of sums amounting together to the whole of the available building fund, to be paid to the builder by C. and A., "their executors or administrators, or the person or persons for the time being entitled to apply the fund under the act," the builder agreed with C. and A. "and with such person or persons as aforesaid," and C. and A., "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did agree with the builder": then followed provisions under which he was to build the church and parsonage in accordance with plans and specifications; and a clause stipulating that the consideration moneys should be paid in manner provided by the specifications. The specifications provided for monthly payments on account of the contracts: also, that the architect might order additional works: and that payments for additional works were to be made on the completion of the entire works. In June, 1869, C., having obtained preferment, ceased to be vicar of St. Pancras, by which time the whole of the building fund had been exhausted. The buildings were completed in June, 1870. In February, 1875, C. died, whereupon the builder brought an action against the executors to recover a sum alleged to be due for extras under the contracts:—Held, first, that the liability of C. and A. respectively under the contracts was restricted to the period during which they were respectively vicar and incumbent, and therefore that C.'s liability terminated on his ceasing to be vicar. *Ib.*

Held, secondly, that in any case the liability of C. and A. extended only to the amount of the building fund, and no further. *Ib.*

One who covenants for himself, his heirs, executors, and administrators, and under his own hand and seal, for the act of another, will be personally bound by his covenant, though he describes himself in the deed as covenanting for and on the part and behalf of such other person. *Appleton* v. *Binks*, 5 East, 148; 1 Smith, 361; 7 R. R. 672.

Obnoxious to the Rule against Perpetuities.]—A. conveyed land to B., reserving the minerals, and covenanted that in case he, his heirs, or assigns, should at any time sell the minerals under the adjoining land, he, his heirs or assigns, would offer to B. his heirs or assigns, the reserved minerals at the same price per acre:—Held, that the covenant was not obnoxious to the rules against perpetuities, and the offer must be made in writing. *Birmingham Canal Co.* v. *Cartwright*, 48 L. J., Ch. 552; 11 Ch. D. 421; 40 L. T. 784; 27 W. R. 597. See *McLean* v. *McKay*, L. R. 5 P. C. 327; post, col. 1049. But see *L. & S. W. Ry.* v. *Gomm*, 51 L. J., Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620.

Limiting Power of Alienation.]—A covenant prohibiting alienation, except to a certain specified and limited class, and reserving a penal rent for the breach of the covenant, is repugnant to the nature of an estate in fee simple. *Morris* v. *Morris*, Ir. R. 6 C. L. 73.

A covenant in a fee farm grant of 1858, that the grantee, his heirs and assigns, might assign, sublet, or otherwise part with the possession of the demised premises, provided he did not divide them into more than four divisions or lots, unless with the consent in writing of the grantor, his heirs and assigns, is absolutely void and inoperative, as being repugnant to the free power of alienation necessarily implied by the fee farm grant. *Lunham, In re*, Ir. R. 5 Eq. 170.

6. Uncertain.

To accept a Reasonable Composition.]—Lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for 12 years, but to accept a reasonable composition, not exceeding 3*s.* 6*d.* per acre, and thereto bound himself and his assigns; his under-lessee sued (in the name of a trustee, to whom he had nominally, again under-leased) for tithes in kind against the tenant of the land, and had a decree; such an agreement is void, for the un-

certainty of the sum to be paid. *Brewer* v. *Hill*, 2 Anstr. 413; 3 R. R. 596.

To Settle after-acquired Property—Value in Blank.]—A party to a deed of family arrangement thereby covenanted, that if he should at any time become entitled to property exceeding the value of —— (which was left in blank), he would settle it upon certain specified trusts. Before any such property accrued, or the persons entitled under the trusts were ascertained, he filed a bill to have it declared that the covenant was void for uncertainty. Semble, that there was no such uncertainty as to render the covenant void. *Fyfe* v. *Arbuthnot*, 1 De G. & J. 406: 26 L. J., Ch. 646; 3 Jur. (N.S.) 651; 5 W. R. 793.

To Plant and Preserve Trees.]—A lease contained a covenant by the lessee to plant with proper forest trees a portion of the premises, and to replant such parts thereof whereon trees then stood, or were planted, and which trees had been injured or destroyed; and to repair and keep in repair the fence or fences whereby the planted portion of the lands was then, or might thereafter be, inclosed, so as, at all times during the term, to preserve and keep the trees which then were, or should thereafter be, growing or planted as aforesaid, from all waste, spoil, damage or destruction whatsoever:—Held, that the covenant was too uncertain and indefinite to be carried into specific execution by the court. *Bernard* v. *Mestra*, 12 Ir. Ch. R. 389.

Injunction.]—Where a covenant is indefinite or uncertain in its terms, the court will not interfere by way of injunction. *Low* v. *Innes*, 10 Jur. (N.S.) 1037.

7. VOLUNTARY.

A voluntary covenant by a party to pay a sum of money to persons therein mentioned, either in his lifetime or in a certain time after his death, is a valid covenant, and creates a valid debt, though the deed was kept in the covenantor's possession till his death, and its execution was unknown to the covenantees or cestuis que trustent. *Alexander* v. *Brame*, 19 Beav. 436. Affirmed on appeal, 7 De G. M. & G. 525; 3 W. R. 642.

III. RUNNING WITH THE LAND.

See also VENDOR AND PURCHASER; and VII. 2, e, post.

To cleanse Watercourse.]—Baron and feme grant a watercourse through the feme's lands, with covenants for them, their heirs and assigns, to cleanse and keep it in repair, and suffer a common recovery to establish a grant; this is not a personal covenant as to the baron and feme, but a covenant which runs with the lands, and shall bind the assignees, being made good by the recovery. *Holmes* v. *Buckley*, Pre. Ch. 39. See *Austerberry* v. *Oldham Corporation*, infra.

To Indemnify against Rent-charge.]—If A. has lands subject to a rent-charge, and grants part of the lands to B., with a covenant that such part shall be free, this is not a real covenant to run with the land, but personal only, and binding on the heir in respect of assets. *Cook* v. *Arundel*, Hardr. 87. But see *Cornbury* v. *Middleton*, 1 Ch. Ca. 212.

Not to sell Water from a Well.]—Covenant upon a conveyance in fee, with the grantors, lessees of the waterworks, not to sell or dispose of of water from a well to the injury of the proprietors of the said waterworks, their heirs, executors, administrators and assigns. Quære, whether the covenant runs with the land so as to bind and be enforced by assignees, whether it is contrary to the policy of the law, and as to the effect of a renewal of the lease. The parties left to law, and a demurrer allowed, for the inconvenience of enforcing such a covenant by injunction. *Collins* v. *Plumb*, 16 Ves. 454; 10 R. R. 214.

To surrender Copyhold.]—Covenant for one's self and heirs, to surrender copyhold: heir decreed to surrender it. *Neeve* v. *Keck*, 9 Mod. 106.

To convey by Rail, and pay Toll for, all Stone used in Covenantor's Works.]—The Monmouthshire Canal Act provided that, upon auxiliary railroads made by private individuals, under the authority of the act, the tolls should not exceed the rate of 2½*d.* a ton per mile; and it also empowered the canal company by agreement with the landowners itself to construct auxiliary railroads, on which tolls not exceeding 5*d.* a ton per mile might be charged. Certain landowners and owners of iron works, and among others the lessees of the Beaufort works, formed a joint company, and under the powers given by the act constructed a railroad connecting a lime quarry, called the Trevil quarry, with the several iron works, and with the railroads of the canal company. In the partnership deed of the railroad company, the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil quarry, and to convey all such limestone, and also all the iron stone from the mines to the said works, along the Trevil railroad, and to pay a toll of 5*d.* a ton per mile for the same:—Held, that the covenant did not run with the land so as to bind assignees at law, and that a court of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it. *Keppell* v. *Bailey*, 2 Myl. & K. 517; Coop. t. Brougham, 298.

To produce Title-deeds.]—Covenant to produce title-deeds runs with the land, and for benefit of purchasers, and not for benefit of vendors. *Barclay* v. *Raine*, 1 Sim. & S. 449; 24 R. R. 206.

For Title.]—A. sold and covenanted to surrender copyholds to B., and covenanted for the title in the usual manner, and next day surrendered. Afterwards B. sold to C., and covenanted to surrender, and for title as against his own acts only, and afterwards surrendered to C.:—Held, that the original covenants were capable of being enforced against A., for either they ran with the land, or C. was entitled to sue on them in B.'s name. *Riddell* v. *Riddell*, 7 Sim. 529; 5 L. J., Ch. 102.

Against carrying on Certain Trades.]—A conveyance of an estate to a purchaser and his

heirs to the use that certain trades should not be carried on upon the premises is a stipulation in the nature of a covenant running with the land. *Hodgson* v. *Coppard*, 29 Beav. 4; 30 L. J., Ch. 20; 9 W. R. 9.

For First Refusal of Land.]—A lease for 500 years, dated in 1669, contained a covenant by the lessee, his executors, administrators and assigns, with the landlord, his executors, administrators and assigns, not to sell before the first proffer be made to the landlord, his executors, administrators, and assigns, to the end that they might have the first refusal thereof, and pay as much as any other person should bonâ fide offer:—Held, a covenant that runs with the land, but that it is not a perpetual one, and therefore an assignment of the tenant's interest having been made 140 years ago, it must be presumed that the landlord declined the offer, or waived his right, and the tenant must hold the land discharged from the covenant. *Houghton, In re*, 11 Ir. Ch. R. 136.

To pay for Injury to Surface.]—Three licencees of a right to dig minerals, jointly and severally covenanted with the grantor of the licence to pay him compensation for injury to surface. Two of them assigned their right under the licence:—Held, that the covenant ran with the land, so as to bind the assignee, and that the covenant of the three licencees being joint and several, the grantor was entitled to recover the whole compensation from the assignee of two of them. *Norral* v. *Pascoe*, 10 Jur. (N.S.) 792; 10 L. T. 809; 12 W. R. 973.

To use as Dwelling-house only.]—A covenant in a lease to use a house as a private dwelling-house only runs with the land, though the word assigns be not used. *Wilkinson* v. *Rogers*, 10 Jur. (N.S.) 5; 9 L. T. 434; 12 W. R. 119.

To allow Lessee to use Conduit and Waste Water in Conduit.]—A covenant by a lessor with lessee, his heirs and assigns, that it should be lawful for lessee, his heirs and assigns, during the continuance of the demise, to make use of a conduit made for carrying off certain waste and superfluous water, and to take, use, and enjoy such waste and superfluous water, if any there should be, for their own use:—Held, a covenant running with the land. *Athol* v. *Midland G. W. of Ireland Ry.*, Ir. R. 3 C. L. 333.

To keep open as a Garden the Enclosure in the Centre of a London Square.]—A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land, so as to be binding on subsequent purchasers at law. *Tulk* v. *Moxhay*, 2 Ph. 774.

Not to use as Beer-shop.]—The owner of a freehold house had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards let to the defendant as tenant from year to year, without express notice of the covenant:—Held, that although the covenant might not at law run with the land, the defendant was bound by it in equity. *Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R. 1 Ch. 463; 12 Jur. (N.S.) 460; 14 L. T. 499; 14 W. R. 748.

The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it applies equally to a yearly tenant as to the purchaser of a greater interest. *Ib.*

Semble, a covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beer-shop does not run with the land. *Ib.*

In Partition Deed, for Maintenance of Sea-wall.]—Lands situated below the level of the sea in Broomhill Level, Guildford Level, and Walland Marsh, were, previously to 1794, held in undivided shares. In that year these lands were partitioned by a deed containing a covenant that the expense of keeping and maintaining the wall and gutts of and belonging to the lands thereby divided, should be borne by the owners, and should be payable out of the lands by an acre-scot. *Morland* v. *Cook*, 37 L. J., Ch. 825: L. R. 6 Eq. 252; 18 L. T. 496; 16 W. R. 777.

Semble, that the covenant was one which would run with the land although the assigns of the covenantors were not named. *Ib.*

To supply Water from Well.]—A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—Held, first, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's Case* (5 Coke Rep. 16; 1 Sm. L. C. 52), but if not, a sub-purchaser with notice of the covenant was bound by it. *Cooke* v. *Chilcott*, 3 Ch. D. 694; 34 L. T. 207. *See* next case.

Held, secondly, that, though the covenant was not one of which the court would decree specific performance directly, as being for the construction of works which the court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. *Ib.*

To repair and maintain Road.]—The doctrine in *Tulk* v. *Moxhay* (2 Ph. 774) is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law. Semble, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant. *Cooke* v. *Chilcott* (3 Ch. D. 694) overruled on this point. *Morland* v. *Cook* (L. R. 6 Eq. 252) explained. *Holmes* v. *Buckley* (1 Eq. C. Abr. 27) discussed. Consideration of the circumstances under which a covenant will be held to touch or concern the land of the covenantee so that the benefit may run with the land. *Austerberry* v. *Oldham Corporation*, 55 L. J., Ch. 633; 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

A. by deed conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company established

to raise the necessary capital for making the road); and in the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to A. The trustees duly made the road, which afforded the necessary access to A.'s adjoining lands. A. afterwards sold his adjoining lands to the plaintiff, and the trustees sold the road to the defendants, both parties taking with notice of the covenant to repair:—Held, that the plaintiff could not enforce the covenant against the defendants. *Ib.*

On Sale of Land, that adjoining Plot should never be Sold.]—The owner of land sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties and their successors":—Held, that this was merely an agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, and that such an agreement did not contravene any rule of law, but gave the person who might hold the vendee's land the right to enforce the obligation against the person who might hold the vendor's land. Thus, the former might apply to a court of equity to order the removal of a structure that had been placed on the plot in violation of the agreement. *McLean* v. *McKay*, L. R. 5 P. C. 327.

Relating to Land.]—A covenant relating to but not running with land is binding on an assign with notice. *Luker* v. *Dennis*, 47 L. J., Ch. 174; 7 Ch. D. 227; 37 L. T. 827; 26 W. R. 167.

As to what Covenants run with the Land.]—See also *Spencer's Case*, 5 Coke, 16; 1 Sm. L. C., 10th ed., 52.

IV. IMPLIED COVENANTS.

On Assignment of Debts.]—When a debt is assigned with the usual power of attorney to sue in the assignor's name, there is an implied covenant by the assignor not to thwart the remedy of the assignee against the debtor, and it is a breach of such covenant for the assignor to release the debtor from an arrest under bailable process at the suit of the assignee, though such arrest has been made for a larger sum than actually due. *Gerard* v. *Lewis*, 36 L. J., C. P. 173; L. R. 2 C. P. 305; 15 L. T. 663; 15 W. R. 581.

To pay.]—A defaulting trustee executed a deed, whereby, after reciting that he held in his hands trust moneys to a certain amount, which he proposed to secure by a mortgage on his own estate, he conveyed certain property to the cestuis que trustent by way of mortgage. The deed contained a proviso for redemption and a power of sale, but no covenant to pay the mortgage debt or interest. The mortgaged estate was insufficient to cover the debt:—Held, that the deed did not convert the debt into a specialty debt. *Isaacson* v. *Harwood*, 37 L. J., Ch. 209; L. R. 3 Ch. 225; 18 L. T. 622; 16 W. R. 410.

Where a trustee executed a deed containing merely an appointment of him as trustee, and a declaration by him that he accepted the office:—Held, that no covenant by him could be implied, and that a claim for trust money received and misapplied by him did not constitute a specialty debt against his estate. *Holland* v. *Holland*, 38 L. J., Ch. 398; L. R. 4 Ch. 449; 21 L. T. 129; 17 W. R. 657.

See *Saunders* v. *Milsome*, L. R. 2 Eq. 573; and *Dickson, In re*, L. R. 12 Eq 154; ante, I.

A covenant to pay will not be implied where there is merely an acknowledgment by deed of a simple contract debt, if it appears that the acknowledgment is only a collateral object of the deed, and that the main object is to give security for the debt. *Marryat* v. *Marryat*, 28 Beav. 224; 29 L. J., Ch. 665; 6 Jur. (N.S.) 572; 2 L. T. 531.

A count alleged that the defendant and L. carried on business in co-partnership, and that, by deed between the defendant and L. of the first part, and the plaintiff of the second part, it was witnessed that the defendant and L. and each of them granted, assigned and transferred to the plaintiff all the co-partnership stock, debts, sums of money, and all other the personal estate and effects and property of them the defendant and L., as such co-partners. It then averred, that, at the time of the making of the deed, the defendant was indebted to the co-partnership in 240*l.*, being part of the debts, sums of money, and personal estate and effects and property of the co-partners; and it assigned, for a first breach, non-payment of the 240*l.* There was a second breach, alleging that, at the time of making the deed, a bill of exchange for 120*l.*, payable to the order of the defendant, and then being in the possession of the defendant, was part of the personal estate and effects and property of the co-partners, and that the defendant made default in transferring the bill of exchange to the plaintiff, and, after the making of the deed, incapacitated himself from so doing, and from conferring on the plaintiff any right or title to receive the money specified in the bill, by parting with the possession of the bill in such manner and on such terms as so to incapacitate himself; and thereby the defendant prevented the plaintiff from acquiring or having any right or title to the money, contrary to the deed:—Held, that there was no implied covenant on the part of the defendant to pay to the plaintiff the sum due from him to the co-partnership, but that there was an implied covenant on his part not to do anything in derogation of his deed. *Aulton* v. *Atkins*, 18 C. B. 249; 25 L. J., C. P. 229; 2 Jur. (N.S.) 812; 4 W. R. 592. S. P., *Parnell* v. *Hingston*, 2 Jur. (N.S.) 854; 4 W. R. 794.

By the acknowledgment of a debt in a deed under seal, a covenant to pay will not be implied where the acknowledgment is merely collateral to the purpose for which the deed was executed. *Jackson* v. *North-Eastern Ry.*, 47 L. J., Ch. 303; 7 Ch. D. 573; 37 L. T. 664; 26 W. R. 513.

The managing director of an incorporated company advanced large sums of money to the company, which was expended ultra vires the company's powers in the purchase and working of collieries. Large sums of money were also advanced by the directors out of the company's funds for the same purpose. By a deed, under the seal of the company, which recited and acknowledged the advances made by him, out of his own money, with the concurrence of the directors, and that the same were for the benefit of the company, and that he had not received any private advantage thereby, the collieries

were vested in trustees upon trust to pay out of the rents and profits the interest on the advances made by the directors, then the interest of his advances, and, in the next place, to invest the surplus rents, if any, to constitute a fund to pay off the capital in the priority in which the interest thereon was payable. The deed contained a proviso that if any interest of the manager's advances should be in arrear by reason of insufficient rents and profits, such interest should be a debt (not carrying interest), to be paid after the payment of capital advanced by the directors The collieries were sold and realised only sufficient to pay about one-half the advances by the directors:—Held, that the manager was not a specialty creditor of the company under the deed, which was only for the purpose of giving him collateral security. *Ib.*

See *Courtney* v. *Taylor*, 6 Man. & G. 851; 7 Sc. (N.R.) 749; 12 L. J., C. P. 330, ante, col. 1022.

By a deed under seal between the plaintiffs and the defendant, after reciting an agreement by the plaintiffs to transfer to the defendant their interest in certain inventions and letters patent for 1,000*l.*, it was witnessed that in pursuance of such agreement, and in consideration of 1,000*l.* upon the execution, &c., paid by the defendant to the plaintiffs (the receipt of which the plaintiffs thereby acknowledged and therefrom discharged the defendant), the plaintiffs granted and assigned the inventions and letters patent to the defendant. In an action on the deed by the plaintiffs, subsequently to recover the 1,000*l.* from the defendant, the first count of the declaration alleged that in consideration of the plaintiffs executing a deed of assignment to the defendant of certain inventions and letters patent, the defendant promised that, upon the plaintiffs being ready and willing to deliver the deed to the defendant, he would accept the same and pay the agreed consideration of 1,000*l.*; that the plaintiffs were ready and willing, but the defendant would not accept delivery of the deed, and had not paid the 1,000*l.* The second count alleged that, by an indenture between the plaintiffs and the defendant it was agreed that the plaintiffs should transfer to the defendant their interest in certain inventions and letters patent for 1,000*l.*; that the plaintiffs thereupon assigned the inventions to the defendant, but the defendant had not paid the 1,000*l.* By his pleas to the first count the defendant denied the promise and breaches, and the readiness and willingness of the plaintiffs as alleged; and to the second count he pleaded that the indenture was not his deed, and that the plaintiffs did not assign the inventions. At the trial it was proved that no consideration money was in fact paid or passed. The defendant contended that the deed contained no covenant or agreement to pay the 1,000*l.*; and, secondly, that, by the recital of payment and receipt of the money, the plaintiffs were estopped from denying its payment:—Held, that the deed contained no covenant to pay the 1,000*l.*, and that, in the face of the acknowledgment therein contained that the defendant had paid the money, it was impossible to imply such a covenant on his part, and that, too, on partial evidence. *Morgan's Patent Anchor Co.* v. *Morgan*, 35 L. T. 811.

A settlement to which A., B., and T. were parties, executed previously to the marriage of A. (B.'s daughter) with T., recited T.'s title to certain estates, and that B. agreed to give and appoint to A. a portion of 3,000*l.*, of which the sum of 1,000*l.* was to be paid in cash, and the remainder to be charged on the estates of B., and that T. had agreed to secure a jointure of 400*l.* a year for A., and to charge his estates with 3,000*l.* for the younger children of the intended marriage; and that, subject to such jointure and charge, T.'s estate should be settled on the first and other sons of the marriage, in tail; further, that B. had under a power charged his estates with 3,000*l.*, portions for his younger children (of whom A. was one), and that it had been agreed that B. should pay 1,000*l.*, part of the marriage portion of A., immediately to T., and that B. should appoint 2,000*l.*, the residue of the 3,000*l.*, a charge on his estates, the two sums to be in full for the marriage portion of A. B. appointed 2,000*l.* out of the 3,000*l.*, and directed it to be raised and paid to A. at his death, and T. charged his estates with a jointure of 400*l.* a year, and 3,000*l.* for younger children. By another deed reciting the appointment of the 2,000*l.* by B., which with the 1,000*l.* was to be in full for the portion of A., A. and T. released B. and his heirs, and his property real and personal, from all claims in respect of certain provisions out of other funds provided for his younger children:—Held, that the deeds contained no personal covenant by B. to pay the 2,000*l.*, even though it should turn out that the amount was not well charged on the estates by reason of a bad execution of the power by B. *Borrowes* v. *Borrowes*, Ir. R. 6 Eq. 368.

On Assignment of all Rights in a Medicine.]—The plaintiff declared on a deed, whereby the defendant, the original proprietor of a medicine, assigned all his interest in it to a third person, subject to a covenant by the assignee to pay him one-third of the profits during his and his wife's lives; and also covenanted with the assignee, that he would not thereafter, by himself or jointly with any other, prepare or sell, or engage with any other person in preparing or selling the medicine; and then a second deed, whereby the first assignee assigned all his interest in the medicine to the plaintiff, subject to the covenant of reservation: and then a third deed between him and the defendant (reciting the two former), and that he had agreed with the defendant for the absolute purchase of all his interest, as well in the medicine as in the one-third share so reserved to the defendant: by which deed the defendant assigned to the plaintiff all that third share, and all other shares or proportions, right, title, interest, claim, or demand, whatsoever of the defendant to the medicine or to the profits, with a covenant that the plaintiff might at all times thereafter prepare and sell the medicine in the name of the defendant, and receive the profits to his own use: and another covenant for further assurance:—Held, that the last deed alone (without the confirmation, which, however, the construction of it received from the two former recited therein) showed an intention in the defendant, and the words of it were large enough to assign to the plaintiff, not only the one-third share of the profits reserved by the first indenture, but all the defendant's right, title and interest in the medicine, and all the future profits arising from the sale, and that such assignment of all his interest and property in the medicine raised an implied covenant that he would not prepare or sell the medicine, or engage with others in so doing for his own profit; such preparation and sale being a retention and exercise of the right of preparing and vending the

medicine of which he was once a proprietor, in derogation of his deed, whereby he had conveyed such right to the plaintiff. *Sedd'm* v. *Senate*, 13 East, 63 ; 12 R. R. 299.

To Divert Stream.]—A declaration recited a deed, whereby two pieces of land were conveyed to the defendants, subject to the performance by them of certain agreements. In this deed the piece of land in question was described as a slip of land then being intended to be formed into a new course for the river Benet. The declaration stated that the defendants covenanted with the plaintiffs that they should and would within a reasonable time, at their own cost and expense, make and cut the intended new course for the same. It then went on to state a covenant to make a bridge over the intended new cut, for the plaintiffs' use, within a given time, and a covenant to make good the banks of the new cut, and after the same should have been made good and the railway completed, to reconvey to A., one of the plaintiffs, the slip of land which should form the new course of the river, and also to fill up and level the then existing course, so far as the same should have been diverted. The declaration charged breaches in not making a new cut, in not diverting the stream of the Benet, in not constructing a bridge over the new cut, in not perfecting its banks, in not conveying to A. the slip of land, with the water of the river duly diverted in the new course, and in not filling up the existing course of the Benet, so far as the stream thereof should and ought to have been diverted. The deed, as set out, did not in express terms contain any covenant to make and cut the new course, or to divert the stream of the river ; but it did contain express covenants to the effect of all the other covenants stated in the declaration :—Held, that there was no implied covenant on the part of the defendants to make the cut, and divert the stream of the Benet, and consequently there could be no breach of the express covenants to build the bridge, unless the cut was made and the stream diverted. *Rashleigh* v. *S.-E. Ry.*, 10 C. B. 612. Doubted in Ex. Ch. on appeal, and compromised. See *Knight* v. *Gravesend Waterworks Co.*, infra.

To Sink Shaft.]—A lease, by which coal mines in the north of England were demised, contained a covenant by the lessees that they would, once in every month, at their own expense, draw to bank at some of the pits or shafts of the collieries or coal mines demised, and lay in some convenient place upon the lands and premises of the lessors, for the lessors, all the manure, compost and dung to be made and bred by the horses employed underground in working the collieries. The lease contained various clauses, which spoke of the pits or shafts to be sunk on the premises, but did not contain any express covenant by which the lessees were either bound to sink a pit or to work the mines, and it was also doubtful whether the lessees were empowered to work the mines by "outstroke" :—Held, that no covenant could be implied imposing upon the lessees, upon the mines being worked and manure being made within them, the obligation of sinking a pit or shaft upon the demised lands, although they might be liable for a breach of covenant in working the mines by outstroke. *James* v. *Cochrane*, 7 Ex. 170 ; 21 L. J., Ex. 229. Affirmed, 8 Ex. 556 ; 22 L. J., Ex. 201 ; 1 W. R. 232.

To Erect Steam Engine.]—By a deed reciting that a waterworks company had determined to construct a well, and that the engineers of the company had prepared the necessary drawings for the same, and made a general specification referring to the drawings of all the works to be done, and of the materials to be found and provided for that purpose ; that the plaintiff had agreed to make the well, and to execute all the works particularised in the specification, and which might be implied therefrom or incidental thereto, for a certain sum ; and that to the drawings and specification the corporate seal of the company had been affixed, and that the plaintiff had signed the same ; the plaintiff covenanted to complete the well and works mentioned in the specification or shewn in the drawings, or which might be reasonably implied therefrom or be considered incidental thereto, of the materials and in manner and in all respects therein mentioned ; and that the plaintiff would find all materials required in the making and completing the works of such sort as in the specification described ; and of scaffolding, engines, pumps, &c., mentioned in the specification as required to be provided by the person contracting to perform the work as might be found necessary to complete the works ; and fully to complete the works in a workmanlike manner. The company covenanted to pay the money, and such further sums as should be payable in respect of deviations from the works. The specification contained the following passage—"The contractor will be required to sink the well to the depth of 120 ft., after which the company will undertake the erection of the permanent steam-engine, and permit the pumping to be performed by it, a sufficient interval of time being allowed for the erection of the steam engine, and such time added to the period assigned to the contractor for the performance of the works" :—Held, that there was an implied covenant on the part of the company to erect the permanent steam engine, as provided in the specification. *Knight* v. *Gravesend Waterworks Co.*, 2 H. & N. 6 ; 27 L. J., Ex. 73.

To Retain Son in Service.]—A declaration stated, that, by deed between the defendant and the son of the plaintiff and the plaintiff, the plaintiff covenanted that his son should be assistant to the defendant, a dentist, for five years, and do all such services as he should order to be performed in the way of his art. The defendant, for the services to be done by the son covenanted during the term, and in case the son should perform his part of the agreement, that the defendant would pay the son a certain sum weekly during the term, as compensation for his services. That the son entered upon the service, and that he and the plaintiff performed their part of the agreement, and were ready and willing to continue such performance during the term. Breach, that the defendant refused to permit the son to continue in the service, and dismissed him. Judgment was arrested on the ground that the breach was ill-assigned, as the declaration contained no implied covenant by the defendant to retain the son in the service during the five years. *Dunn* v. *Sayles*, D. & M. 579 ; 5 Q. B. 685 ; 13 L. J., Q. B. 159 ; 8 Jur. 358. S. P., *Aspdin* v. *Austin*, 5 Q. B. 671 ; D. & M. 515 ; 13 L. J., Q. B. 155.

To exclusively Employ.]—Plaintiffs covenanted with defendants to supply, when required so to

do by defendants' surveyor, horses carts, and men, at certain rates, from March 1858, to March, 1859, for watering the streets Defendants covenanted with plaintiffs that they, the plaintiffs, observing their covenant, defendants would pay monthly to plaintiffs the sum due in accordance with the said rates for the works so ordered and done The defendants were to be at liberty to hire other men horses &c at plaintiffs' expense if plaintiffs made default in the supply of men horses, &c, approved by the surveyor, or in sufficiently watering The plaintiffs agreed not to assign the contract and if they made any default, or became insolvent, the defendants might at any time, on giving three days notice declare the agreement void —Held that there was an implied covenant on the part of the defendants to employ the plaintiffs, and no others to do the work during the specified time *Hornsby* v *St Luke's Chelsea, Vestry*, 2 L T. 176

To procure Assent of the Commissioners of Woods and Forests]—An agreement was entered into between a corporation and S, a contractor for works whereby the corporation agreed to let to him the construction and completing of works which they were empowered by act of parliament to make, according to a specification and plans annexed, at or for 12 307*l* and 'on the conditions and in manner hereinafter mentioned' and S agreed to take the works and complete the same in manner set forth in the specification, and for the sums and subject to the provisions hereinafter mentioned The agreement went on to provide that S should construct certain of the works described in the specification as the first portion thereof, for 7,318*l*, to be paid as in the specification mentioned, and that he should also construct the second portion, so described, for 4,987*l*, subject to the following provisions that is to say, "that the assent of the Commissioners of Woods and Forests shall be given to the corporation to carry out the said last mentioned works, so far as the same affect the land or soil of the crown, and that the corporation is not prevented from carrying out the last mentioned works by the Eastern Union Railway Company and, further, that the approbation of the Lords Commissioners of the Treasury is given to the corporation to borrow on bond or on mortgage of the rates and property of the borough such sum or sums of money as may enable the corporation to pay for the same In an action by S against the corporation upon this agreement, the declaration assigned for breach that the corporation had omitted within a reasonable time to procure the assent of the Commissioners of Woods and Forests, and the approbation of the Lords Commissioners of the Treasury, or to permit S to commence the second portion of the works —Held, that there was nothing in the language of the agreement to warrant the court in implying a covenant on the part of the corporation to obtain the assent and approbation therein mentioned *Smith* v *Harwich Corporation*, 2 C B (N S) 651, 26 L J, C. P 257

To send Mill Refuse into Reservoir.] — By deed between S and W, it was recited that W had, by S's licence, made a reservoir on S's close for the reception of the refuse from W's mill; and, in consideration of such licence, W agreed to give to S the liberties and privileges after mentioned, and to supply him with pure water. And it was witnessed that S., in consideration of being supplied with pure water, and of receiving for his own use the refuse which might from time to time be found in the reservoir, and of the privilege of using it for manuring his land covenanted for himself his heirs executors, and administrators, to license W to use the reservoir for the purposes aforesaid and that S, his heirs &c, would scour and cleanse the reservoir when necessary And W, for himself, his heirs executors, and administrators covenanted to supply S with pure water, sufficient to supply his cattle on certain closes and that it should be lawful for S, his heirs and assigns, to cleanse and scour the reservoir, and to take the refuse away therefrom to and for his and their own use and benefit Admitted that the covenant to supply S with pure water ran with the closes, the cattle on which were to be supplied with water But held by Lord Campbell C J, Erle and Crompton, JJ, dissentiente Coleridge, J, that there was no covenant express or implied, compelling W to send the refuse from his mill to the reservoir *Sharp* v *Waterhouse*, 7 Ll & Bl 816, 27 L J, Q B 70, 3 Jur (N S) 1022

To continue Business]— A effected a life policy with an insurance company by which the funds of the company were according to the deed of settlement to be alone liable for the amount insured, and no shareholder was to be individually liable to any claim on the policy beyond the unpaid amount of his shares, and by which A was to be entitled to bonuses payable out of the profits when ascertained and divided among the policy holders at the discretion of the directors of the company By the deed of settlement provision was made for the dissolution of the company, and upon such dissolution for the transfer of the company's funds The company having afterwards united with another insurance company, to whom the funds, policies, and liabilities of the former were assigned, and having ceased to exist as a separate company, A sued the company for such transfer as being a wrongful alienation of their funds, and also for ceasing to carry on business, and to accumulate profits —Held, that the action could not be maintained, as there was no implied covenant by the company to continue the business of an insurance company, and to keep the funds to answer the claims upon policies effected with it *King* v *Accumulative Life Fund Insurance Co*, 3 C B (N S) 155, 27 L J, C P 57, 3 Jur (N S) 1264

The defendant sold to the plaintiffs his news agency business for 2,500*l*, payable by instalments The first two instalments of 500*l* each were payable at all events, but the payment of the other two of 750*l* each was contingent on the profits of the business, and in the event of the profits of the business exceeding a certain amount the defendant was to receive further benefits The plaintiffs at the same time engaged the defendant to superintend their business, including, along with the business sold, certain other branches, for five years at a salary, he undertaking to obey their directions Within the first year the plaintiffs agreed with a company to discontinue the news agency business, giving the company the option of continuing such parts of it as the company might elect to continue The plaintiffs then directed the defendant to discontinue the transmission of news, and the defendant refusing to obey, they filed their bill for an injunction to restrain him from transmitting news, which in-

junction was granted —Held, that, as the purchase money was to be ascertained by reference to the profits, there was an implied covenant by the plaintiffs that the business should be carried on, and that, as the plaintiffs had broken this implied covenant, they were not entitled to restrain the defendant from breaking any other part of the agreement *Telegraph Despatch Co* v *McLean*, L R 8 Ch 658

—— **On Sale of Patent, to keep it on foot**]—On the sale of a patent by the patentees to a limited company a deed of assignment was executed by the parties, by which after a recital that the patentees had agreed to sell the patent to the company for 250*l*, "and for the other considerations therein appearing,' the patentees assigned the patent to the company absolutely and after covenants for title by the patentees including a covenant for quiet enjoyment of the patent "during the term subsisting therein, the company covenanted to pay to the patentees a royalty for every article 'which should be manufactured or sold by the company" under the patent "while subsisting,' and also a proportion of the profits arising from the manufacture or sale and from licences granted for the manufacture or sale of articles to be manufactured under the patent 'while subsisting The deed contained no express covenant by the company to keep the patent on foot, or to manufacture or sell articles under the patent On the expiration of the first four years of the patent the company duly paid the first renewal fee under the Patents, Designs and Trade-marks Act, 1883, but on the expiration of the fifth year they, through inadvertence, omitted to pay the second renewal fee within the time required by the act and the rules there under, and consequently the patent lapsed After an ineffectual attempt to obtain a private act of parliament to revive the patent the company passed resolutions for a voluntary winding-up, and the patentees thereupon sent in a claim for damages for the loss, through the lapse of the patent, of the royalties reserved by the assignment, contending that a covenant to keep the patent on foot should be implied in the assignment —Held, that no such covenant could be implied, and that, even if it could, the patentees could not obtain more than nominal damages, the company being under no obligation, either express or implied, to manufacture the patented articles, and being no longer able to carry on business The doctrine of implying covenants in deeds discussed *Railway and Electric Appliances Co, In re*, 57 L J, Ch 1027, 38 Ch D 597, 59 L T 22, 36 W R 730

As to Cultivation]—Special covenants as to cultivation not implied from the mere act of holding over, as they may be from payment of rent at the same period, as evidence of agreement to hold, not only on the same terms, but subject to the same covenants *Kimpton* v. *Eve*, 2 Ves & B 349, 13 R R 116

For Title]—Implied covenant by vendor of a freehold estate for the title, though an assignee in bankruptcy, selling by a general description, not restrained to his actual interest. *Deverell* v *Bolton* (*Lord*), 18 Ves. 512

On Agreement for Lease with Usual Covenants]—Whether an agreement for a lease with usual covenants includes a covenant against assigning or underletting without licence quære In this instance, upon the particular construction of the agreement for the lease of a farm, the words 'such other clauses as are usual in such cases" has not that effect *Vere* v *Lovedon*, 12 Ves. 179 S P, *Jones* v *Jones* *ib*, 186, 10 R R. 77, n

On an agreement for a lease "with all usual and reasonable covenants,' a covenant not to underlease or assign is implied where the custom of the place is not generally against it *Folkingham* v *Croft*, 3 Anstr 700, 4 R R 844

V HOW DISCHARGED

Not by Parol]—A covenant for payment of a sum certain, although the payment does not accrue until after notice given cannot be discharged by parol before breach *Hemley* v *Spence*, 8 Ex 668, 22 L J Ex 249

A plaintiff declared against an administratrix, upon a deed, entered into by her testator a plea that the testator died insolvent and then alleging a parol agreement with the plaintiff, upon the faith of which she was induced to take out letters of administration, to assign the deed to the plaintiff, the promise being that the plaintiff would not seek to charge her in that capacity, is bad as seeking to answer an agreement under seal by a parol promise, and, at the trial of the cause, it was not to be taken as alleging a deed under seal, but was proved by evidence of a parol agreement, and proof being given, a verdict for her was rightly entered *Harris* v *Goodwyn*, 2 Scott (N R) 459, 9 D P C 409, 2 Man & G 405, 10 L J, C P. 62

Held also, however, that the plaintiff was entitled to judgment non obstante veredicto *Ib*

A declaration alleged the making of a lease in the lifetime of W, of whom the plaintiff was surviving executor, by which premises were demised to the defendant for a term, covenants being contained in the instrument to repair and maintain all erections and improvements on the premises, and to surrender and yield up the premises with all such improvements and erections well and sufficiently maintained and repaired Breach, alleging the making of a greenhouse which was an erection and an improvement on the premises, and its removal before the yielding up of the premises A plea that the defendant assigned the premises to B, who assigned to P, who assigned to H, and that it was agreed between the testator and H, and the testator promised H, that, if he would make and set up a greenhouse in and upon the premises, he should be at liberty to pull down and remove the same, is bad, as setting up a parol agreement to vary a contract under seal *West* v *Blakeway*, 9 D P. C 846, 3 Scott (N R) 199, 2 Man & G. 729, 10 L J, C. P 173, 5 Jur 630

By a deed of apprenticeship A became bound to B, described therein as an auctioneer, appraiser and corn-factor, as apprentice in the business of an auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve, and C the father of A covenanted for the performance of his duties as an apprentice B sued C on the deed, alleging as a breach that A had absented himself from his service C pleaded that B. had given up the trade of a corn-factor. A

replication, that B. had given it up with the consent of C., and that afterwards A. continued to serve until he absented himself, is bad, as setting up an alteration of the deed by parol. *Ellen* v. *Topp*, 7 Ex. 424 ; 20 L. J., Ex. 241 ; 15 Jur. 451.

Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee. *Flinn* v. *Calow*, 1 Man. & G. 589.

A declaration after stating an agreement under seal, between the plaintiffs and a company, by which the plaintiffs agreed to build a ship for the company, and by which it was stipulated that no alterations should be made in the building of the ship, unless on the authority of a letter, signed by the secretary of the company, stating that the directors had directed such alterations ; alleged, that during the progress of the works the company required alterations to be made in the building of the ship, which the plaintiffs accordingly made, and that the company discharged the plaintiffs from the stipulation in the agreement as to requiring the authority of such letter signed by the secretary. Breach, the non-payment of the costs of such alterations. Plea, that such discharge was not a discharge by deed. Replication on equitable grounds, that the company, by parol, directed the plaintiffs to make the alterations, and that they, at the request of the company, made such alterations, and that the company took to the ship and enjoyed the benefit of such alterations, and that, by reason of the premises, the plaintiffs were, in equity, discharged by the company from the stipulation, and the company ought not, in equity, to be allowed to set up the want of a discharge by deed in bar to the claim for the cost of the alterations,—is bad, as contradicting the declaration, and showing that the plaintiffs had no legal right ; but, if any, only an equitable one. *Thames Ironworks Co.* v. *Royal Mail Steam Packet Co.*, 13 C. B. (N.S.) 358 ; 31 L. J., C. P. 169 ; 8 Jur. (N.S.) 100 ; 9 W. R. 942.

By Compulsory Sale.]—A landowner who has covenanted in the usual form that neither he nor his assigns shall build upon his land, is discharged from his covenant after selling the premises to a railway company under their compulsory powers, as the company become assignees of the land, not by the voluntary act of the former owner, but by compulsion of law. *Baily* v. *De Crespigny*, 38 L. J., Q. B. 98 ; L. R. 4 Q. B. 180 ; 19 L. T. 681 ; 17 W. R. 494.

VI. BREACH.

1. What Amounts to.

To give First Refusal of Purchase.]—A. granted a lease to B. of tenements, and covenanted that if he, his heirs, or assigns, should, during the term, have any offer made for the disposal of certain land adjoining the demised premises, he or they should not dispose of the same without previously offering it to B., his executors, administrators, or assigns, at 5*l.* per cent. less than such offer. Before the expiration of the lease, A. sold to C. upon one entire contract, and for one entire sum, the whole of his estate, comprising the demised premises and the ground which was the subject of the covenant, without making any offer of the latter to B. :—Held, that this was no breach of the covenant, either absolute or implied, on the part of A. *Callison* v. *Lettsom*, 2 Marsh. 1 ; 6 Taunt. 224 ; 16 R. R. 605.

To Build.]—It is no defence to a covenant for not building a house within a reasonable time, that up to a certain day the house remained unbuilt with the plaintiff's knowledge, and that he then required the defendant to build the house, and that a reasonable time had not since elapsed. *Fisher* v. *Ford*, 1 Arn. & H. 12 ; 4 Jur. 1034.

In ejectment, on the ground of a forfeiture by reason of an alleged breach of covenant, it appeared that an ancestor of the plaintiff had conveyed the premises to trustees on behalf of the inhabitants of a parish for 1,000 years, by a deed, which contained a covenant on the part of the trustees, that they would build a workhouse, and would use and occupy the premises for the use and maintenance of the poor who should become chargeable to the parish, and would not convert the house or land, or employ the profits thereof to any other use ; with a condition for re-entry if the trustees should sell, assign, transfer or otherwise part with their estates, or if they should not observe, perform, fulfil and keep all the covenants therein contained. Afterwards the paupers were removed to a union workhouse, in consequence of an order by the poor law commissioners, and the workhouse was shut up ; and the land had since that time been let, and the rent applied in aid of the rates for the relief of the poor :—Held, first, that there was no breach of covenant ; and, secondly, that if there was any, it was excused by compulsion of law. *Doe* d. *Anglesea* (*Marquis*) v. *Rugeley Churchwardens*, 6 Q. B. 107 ; 13 L. J., M. C. 137 ; 8 Jur. 615.

To Pay.]—A covenant provided, that if a company should displace a certain person from his employment of agent to the company, they would repay the covenantee a sum of money paid to them by him for the agent's debts :—Held, that a transfer of their business to another company, and a voluntary dissolution, by which the place ceased to exist, was a displacement, and entitled the covenantee to sue for the money. *Stirling* v. *Maitland*, 5 B. & S. 840 ; 34 L. J., Q. B. 1 ; 11 L. T. 337 ; 13 W. R. 76.

Action on a covenant in a coal lease to pay a certain proportion of the value of 9 cwt. of coals to be raised, unless prevented by unavoidable accident from working the pit. Plea, that the defendant was prevented by unavoidable accident. It appeared that the accident might have been remedied at a greater expense than the value of the coals to be raised :—Held, that the plaintiff was entitled to recover. *Morris* v. *Smith*, 3 Dougl. 279.

Not to open Door in Front of Street.]—A. enfeoffed B. with a piece of land bounded on the west by a street, and on the east partly by buildings belonging to B., and partly by buildings belonging to G. A. covenanted that he would not at any time after the feoffment permit or suffer any warehouse door to be opened or put out to the front of the street. A warehouse door was put out in the buildings belonging to G. at the eastern extremity of A.'s land, about eight feet distance from, but giving access to, the street :—

Held, that this was a breach of the covenant, though the premises in which the door was put out did not stand upon his land, were not in his occupation, and were not level with the front of the street. *Liverpool Corporation* v. *Tomlinson*, 7 D. & R. 556.

Not to use Rooms in a Particular Manner.]—A new breach of a covenant not to use rooms in a particular manner is committed every day the rooms are so used. *Doe* d. *Ambler* v. *Woodbridge*. 4 M. & Ry. 302; 9 B. & C. 376; S. P., *Flower* (*Lord*) v. *Peck*, 1 B. & Ad. 128.

To Sink for Coal.]—Where lessees of land and of coal mines covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished, or in default to pay so much to the lessor as arbitrators should award, and the lessees gave a bond to the lessor, conditioned to perform the award which was made:—Held, that to an action on the bond it was a sufficient answer that they had proceeded to sink for coal as far, &c. (in the words of the covenant), but that none could be found. *Hanson* v. *Boothman*, 13 East, 22.

To Keep on Foot a Policy.]—A party covenanted to do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot a policy:—Held, that this covenant could not be read negatively as if he had covenanted to do no act whereby it would become void, and therefore that the covenant was not broken by the suicide of the covenanter, whereby the policy became forfeited. *Dormay* v. *Borrodaile*, 10 Beav. 335; 16 L. J., Ch. 337; 11 Jur. 379. And see *S. C.*, at law, 5 Man. & Gr. 639.

That Covenantor has Power to Transfer Ship.]—By a deed-poll, of the 21st October, 1836, the defendant sold and assigned to the plaintiff a particular ship or vessel, with her masts, tackle, and appurtenances; and covenanted that he had good right, full power, and lawful authority, to sell and assign the premises to the plaintiff. To a declaration on this covenant, assigning as breaches, that, at the time of making the deed-poll, the ship was wholly lost and destroyed, and was incapable of being assigned; and that the defendant had not, at that time, good right, &c., to assign:—the defendant pleaded, that the ship was not, at the time of making the deed-poll, wholly lost and destroyed; and that the defendant had good right, &c., to assign her. It appeared that, at the time of the sale, the ship was on a foreign voyage; that on the 13th October she went aground in a storm, on the coast of the Prince of Wales's Island, and was left by the crew, who, however, had access to her afterwards; that she lay aground five feet above water, on one side and with her masts standing, till the 24th, when the captain called a survey, and by the surveyor's advice sold her; that her bulk ends were strained, but that, if there had been facilities at hand, and if it had been a different season of the year, she might have been got off and repaired; and that she had sustained no more damage on the 21st October than when she first took the ground:—Held, that the covenant of the defendant, that he had power to transfer her as a ship, was not broken. *Barr* v. *Gibson*, 3 M. & W. 390; 1 H. & H. 70; 7 L. J., Ex. 124.

Relating to Theatres.]—A lease of the opera house contained covenants on the part of the lessee: first, not to use the house for any but purposes of a theatrical kind, and to use his best endeavours to improve the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year:—Held, that this was not a breach of the covenant. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 913; 6 W. R. 523.

And, secondly, not to grant away, assign, dispose of or charge the stalls or boxes for any longer period than one year or season. On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st of August, 1852, he made another lease of the same boxes to a different person, with this habendum: "From the 1st of February next ensuing, or from such subsequent day during the year upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day":—Held, that this was not a breach of the covenant. *Ib.*

And, thirdly, not to charge nor incumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges or any other incumbrance whatever. The lessee was greatly in debt. In respect of his debts, he granted warrants of attorney, one of which was to secure payment of bills not then due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and be registered, and judgments were signed against him on those warrants of attorney, and upon judge's orders, and registered:—Held, that no breach of this covenant had been committed. *Ib.*

Not to Prejudice Premises — Insolvency.]—A trader assigned his household furniture by a mortgage deed, which provided that the trader should quietly enjoy until default made in payment of the demand. The deed contained a covenant by the trader not to execute, do, or suffer any act, deed, matter or thing, by means of which the premises should be assigned, charged or prejudicially affected, or whereby the mortgagee might be hindered from receiving, recovering or taking possession of the same:—Held, that filing a declaration of insolvency, while the goods were allowed to remain in the possession of such trader, was a breach of the covenant. *Hill* v. *Cowdery*, 1 H. & N. 360; 25 L. J., Ex. 285; 4 W. R. 681.

Erecting Wall instead of Houses.]—Land was sold, subject to a covenant entered into with a neighbouring landowner, that "no buildings, except dwelling-houses," to front a certain road, should be built thereon. The purchaser threw the land into his garden, and inclosed it, by erecting thereon, along the side of the road, a wall, 8 ft. 6 in. high, for the greater part, but carried up in one part to the height of 11 ft. 6 in., for the purpose of forming the back of vineries and a greenhouse. In a suit for an injunction, to restrain the wall from continuing:—Held, that the boundary garden wall 8 ft. 6 in. high was no breach of covenant, but the raising it for the purposes of the vineries was; but no substantial injury being caused, the court awarded damages instead of granting an injunction in respect of the breach. *Bowes* v. *Law*, 39 L. J.,

Ch. 483; L. R. 9 Eq. 636; 22 L. T. 267; 18 W. R. 640.

Erecting Stable instead of Houses.]—A covenant to the effect that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell* v. *Baber*, 18 W. R. 1021.

Charitable Institution.]—The erection of a building to be used for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions:—Held, to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade." *German* v. *Chapman*, 47 L. J., Ch. 250; 7 Ch. D. 271; 37 L. T. 685; 26 W. R. 149—C. A.

National School—Nuisance.]—The owner of one of the lots on a building estate having made a free gift of the same to the committee of a district national school, for the purpose of having a national school erected thereon:—Held, that the word "nuisance" in a covenant by which all the owners of the lots were bound must be restricted to its technical meaning; that the establishment of a national school is not a legal nuisance; and that the establishment of such a school on one of the above lots could not be restrained by the owner of a dwelling-house built on an adjoining lot, though his property would be depreciated thereby. *Harrison* v. *Good*, 40 L. J., Ch. 294; L. R. 11 Eq. 338; 24 L. T. 263; 19 W. R. 346.

Eating-House.]—B. demised an eating-house for a term of twenty-one years, and covenanted that he would not during the term let any house in the same street for the purpose of carrying on the business of an eating-house, provided always that the covenant should be binding only on B., and not on his heirs, administrators or assigns. Subsequently B. let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without B.'s licence. The first lease was subsequently assigned to K., and the second to G. K. brought an action against B. and G. to restrain G. from carrying on an eating-house on the premises comprised in the second lease, and B. from permitting him to do so:—Held, that the covenant could not be treated as a covenant that none of the houses should during the term be used as an eating-house, and that as B. had not let the second house for the purpose of an eating-house, the covenant was not broken by G.'s carrying on there the business of an eating-house, nor by B.'s not interfering with his doing so. *Kemp* v. *Bird*, 5 Ch. D. 549. Affirmed on appeal, 46 L. J., Ch. 828; 5 Ch. D. 974; 37 L. T. 53; 25 W. R. 838—C. A.

Private House—Auction on Premises.]—A covenant to use a house as a private house only is not broken by an auction sale on the premises of the furniture belonging to the house. *Reeves* v. *Cattell*, 24 W. R. 485.

Bay Windows.]—The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mortgagees in fee in possession of the estate, their heirs and assigns, not to erect any building on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, and about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof. Upon a bill for an injunction by the transferee from the mortgagees, and by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—Held, first, that the bay windows were buildings within the meaning of the covenant and the erection of them a violation of it. *Manners (Lord)* v. *Johnson*, 45 L. J., Ch. 404; 1 Ch. D. 673; 24 W. R. 481.

Held, secondly, that there being a clear breach of covenant, the covenantees were entitled to the injunction without the necessity of showing damage. *Ib.*

Held, thirdly, that invasion of privacy constituted damage. *Ib.*

Held, fourthly, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy. *Ib.*

Held, fifthly, that both the plaintiffs had material interests sufficient to support the suit. *Ib.*

To occupy Premises properly.]—A tenant's allowing a footpath to be made across a part of the demised premises is no breach of a covenant to occupy the premises in a proper manner. *Doe* d. *Worcester (Trustees)* v. *Rowlands*, 9 Car. & P. 734.

To Serve as Apprentice.]—By the terms of an indenture of apprenticeship, an infant was placed by his father (who was a party to the indenture) as apprentice to a master, described in the indenture as "an auctioneer, appraiser and cornfactor, to learn his art, and with him, after the manner of an apprentice, to serve." Afterwards, the master wholly relinquished the trade of corn-factor, whereupon the apprentice absented himself from his master's service:—Held, in an action on the indenture by the master against the father for the desertion of the apprentice, that the relinquishment by the master of his trade of corn-factor was a good answer. *Ellen* v. *Topp*, 6 Ex. 424; 20 L. J., Ex. 241; 15 Jur. 451.

As to Trade.]—A declaration stated, that the defendant assigned his practice of a surgeon and an apothecary to the plaintiff, and covenanted that he would not, directly or indirectly, by himself or in co-partnership with any person, carry on the practice of a surgeon or an apothecary within a certain distance, under a penalty; and alleged as breach the practising of the defendant within that distance. The defendant pleaded that he did not carry on the business of a surgeon. On several occasions, he acted as a surgeon and an apothecary within the prescribed distance, but he had done so with the knowledge and consent of the plaintiff, and for

the purpose of assisting him in his business :— Held, that the defendant's conduct did not amount to a breach of the covenant. *Rawlinson* v. *Clarke*, 14 M. & W. 187 ; 14 L. J., Ex. 364.

And see also cases under CONTRACT.

Restrictive Covenants in Leases.]—*See* LANDLORD AND TENANT.

Restrictive Covenants on Sale of Property.]—*See* VENDOR AND PURCHASER.

2. RELIEF FROM FORFEITURE.

Generally.]—Court of equity will not relieve against wilful voluntary breach of covenant. *Descarlett* v. *Dennett*, 9 Mod. 22.

Where defendant prevents plaintiff's performance of covenant, chancery will remove the opposition. *Wood* v. *Tirrell*, Cary, 59.

Relief against forfeiture, where compensation can be given, applies only to cases of contract, not to the provisions of a statute, or conditions in law. Where penalty only designed to secure the money, then relief may be given against it. *Keating* v. *Sparrow*, 1 Ball & B. 374.

Relief given against forfeiture by breach of covenant by lessee, where compensation can be made. *Davis* v. *West*, 12 Ves. 475.

Equity will not relieve against a breach of covenant, unless the payment of money will be an adequate compensation for it. *Elliott* v. *Turner*, 13 Sim. 477.

Not on ground of Acquiescence, unless Fraudulent.]—The court never on light grounds interposes against the legal effects of a covenant, on the ground of acquiescence ; there must be fraud, such as acquiescing for a benefit to arise from taking advantage of the breach, or giving reason to suppose there would not be any interference. *Gerrard* v. *O'Reilly*, 2 Con. & L. 165 ; 3 Dr. & War. 414.

See 44 & 45 Vict. c. 41, s. 14, and 55 & 56 Vict. c. 13 : and LANDLORD AND TENANT.

VII. ACTION ON.

1. FORM OF.

When must be Covenant.]—An action in the nature of waste will lie against a lessee of a mine for an injury to the reversion by the removal of a barrier or boundary between it and an adjoining mine, although the act complained of might also be the subject of an action for the breach of an express covenant. *Marker* v. *Kenrick*, 13 C. B. 188 ; 22 L. J., C. P. 129 ; 17 Jur. 441.

A devisee in trust of mortgaged premises for sale and payment of the debts of the mortgagor, borrowed 200*l.* of the plaintiff for the purpose of paying off a portion of the debts of the mortgagor ; and by deed between him and the plaintiff, reciting these facts, charged the premises with payment of that amount, and covenanted that he and his heirs should out of the money that should come to his hands as such trustee, or out of the personal estate, if any, of the mortgagor, pay to the plaintiff the principal and interest secured by the deed :—Held, that the plaintiff was not entitled to sue the devisee for money lent, but that his remedy was upon the covenant contained in the deed. *Mathew* v. *Blackmore*, 1 H. & N. 762 ; 26 L. J., Ex. 150 ; 5 W. R. 363.

A tenant under a lease cannot maintain an action on an implied promise for money paid under a distress by a superior landlord : the remedy is covenant on the express contract. *Schlencker* v. *Moxey*, 5 D. & R. 747 ; 3 B. & C. 789 ; 27 R. R. 482.

A lessee of premises granted and assigned them by indenture to the plaintiff, who, having been distrained upon for rent in arrear to the superior landlord before the assignment, brought an action to recover the money paid under the distress, and relied upon an express promise by the lessee to repay it :— Held, that as covenant would lie on the covenant implied in the word "grant," assumpsit would not lie on any implied contract to indemnify the plaintiff, nor on the express promise which was not founded on a new consideration. *Baber* v. *Harris*, 1 P. & D. 360 ; 9 A. & E. 532 ; 2 W. W. & H. 1 ; 8 L. J., Q. B. 153.

For Injunction.]—An application for an injunction to restrain an alleged breach of covenant had been once ordered to stand over until the decision of two legal questions raised by defendant. On those questions being decided in the plaintiff's favour, and the motion coming on again, the defendant raised a third legal objection, and the court below, at his request, directed a case to be stated for the opinion of a court of law upon it, but, on the ground of the delay in bringing it forward, granted an injunction in the meantime. On appeal, however, the lord chancellor dissolved the injunction notwithstanding that circumstance, on the ground of the much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other might succeed at law. *Rigby* v. *G. W. Ry.*, 2 Ph. 44 ; 1 Coop. C. C. 3 ; 4 Railw. Cas. 491 ; 15 L. J., Ch. 266 ; 10 Jur. 531.

Where the interference of the court by injunction depends upon a legal right which is disputed, the court ought for its own security to put the matter into a course for ascertaining that right ; and if that is to be done by sending a case for the opinion of a court of law, this court ought not to leave it to the option of the defendant, but ought itself to direct a case to be prepared, with a reference to the master to settle it in case the parties differ. *Ib.*

Where a breach of covenant is threatened, and has been partly executed, the court, having jurisdiction to restrain the threatened breach, will also award damages in respect of the executed breach. *Hindley* v. *Emery*, 35 L. J., Ch. 6 ; 11 Jur. (N.S.) 874 ; 13 L. T. 272 ; 14 W. R. 25.

Where a breach of covenant is proposed, the court will not refuse to interfere on the ground that there has been a mistake on the part of both parties in the form of the covenants ; or that the aggrieved party may have already permitted some other infringement of the covenant ; or on the ground of inconvenience to the public, *Lloyd* v. *L. C. & D. Ry.*, 34 L. J., Ch. 401 ; 12 L. T. 362 ; 13 W. R. 698.

Before the court would refuse to enforce a covenant, it must be clear that no substantial damage could arise from the breach of it. *Ib.*

A., owner of land through which a company proposed to make a railway upon a viaduct, withdrew his opposition to the company's bill in parliament, in consideration of an agreement by the company not to erect on the land to be taken by them from him, within eighty feet from other premises in his possession, any building, "except their proposed railway," above the height of eighteen feet. The bill passed,

and a viaduct thirty-three feet high, part of which was within eighty feet from the plaintiff's premises, was erected on the land taken from A. This viaduct was wide enough for, and carried two lines only; subsequently to its erection, a conveyance of A.'s land to the company was prepared and executed, which contained a covenant on the part of the company to the same effect (omitting only the exception as to the railway, then completed) as the provision in the agreement restraining buildings. On the company afterwards beginning to build brick piers above the height of eighteen feet, within eighty feet of A.'s other premises, with a view to widening their viaduct so as to carry four lines instead of two, an injunction to restrain the company from erecting any such buildings in breach of their covenant was granted. *Ib.*

The circumstance that a work undertaken in breach of a valid covenant is one of great public importance, is not sufficient to induce a court of equity to refuse to restrain the breach of covenant. *Ib.*

It is no defence to an application for an injunction to restrain a breach of covenant to say that the covenantee sustains no damage from the breach, for, if the covenanter derives any benefit therefrom, the covenantee may reasonably demand a share of it as the price of his consent. *Wells* v. *Attenborough*, 24 L. T. 312; 19 W. R. 465.

Where, however, an injunction would inflict great injury on the defendant, and a delay in granting it would cause little or no loss to the plaintiff, the court will not grant it on an interlocutory application, but will express its opinion and direct the motion to stand over till the hearing. *Ib.*

Equity will interfere in the case of a breach of covenant, notwithstanding the covenantee might not have recovered damages for it at law. *Elliott* v. *Turner*, 13 Sim. 477.

There is no case where relief has been given in equity for satisfaction merely on an implied covenant. *Saltern* v. *Melhuish*, Ambl. 251.

2. Parties.

a. Generally.

Only Parties to Covenant can Sue or be Sued.]—A deed inter partes is only available between those who are parties to it. *Barford* v. *Stuckey*, 8 Moore, 88; 1 Bing. 225; 1 L. J. (o.s.) C. P. 73.

An action of covenant only lies upon a deed inter partes between the parties thereto; therefore where, in an action upon an indenture of lease, it appeared that the landlord by writing, not under seal, authorised his attorney to execute a lease for and on his (landlord's) behalf, and the attorney signed and sealed the lease in his own name:—Held, that the landlord could not maintain an action against the tenant upon the indenture, although the covenants were expressly stated to have been made by the tenant to and with the landlord. *Berkeley* v. *Hardy*, 8 D. & R. 102; 5 B. & C. 355; 4 L. J. (o.s.) K. B. 184; 29 R. R. 261.

Where rent was reserved by a lease to a person who was not a party to the lease, and the lessees covenanted with him and the lessors to pay rent:—Held, that an action of covenant would not lie at the suit of him and the lessors. *Southampton (Lord)* v. *Brown*, 6 B. & C. 718; 5 L. J. (o.s.) K. B. 253; 30 R. R. 511.

When a deed is made inter partes, no one who is not expressed to be a party can sue on a covenant contained in it, and this is not a mere rule of construction, but a rule of positive law. *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins*, 3 H. & C. 677; 34 L. J., Ex. 121; 11 Jur. (N.S.) 468; 12 L. T. 427; 13 W. R. 841.

In a lease, the lessor reserved a right to enter and cut timber, making reasonable satisfaction to the lessee for any damage occasioned thereby; an action of covenant does not lie by such lessee for any wrongful act of cutting down by a third person, if without the consent or authority of the lessor, however he may countenance the act afterwards. *Griffiths* v. *Brome*, 6 Term Rep. 66.

Where it only appeared that the lessor had promised to make compensation afterwards for such wrongful act, if the wrong-doer himself did not; this was not considered as an adoption of the act, nor as evidence of a prior consent to it whereon to found an action on the covenant. *Ib.*

Where two persons, for valuable consideration as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger cannot enforce the covenant against the two, though either of the two might do so against the other. *Colyear* v. *Mulgrave* (*Countess*), 2 Keen, 81; 5 L. J., Ch. 335.

The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built on the ground, any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. On a bill by B. to restrain A. from erecting and the lessor from approving the building objected to:—Held, that B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit. *Master* v. *Hansard*, 46 L. J., Ch. 505; 4 Ch. D. 718; 36 L. T. 535.

Where Party to Covenant has not Executed.]—A covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself had not executed it, notwithstanding there may be cross covenants on the part of the covenantee, which are stated in the deed to be the consideration for the covenants on the part of the covenantor. *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64; 2 W. R. 193; *Rose* v. *Poulton*, 2 B. & Ad. 822; 1 L. J., K. B. 5.

But with respect to leases, the covenants which depend on the interest of the lease and are made because the covenantor has that interest, such as those to repair and pay rent during the term, are not obligatory if the lessor does not execute. *Pitman* v. *Woodbury*, 3 Ex. 4; *Swatman* v. *Ambler*, 8 Ex. 72; 22 L. J., Ex. 81. See *Cooch* v. *Goodman*, 2 Q. B. 580; 2 G. & D. 159; 11 L. J., Q. B. 225.

A lease for eleven years was executed by the lessee, but not by the lessor. The lessee entered under it, and occupied the premises during the whole term. The lessor died, after having devised the premises:—Held, that as he had not executed the lease, his devisee could not maintain an action of covenant as assignee of the reversion of the term of eleven years. *Cardwell* v. *Lucas*, 2 M. & W. 111; 6 L. J., Ex. 52.

Where tenant for life and remainderman are parties to an indenture, whereby they (so far as they legally can and may, according only to their respective estates and interests) demise their estate for a term of years, and the lessee enters into possession, the tenant for life may sue him for breach of covenant, although the indenture has not been executed by the remainderman. *Hare* v. *Greek*, 3 H. & C. 391; 34 L. J., Ex. 4; 10 Jur. (N.S.) 1187; 11 L. T. 315; 13 W. R. 80.

A. covenanted with B. & C., their executors, administrators, and assigns, to pay a sum of money, to be held by them on certain trusts. C. did not assent to or execute the deed, and subsequently, by another deed to which neither A. nor B. was a party, disclaimed all the trusts of the first deed:—Held, that B. could not alone sue A. upon the covenant during the lifetime of C. *Wetherell* v. *Langston*, 1 Ex. 634; 17 L. J., Ex. 338—Ex. Ch.

Where two trustees of a marriage settlement did not sign:—Held, that they were, nevertheless, necessary parties to an action of covenant by the third. *Petrie* v. *Bury*, 3 B. & C. 353; 3 L. J. (O.S.) K. B. 29; 27 R. R. 383.

By a deed expressed to be made between G. of the first part, the defendant and two others, as sureties of G., of the second part, and the plaintiff of the third part, G., the defendant and the two other sureties jointly and severally covenanted to repay the plaintiff moneys advanced by him to G. The defendant, having been sued for a breach of this covenant, a plea that he executed the deed in the faith that P. (one of the sureties) should join therein and execute the same, and that P. never did join therein or execute the same, is a bad plea. *Cumberlege* v. *Lawson*, 1 C. B. (N.S.) 709; 26 L. J., C. P. 120; 5 W. R. 237.

Lease by Wife not Acknowledged by her.]—A husband and wife, seised in fee in right of the wife, demised land for a term of years. The deed was executed by both, but not acknowledged by the wife under 3 & 4 Will. 4, c. 74, s. 79. The husband died during the term, but his widow did nothing to disaffirm the tenancy; and the lessee was in possession for the whole term:—Held, that an action was maintainable by the wife's executors against the lessee's sureties (parties to the lease) on the covenants in the lease. *Tyler* v. *Slater*, 37 L. J., Q. B. 33; L. R. 3 Q. B. 42; 17 L. T. 168; 16 W. R. 124.

Tenants in Common.]—A covenant to repair in a joint demise by tenants in common runs with the entire reversion, and all the tenants in common of the reversion at the time of the breach, or their representatives, must join in an action on such a covenant. *Thompson* v. *Hakewill*, 19 C. B. (N.S.) 713; 35 L. J., C. P. 18; 11 Jur. (N.S.) 732; 13 L. T. 289; 14 W. R. 11.

Tenants in common may sue a lessee of a house for negligence of repairs, who after the demise, but before the breach alleged, became a co-tenant of the plaintiffs in the same house. *Yates* v. *Cole*, 2 Br. & B. 660. *S. C.*, nom. *Gates* v. *Cole*, 5 Moore, 534; 23 R. R. 524.

Chairman of Company.]—An action does not lie against the chairman of the board of directors of a company, not incorporated by act of parliament, upon a deed under the seal of a former chairman, though sealed by him for and on behalf of the company. *Hall* v. *Bainbridge*, 1 Scott (N.R.) 151; 1 Man. & G. 42; 8 D. P. C. 583; 9 L. J., C. P. 281.

Covenant with Mortgagee and Mortgagor—Action by Mortgagee alone.]—Declaration on a covenant for rent by the representative of a mortgagee for a term of 5,000 years upon an indenture of lease for 4,000 years, by the mortgagee, S., to which the mortgagor, Y., was a confirming party, against the assignee of the lessee, L.; the mortgage being prior to the making of the lease. The reddendum was in the following words:—"Yielding and paying yearly and every year during the term, unto S., his executors, &c., during the continuance of the mortgage, and after payment thereof, unto Y., his executors, &c., the yearly rent of 18*l*. 18*s*." The covenant was by L., "to and with S., his executors, &c., and also to and with Y., his executors, &c.," that L., his executors, administrators and assigns, would pay the yearly rent "on the several days and times, and in manner as the same was reserved and made payable." The plaintiff traced title from S., by deeds, to all of which Y.'s name appeared as a party; but the declaration did not aver that any one of them was executed by Y. Averment, that the plaintiff became possessed of the demised premises for all the residue and remainder of the term of 5,000 years, and that, after the making of the indenture of lease, and during the term granted, and after the defendant became assignee, and while he continued assignee, two years' rent became in arrear:—Held, that the covenant was several, and the action was properly brought by the representative of the mortgagee alone. *Harrold* v. *Whitaker*, 11 Q. B. 147; 15 L. J., Q. B. 345; 10 Jur. 1004. Affirmed in error, 11 Q. B. 163; 17 L. J., Q. B. 343; 12 Jur. 395—Ex. Ch.

Corporations.]—A declaration by A., B. and C., stated, that, by deed, they demised premises to the defendant for a term; that he covenanted to yield up the premises in good repair at the end of the term, and that, at the end of the term, he yielded up the premises out of repair. The defendant set out the deed, which appeared to be made between A., the master, and B. and C., the governors of a hospital of the one part, and the defendant of the other part. It stated that the master and governors demised the premises to the defendant, and that the covenant was made with the master and governors, and their successors; and it also contained covenants by the master and governors, for themselves and their successors, and concluded thus: "In witness whereof the master and governors have hereunto affixed their common seal." A seal, purporting to be a common seal, was affixed on the part of the lessors, and the deed purported to have been signed, sealed and delivered by the defendant. The defendant then pleaded that the deed was not signed by the plaintiffs, or their agent, lawfully authorised by writing; and that there was no demise of the premises signed by them or their agent, lawfully authorised by writing:—

Held, that it appeared by the record that the lease was made by a corporation, and that no action could be maintained upon it in the names of the plaintiffs. *Cooch* v. *Goodman*, 2 G. & D. 159 : 2 Q. B. 580 ; 11 L. J., Q. B. 225 ; 6 Jur. 779.

b. Joint and Several.

Where Interest Joint, all must sue; where Interest Several, each may sue.]—Though a covenant is joint in its terms, yet if the interests of the covenantees are several, each may sue separately for a breach. *Withers* v. *Bircham*, 5 D. & R. 106; 3 B. & C. 254; 3 L. J. (o.s.) K. B. 30 ; 27 R. R. 350.

The criterion by which the propriety of the joinder or the nonjoinder of parties to a covenant in an action for breaches is to be ascertained, is the nature of the interest of the covenantees. If the interest is several, the action may be several ; if joint, it must be joint ; and the terms or language of the covenant do not control that principle. *James* v. *Emary*, 5 Price, 529 ; 2 Moore, 195 ; 8 Taunt. 245 ; 19 R. R. 503.

Though an agreement is made jointly with two parties, yet, where the interests are several, and the damages several, each of the covenantees may sue without joining the other. *Palmer* v. *Sparshott*, 4 Scott (N.R.) 743 ; 4 Man. & G. 137 ; 11 L. J , C. P. 204.

By articles of agreement for the sale of premises, the defendant covenanted with the plaintiff, and with the several other parties beneficially interested in the premises .—Held, that their interest was several, and that the plaintiff might sue alone. *Poole* v. *Hill*, 9 D. P. C. 300 ; 6 M. & W. 835 ; 10 L. J., Ex. 81.

Where a party covenanted by deed, for himself, his heirs, executors and administrators, with each of certain parties thereto (proposed shareholders, the plaintiff being one, in the term and coal mines hereafter mentioned), his executors, administrators and assigns, that he would produce and show a good marketable title to a term of forty-two years, and the seams of coal, by the deed demised and granted ; and that he would effectually assign, assure and vest the same according to the true intent and meaning of the deed ; and that he would, with all practicable speed, proceed with, and within four years complete, the harbour and works :—Held, upon an action brought by the plaintiff alone for a breach of these covenants, that they were in their nature several, and, therefore, that the action was rightly brought. *Mills* v. *Ladbroke*, 7 Scott (N.R.) 1005 ; 7 Man. & G. 218 ; 13 L. J., C. P. 122 ; 8 Jur. 247.

Where the interest of the covenantees is joint, although the covenant is in terms joint and several, the action follows the nature of the contract, and must be brought in the names of all the covenantees *Pugh* v. *Stringfield*, 3 C. B. (N.S) 2 ; 27 L. J., C. P. 34. See *S. C.*, 4 C. B. (N.S.) 364 ; 27 L. J., C. P. 225 ; 6 W. R. 487.

By articles of agreement, under seal, between L. and the defendant, of the one part, and the plaintiff and H., of the other part ; after reciting, that L. and the defendant, as solicitors of D., had applied to the plaintiff to lend D. 2,900*l.* out of moneys of H., in the plaintiff's hands, and held by him in trust for her, upon the security of a policy of insurance and other securities, but that the plaintiff had declined to do so without further security ; and that, thereupon L. and the defendant proposed to enter into the covenant hereinafter contained ; L. and the defendant, in pursuance of the agreement, and in consideration of the premises, and of the plaintiff having so advanced 2,900*l.* to D., at the request of L. and the defendant, did covenant with and to the plaintiff ; and also as a separate and distinct covenant with and to H., that L. and the defendant, or one of them, would pay to the plaintiff the interest on the 2,900*l.*, or such part thereof as should remain unpaid :—Held, that the plaintiff could not maintain an action upon this covenant without joining H. *Hopkinson* v. *Lee*, 6 Q. B. 964 ; 14 L. J., Q. B. 101 ; 9 Jur. 616.

Joint covenantees who may sue, must sue jointly, unless they have expressly disclaimed the covenant, which it lies upon the party suing to show. *Petrie* v. *Bury*, 5 D. & R. 152 ; 3 B. & C. 353 ; 3 L. J. (o.s.) K. B. 29 ; 27 R. R. 383.

Where the owner of one undivided moiety, and the mortgagor and mortgagee of the other, join in a demise, the covenants being with all three, although there is no reversion in the mortgagor, he is entitled to join with the other two in an action against the assignees in bankruptcy of the lessee for the rent. *Magnay* v. *Edwards*, 13 C. B. 179 ; 1 C. L. R. 141 ; 22 L. J., C. P. 170 ; 17 Jur. 839 ; 1 W. R. 331. Following *Wakefield* v. *Brown*, 9 Q. B. 209 ; 15 L. J., Q. B. 373 ; 10 Jur. 853.

How Covenant Declared on.]—A joint and several covenant by A. and other persons, that "they, or some or one of them," will pay a certain sum, may be declared upon as a covenant by A. to pay. *Caldwell* v. *Becke*, 2 Ex. 318.

A covenant, whereby "A., B. and C., and any two of them jointly, and each of them separately," covenanted with D. that A., B. and C., "or some or one of them," shall pay D. a sum of money, is properly declared upon in an action of covenant against A alone as a covenant that A. would pay that sum to D. *Addison* v. *Gibson*, 10 Q. B. 106 ; 16 L. J.. Q. B. 165 ; 11 Jur. 654.

Who to be Sued.]—An action against A. and B., on a covenant supposed to be implied as incident to a demise by lease : on production of the lease, it appearing that, in point of law, A. only demised, and that B., who had an equitable interest, merely confirmed, the action is not maintainable against A. and B. *Smith* v. *Pocklington*, 1 C. & J. 445 ; 1 Tyr. 309.

If an obligee of a bond covenants not to sue one of two joint and several obligors, and, if he does, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean* v. *Newhall*, 8 Term Rep. 168.

A plaintiff sued five out of a larger number of persons, joint and several covenantors ; before trial two of the five became bankrupt. The plaintiff was allowed to try the action against the remaining three, and the judge refused to compel them to bring the trustees in bankruptcy before the court to enforce contribution. *Lloyd* v. *Dimmack*, 47 L. J., Ch. 398.

And see ante, II. Construction ; 2. Joint and Several (col. 1028).

c. Personal Representatives.

When Suing.]—Where an executrix declared, that the defendant, by deed, conveying to her testator lands in fee subject to redemption on payment of a sum certain, covenanted with the testator, that he was, at the time of the execution of the deed, seised in fee, and had a right to

convey; and assigned for breach that the defendant was not seised in fee, and had not a right to convey:—Held, that the executrix could not maintain an action for such breaches of covenant, without showing some special damage to the testator in his lifetime, or that she claimed some interest in the premises. *Kingdon* v. *Nottle*, 1 M. & S. 355; 14 R. R. 462.

By an indenture tripartite between A. 1, B. 2, and C. 3, A., tenant for life, demised to C., and C. covenanted with B. (a receiver) and other the receiver or receivers for the time being, and to and with such other person, who for the time being should be entitled to the freehold, and to and with every of them. A. died:—Held, that his executrix could not maintain an action for a breach in her testator's lifetime, but that the action was joint, and survived to B. *Southcote* v. *Hoare*, 3 Taunt. 87; 12 R. R. 600.

An executor, though not named, may sue upon a covenant made with the testator in reference to a chattel. *Doe* d. *Rogers* v. *Rogers*, 2 N. & M. 550.

An executor of a lessor, tenant from year to year, may sue for a breach of covenant in a lease, for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death. *Mackay* v. *Mackreth*, 2 Chit. 461; 4 Dougl. 213.

But such a declaration should state the termor's interest and title in the premises. *Ib.*

When Sued.]—If tenant in tail male demises for a term of ninety-nine years, and his lessee assigns over to another, but, before such assignment, the tenant in tail male dies without issue male, no action upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it. *Andrew* v. *Pearce*, 1 Bos. & P. (N.R.) 158; 8 R. R. 776.

A covenant by two joint lessees, if it is joint and several, will bind the executors of the deceased lessee. *Enys* v. *Donnithorne*, 2 Burr. 1190.

In an action against executors, in their own right on a covenant for good title and quiet enjoyment against any person or persons whatever, contained in an assignment of a lease of the testator (by way of mortgage), the declaration must show a breach by some act of the covenantors. *Noble* v. *King*, 1 H. Bl. 34.

In an action upon an indenture of lease against the surviving executrix of the lessee, the declaration stated, that, upon the death of the lessee, all his estate and interest in the premises came to and vested in the defendant and P., who were executrices of the last will and testament of the lessee, by reason whereof the defendant and P., as executrices, became and were possessed:—Held, a sufficient averment that the term vested in the defendant and P. as executrices. *Ackland* v. *Pring*, 3 Scott (N.R.), 297; 2 Man. & G. 937; 10 L. J., C. P. 231.

Held, also, that it was unnecessary to aver that the term had vested in the defendant and P. as executrices, as the vesting of a term in the lessee's personal representatives, together with the liability of such personal representatives to be sued upon the covenants of the lease, is in effect a conclusion of law. *Ib.*

E. covenanted that he, in his lifetime, or his heirs, executors, or administrators would, within three months after his death, pay 3,000*l.* He died, having devised real estate to trustees for E. for life, and remainders over, and other real estate to the same trustees, for payment of debts. The trustees, under an order of the court of chancery, conveyed the estate to new trustees, who became the legal personal representatives of the testator, and the tenant for life mortgaged his estate:—Held, that, after the death of the covenantor, an action of debt would lie upon that covenant. *Coope* v. *Cresswell*, 36 L. J., Ch. 114, L. R. 2 Ch. 112; 15 L. T. 42; 15 W. R. 242.

Held, also, that the action would lie against the trustees under the will and the heir, by 3 Will. & M. c. 14. s. 3, and execution would be thus obtained against the land; and that the alienation by the trustees was not such an alienation as would, under s. 7, prevent the action; nor was the alienation by the equitable tenant for life such an alienation. *Ib.*

Held, also, that the same conclusions would probably be arrived at, even if the legal estate in fee had been outstanding at the time of the testator's will and death, inasmuch as 3 Will. & M. c. 14, makes the devisees of an equitable estate liable for debts. *Ib.*

Held, also, that payment within twenty years of interest on the 3,000*l.* by the trustees, was not sufficient, within 3 & 4 Will. 4, c. 42, s. 5, to prevent that statute from being pleaded in bar by the equitable tenant for life. *Ib.*

d. Heirs and Devisees.

Action by Heir]—On a covenant for further assurance, where the breach happened in the time of the covenantee, but the damage accrued to the heir, the heir has a preferable title to the executor to bring the action of covenant. *King* v. *Jones*, 1 Marsh. 107; 5 Taunt. 418; 15 R. R. 533. And see *Kingdon* v. *Nottle*, 1 M. & S. 355; 14 R. R. 462.

An action lies by the heir, upon a covenant made to the ancestor and his heirs, to whom lands are conveyed in fee by husband and wife, that he and his wife will make further assurance upon request of the ancestor and his heirs; and the heir may well assign for breach, that his ancestor requested the husband, that he and his wife should levy a fine to pass the estate of the wife legally to him and his heirs, which they refused to do before their decease, per quod after the death of the ancestor, the devisee of the wife ejected the heir. *Jones* v. *King*, 4 M. & S. 188; 15 R. R. 533.

Against Heir]—To an action against the heir on a covenant by his ancestor, for himself, his heirs, executors, administrators and assigns, a plea that he has not any lands by hereditary descent in fee-simple from his ancestor, is bad for omitting to negative that he had estates pur autre vie by descent from the covenantor. *Fitzgerald* v. *Fitzgerald*, 1 Ir. C. L. R. 347.

Against Devisees.]—The devisee of the equity of redemption (the legal fee being in a mortgagee) is not liable as assignee of all the estate, right, title and interest of the original covenantor. *Carlisle Corporation* v. *Blamire*, 8 East, 487; 9 R. R. 491.

An action of covenant does not lie upon the 3 Will. & M. c. 14, against the devisee of land, to recover damages for a breach of covenant made by the devisor; but the remedy thereby given is confined to cases where an action of debt lies. *Wilson* v. *Knubley*, 7 East, 127; 3 Smith, 128.

By Devisees.]—An action lies by a devisee of lands in fee, upon a covenant made by the defendant to the testator, to whom the defendant conveyed the lands in fee, that he was lawfully seised, and had a good right to convey; for such covenant runs with the land, and though broken in the lifetime of testator, it is a continuing breach in the time of the devisee, and it is sufficient to allege for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. *Kingdon* v. *Nottle*, 4 M. & S. 53; 16 R. R. 379.

Where there was a devise to trustees and their heirs during the life of A., in trust for A., and after his decease to B. in fee: and the trustees recovered, in A.'s lifetime, damages for breach of covenant in a lease granted by the testatrix, and still subsisting. Upon A.'s death:—Held, that the damages belonged to her estate. *Noble* v. *Cass*, 2 Sim. 343; 29 R. R. 115.

Where a lessor had not executed the lease, his devisee could not sue on the covenants as assignee of the reversion. *Cardwell* v. *Lucas*, 2 M. & W. 111; 6 L. J., Ex. 52; ante, col. 1069.

e. Assignees.

Actions by.]—Devise to the use of I. for life, without impeachment of waste, remainder to the use of the plaintiff for life:—Held, that the plaintiff, after the death of I., was an assignee within the 32 Hen. 8, c. 34, and might maintain an action of covenant against the lessee for rent in arrear after death of I., and during the continuance of the term. *Isherwood* v. *Oldknow*, 3 M. & S. 382; 16 R. R. 305.

An action of covenant will lie by the assignees of the reversion of part of the demised premises against the lessee for not repairing. *Twynam* v. *Pickard*, 2 B. & Ald. 105; 20 R. R. 368.

The fact of the plaintiff being assignee only of a part of the interest created by the lease will not preclude him from suing the lessor for and recovering damages in respect of the breach of the covenant. *Simpson* v. *Clayton*, 4 Bing. (N.C.) 758; 6 Scott, 469; 1 Arn. 299; 8 L. J., C. P. 59.

L. being seised in fee, demised to B. for twenty-one years, from June, 1814: B. demised to M. for twenty-one years, from June, 1814, wanting twenty-one days; and then by deed-poll granted to L. the indenture of lease to M., the premises thereby granted, and the rent reserved, to hold to L., his executors, &c., for the term mentioned in the demise to M.; L., by lease and release, conveyed the premises, the reversion and reversions, rents, issues and profits, and all his interest, in fee to the plaintiff, by way of mortgage; M. assigned his term to the defendant by way of mortgage, but the defendant never entered:—Held, that plaintiff might sue the defendant on the covenants in M.'s lease. *Burton* v. *Barclay*, 7 Bing. 745; 5 M. & P. 785; 9 L. J. (O.S.), C. P. 231.

By a deed to lead the uses of a recovery, lands were limited to the use of such a person as A. should by deed or will appoint, and in default of and until appointment, to the use of B. in trust for A., his heirs and assigns, reserving to A. a leasing power. A. (reciting the power) demised for a term to C., "yielding and paying unto A., his heirs and assigns during the term," a certain rent, with covenants to pay rent, to repair, &c., and a proviso for re-entry by A., his heirs and assigns, in case of breach:—Held, that the covenants enured in favour of the assignees of the reversion. *Greenway* v. *Hart*, 14 C. B. 340; 2 C. L. R. 370.

A. having only an equitable interest, made a lease of copyhold premises in 1762, subject to certain covenants, to be performed by the lessee and his assigns. In 1775 he obtained the legal estate:—Held, that the assignee of the reversion could not maintain an action against the assignee of the lessee, for breach of the covenants in the lease. After the lessor had obtained the legal estate, he granted another lease, in which the former lease of 1762 was recited; but it was agreed that it should continue in force, and the same rent remain reserved:—Held, that the assignee of the reversion could not sue for breach of the covenants contained in the lease of 1762. *Whitton* v. *Peacock*, 1 Hodges, 376.

By a will, power was given to a tenant for life to lease for twenty-one years, and to executors to mortgage in fee or for years. In 1812, after the testator's death, the tenant for life made a grant for ninety-nine years, if he should so long live; in 1814 he demised under his power for twenty-one years. In 1828, the executors mortgaged for 1,000 years under their power:—Held, that the leasing power under the will was not suspended by the lease of 1812, so far as regarded the grantee of the term under the power to demise by way of mortgage given to the executors, and consequently that such grantee had the immediate reversion in him, and might sue on the covenant in the lease of 1814. *Bringloe* v. *Goodson*, 6 Scott, 502; 4 Bing. (N.C.) 726; 1 Arn. 322; 8 L. J., C. P. 116.

The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only, and therefore the representatives of all the tenants in common must join in suing for a breach. *Thompson* v. *Hakewell*, 19 C. B. (N.S.) 713; 35 L. J., C. P. 18, 13 L. T. 909; 11 Jur. (N.S.) 732; 14 W. R. 11.

Where a reversion in one person is devised to several as tenants in common, each has a separate right of action for breach of a covenant running with the land. *Roberts* v. *Holland*, 62 L. J., Q. B. 621; [1893] 1 Q. B. 665; 5 R. 370; 41 W. R. 494.

Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Tuite* v. *Gosling*, 48 L. J., Ch. 397; 11 Ch. D. 273; 40 L. T. 251; 27 W. R. 394.

See *Cardwell* v. *Lucas*, ante, col. 1075.

—— **What sufficient Allegation of Title.**]—Where the assignee of the reversion, who sued the defendant, alleged that the lessor was seised (without stating of what estate), and being so seised, devised to the plaintiff in fee, it is a sufficient allegation of title after verdict. *Harris* v. *Beavan*, 4 Bing. 646; 1 M. & P. 633; 6 L. J. (O.S.) C. P. 149.

Actions against.]—Under an absolute assignment of a term, the assignee may be sued on the covenants, before he has taken actual possession. *Walker* v. *Reeves*, 2 Dougl. 461, n.

An action of covenant for non-payment of rent lies against an assignee of a lease, to whom an assignment is made by way of mortgage security

although he has never entered, or taken actual possession. *Williams* v. *Bosanquet*, 3 Moore, 500 ; 1 Br. & B. 238 ; 21 R. R. 585.

The assignee of a term declared against as such is not liable for rent accruing after he has assigned over, though it is stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute. *Chancellor* v. *Poole*, 2 Dougl. 764.

A trustee to whom two leases were assigned in trust for securing an annuity, saying to the occupier of one of the demised houses, "You must pay the rent to me ; I am become landlord for my client, who has the annuity, and you must pay the ground-rents for me ; " is liable to the lessor, as assignee of both leases, for non-payment of rent and not repairing. *Gretton* v. *Diggles*, 4 Taunt. 766 ; 14 R. R. 662.

A plea in abatement, by a defendant sued in covenant as the assignee of a lease, that the right and interest in the premises vested in him jointly with another person therein named, is bad, for not showing how the premises came into the joint possession of himself and that person. *Heath* v. *Livingston*, 1 D. & L 334 ; 11 M. & W. 896 ; 12 L. J., Ex. 432 ; 7 Jur. 934.

The lessees of a theatre, by a deed agreed to pay certain money lent to them by the plaintiff, on a certain day, and that until payment the plaintiff, and such persons as he might appoint, should have the free use of two boxes in the theatre, one in the dress circle, and one in the circle above, no specific boxes being mentioned. The lessees afterwards assigned their interest in the theatre to the defendant :—Held, that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes in the theatre. *Flight* v. *Glossop*, 2 Scott, 220 ; 2 Bing. (N.C.) 125; 1 Hodges, 263 ; 4 L. J., C. P. 268.

Action against the assignee of the lessee for the non-payment of rent : plea. that before the rent became due, he assigned all his estate and interest in the premises to A. and B.; replication, that in and by the indenture, the lessee, for himself, his executors, administrators, and assigns, covenanted that he, his executors or administrators, should not assign the premises without the consent of the lessor, and that no consent was given :—Held. first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not estop the assignee from the setting up the assignment ; and, secondly, that the action being founded on privity of estate, the liability of the assignee ceased as soon as the privity of estate was destroyed. *Paul* v. *Nurse*, 8 B. & C. 486 ; 2 M. & Ry. 525 ; 7 L. J. (o.s.) K. B. 12.

Where it appears on the face of a lease, as set out in a declaration, in an action on the covenant for rent, that the lessor has only an equitable interest, the covenant for the payment of the rent may be properly treated as a covenant in gross. *Pargeter* v. *Harris*, 7 Q. B. 708 ; 15 L. J., Q. B. 113 ; 10 Jur. 260.

A., by an indenture, executed by himself and B., assigned to B. premises, subject to the payment of the rent, and to the performance of the covenants and agreements reserved and contained in the original lease. B. entered under this assignment, and afterwards assigned over to a third person :—Held, that B. was not liable to A. for rent which the latter had been called upon to pay, in consequence of the default of B.'s assignee : the words "subject to the payment of the rent, &c." being words of qualification and not of contract. *Wolveridge* v. *Steward*, 3 M. & Scott, 561 ; 1 C. & M. 644; 3 Tyr. 637 ; 2 L. J., Ex. 303 ; 3 L. J.. Ex. 360.

An action lies against the assignee of a lessee of an estate for part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract ; and in case of eviction the rent may be apportioned. Aliter in an action against the lessee himself, who is liable on his personal contract. *Stevenson* v. *Lambard*, 2 East, 575 ; 6 R. R. 511.

A covenant for renewal is in itself a mere personal contract, and at law the only remedy which lies for the breach of it is a personal action ; but a substantive, independent covenant binds the covenantor and his representative, in respect of the assets transmitted. *Chandos* (*Duchess*) v. *Brownlow*, 2 Ridgw. P. C. 405.

By 32 H. 8, c. 34 ; 10 Car. 1, c. 4, s. 2, it is now clearly settled, that to charge any person in covenant as an assignee, 1st, the covenant must relate to the land demised, and 2nd, there must be a privity of estate between the assignee and the covenantee, and if he is to be charged as assignee of the lessee, he must have in him the whole term and interest of the lessee. So, if the subject-matter of a covenant running with the land has existence at the time of the demise, the assignee is bound, though he be not named ; but a covenant in a lease can only affect assignee claiming subsequent to the lease. *Ib.*

If a lessee comes into equity to compel a specific execution of a covenant in a lease, as running with the estate of the reversioner, he must show that the defendant is personally liable at law, in respect of the covenant and of his estate. *Ib.*

The owners of a freehold property, on a sale of a plot of land to the plaintiff, covenanted with him not to allow any house built on the adjoining land to be used for the sale of liquor. They afterwards sold another plot to a person who granted a lease to the defendant, such lease purporting to allow the defendant to carry on the trade of a vendor of wines and spirits and bottled ale. The defendant at the date of his lease knew of the existence of the former covenant. The defendant having commenced to carry on the sale of wines, &c. :—Held, that an assign with notice was in the same position as a party to the covenant, and that, therefore, the court would not require substantial damages to be shown before granting an injunction to restrain a breach. *Richards* v. *Revett*, 47 L. J., Ch. 472 ; 7 Ch. D. 224 ; 37 L. T. 632 ; 26 W. R. 506.

An assignee of land with notice of a covenant is subject to the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other. *Ib.*

See also ante, III.—Running with the Land, (col. 1045).

3. Pleadings.

a. Venue.

Where there are several facts material to the plaintiff's action arising in different counties, an action of covenant may be brought in either. *London Corporation* v. *Cole*, 7 Term Rep. 583.

In an action on a covenant by the assignee of the lessee of a term, the action is local, and the venue must be laid in the county where the lands are situated. *Berwick Corporation* v. *Shanks*, 11 Moore, 372; 3 Bing. 459; 4 L. J. (O.S.) C. P. 152.

b. Claim.

What sufficient.]—A defendant covenanted that he would pay over the first fruits and proceeds, which should be first realized and be at his disposition under a sequestration, forthwith upon the receipt thereof, to the plaintiff. In an action upon the covenant, the declaration stated, that, although divers first fruits and proceeds were realized, and at the defendant's disposition, yet he had not paid them over:—Held, sufficient, and that it was not necessary to aver a receipt of them by the defendant. *Smith* v. *Nesbitt*, 2 C. B. 286; 15 L. J., C. P. 9.

A. and B., lessees of a coal mine, A. being also lessee in trust for himself and B. of land adjoining, necessary for the working of the mine, covenanted with C. that they would do nothing whereby an annuity, charged (with power of entry upon the mine, and sale, in case the annuity should be in arrear) upon the profits which, after payment of the rent charged thereon, might be made under the leases of the mine and land, by the sale of the coal or otherwise, may be impeached. In an action on the covenant, C. assigned as breaches—first, that A. surrendered the land, and took a new lease to himself and B. jointly, in trust for other persons, whereby the annuity became and was impeached, and the plaintiff lost his remedies to enforce it; secondly, that A. and B. accepted a new lease of the land, at an increased rent, and, in other respects, upon less advantageous terms, for the fraudulent purpose of obtaining from the lessor a demise of mines under the land upon terms advantageous to A. and B. whereby the annuity became and was impeached; and thirdly, that A. and B. assigned such neighbouring mine and the land to D., whereby the annuity became and was impeached:—Held, that the declaration was insufficient, for not showing in what manner the acts complained of operated to impeach the annuity. *Pitt* v. *Williams*, 4 N. & M. 412; 2 A. & E. 419; 4 L. J., K. B. 131. See *S. C.*, 5 A. & E. 885.

In an action on a covenant, to do no act whereby an annuity charged upon the profits of a coal mine shall be impeached, it is no ground of demurrer that the declaration does not allege that any profits have been made. *Ib.*

The reversion of lands demised to the defendant for years is conveyed to A. and B., and the heirs of B., in trust for A. and his heirs; A. declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of B., states himself to be "thereby seised of the reversion in his demesne as of fee." This is bad on general demurrer. *Scott* v. *Godwin*, 1 Bos. & P. 67.

In an action on a lease, it is sufficient if the declaration sets out the legal operation and effect of the demise. *Wilson* v. *Bramhall*, 1 Y. & J. 2.

A declaration alleging, that by indenture, purporting to be made between the plaintiff and defendant, it was witnessed that the defendant covenanted, is sufficiently certain. *Baymon* v. *Batley*, 8 Bing. 256; 1 M. & Scott, 339; 1 L. J., C. P. 75.

What a Variance.]—By deed it was covenanted that the defendant should obtain a licence from the lord of the manor, and should grant a lease to the plaintiff, and that such lease should contain a covenant that the defendant would, during the term, repair the premises demised, and that, till such licence was obtained and such lease granted, the plaintiff should hold the premises as tenant from year to year, subject to the terms and conditions specified. In an action upon the deed, the plaintiff, in his declaration, set out the covenant that the defendant should obtain the licence and grant the lease, and the proposed covenant to repair; and alleged that the parties further covenanted, that, till the licence should be obtained and the lease granted, the plaintiff should be considered as tenant from year to year, and that whilst the plaintiff should be possessed of the premises as tenant from year to year, under the provisions of the deed, the defendant should repair the premises:—Held, no variance. *Price* v. *Birch*, 4 Man. & G. 1; 1 D. (N.S) 720; 11 L. J., C. P. 198.

A declaration alleged that the defendant covenanted that he and all persons claiming under him would, upon request, and at the expense of the defendant, execute all such further assurances as might be required. It appeared by the deed when produced, that the covenant was, that the defendant "would, upon the request and at the expense of the defendant, execute," &c.:—Held, a variance. *Whyte* v. *Burnby*, 16 L. J., Q. B. 156.

A declaration in an action on a covenant for the assignment of a share in stock, professed to set out the covenant, and described it as a covenant to assign a certain sum of 2,000*l.* The defendant set out the deed, and demurred as for a variance, that the covenant was to assign stock, not money:—Held, to be no variance. *Ross* v. *Parker*, 2 D. & R. 662; 1 B. & C. 358.

In an action against a surety in an annuity bond, who had become bound to pay in twenty-eight days from the time specified for payment by the grantor, in case of failure by the latter, the declaration by mistake stated that the payment had become due from the surety on the day on which it had become due only from the principal:—Held, that as the bond and covenant were upon the whole set forth with sufficient certainty to prevent any reasonable mistake as to the ground of action, the inconsistent allegation might be rejected as surplusage. *Hearn* v. *Cole*, 1 Dow, 459, 463.

One may declare in an action that the deed was indented, made, and concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made and concluded. *Hall* v. *Cazenove*, 4 East, 477; 1 Smith, 272; 7 R. R. 611. And see *Mayelston* v. *Palmerston* (*Viscount*), M. & M. 6; 2 Car. & P. 474.

A declaration stated that the defendant covenanted to pay a certain sum of money at a certain time. Upon oyer, the covenant appeared to be to pay the money at that time, and also at a particular place. The defendant demurred, and assigned the variance as a cause of demurrer:—Held, that there was no material variance. *Paine* v. *Emery*, 4 D. P. C. 191; 1 Gale, 266; 5 Tyr. 1097; 2 C. M. & R. 304; 4 L. J., Ex. 250.

Where a declaration in an action by the reversioner against A., the assignee of a lease for years (granting licence to B. to continue a channel open through the bank of a navigable

river, upon certain conditions), imported that the grantors had the entire right and absolute possession of the channel, and full power to grant the use of it to B., and it appeared from the indenture that they were described merely as the persons who had the greatest proportion or share in the profits of the navigation, and that they, by virtue of all or any powers and authorities vesting in or enabling them, granted the licence to B., his executors, administrators and assigns: —Held, that this was a variance, as the grantors had not the privilege which the deed, as set out in the declaration, purported to grant. *Portmore (Earl)* v. *Bunn*, 3 D. & R. 145; 1 B. & C. 694; 1 L. J. (o.s.) K. B. 196.

Declaration against a defendant as assignee of "all the estate," &c., in certain premises; evidence, that he is assignee of part, is a variance. *Hare* v. *Cator*, Cowp. 766.

Where a declaration stated the consideration to be that the plaintiff would assign to the defendant a bill of exchange, and that he did assign it to the defendant, and a promise by the latter accordingly, and it was proved that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds to the plaintiff; and in pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, for the defendant's own use: and the defendant covenanted to pay the plaintiff a sum equal to any money he should receive on account of the bill:—Held, that as the declaration imported that the plaintiff had made an absolute assignment of the bill, and as the assignment in evidence was conditional only, it was a variance. *Van Sandau* v. *Burt*, 5 B. & Ald. 42.

—— **In Statement of Consideration.**] — A declaration alleged a deed to have been made for considerations therein mentioned; the deed itself contained only one (a pecuniary consideration) :—no variance. *Gully* v. *Exeter (Bishop)*, 12 Moore, 591; 4 Bing. 290; 5 L. J. (o.s.) C. P. 178; 29 R. R. 565.

A declaration stated, that by an indenture it was witnessed that, as well in consideration of certain furnaces to be erected by the plaintiff, B. did demise. The defendant pleaded non est factum. On producing the deed, it appeared to be, that as well in consideration of the erection of the furnaces, "as also for building certain houses and payment of rent, B. did demise":— Held, a variance. *Swallow* v. *Beaumont*, 2 B. & Ald. 765; 1 Chit. 518.

—— **In Description of Parties.**]—In an action on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff of the one part, and the defendant of the other. On the production of the lease, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other:—Held, no variance, although the premises demised were the property of the wife before marriage. *Arnould* v. *Revoult*, 4 Moore, 66; 1 Br. & B. 433.

A declaration on a lease which stated that the plaintiffs derived their titles from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four. *Wood* v. *Day*, 1 Moore, 389; 7 Taunt. 646.

In an action against a mortgagor, a statement that the defendant bound himself, his heirs, executors, &c., is no variance, though the word "heirs" was not mentioned in the covenant. *Hamborough* v. *Wilkie*, 1 Chit. 518; 4 M. & S. 474, n.

What Sufficient Allegation of Breach.] — Action, upon an indenture, whereby the defendant demised to the plaintiffs, for ten years, a brewery at S., and, also, the exclusive or such other privilege as the defendant then enjoyed, of "supplying ale" to certain public houses, "then the property of the defendant, or then under his control, that is to say, the Punch Bowl." The declaration averred, that, at the time of making the indenture, the defendant was the landlord and owner of the Punch Bowl, and in the occupation thereof, and that afterwards he demised it to G., who covenanted with the defendant to purchase all the ale consumed on the premises from the plaintiff. Breach, that G., during his tenancy of the Punch Bowl, did not purchase all the ale from the plaintiff, but purchased it from the defendant and others:— Held, that this breach was not well assigned, and, also, that the declaration should have shown what privilege the defendant possessed. *Hinde* v. *Gray*, 1 Man. & G. 195; 1 Scott (N.R.) 123; 9 L. J., C. P. 253; 4 Jur. 392.

In an action on a covenant to allow a business to be carried on in a certain shop, a breach that the defendant improperly shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times. *Hodges* v. *Gray*, 4 D. P. C. 733.

In a declaration on a covenant to "save harmless and keep indemnified W., his heirs and assigns, and also certain closes, &c., from and against all actions, suits, claims and demands whatsoever, both in law and equity, which should or might be had, made, commenced or prosecuted by any person or persons claiming any right, title or demand in, to or upon the closes, as heir at law of H. P. and others, of and from all costs, charges and expenses which W. should sustain or be put to, for or by reason or means of such actions, suits, claims or demands, or otherwise howsoever;" to which the breaches assigned were, first, that P. made claim and demand, and claimed to have right and title of, in, to and upon the closes, and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use; and secondly, that he caused and procured, and suffered and permitted, one B., who then held and enjoyed the closes, to attorn to him, and to withhold the payment of the rents, issues and profits; and thirdly, that certain title deeds relating to the closes, were kept, detained and withholden by one A., at the instance, and through the means, and by and through the claim and demand of T. B., W. P., &c.:—Held, after the defendant had pleaded over, that these breaches were well assigned on the covenant declared upon. *Fowle* v. *Welsh*, 2 D. & R. 133; 1 B. & C. 29; 1 L. J. (o.s.) K. B. 17; 25 R. R. 291. And see *Nash* v. *Palmer*, 5 M. & S. 374; 17 R. R. 364.

The defendant purchased an estate charged with an annuity to S., and, as part of the bargain, covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it. Breach, in a declaration on this covenant, assigning non-payment of the annuity, without adding that the vendor had been thereby damnified, is

sufficient. *Saward* v. *Anstey*, 2 Bing. 519 ; 10 Moore, 55 : 3 L. J. (o.s.) C. P. 63. Affirmed, 4 L. J. (o.s.) K. B. 1.

A declaration stated, that, by deed, the defendant covenanted that he would appear at an office for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do, or permit to be done, any act whereby such insurance should be avoided or prejudiced. It alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him ; and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso that if the defendant went beyond the limits of Europe the policy should be null and void. Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America :—Held, that the declaration was bad, for not averring that the defendant had notice that the policy was affected. *Vyse* v. *Wakefield*, 6 M. & W. 442 ; 8 D. P. C. 377 ; 4 Jur. 509 Affirmed, in error, 7 M. & W. 126 ; 8 D. P. C. 912 ; 9 L. J., Ex. 274 ; 4 Jur. 611.

Action upon a deed, in which it was recited, in effect, that the defendant had accepted securities from B., which were to be valid upon the advance of money by the defendant to B., and void upon the repayment of the same by B. to the defendant ; and that the defendant had, after taking the securities, but before making the deed, advanced 269*l.* to B., and that the money had not been repaid at the time of making the deed ; and that, in order to induce the plaintiff, in his turn, to advance money to the defendant, the defendant, by the deed, assigned to the plaintiff the securities which he held from B. ; and in which the defendant covenanted, that he had neither done nor omitted, at any time, any act by which the securities, or any estate or interest therein, should or might be in any manner affected, and that 269*l.* remained, at the time of making the deed, due upon the securities to the defendant. The breach alleged was, that the defendant never made any advances to B. upon the securities, nor was the sum of 269*l.*, or any part of it, owing to the defendant at the time of making the deed :—Held, that the breach was well assigned, and that the plaintiff was not estopped from denying that the defendant had made any advance ; for, as this fact was material for the validity to the plaintiff of the securities on which he advanced his money to the defendant, and as he took the covenant of the defendant to secure to him the truth of that fact, the true construction of the indenture was, that the recital in question was intended by the parties to be the statement of the covenantor only. *Stronghill* v. *Buck*, 14 Q. B. 781 ; 14 Jur. 741.

c. Defence and Replication.

Non est factum.]—Where a defendant sets out the deed, and pleads non est factum, the deed so set out becomes part of the declaration, and the only question at the trial upon that issue is, whether the deed set out was executed by the defendant. *Snell* v. *Snell*, 7 D. & R. 294 ; 4 B. & C. 741 ; 4 L. J. (o.s.) K. B. 44.

Where a deed is pleaded according to its supposed legal effect, non est factum (the deed not being set out on oyer) not only puts in issue the fact of its execution, but the construction of it, as alleged in the previous pleading. *North* v. *Wakefield*, 13 Q. B. 536 ; 18 L. J., Q. B. 214.

Permission.]—Where to an action on a bond, which contained a condition that the defendant should not open a shop within a certain distance of premises demised in a lease, he pleaded that he opened a shop, by the licence of the plaintiff :—Held, bad, on the ground that a licence after breach was not good unless by deed. *Sellers* v. *Brikford*, 1 Moore, 460.

Traverse of Breach.]—The defendant covenanted with the plaintiff to use his best endeavours, and all due diligence, to forward certain works, so that the works should be completed in as short a time as practicable. To a declaration, alleging as a breach that the defendant did not nor would use his best endeavours, or due or any diligence to forward the works, so that the same might be completed in as short a time as practicable, a plea that he did use his best endeavours, and all due diligence to forward the works, so that the same might be completed in as short a time as practicable, but by causes wholly beyond his control, and without any default on his part, he was hindered and prevented from forwarding the works, is good, as a traverse of the breach. *Vickers* v. *Overend*, 7 H. & N. 92 ; 30 L. J., Ex. 388.

Performance pleaded otherwise than in the terms of the covenant itself is bad, even on general demurrer. *Scuddamore* v. *Stratton*, 1 Bos. & P. 455.

Non infregit conventionem cannot be pleaded where a plaintiff assigns a breach without setting forth the particulars of the title of a third person. adding, "and so the defendant did not keep his covenant." *Hodgson* v. *East India Co.*, 8 Term Rep. 278.

Non infregit conventionem is not an issuable plea to a breach of covenant assigned in the negative. *Bone* v. *Eyre*, 2 W. B. 1312. *S. C.*, nom. *Boone* v. *Eyre*, 1 H. Bl. 273, n.; 2 R. R. 768.

If a plaintiff assigned as a breach that the defendant did not repair, a plea that the defendant did not break his covenant was bad, on special demurrer, although the declaration concluded by averring that so the defendant has broken his covenant ; but it was good after verdict. *Taylor* v. *Needham*, 2 Taunt. 278 ; 11 R. R. 572.

Tender.]—Upon a bare covenant for the payment of money the defendant may plead a tender. *Johnson* v. *Clay*, 7 Taunt. 486 ; 1 Moore, 200.

Judgment.]—Where two out of three joint covenantors suffer judgment by default on counts on several deeds, and the third defends and succeeds on some counts, the plaintiff cannot hold his judgment on those counts against the other two. *Morgan* v. *Edwards*, 6 Taunt. 398 ; 2 Marsh. 201.

Acquiescence.]—Acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. *Western* v. *M'Dermot*, 35 L. J., Ch. 190 ; 12 Jur. (N.S.) 366. Affirmed, 36 L. J., Ch. 76 ; L. R. 2 Ch. 72 ; 15 L. T. 64 ; 15 W. R. 265.

The court will grant an injunction to restrain

a breach of a covenant, although the covenantee has allowed the breach to go on for a few months, if such breach has been of a gradual and not conspicuous character. *Mitchell* v. *Steward*, 14 L. T. 134.

Where a lessee, who has entered into a restrictive covenant as to user of premises, underlets to a person who, with his sanction, commits a breach of the covenant, he may properly be made a party to a suit for an injunction, and is liable for the costs. *Ib.*

Acquiescence in the violation of a covenant to a certain extent:—Held, a sufficient objection to an interlocutory application for an injunction against a greater violation of it. *Child* v. *Douglas*, 5 De G. M. & G. 739.

Where on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful:—Held, that the burden of proof was on the plaintiff to show that the balance of convenience was in favour of granting the injunction. *Ib.*

Acquiescence in a trivial breach of covenant does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards* v. *Revett*, 47 L. J., Ch. 472; 7 Ch. D. 224; 37 L. T. 632; 26 W. R. 166.

When the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant. *Ib.*

Where land was acquired from a corporation upon the terms that any lease of it must contain a covenant against its use for the sale of meat, and the corporation acquiesced in the building of houses upon the land, knowing that they were being built for the purpose of being let as butchers' shops:—Held, that the corporation could not enforce the restrictive covenant. *London* (*Corporation*) v. *Sandon*, 26 L. T. 86.

Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance. *German* v. *Chapman*, 47 L. J., Ch. 250; 7 Ch. D. 271; 37 L. T. 685; 26 W. R. 149.

Other Defences.]—A declaration stated that, by a deed of the 20th July, 1825, between the plaintiff; E., the defendant's testator; and W.; E., for himself, his executors, &c., covenanted with the plaintiff to pay to W. 1,200*l.* Breach, non-payment by E. in his lifetime, or by the defendant, as his executor, to the plaintiff or W. The defendant pleaded, first, non est factum; and in the second plea set out the deed. In this deed it was stated that, by a mortgage, dated the 12th April, 1825, W. had become mortgagee of the premises to the plaintiff for 1,200*l.*, with a proviso, that if the plaintiff should, within six months after the demand of payment of the 1,200*l.* (such demand to be in writing, but not to be good or valid unless made after the 12th April, 1828), pay to W. 1,200*l.* and interest, W. would assign the premises to the plaintiff. The deed declared on then stated that, for the considerations therein mentioned, the plaintiff sold to E., his executors, &c., the premises for the residue of the term, subject to the mortgage to W., of the 12th of April, 1825, and to the payment of 1,200*l.* thereby secured, and interest. The plea then alleged that, after the breaches in the declaration, on the 24th October, 1825, the plaintiff became bankrupt; that the plaintiff obtained his certificate; and that the 1,200*l.* became payable by the plaintiff to W. before the bankruptcy of the plaintiff. The third plea stated that the deed declared on was the same as that set forth in the second plea; it then set out the proviso and covenant contained in the mortgage of the 12th April, 1825, and alleged that no demand in writing of payment of the 1,200*l.* had been given to the plaintiff. These pleas having been demurred to:—Held, that the declaration was good. *Trott* v. *Smith*, 12 M. & W. 688; 13 L. J., Ex. 178.

Held, secondly, that the 1,200*l.* was not due until after six months' demand in writing, subsequent to the 12th April, 1828; and that the second plea was a sufficient answer as to the principal of 1,200*l.* *Ib.*

Held, thirdly, that the interest on the 1,200*l.* being payable absolutely and not on demand, the plea which was pleaded to the interest as well as to the principal, being bad in part, was bad altogether and that the same objection applied to the first special plea. *Ib.*

Held, fourthly, that the first plea was bad, as it negatived, on the face of it, any possibility of interest in the covenant on the part of the plaintiff's assignees, and therefore that it was not necessary for the plaintiff to reply that fact. *Ib.*

Where there are mutual covenants, one cannot be pleaded in bar of the other. *Bone* v. *Eyre*, supra.

Replication.]—Declaration by A., the surviving lessor in a lease for years, granted by A., B., and C., to the defendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term. Plea, that A., B., and C., from the time of making the demise until the death of B., and A. and C. afterwards, had a reversion for a longer term of years expectant on the lease: and that after B.'s death, and before any breach of covenant, A. and C. assigned such reversion to D., and thenceforward ceased to have any reversion in the premises. Replication, that A., B. and C. were not, until the death of B., nor were A. and C. afterwards, possessed of the reversion in the premises, is bad, as being a departure from the declaration. *Green* v. *James*, 6 M. & W. 656; 10 L. J., Ex. 73.

4. Evidence.

Description of Premises in Lease.]—If a lease describes the demised land as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term. *Birch* v. *Stevenson*, 3 Taunt. 469; 12 R. R. 679.

Under Defence of Non est factum.]—A fraudulent misrepresentation of the legal effect of a deed by which a party is induced to execute it, cannot be given in evidence under non est factum. *Edwards* v. *Brown*, 1 Tyr. 182; 1 C. & J. 307; 3 Y. & J. 423; 9 L. J. (o.s.) Ex. 84.

In an action on a covenant, under non est factum, a defendant cannot be allowed to give in

evidence what amounts to a licence *Ratcliff* v *Pemberton*, 1 Esp 35

Proof that the deed was delivered as an escrow is admissible in evidence under non est factum *Stoytes* v *Pearson*, 4 Esp 255

A, by deed, covenanted to pay B a sum of money on a certain day Such deed also contained an assignment by A to B of certain goods as per schedule In an action brought for a breach of the covenant for the non payment of the money, and non est factum pleaded —Held that it was not necessary for the plaintiff to produce the schedule referred to in proof of his case *Dains* v *Heath*, 3 C B 938, 16 L J, C P 117, 11 Jur 185

Extension of Time within which Work is to be Done]—A plaintiff covenanted to build two houses for 500*l* by a certain day, and averred in an action, that the houses were built in the time evidence that the time had been enlarged by parol agreement, and the houses finished within the enlarged time did not support the declaration *Littler* v *Holland* 3 Term Rep 590 See *Bailey* v *Homan*, 3 Bing (N C) 915, 5 Scott, 94, 3 Hodges, 184

Presumption of Mesne Assignments]—If a plaintiff produces an original lease for a long term, and proves possession for seventy years the mesne assignments will be presumed *Earl* d *Goodwin* v *Baxter* 2 W Bl 1228

Other]—In an action on an indenture of lease which purported to be granted by S in exercise of a power given him by a will, the lessee, by holding under the lease, and executing a counterpart, admits the due execution of the will *Bringloe* v *Goodson*, 5 Bing (N C) 738, 8 L J, C P 116

Covenant by a lessee of a house that he would use his best endeavours to continue it open as a public licensed victualling house, and to increase its trade, and that he would not remove the trade or the licence to any other public house Breach, that he did not use his best endeavours to continue the house open as a public licensed victualling house, but allowed it to be discontinued and the licence to be removed The plea was only that the defendant did use his best endeavours to continue the house open and to increase the trade according to the covenant After the lease was granted, in consequence of complaints of irregularities in the conduct of it by the tenant, the licence was taken away by the magistrates, and from that time till the lease expired the house had not been licensed —Held, that it lay on the defendant to show that he did some act after the licence was taken away, such as applying for a rehearing of the case, or some other act endeavouring to obtain the continuance of the licence, and to get the house open again *Lander* v *Pryor*, 8 Car & P 518

5 Measure of Damages.

To Pay off Incumbrances]—A party, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l*, within a year —Held, that on his failing to do so, the trustees were entitled to recover the whole 19,000*l*., though no special damage was laid or proved. *Lethbridge* v. *Mytton*, 2 B. & Ad. 773; 9 L. J. (o.s.) K.B. 330.

To Pay Amount of Promissory Note]—The plaintiff as surety joined the defendant in a promissory note and the defendant by deed covenanted with the plaintiff to pay him the amount of the note on a day certain the note not having been paid —Held, in an action on the covenant, that the measure of damages was the amount of the note though it remained unpaid *Loosemore* v *Radford*, 9 M & W 657 1 D (N S) 881 11 L J, Ex 284

When Unliquidated Sum]—In an action of covenant, the jury is not restricted to giving nominal damages, though no actual damage naturally arising from the breach is proved *Hoy* v *Wyche*, 2 G & D 569 12 L J, Q B 85 6 Jur 559

A covenant by a defendant, that the debts of a firm in which the defendant was about to be admitted as a partner did not exceed a specific sum, and that if they did the defendant would pay on demand of the plaintiff, the sum by which the debts might exceed the specific amount is a covenant for an unliquidated sum *Waller* v *Broadhurst* 8 Ex 889, 23 L J Ex 71

Held that it was properly left to the jury to say what loss the plaintiff had sustained by a breach of the covenant by the defendant *Ib*

Of Ship's Husband to take in Cargo]—A ship's husband covenanted that his ship should at one port take in brandy and convey it to another port, and there receive a cargo of fruit, which the freighters of the ship covenanted to supply He did not take the brandy and the freighters did not furnish a full homeward cargo for which he recovered damages against them They afterwards brought an action against his widow and representative to recover damages for the breach of his covenant —Held, that they could not recover in any shape, in that action, either the damages they had paid or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband in not taking in the brandy *Walton* v *Fothergill*, 7 Car & P 392

That Defendant had not Encumbered]—In an action on a covenant that the defendant had done no act to encumber, contained in a conveyance of land by the defendant to the plaintiff, for a consideration of 150*l* —Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase money and interest, and the mortgage included other lands sufficient in value to satisfy it *Connell* v *Boulton*, 2 Upp Can L J (N S) 240

6 Restraining Actions

Jurisdiction by injunction upon ground of vexation by repeated actions for breach of covenant *Waters* v *Taylor*, 2 Ves & B 302, 13 R R 91

By an award a plaintiff was directed to pay a gross sum and interest to the defendant by instalments, and if the plaintiff made default in payment, he should forthwith execute a mortgage of certain property to the defendant for the whole amount and interest Default was made, and after some negotiation, it was agreed that the residue of the sum should be paid by instalments other than those stated in the award, and

that a deed embodying such new stipulations, and also a mortgage, should be prepared At the time of the execution of the deed, the plaintiff found that, by its terms, another sum of 100*l* was proposed to be added to the amount secured, and a proviso was to be inserted that in default of payment of any instalment the whole of the amount secured might immediately become payable, with a covenant by the plaintiff that, in default of payment of any instalment, he would on demand pay the whole amount and interest The plaintiff alleged that he signed the deed on the verbal assurance that this proviso and covenant should not be strictly enforced The deed was executed containing the new stipulations with a proviso and covenant to the effect above mentioned —Held that the proviso and covenant were inequitable and that a court of equity would restrain the enforcement of them *Sterne v Beck*, 8 L T 344

A H B

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1. AS TO STATE OF MIND.

Mens rea.]—The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind. Though the legislature may enact that persons shall be criminally responsible for certain acts even though they have no guilty mind, yet it is for the prosecution to show that the legislature has in fact so enacted —per Field, J. *Chisholm* v. *Doulton*, 58 L. J., M. C. 133; 22 Q. B. D. 736; 60 L. T. 966; 37 W. R. 749; 16 Cox, C. C. 675; 53 J. P. 550.

As a general rule no penal consequences are incurred where there has been no personal neglect or default, and a mens rea is essential to an offence under a penal enactment, unless a contrary intention appears by express language

or necessary inference. *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R. 9 C. P. 1; 29 L. T. 540.

By a railway act it was enacted "that if any person shall do any act, matter, or thing to obstruct the free passage of the railway or any part thereof," he shall be liable to a penalty :—Held, that, to render a party liable, he must have intended to have committed the obstruction complained of. *Batting* v. *Bristol and Exeter Ry.*, 3 L. T. 665; 9 W. R. 271.

It is a general principle of our criminal law that there must be, as an essential ingredient in a criminal offence, some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind, which is designated by the expression mens rea—per Cave, J. *Chisholm* v. *Doulton*, supra.

A guilty knowledge on the part of the sender is necessary to render him liable under a railway act providing that he shall mark the nature of dangerous goods on the outside of the package under a penalty. *Hearne* v. *Garton*, 2 El. & El. 66; 28 L. J., M. C. 216; 5 Jur. (N.S.) 648; 7 W. R. 566.

I do not think that the maxim as to the mens rea has so wide an application as it is sometimes considered to have. In old times, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created —per Stephen, J. *Cundy* v. *Lecocq*, 53 L. J., M. C. 125; 13 Q. B. D. 207; 51 L. T. 265; 32 W. R. 769; 48 J. P. 599.

By a colonial statute the sale or delivery of wool subject to a registered lien without the written consent of the lienee "with a view to defraud" is made a punishable offence; in words immediately following, the sale of cattle subject to a statutory mortgage without such written consent is made penal, and the words "with a view to defraud" are omitted. In an information for such sale of cattle the respondent was committed for trial, but the crown refused to prosecute. The respondent thereupon brought an action for malicious prosecution, in which he swore that he had obtained the verbal consent of the appellants; but this the appellants denied. The jury found a verdict in favour of the respondent, and awarded damages. The supreme court discharged a rule for a new trial or for a nonsuit or verdict for the appellants :—Held, that intent to defraud was not a necessary element in the statutory offence charged, that the order of the supreme court must be discharged, and a verdict for the appellants made absolute, with costs. *Bank of New South Wales* v. *Piper*, 66 L. J., P. C. 73; [1897] A. C. 383; 76 L. T. 572; 61 J. P. 660—P. C.

In order to convict the licensee of a public-house under sub-s. 2 of s. 16 of the Licensing Act, 1872, for serving a constable with liquor or refreshment while on duty, mens rea or knowledge on the part of the defendant that the constable was on duty must be proved. *Sherras* v. *De Rutzen*, 64 L. J., M. C. 218; [1895] 1 Q. B. 918; 15 R. 388; 72 L. T. 839; 43 W. R. 526; 18 Cox, C. C. 157; 59 J. P. 440.

Under clause 3 of s. 27 of the Sale of Food and Drugs Act, 1875, in order to constitute the offence of giving a false warranty in writing to a purchaser in respect of an article of food or drug, a mens rea on the part of the seller at the time when the warranty was given must be proved. *Derbyshire* v. *Houliston*, 66 L. J., Q. B. 569; [1897] 1 Q. B. 772; 76 L. T. 624; 45 W. R. 527; 61 J. P. 374.

Honest belief as to Legality of Act.]—The belief, though erroneous, of a prisoner in the existence of a right to do the act complained of excludes criminality. *Reg.* v. *Twose*, 14 Cox, C. C. 327.

The defendant was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the above act or under any previous act, but it was specially found by the jury who convicted, that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed they were not lunatic :—Held, that such belief was immaterial, and that the conviction was right. *Reg.* v. *Bishop*, 49 L. J., M. C. 45; 5 Q. B. D. 259; 42 L. T. 240; 28 W. R. 475; 14 Cox, C. C. 404; 44 J. P. 330.

The prisoner was convicted under 24 & 25 Vict. c. 100, s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead :—Held, by majority of the court, that a bonâ fide belief on reasonable grounds of the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong. *Reg.* v. *Tolson*, 58 L. J., M. C. 97; 23 Q. B. D. 168; 60 L. T. 899; 37 W. R. 716; 16 Cox, C. C. 629; 54 J. P. 4—C. C. R.

A man was convicted under 24 & 25 Vict. c. 100, s. 55, of unlawfully taking an unmarried girl, under the age of sixteen, out of the possession and against the will of her father. It was proved that he did take the girl, and that she was under sixteen; but that he bonâ fide believed and had reasonable ground for believing that she was over sixteen :—Held, that the latter fact afforded no defence, and that he was rightly convicted. *Reg.* v. *Prince*, 44 L. J., M. C. 122; L. R. 2 C. C. 154; 32 L. T. 700; 24 W. R. 76; 13 Cox, C. C. 138.

Scienter.]—In a colliery certain horses were worked while suffering from raw wounds. T. was an owner, and S. was the certificated manager, but neither was proved to be present or to have any notice or knowledge of the state of the horses :—Held, that the justices were wrong in convicting S. of illtreating the horses under 11 & 12 Vict. c. 92, s. 2, merely because he was certificated manager, and that some knowledge of the matter was an essential ingredient of that offence. *Small* v. *Warr*, 47 J. P. 20.

Delirium tremens.]—Drunkenness is no excuse, but delirium tremens caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility. *Reg.* v. *Davis*, 14 Cox, C. C. 563.

Ignorance of Law.]—Ignorance of a statute is no excuse for the violation of its provisions. *Reg.* v. *Crawshaw*, Bell, C. C. 303; 30 L. J., M. C. 58; 3 L. T. 510; 9 W. R. 38; 8 Cox, C. C. 375.

A foreigner is therefore guilty of a crime committed by him in England, though he did not know he was doing wrong, and the act was not an offence in his own country. *Rex* v. *Esop*, 7 Car. & P. 456.

Where a prisoner was indicted for an offence on the high seas under a statute passed a few weeks before, and before notice could have reached the place where the offence was committed:—Held, that as he could not have been tried before the passing of the statute, and could not have heard of it, he ought to be pardoned. *Rex* v. *Bailey*, R. & R. 1.

See further, MAXIMS.

2. AGENTS.

Innocent Agent—Liability of Employer as Principal.]—If a man does, by means of an innocent agent, an act which amounts to a felony, the employer, and not the agent, is accountable for the act. *Reg.* v. *Bleasdale*, 2 Car. & K. 765.

Where two persons were indicted for making and engraving a plate for the purposes of forgery, and it was proved that one of them gave the order for the manufacture of the plate to an innocent agent, who never saw the other until it was completed:—Held, that they were both correctly charged as principals. *Reg.* v. *Bull*, 1 Cox, C. C. 281.

Where persons employ an innocent agent to engrave a plate, they may be indicted for the felony of engraving it. *Reg.* v. *Mazeau*, 9 Car. & P. 676.

Prisoner induced a child of the age of nine years to rob his father's till and give him the money. On his indictment as principal for this offence, it is a question for the jury whether the child was an innocent agent or particeps criminis; and if the latter, the prisoner must be acquitted. *Reg.* v. *Manley*, 1 Cox, C. C. 104.

If A., by letter, desires B., an innocent agent, to write the name of S. to a receipt on a post-office order, and the innocent agent does it, believing that he is authorised so to do, A. is a principal in this forgery, and it makes no difference, that, by the letter, A. says to B. that he is at liberty to sign the name of S., and does not in express words direct him to do so. *Reg.* v. *Clifford*, 2 Car. & K. 902.

The prisoner employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings. The die-sinker, suspecting fraud, informed the commissioners of the Mint, and, under their directions, made the die, for the purpose of detecting the prisoner:—Held, that the die-sinker was an innocent agent, and the prisoner rightly convicted as a principal under 2 & 3 Will. 4, c. 34, s. 10. *Reg.* v. *Bannen*, 2 M. C. C. 309; 1 Car. & K. 295.

Where a prisoner, charged with uttering a forged note to A., knowing it to be forged, gave forged notes to a boy who was ignorant of that fact, and directed him to pay away the note mentioned in the indictment at A.'s for the purchase of goods, and the boy did so, and brought back the goods and the change to the prisoner:—Held, that it was an uttering by the prisoner to A. *Rex* v. *Giles*, Car. C. L. 191; 1 M. C. C. 166.

B. was one of many persons employed whose wages were paid weekly at a pay-table. On one occasion when B.'s wages were due the prisoner said to a little boy, "I will give you a penny if you will go and get B.'s money." The boy went innocently to the pay-table, and said to the treasurer, "I am come for B.'s money"; and B.'s wages were given to him:—Held, that the prisoner might be convicted of obtaining the money by false pretences. *Reg.* v. *Butcher*, Bell, C. C. 6; 28 L. J., M. C. 14; 4 Jur. (N.S.) 1155; 7 W. R. 38; 8 Cox, C. C. 77.

The prisoner, knowing that some old country banknotes were valueless, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know:—Held, that the prisoner was guilty of obtaining the money by false pretences. *Reg.* v. *Dowey*, 37 L. J., M. C. 52; 17 L. T. 481; 16 W. R. 344; 11 Cox, C. C. 115.

A prisoner was indicted for the murder of her infant child by poison. She purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. The person did not do so, but put the bottle on the mantelpiece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died:—Held, that the administering of the laudanum by the child was as much, in point of law, an administering by the prisoner, as if she herself had actually administered it with her own hand. *Reg.* v. *Michael*, 9 Car. & P. 356; 2 M. C. C. 120.

Onus of Proof that Agent innocent.]—Where agents appear to have acted in good faith, and the prisoner relies on their being guilty, and therefore principals in the felony, the onus is on him to prove it. *Reg.* v. *Valler*, 1 Cox, C. C. 84.

Possession by Agent.]—In order to convict a person charged on 2 & 3 Will. 4, c. 34, s. 8, with having in his possession more than three pieces of counterfeit coin, with intent to utter them, it was not necessary that the possession should be an individual possession, but it was enough if the coin was in the possession of the person so charged, or his immediate agent. *Reg.* v. *Williams*, Car. & M. 259. *See* 24 & 25 Vict. c. 99, s. 1.

Concealment of Birth—Burial by Agent.]—*See* post, col. 1482, et seq.

Liability of Master for Acts of.]—The owner of works carried on for his benefit by his agents and servants, is liable to an indictment for a nuisance, resulting from the mode of carrying on the business, although such nuisance was committed in opposition to his orders, and without his knowledge, the proceedings by indictment in such case being criminal in form only. *Reg.* v. *Stephens*, 7 B. & S. 710; 35 L. J., Q. B. 251; L. R. 1 Q. B. 702; 12 Jur. (N.S.) 961; 14 L. T. 593; 14 W. R. 859.

B. was a person who kept fireworks contrary to the statute. In his absence a fire broke out by the negligence of his servants, and a rocket ignited, flew across the road and killed a person:—Held, that a conviction of manslaughter was wrong, as the death was caused by the servant's negligence. *Reg.* v. *Bennett*, Bell, C. C. 1; 28 L. J., M. C. 27; 4 Jur. (N.S.) 1088; 7 W. R. 40; 8 Cox, C. C. 74.

3. Persons under Coercion and Compulsion.

a. Presumed Coercion of Wife.

When Crime Committed in Husband's Presence.]—A wife cannot commit larceny in the company of her husband, for it is deemed his coercion and not her voluntary act. *Anon.*, 2 East, P. C. 559.

The law, out of tenderness to the wife, if a felony is committed in the presence of the husband, raises a presumption primâ facie, and primâ facie only, that it was done under his coercion. *Rex* v. *Hughes*, 2 Lewin, C. C. 229.

A wife went from house to house uttering base coin. Her husband accompanied her, but remained outside:—Held, that the wife acted under the husband's coercion. *Conolly's Case*, 2 Lewin, C. C. 229.

Husband and wife were jointly tried upon an indictment charging them with feloniously wounding, with intent to disfigure. The jury found that the wife, at the time of the commission of the offence, acted under the coercion of her husband, and that she herself did not personally inflict any violence:—Held, that she could not be convicted. *Reg.* v. *Smith*, Dear. & B. C. C. 553; 27 L. J., M. C. 204; 4 Jur. (N.S.) 395; 6 W. R. 471; 8 Cox, C. C. 27.

If larceny is committed jointly by husband and wife, the latter is entitled to be acquitted, as she must be presumed to be under his coercion and control. *Rex* v. *Knight*, 1 Car. & P. 116.

Husband and wife were jointly indicted for a misdemeanor in uttering counterfeit coin:—Held, that the wife was entitled to an acquittal, as it appeared that she uttered the money in the presence of her husband. *Rex* v. *Price*, 8 Car. & P. 19.

But on an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration:—Held, that she might be guilty, although her husband was with her when she took the oath. *Rex* v. *Dicks*, 1 Russ. C. & M. 147.

Joint Commission of Crime—Absence of Wife—Marital Compulsion.]—The fact that the parties charged with a crime are married does not form a presumption of compulsion by the husband, and no such presumption arises where a woman procures and contrives the commission of an offence committed by the husband in her absence. *Brown* v. *Att-Gen. of New Zealand*, 67 L. J., P. C. 7; 77 L. T. 414—P. C.

Larceny—Possession of Goods—Question for Jury.]—Where goods are found in the house of a married man and such possession is proved as evidence of larceny, they must be considered in his possession and not in possession of his wife, unless she says something that implicates herself, in which case it is a question for the jury as to whose possession the goods were. *Reg.* v. *Banks*, 1 Cox, C. C. 238.

Receiving Stolen Goods.]—A wife cannot be convicted of feloniously receiving goods stolen by her husband. *Reg.* v. *Brooks*, Dear. C. C. 184; 22 L. J., M. C. 121; 17 Jur. 400; 1 W. R. 313; 6 Cox, C. C. 148.

A wife, jointly with her husband, cannot be convicted of receiving stolen goods. *Reg.* v. *Matthews*, T. & M. 337; 1 Den. C. C. 596; 14 Jur. 513; 4 Cox, C. C. 214.

Where both were found guilty on a joint indictment, the conviction of the husband affirmed, that of the wife quashed. *Ib.*

—— **Application to Confession.**] — Where stolen goods are found in a man's house, and his wife, in his presence, makes a statement exonerating him, and criminating herself:—Semble, that, with respect to the admissibility of this statement in evidence against her, it may be a question whether the doctrine of presumed coercion does not apply. *Reg.* v. *Laugher*, 2 Car. & K. 225.

Coining Implements Found in House.]— If coining implements are found in a house occupied by a man and his wife, the presumption is that they are in the possession of the husband alone; unless there are circumstances to show that the wife was acting separately and without her husband's sanction, they cannot both be convicted. *Reg.* v. *Boober*, 4 Cox, C. C. 272.

The fact of a wife attempting to break up coining implements at the time of her husband's apprehension, if done with the object of screening him, is no evidence of a guilty possession. *Ib.*

Crime Committed when Husband Absent.]—If a wife commits larceny in the absence of her husband, and by his mere command, she is punishable as if she was sole, and the husband, it is said, may be accessory to the wife. *Anon.*, 2 East, P. C. 559.

A wife who takes an independent part in the commission of a crime, when her husband is not present, is not protected by her coverture. *Reg.* v. *John*, 13 Cox, C. C. 100.

A wife, by her husband's order and procuration, but in his absence, knowingly uttered a forged order and certificate for the payment of prize-money:—Held, that the presumption of coercion at the time of uttering did not arise, as the husband was absent; and that the wife might be convicted of the uttering, and the husband of procuring. *Rex* v. *Morris*, R. & R. C. C. 270.

Husband and wife were jointly indicted for stealing. The husband was in the employ of the prosecutors, and was seen near the spot when the property stolen arrived at the prosecutors'. The next day the wife was seen near the spot where her husband was engaged on his work. She was at a spot where there was no road, with a bundle concealed, and was followed home. On the following day she pledged the stolen property at two different places. At one of the places where she was not known she pledged in a false name:—Held, that upon this evidence the wife might be convicted of stealing the property. *Reg.* v. *Cohen*, 11 Cox, C. C. 99; 18 L. T. 489; 16 W. R. 941.

Presumption may be Rebutted.]—The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favour, which is in all cases capable of being rebutted by the evidence. *Reg.* v. *Torpey*, 12 Cox, C. C. 45.

To what Offences Applicable.]—This disputable presumption of law exists in misdemeanours, as well as in felonies, and the question for the jury is the same in both cases. *Ib.*

The doctrine applies to the crime of robbery with violence. *Ib.*

Upon an indictment for highway robbery with violence, D. and his wife were found guilty, the jury finding as to the wife that she had acted under the compulsion of her husband:—Held, that as to the wife the verdict amounted to one of not guilty. *Reg.* v. *Dykes*, 15 Cox, C. C. 771.

Husband and wife may be jointly convicted of an assault. *Reg.* v. *Cruse*, 2 M. C. C. 53; 8 Car. & P. 541.

Or for keeping a bawdy house. *Rex* v. *Williams*, 10 Mod. 63; 1 Salk. 384.

Or for keeping a gaming house. *Rex* v. *Dixon*, 10 Mod. 335.

If husband and wife jointly commit a murder, both are equally amenable to the law, as the doctrine of presumed coercion of the wife does not apply in murder. *Reg.* v. *Manning*, 2 Car. & K. 903.

So also a wife is amenable as an accessory before the fact to a murder committed by her husband; but if the only part she took in the transaction was in harbouring and comforting her husband after the crime was committed, she is not liable as an accessory after the fact. *Ib.*

Indictment.]—Where a woman was indicted as "the wife of A." it is sufficient proof that she was so, without adducing further evidence to prove the fact. *Rex* v. *Knight*, 1 Car. & P. 116.

Question to be left to Jury.]—A husband and wife were jointly indicted for receiving stolen goods, and both convicted:—Held, that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of the husband, the conviction of the wife was wrong, though she had been more active than her husband. *Rex* v. *Archer*, 1 M. C. C. 143.

When a wife was indicted with her husband for receiving stolen property and the evidence was, that although not present when her husband received the property she had subsequently dealt with it and ultimately destroyed it:—Held, that it was a question for the jury whether she acted for the purpose of aiding her husband in turning the goods to a profit, or whether she acted thus to conceal her husband's guilt and screen him from the consequences. In the first case she might be found guilty, in the second she ought to be acquitted. *Reg.* v. *McClarens*, 3 Cox, C. C. 425.

A woman and her husband and P. were indicted jointly for burglary and receiving. The jury found P. guilty of housebreaking, and the woman and her husband of receiving. Part of the stolen property was found in the house where she and her husband lived together; and she, in the absence of her husband, some time after the housebreaking, was seen dealing with part of the stolen things, when she made a statement importing a knowledge that they had been stolen. The judge declined to leave it to the jury to find whether she received the stolen property from her husband or in his absence:—Held, that the conviction could not be supported. *Reg.* v. *Wardroper*, Bell, C. C. 249; 29 L. J., M. C. 116; 6 Jur. (N.S.) 232; 1 L. T. 416; 8 W. R. 217; 8 Cox, C. C. 284.

Evidence of Marriage.]—A woman was indicted for uttering counterfeit coin. At the time of the commission of the offence she was in company with a man who went by the same name, and who was convicted at the previous assizes of the offence. When the prisoners were taken into custody, the constable addressed the female as the male prisoner's wife. He denied the fact in the hearing and presence of the woman. Since her committal she had been confined of a child:—Held, that, under the circumstances, although the woman had not pleaded coverture, and even although she had not asserted she was married to the male prisoner when he stated she was not his wife, it was a question for the jury whether, taking the birth of the child and the whole circumstances, there was not evidence of the marriage, and the jury thought there was, and acquitted her. *Reg.* v. *M'Ginnes*, 11 Cox, C. C. 391.

Where, on the trial of a man and woman for larceny, it appears that they addressed each other as husband and wife, and passed and appeared as such and were so spoken of by the witnesses for the prosecution, it will be for the jury to say whether they are satisfied that they are in fact husband and wife, even though the woman pleaded to the indictment, which described her as a single woman. *Reg.* v. *Woodward*, 8 Car. & P. 561.

In such a case a female ought not to be indicted as a single woman. *Ib.*

Where a woman is charged with comforting, harbouring and assisting a man who has committed a murder, if the counsel for the prosecution has reason to believe that she was married to the man, and it appears clearly that she considered herself as his wife, and lived with him as such for years, he will be justified in not offering any evidence against her, even though he has also reason to believe that the marriage was in some respects irregular, and, probably, invalid. *Reg.* v. *Good*, 1 Car. & K. 185.

If a man and woman be jointly indicted for larceny, the latter as a single woman, in order to entitle her to acquittal on the ground of coercion, the jury must be satisfied that the prisoners were in fact married, though it is not absolutely necessary to prove the actual marriage. *Rex* v. *Hassall*, 2 Car. & P. 434.

b. Other Persons under Compulsion.

When a Defence.]—An apprehension, though never so well grounded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse for joining or continuing with rebels. *Rex* v. *M'Growther*, 1 East, P. C. 71.

But it is otherwise if the party joins from fear of death or by compulsion. *Rex* v. *Gordon*, 1 East, P. C. 71.

On an indictment on 7 & 8 Geo. 4, c. 30, s. 4, for breaking a threshing-machine, the judge allowed a witness to be asked whether the mob, by whom the machine was broken, did not compel persons to go with them, and then compel each person to give one blow to the machine; and also, whether at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. *Rex* v. *Crutchley*, 5 Car. & P. 133.

A., who was insane, collected a number of persons together, who armed themselves, having a common purpose of resisting the lawfully constituted authorities; A. having declared that he would cut down any constable who came against

him. A., in the presence of C. and D., two of the persons of his party, afterwards shot an assistant of a constable, who came to apprehend A. under a warrant:—Held, that C. and D. were guilty of murder, as principals in the first degree, and that any apprehension that C. and D. had of personal danger to themselves from A., was no ground of defence for continuing with him after he had so declared his purpose; and also, that it was no ground of defence that A. and his party had no distinct or particular object in view when they assembled together and armed themselves. *Reg.* v. *Tyler*, 8 Car. & P. 616.

The apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal. *Ib.*

4. Corporations.

When Liable.]—A corporation aggregate may be guilty of a misdemeanor by nonfeasance, such as the non-repair of bridges which it is their duty to repair. *Reg.* v. *Birmingham and Gloucester Ry.*, 3 Railw. Cas. 148; 2 G. & D. 236; 9 Car. & P. 478; 3 Q. B. 223; 6 Jur. 804.

In such a case an indictment is maintainable against it in its corporate name. *Ib.*

An indictment will lie against a corporation for a misfeasance at common law. *Reg.* v. *Great North of England Ry.*, 9 Q. B. 315; 16 L. J., M. C. 16; 10 Jur. 755; 2 Cox, C. C. 70.

An incorporated company demurred to a bill in equity, because the discovery thereby sought might subject it to criminal prosecution under 59 Geo. 3, c. 69 (Foreign Enlistment Act):—Held, that a corporation was not liable to be indicted under that act, and the court overruled the demurrer. *Two Sicilies (King)* v. *Willcox*, 1 Sim. (N.S.) 334; 19 L. J., Ch. 488; 14 Jur. 751.

Where a corporation aggregate are defendants, they are not liable to a prosecution for perjury though their answer be never so false. *Wych* v. *Meal*, 3 P. W. 310.

Appearance—Certiorari.]—If indicted in the queen's bench, they can appear by attorney; but if indicted at the assizes, or sessions, where they cannot appear by attorney, they should apply for a certiorari and appear by attorney, and compel appearance by distress infinite. *Reg.* v. *Birmingham and Gloucester Ry*, 9 Car. & P. 478. See *S. C.*, 1 G. & D. 457; 3 Q. B. 223; 5 Jur. 40.

Certiorari — Recognizances.]—Where an indictment against a corporation, for the non-repair of a highway, is removed by certiorari, at the instance of the prosecutor, the prosecutor is not required by 16 & 17 Vict. c. 30, s. 5, to enter into recognizances to pay the defendant's costs in case of acquittal, indictments against corporations being excepted from the operation of the act. *Reg.* v. *Manchester Corporation*, 7 El. & Bl. 453; 26 L. J., M. C. 65; 3 Jur. (N.S.) 839; 5 W. R. 373.

5. Deaf and Dumb Persons.

Arraignment of—Mute of Malice or by Act of God.]—*See* post, col. 1765.

Not Understanding Proceedings at Trial.]—A deaf mute being tried for felony, was found guilty, but the jury found also that he was incapable of understanding, and did not understand, the proceedings at the trial:—Held, that he could not be convicted, but must be detained as a non-sane person during the queen's pleasure. *Reg.* v. *Berry*, 45 L. J., M. C. 123; 1 Q. B. D. 447; 34 L. T. 590; 13 Cox, C. C. 189.

6. Drunkards.

No Defence.]—Drunkenness is not, in law, any excuse for crime. *Rex* v. *Pearson*, 2 Lewin, C. C. 144.

Although drunkenness is no excuse, delirium tremens caused by excessive drinking is different. If it produces such a degree of madness as to render the person incapable of distinguishing right from wrong at the time the offence is committed, he is relieved from criminal responsibility. *Reg.* v. *Davis*, 14 Cox, C. C. 563.

Drunkenness may rebut Malice.]—In a case of stabbing where the prisoner has used a deadly weapon, the fact that he was drunk does not at all alter the nature of the case: but if he had intemperately used an instrument, not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time. *Rex* v. *Meakin*, 7 Car. & P. 297. See *Reg.* v. *Monkhouse*, 4 Cox, C. C. 55.

If a man is drunk, this is no excuse for any crime he may commit; but where provocation by a blow has been given to a person, who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered on the question, whether he was excited by passion, or acted from malice; as, also, it may be on the question, whether expressions used by the prisoner manifested a deliberate purpose, or were merely the idle expressions of a drunken man. *Rex* v. *Thomas*, 7 Car. & P. 817.

Though drunkenness is no excuse for crime, it may be taken into account by the jury, when considering the motive or intent of a person acting under its influence. *Reg.* v. *Gamlen*, 1 F. & F. 90.

The intention of the party guilty of murder being an element of the crime itself, the fact that a man was intoxicated at the time he caused the death of another may be taken into consideration by the jury in determining whether he formed the intention necessary to constitute the crime of murder. *Reg.* v. *Doherty*, 16 Cox, C. C. 306.

Where, on the trial of an indictment for an attempt to commit suicide, it appeared that the prisoner was at the time of the alleged offence so drunk that she did not know what she did:—Held, that this negatived the attempt to commit suicide. *Reg.* v. *Moore*, 3 Car. & K. 319; 16 Jur. 750.

On a charge of attempting to commit suicide, the mere fact of drunkenness is no excuse for the crime; but it is a material fact for the jury to consider, before coming to the conclusion that the prisoner really intended to destroy his life. *Reg.* v. *Doody*, 6 Cox, C. C. 463.

7. Foreigners.

A person naturalised in this country becomes, to all intents and purposes, a British subject, and ceases to be an alien. *Reg.* v. *Manning*, 2 Car. & K. 903; T. & M. 155; 1 Den. C. C. 467; 19 L. J., M. C. 1; 13 Jur. 962.

It is no defence on behalf of a foreigner charged in England with a crime committed there, that he did not know he was doing wrong, the act not

being an offence in his own country. But though it is not a defence in law, yet it is a matter to be considered in mitigation of punishment. *Rex* v. *Esop*, 7 Car. & P. 456.

8. Infants.

Under Seven.]—An infant, under the age of seven years, cannot incur the guilt of felony. *Marsh* v. *Loader*, 14 C. B. (N.S.) 535; 11 W. R. 784.

Under Fourteen.]—If a child, more than seven and under fourteen years of age, is indicted for felony, it will be left to the jury to say whether the offence was committed by him, and, if so, whether, at the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary is proved. *Rex* v. *Owen*, 4 Car. & P. 236. S. P., *Reg.* v. *Smith*, 1 Cox, C. C. 260.

A boy under fourteen cannot be convicted of an assault with intent to commit a rape. *Rex* v. *Eldershaw*, 3 Car. & P. 366.

A boy who, at the time of the commission of the offence of rape, is under fourteen, cannot, in point of law, be guilty of an assault with intent to commit a rape; and if he is under that age, no evidence is admissible to show that, in point of fact, he could commit the offence. *Reg.* v. *Phillips*, 8 Car. & P. 736. S. P., *Rex* v. *Groombridge*, 7 Car. & P. 582.

A boy under fourteen years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it was proved that he was arrived at the full state of puberty. *Reg.* v. *Jordan*, 9 Car. & P. 118. S. P., *Reg.* v. *Brimilow*, 9 Car. & P. 366; 2 M. C. C. 122.

A boy under fourteen cannot be convicted under s. 4 of the Criminal Law Amendment Act, 1885, of the offence of carnal knowledge of a girl under thirteen. *Reg.* v. *Waite*, 61 L. J., M. C. 187; [1892] 2 Q. B. 600; 67 L. T. 300; 41 W. R. 80; 17 Cox, C. C. 554.

But in such a case he may be convicted of an indecent assault under s. 9 of the Criminal Law Amendment Act, 1885. *Reg.* v. *Williams*, 62 L. J., M. C. 69; [1893] 1 Q. B. 320; 5 R. 186; 41 W. R. 332.

A child under fourteen, indicted for murder, must be proved conscious of the nature of the act. *Reg.* v. *Vamplew*, 3 F. & F. 520.

Where coining implements were found in the house occupied by a man, his wife, and a child ten years of age, the jury was directed to acquit the child of a felonious possession. *Reg.* v. *Boober*, 4 Cox, C. C. 272.

9. Insane Persons.

When Insanity is a Defence.]—To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong; and that, at the time of committing the act, he did not consider that it was an offence against the laws of God and nature. *Rex* v. *Offord*, 5 Car. & P. 168.

If, to an indictment for treason for attempting the life of the sovereign, by shooting at her majesty, the defence is insanity, the question for the jury will be, whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime. *Reg.* v. *Oxford*, 9 Car. & P. 525.

Semble, that, notwithstanding a party accused did an act which was in itself criminal, under the influence of an insane delusion, with a view of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law. *Macnaghten's case*, 10 Cl. & F. 200; 8 Scott (N.R.) 595; 1 Car. & K. 130.

If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law, he is punishable. *Ib.*

A party labouring under a partial delusion must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real. *Ib.*

To entitle a prisoner to be acquitted on the ground of insanity, he must, at the time of the committing of the offence, have been so insane that he did not know right from wrong. *Reg.* v. *Higginson*, 1 Car. & K. 129.

Where, upon a trial for murder, the plea of insanity is set up, the question for the jury is, did the prisoner do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he is guilty of murder. *Reg.* v. *Townley*, 3 F. & F. 839.

The circumstance of a person having acted under an irresistible influence to the commission of homicide, is no defence if at the time he committed the act he knew he was doing what was wrong. *Reg.* v. *Haynes*, 1 F. & F. 666.

A mere uncontrollable impulse of the mind, co-existing with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity; the question for the jury being, whether the prisoner, at the time he committed the act, knew the character and nature of the act, and that it was a wrongful one. *Reg.* v. *Barton*, 3 Cox, C. C. 275.

On an indictment for maliciously setting fire to a building, it is not necessary to prove actual ill-will in the prisoner towards the owner; and in order to justify a jury in acquitting a prisoner on the ground of insanity, they must believe that he did not know right from wrong; but if they find that the prisoner, when he did the act, was in such a state of mind that he was not conscious that the effect of it would be to injure any other person:—Held, that this will amount to a general verdict of not guilty. *Reg.* v. *Davies*, 1 F. & F. 69.

Where a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was during such a fit, though there is nothing before or after the act to indicate it, and though there is some evidence of design and malice. *Reg.* v. *Richards*, 1 F. & F. 87.

Evidence—What Admissible.]—Where an accused person is supposed to be insane, a medical man, who has been present in court and heard the evidence, may be asked, as a matter of

science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. *Reg.* v. *Macnaghten*, 10 Cl. & F. 200; 8 Scott (N.R.) 595; 1 Car. & K. 130. S. P., *Rex* v. *Wright*, R. & R. 456; *Rex* v. *Searle*, 1 M. & Rob. 75.

On a trial for murder evidence was called, on the prisoner's behalf, to prove his insanity. A physician, who had been in court during the whole trial, was then called on the part of the prosecution, and asked whether, having heard the whole evidence, he was of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind?—Held, notwithstanding the opinion of the judges in Reg. *v.* Macnaghten (supra), that such a question ought not to be put, but that the proper mode of examination was to take particular facts, and assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the prisoner at the time the alleged act was committed. *Reg.* v. *Frances*, 4 Cox, C. C. 57.

To ask a witness whether, in his opinion, the prisoner is capable of judging between right and wrong, is an improper question, for that is what no witness thought of, or is prepared to answer. *Reg.* v. *Layton*, 4 Cox, C. C. 149.

A medical witness should give his opinion as to the state of mind, not as to the responsibility of the prisoner; the latter is for the jury, under the direction of the judge. *Reg.* v. *Richards*, 1 F. & F. 87.

In order to prove insanity it is not necessary to adduce medical evidence; if facts are proved indicating an unsound state of mind that is sufficient. *Reg.* v. *Dart*, 13 Cox, C. C. 143.

To prove a plea of insanity, evidence that the grandfather of the person had been insane may be adduced, after it has been proved by medical testimony that such disease is often hereditary. *Reg.* v. *Tucket*, 1 Cox, C. C. 103.

Presumption that Prisoner is Sane.]—In all cases of this kind the jurors ought to be told, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that what he was doing was wrong. *Reg.* v. *Macnaghten*, 10 Cl. & F. 200; 8 Scott (N.R.) 595; 1 Car. & K. 130.

When the defence of insanity is set up, in order to warrant the jury in acquitting the prisoner, it must be proved affirmatively that he is insane; if the fact be left in doubt, and if the crime charged in the indictment is proved, it is their duty to convict. *Reg.* v. *Stokes*, 3 Car. & K. 185.

Where a prisoner sets up insanity as a ground of defence, one cardinal rule is, that the burden of proving his innocence on that ground rests on the party accused. The question in such a case for the jury is not whether the prisoner was of sound mind, but whether he has made out to their satisfaction that he was not of sound mind. *Reg.* v. *Layton*, 4 Cox, C. C. 149.

Evidence on which Presumption Rebutted.]—A married woman having killed her husband immediately after an apparent recovery from a disease (the result of childbirth) which caused a great loss of blood, and exhausted the vessels of the brain, and thus so weakened its power and so tended to produce insane delusions of the senses, which, while suffering under such disease, she complained of, and, which, by her own account, had been renewed at the time of the act of homicide (although they were not such as would lead to it):—Held, evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it. *Reg.* v. *Law*, 2 F. & F. 836.

Where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design; but it appeared that there was insanity in her family; and, from her demeanour before and after the act, which, although not wholly irrational, yet was strangely erratic and excited; and from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations, the medical men were of opinion that she was labouring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act; this was left to the jury as evidence on which they might rightly find her not guilty on the ground of insanity. *Reg.* v. *Vyse*, 3 F. & F. 247.

The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions or impressions, or of a moral nature; and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a diseased or a depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong being still, although it may be perverted yet not destroyed; and the theory of a moral insanity, or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject. *Reg.* v. *Burton*, 3 F. & F. 772.

It was proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression;—Held, that this was not enough to raise the defence of insanity, that the sole question was whether the prisoner fired the gun intending to kill, and that his expressions soon after the act were evidence of this, and that alleged inadequacy of motive was immaterial, the question being not motive but intent. *Reg.* v. *Dixon*, 11 Cox, C. C. 341.

The jury may come to a conclusion on this point from the conduct and acts of the accused shortly before and down to the commision of the alleged crime. Although insanity on one point, for instance, a delusion as to property, will not exempt a party from responsibility, the fact is not immaterial in considering his responsibility at another time and on another subject. The want of motive for the commission of the crime, and its being committed under circumstances which render detection inevitable, are important points for the consideration of the jury, when coupled with evidence of insanity on any particular point. *Reg.* v. *Layton*, 4 Cox, C. C. 149.

On a trial for murder, the defence of insanity by the evidence showing a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of delirium tremens, the prisoner, however, not having been labouring under the effects of such a fit at the time of the act, and the circumstances showing sense and deliberation, and a perfect understanding of the nature of the act :—Held, that the evidence was not sufficient to support the defence, as it rather tended to show wilful excesses and extreme folly than mental incapacity. *Reg.* v. *Leigh*, 4 F. & F. 915.

Grand Jury should Find True Bill.]—A grand jury has no authority by law to ignore a bill for murder on the ground of insanity ; it is their duty to find the bill ; otherwise the court cannot order the detention of the party during the pleasure of the crown, either on arraignment or trial, under 39 & 40 Geo. 3, c. 94, ss. 1 & 2. *Reg.* v. *Hodges*, 8 Car. & P. 195.

Trial—Prisoner must be Produced.]—Where a bill had been found against an insane prisoner for murder, and he had been removed by order of the secretary of state to the county lunatic asylum, and the governor of the asylum had made an affidavit that he was in a hopeless state of insanity, the court will nevertheless require that he be brought up, and his alleged insanity inquired into by a jury, unless it is shown that it would be dangerous to bring him into court, and in that case the court will allow the witnesses their costs, and bind them over to appear when called upon. *Reg.* v. *Dwerryhouse*, 2 Cox, C. C. 446.

—— **When Prisoner called on to Plead.**]—When a person alleged to be insane is called upon to plead, the question is whether at that moment she understands she is charged with the offence alleged ; the fact that she has been insane at any time is not for this purpose material. *Reg.* v. *Keary*, 13 Cox, C. C. 143.

—— **When Suggestion of Insanity should be made.**]—A prisoner being arraigned on two indictments for murder, and having with apparent intelligence, pleaded to one and declined to plead to the other, the plea of not guilty was entered for him by statute with the assent of his counsel. The case being then opened, and the first witness examined, and it being then set up by his counsel that he was insane, or not in a fit state to be tried :—Held, that the proper time for making that suggestion was before the prisoner pleaded ; and, had it been so made, a jury should have been empanelled to try the question, whether he was sane and in a fit state to be tried, but as the trial had been begun, and it would be manifestly inconvenient to recommence the trial of the collateral issue, and as, moreover, the evidence as to the prisoner's present sanity was very much mixed up with the general question of his sanity, it was open to the court, under 39 & 40 Geo. 3, c. 94, to take the whole of the evidence and then leave to the jury both questions as to his state of mind at the time of the act and at the time of the trial. *Reg.* v. *Southey*, 4 F. & F. 864.

—— **Prisoner Repudiating his Insanity.**]—The prisoner was indicted for shooting at his wife with intent to murder her, and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane ; and he was allowed by the judge to suggest questions to be put by his lordship to the witnesses for the prosecution, to negative the supposition that he was insane ; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in shewing that the defence was an incorrect one ; and, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity. *Reg* v. *Pearce*, 9 Car. & P. 667.

—— **Address to Jury.**]—When a plea of insanity is set up, the prisoner's counsel has no right, in his address to the jury, to quote the opinions of medical men as given in their works. *Reg.* v. *Crouch*, 1 Cox, C. C. 94. S. P., *Reg.* v. *Taylor*, 13 Cox, C. C. 77.

Inquest—Evidence.]—A party having been indicted for a misdemeanour, of uttering seditious words, and upon his arraignment refusing to plead, and showing symptoms of insanity ; and an inquest being forthwith taken under 39 & 40 Geo. 3, c. 94, s. 2, to try whether he was insane or not :—Held, first, that the jury might form their own judgment of the present state of the prisoner's mind from his demeanour while the inquest was being taken ; and might thereupon find him to be insane, without any evidence being given as to his present state. *Reg.* v. *Goode*, 7 A. & E. 536.

Held, secondly, that, upon his showing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses, or would offer any remark on the evidence. *Ib.*

—— **Onus of Proof**]—Where a jury is empannelled to try whether a prisoner is insane or not at the time when he is brought up to plead to an indictment, the counsel for the prosecution is to begin and call his witnesses to prove the sanity of the prisoner. *Reg.* v. *Davis*, 6 Cox, C. C. 326 ; 3 Car. & K. 328.

But where a jury is empannelled, at the instance of the counsel for a prisoner, to try whether he is insane or not at the time when brought up to plead to an indictment, the proof of the insanity is incumbent on his counsel. *Reg.* v. *Turton*, 6 Cox, C. C. 385.

Commitment.]—A commitment of an insane person, under 39 & 40 Geo. 3, c. 94, s. 3, is not a commitment in execution, and is not to be construed with the same strictness. *Rex* v. *Gourlay*, 7 B. & C. 669 ; 1 M. & Ry. 619 ; 31 R. R. 276. *But see* 1 & 2 Vict. c. 14.

II. DEGREES OF CRIMINALITY.

1. *Principals*, 1116.
2. *Accessories*, 1126.
3. *Practice relating thereto*, 1130.

1. PRINCIPALS.

When Act Committed by Means of Innocent Agent.]—*See* ante, col. 1103.

Actual Presence at time of Committing

Offence.]—If a man encourages another to murder himself, and is present abetting him while he does so, such person is guilty of murder as principal. *Rex* v. *Dyson*, R. & R. 523.

Where three persons were indicted jointly for cutting and wounding, and the third of them did not come up to the spot until after one of the first two had got away, and then kicked the prosecutor while he was on the ground struggling with the other :—Held, that the two who jointly assaulted the prosecutor, and wounded him at first, might be found guilty either of the felony, or of the assault only, but that the third must, under the circumstances, be acquitted altogether. *Reg.* v. *M'Phane*, Car. & M. 212.

Where a prosecutor left his goods in a cart standing in the street, and M. came and led the cart away, and having taken it a short distance, delivered it to another man with directions to take it to his, M.'s house. Upon the cart arriving at the house, S., who was at work in the cellar, having directed a companion to blow out the light, came up and assisted in removing the goods from the cart :—Held, that S could not be indicted as a principal *Rex* v. *M'Makin*, R. & R. 333, n. And see *Rex* v. *Dyer*, 2 East, P. C. 767.

If A. unlocks a door of a room of which he has the key, in order to allow B. to commit a larceny in it, and A. then goes away, and B., in his absence, enters the room and removes articles out of it, A. is not a principal in the larceny. *Reg.* v. *Jeffries*, 3 Cox, C. C. 85.

A. and B. were indicted for larceny as principals; A. had been sent by his master to deliver goods to C. He only delivered part, and the rest was stolen, and found in the possession of B. :—Held, that it was a question for the jury whether B. was present at the time when A. separated the stolen portion from the bulk; for that if he was, both were rightly charged as principals. *Rex* v. *Butteris*, 6 Car. & P. 147.

On a charge of personating a seaman, all persons aiding and abetting are principals, and the offence is not confined to the person only who personates the seaman. *Rex* v. *Potts*, R. & R. 353.

If several plan the uttering of a forged order for payment of money, and it is uttered accordingly by one in the absence of the others, the actual utterer is alone the principal. *Rex* v. *Badcock*, R. & R. 249.

Where a man and woman were indicted for uttering a bad shilling to B., and having in their possession another bad shilling at the time, and the uttering was by the woman alone in the absence of the man :—Held, that the man was not liable to be convicted with the actual utterer, although proved to be the associate of the woman on the day of uttering, and to have had other bad money about him for the purpose of uttering; and, secondly, that the woman could not be convicted of the second offence of having other bad money in her possession, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering. *Rex* v. *Else*, R. & R. 142. But see *Reg.* v. *Greenwood*, 2 Den. C. C. 453; 5 Cox, C. C. 521.

J. had employed M. to load sacks of oats, the property of J., from a vessel in the trams of K., who was to carry them on the trams to the warehouse of K. By previous concert between M. and K., oats were taken by M. from two of the sacks and put into a nose-bag in the absence of K., and hidden under a tram. K. returned in a few minutes, and took the nose-bag, and its contents, from under the tram, and took them away, M. being then within three or four yards of him :—Held, that, as it was all one transaction, and both had concurred in it, and both had been present at some part of the transaction, both could be convicted as principals in the larceny. *Reg.* v. *M'Carthy*, 2 Car. & K. 379.

—— **Encouraging and Promoting Offence.**]—Where two persons go out to fight a deliberate duel and death ensues, all persons who are present encouraging and promoting that death will be guilty of murder. *Reg.* v. *Cuddy*, 1 Car. & K. 210.

Mere presence at a duel is not sufficient to make spectators principals in the combat; if, however, they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of murder. *Reg.* v. *Young*, 8 Car. & P. 644.

—— **Assisting Apprehension under Pretence of Assisting in Offence.**]—If several agree to commit a burglary, but one communicates the intent to an officer, that he may take the other two, and the officer is upon the watch accordingly; the person who has made that communication to the officer will not be particeps criminis in the burglary, although he is present when it is committed, and pretends to assist the other two, but in fact expedites their apprehension. *Rex* v. *Dunnelly*, R. & R. 310; 2 Marsh. 571.

Nor will it make any difference, although his object in detecting is to obtain for himself (by previous agreement with the officer) part of a reward that will be payable on conviction. *Ib.*

Actual Presence—During part of Offence.]—If several combine to forge Bank of England notes, and each executes by himself a distinct part of the forgery, but they are not together when the notes are completed, they are nevertheless all guilty as principals. *Rex* v. *Bingley*, R. & R. 446.

If several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *Rex* v. *Kirkwood*, 1 M. C. C. 304.

The makers of the paper and plate respectively, for the purpose of forging a note afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts were executed. *Rex* v. *Dade*, 1 M. C. C. 307.

A room door was latched, and one person lifted the latch and entered the room and concealed himself, for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch for the purpose of assisting him to enter, and screened him from observation by opening an umbrella :—Held, that the two were in law parties to the breaking and entering and were answerable for the robbery which took place afterwards, though they were not near the

spot at the time when it was perpetrated. *Rex* v. *Jordan*, 7 Car. & P. 432.

—— **Where Principal Insane.**]—A count in an indictment charged A. with the murder of B., and also charged C. and D. with being present, aiding and abetting A. in the commission of the murder. A. was an insane person:—Held, therefore, that C. and D. could not be convicted on this count. *Reg.* v. *Tyler*, 8 Car. & P. 616.

Constructive Presence—Giving Assistance.]—Persons not present, nor sufficiently near to give assistance at the time of uttering forged notes, are not principals, although they may be accessories before the fact. *Rex* v. *Stewart*, R. & R. 363.

If all the prisoners on an indictment for poaching are associated together for that common purpose, and some of the party actually enter a field to effect that purpose, while the others remain near enough to aid and assist, they may all be convicted under an indictment charging them with being in such place for such purpose. *Reg.* v. *Whittaker*, 2 Car. & K. 636; 1 Den. C. C. 310; 17 L. J., M. C. 127; 3 Cox, C. C. 50.

On a charge of poaching it is not necessary to prove that all the prisoners were within the same close if they all were of one party with the same purpose in the place described in the indictment. *Reg.* v. *Vessell*, 2 Den. C. C. 274; T. & M. 598; 3 C. & K. 150; 20 L. J., M. C. 192; 15 Jur. 434; 5 Cox, C. C. 188.

To support an indictment for night-poaching by three or more, it is not sufficient to prove that one of the prisoners was in the place laid in the indictment and that the rest of the party was in another wood which was separated from the place mentioned in the indictment by a turnpike road. *Rex* v. *Dowsell*, 6 Car. & P. 398.

On an indictment for night-poaching by four, one being armed, semble, that if two enter the land laid in the indictment, and the other two remain outside the preserve, but are of the same party, and are there for the same purpose, all ought to be found guilty. *Rex* v. *Lockett*, 7 Car. & P. 300.

Those who are watching at the outside of a preserve for the purpose of giving the alarm, on the approach of the gamekeeper, to others who are in the preserve, and who afterwards go into the preserve for that purpose, are equally guilty with those who enter the preserve at first. *Rex* v. *Passey*, 7 Car. & P. 282.

In order to constitute the offence of stealing in a dwelling-house, and by menaces and threats putting persons being therein in bodily fear, it is not necessary that all the persons engaged in the crime should be actually in the house; and if one remains outside, he may be equally guilty of using menaces and threats, if there was a common purpose to inspire terror. *Reg.* v. *Murphy*, 6 Cox, C. C. 340.

If two utterers of counterfeit coin, with a general community of purpose, go different ways, and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. *Rex* v. *Manners*, 7 Car. & P. 801. See *Reg.* v. *Hurse*, 2 M. & Rob. 360, infra.

On an indictment for a joint uttering of counterfeit coin where both are not present at the time of the uttering, the true question seems to be whether the one was so near the other as to help the other to get rid of the counterfeit coin. *Reg.* v. *Jones*, 9 Car. & P. 761; 2 M. C. C. 85; 2 Lewin, C. C. 119, 297.

Two prisoners together uttered counterfeit coin: they separated and one of them uttered on two occasions two counterfeit coins, but at the last utterings the former was not proved to have been near the other:—Held, that the proof of previous concert would not sustain a count of joint uttering in either the second or third utterings. *Reg.* v. *West*, 2 Cox, C. C. 237.

Where, on an indictment for privately stealing in a shop, it appeared that there were several acting together, some in the shop and some out, for the purpose of assisting those in the shop, and the property was stolen by the hands of one of those who were in the shop:—Held, that those who were on the outside were equally guilty as principals. *Rex* v. *Gogerly*, R. & R. 343.

Going towards a place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he was at such a distance at the time of the felonious taking as not to be able to assist in it. *Rex* v. *Kelly*, R. & R. 421.

A person waiting outside of a house to receive goods, which a confederate is stealing in the house, is a principal in the theft. *Rex* v. *Owen*, 1 M. C. C. 96.

It is not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up, joined him again in the street after the uttering at a little distance, and ran away when the utterer was apprehended. *Rex* v. *Davis*, R. & R. 113.

Common Purpose—Acting in Concert.]—If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entices the owner away, in order that the party who has obtained possession of the goods may carry them off, all will be guilty of the felony; the receipt by one, under such circumstances, being a felonious taking by all. *Rex* v. *Standley*, R. & R. 305.

Where two planned to rob the prosecutrix of some coats, and one got her to go with him that he might get some money to buy them of her, and she left the coats with the other, who immediately absconded with them:—Held, that the receipt by the one amounted to a felonious taking of the coats by both. *Rex* v. *County*, 2 Russ. C. & M. 193, 285.

Where the evidence against two, indicted for stealing oats, was that one of them took the oats from the prosecutor's sacks, and placed them under a cart, and the other came up a few minutes after, and said, "It is all right," and put the oats in a cart and took them to his house; on an objection that there was no evidence to connect the latter with the original taking:—Held, that the evidence showed one transaction in which both concurred. *Reg.* v. *Kelly*, 2 Cox, C. C. 171.

A. received goods from B. (who was the servant of C.) under colour of a pretended sale:—Held, that the fact of his having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B. *Reg.* v. *Hornby*, 1 Car. & K. 305.

If two jointly prepare counterfeit coin, and utter it in different shops apart from each other, but in concert, and intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly. *Reg.* v. *Hurse*, 2 M. & Rob. 360. See *Reg.* v. *Manners*, supra.

When pieces of counterfeit coin are found on one of two persons, acting in guilty concert, and both knowing of the possession, both are guilty. *Reg.* v. *Rogers*, 2 M. C. C. 85; 2 Lewin, C. C. 119, 297.

A., who intended to sell his mare, sent his servant to M. fair, his servant having no authority either to sell the mare or deal with her in any way. The prisoner asked the servant the price, and desired the servant to trot her out; and the prisoner then went to two men, and, having talked to them, walked away. These two men then came up and persuaded the servant to exchange the mare for a horse they had, giving him 24*l.* for the bargain. They changed the saddles, and, without giving any money, rode away with the mare, leaving the servant with a horse of little value. Four days after the prisoner sold the mare at B., stating that he had got her in a chop at M. fair:—Held, that the prisoner ought to be convicted of stealing her, provided that the jury was satisfied that the prisoner was in league with the two other men, and that the three, by a fraud in which each of them was to take his part and did take his part, induced the servant to part with possession of the mare under colour of exchange, but intending all the while to steal the mare. *Reg.* v. *Sheppard*, 9 Car. & P. 121.

If three persons go out together poaching and two of them stand in the road and send their dog into a field to drive out hares, and after this the third leaves them in the road and goes poaching on his own account, this will not support an indictment against the three, as the third prisoner's poaching was not the joint act of the three. *Reg.* v. *Nickless*, 8 Car. & P. 757.

If one of a party of poachers is found in the land specified, the rest co-operating in the pursuit in adjoining land, all may be alleged to be found in the land specified. *Rex* v. *Andrews*, 2 M. & Rob. 37. S. P., *Rex* v. *Lockett*, 7 Car. & P. 300.

Two of the prisoners were seen together running out of a coppice, one of them with a gun. The third immediately afterwards came out of it alone with a gun and a pheasant:—Held, insufficient evidence of concert. *Reg.* v. *Jones*, 2 Cox, C. C. 185.

The offence of poaching is complete if three persons are in one common party unlawfully upon any land for the common purpose of illegally destroying game. *Reg.* v. *Uezzell*, 3 C. & K. 150; 2 Den. C. C. 274; 20 L. J., M. C. 192; 15 Jur. 434; 5 Cox, C. C. 188.

If gamekeepers attempt to apprehend a gang of night poachers, and one of the gamekeepers is shot by one of the poachers, this will be murder in all the poachers, unless it can be proved that any of them separated himself from the rest, so as to show that he did not join in the act. *Rex* v. *Edmeads*, 3 Car. & P. 390.

Where gamekeepers had secured two poachers, and they, having surrendered, called to a third, who came up and killed one of the gamekeepers, this is murder in all, though the two struck no blow, and though the gamekeepers had not announced in what capacity they had apprehended them. *Rex* v. *Whithorne*, 3 Car. & P. 394.

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. *Reg.* v. *Howell*, 9 Car. & P. 437.

All those who assemble themselves together, with an intent even to commit a trespass, the execution whereof causes a felony to be committed; and continue together, abetting one another, till they have actually put their design into execution; and also all those who are present when a felony is committed, and abet the doing of it, are principals in felony. *Ib.*

Where two persons are jointly engaged in an unlawful act, they may be severally convicted thereof. *Mayhew* v. *Wardley*, 11 C. B. (N.S.) 550; 2 N. R. 325; 8 L. T. 504.

If each of two persons is driving a cart at a dangerous rate and they are inviting each other to drive at a dangerous rate, and one of the carts runs over a man and kills him, each of the two is guilty of manslaughter. *Reg.* v. *Swindall*, 2 Car. & K. 230; 2 Cox, C. C. 141.

If A. and B. are riding fast along a highway as if racing, and A. rides by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A. *Rex* v. *Mastin*, 6 Car. & P. 396.

If two or more persons go out together with a purpose to commit a breach of the peace, and, in the course of the accomplishment of that common design, one of them kills a man, the other also is guilty of manslaughter. *Reg.* v. *Harrington*, 5 Cox, C. C. 231.

Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending, as soon as they could get assistance, to secure them; one of the watchmen walked beside the prisoner, and the other watchman beside the other person, at some distance from the prisoner. The other person wounded the watchman who was near him:—Held, that the prisoner could not be convicted of this wounding, unless the jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting, with extreme violence, any person who might attempt to apprehend them. *Rex* v. *Collison*, 4 Car. & P. 565.

The doctrine of constructive homicide, as regards offenders not actually present at, or parties to, an act of homicide, but sought to be made liable for it by reason of their being engaged in a common purpose, in the course of carrying out which the act of homicide occurs, only applies (there being no evidence of a common intent to carry out the purpose at all hazards, and by all means) where the common purpose is felonious; not where it is merely unlawful, as in the case of a misdemeanor, such as night-poaching. *Reg.* v. *Skeet*, 4 F. & F. 931.

Therefore, where several men were engaged at night-poaching, and in a scuffle with a gamekeeper he was killed by a shot from the gun of one of them:—Held, that whether or not the gun was fired, there being no evidence to show that

the other prisoners were parties to the act of firing it, they were not guilty even of manslaughter, merely by reason of the act of homicide occurring in the course of poaching. *Ib.*

Section 4 of the Explosive Substances Act, 1883, provides that any person who makes or has in his possession and under his control any explosive substance, under certain circumstances, shall be liable to penal servitude, &c. :—Held, that if several persons are connected in a common design to have articles amounting to an explosive substance within the act, made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design. *Reg.* v. *Charles*, 17 Cox, C. C. 499.

More than nine men, of whom seven were armed with guns, being out at night in pursuit of game, were met, as they passed through a field from one wood to another, by a party of gamekeepers without firearms, but who at once assaulted them with sticks; and one of them with a dangerous weapon, a flail, likely to inflict deadly injury, with which he struck one of the poachers, upon which another of them fired and killed him. The grand jury was directed to throw out bills for murder against two of the men, one of whom was supposed to have fired the fatal shot, and the whole nine were indicted for manslaughter. There was evidence that they all stood in a row and cried "Shoot" :—Held, that whether or not the man who fired the shot could be identified, none of the prisoners would be guilty unless parties to the act of firing; and that, though their being in a row and crying out "Shoot" was evidence that they were parties to the act, it was only evidence, and its effect would depend upon how far all the circumstances showed that the firing was in pursuance of a common design to shoot, or only in consequence of a particular personal encounter. *Reg.* v. *Luck*, 3 F. & F. 483.

On an indictment of A. and B. for murder, it appeared that both followed the deceased out at night, and that A., who was the first to overtake him, threw him down a steep bank into a wet ditch, and then tried to rob him, and not being able, owing to his resistance, called to B., who then was on the top of the bank, to come and help, which he did, and they both forcibly committed the robbery. It did not appear that there was any serious injury, except that caused by the fall, and the deceased died three weeks afterwards of pneumonia, or inflammation of the lungs, which might either be caused by cold or violence :—Held, that though there was evidence against both for murder, there was not sufficient to convict, unless the jury was satisfied that there was a joint design to commit the violence, nor to convict either, unless satisfied that it caused the death. *Reg.* v. *Lee*, 4 F. & F. 63.

Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also. *Reg.* v. *Jackson*, 7 Cox, C. C. 357.

Six men assaulted another man who was killed by a stab inflicted by one of the assailants :—Held, that the five would be guilty of murder (a) if they participated in a common design to kill; or (b), there being no common design to kill, if the knife was used in pursuance of a common design to use it; or (c), there being no common design to use the knife, if, being present at the moment of stabbing, they assented and manifested their assent by assisting in the offence. *Reg.* v. *Price*, 8 Cox, C. C. 96.

On an indictment for wounding with intent to do some grievous bodily harm, it appeared that two persons, one of whom was the prisoner, attacked and wounded the prosecutor and robbed him; it was not proved which of the persons inflicted the wound :—Held, that if the prisoner inflicted the wound on the prosecutor, with intent to rob him, he having at the same time an intent to do him some grievous bodily harm to effectuate such his intention of robbing, he ought to be convicted on this indictment. *Reg.* v. *Bowen*, Car. & M. 149.

Held, also, that even if the prisoner's was not the hand that inflicted the wound, he ought to be convicted, if the jury was satisfied that the two persons were engaged in the common purpose of robbing the prosecutor, and that the other person's was the hand which inflicted the wound. *Ib.*

If A. is charged with the offence of inflicting an injury dangerous to life, with intent to murder, and B. is charged with aiding and abetting him, it is essential, to make out the charge as against B., that B. should have been aware of A.'s intention to commit murder. *Reg.* v. *Cruse*, 8 Car. & P. 541.

Persons present, aiding and abetting, are principals in the second degree, and are within the Riot Act. *Rex* v. *Royce*, 4 Burr. 2073.

When Act done not the Result of Confederacy.]—If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maims a pursuer to avoid being taken, the others are not to be considered principals in such act. *Rex* v. *White*, R. & R. 99.

If two persons commit a crime and one use violence, after the other has escaped, to prevent capture, only the one so using the violence is within the statute. *Reg.* v. *Harvey*, 1 Cox, C. C. 21.

If a gang of poachers attacks a gamekeeper and leaves him senseless on the ground, and one of them returns and steals his money :—Held, that one only can be convicted of the robbery, as it was not in pursuance of any common intent. *Rex* v. *Hawkins*, 3 Car. & P. 392.

A., B. and C. were indicted for having robbed and beaten D. A. knocked D. down and it was imputed that B. and C. stole the property from his pockets :—Held, that if B. and C. stole the property and A. did not participate in the robbery, A. could not be convicted of an assault, as the assault committed by him was an independent assault unconnected with the robbery; but that if the jury thought that D. was not robbed by any of the prisoners, but had been assaulted by all of them, they might find all guilty of the assault. *Reg.* v. *Barnett*, 2 Car. & K. 594; 3 Cox, C. C. 432.

All persons who even by their presence encourage a fight, from which death ensues to one of the combatants, although they neither say nor do anything, are guilty of manslaughter. But if the death is caused, not by blows given in the fight itself, but by other parties breaking the ring and striking the deceased with bludgeons, the persons who merely encouraged the

fight by their presence are not answerable. *Rex* v. *Murphy*, 6 Car. & P. 103.

If A. and B. agree together to assault C. with their fists, and C. is killed by a chance blow of the fist from either of them, both are guilty of manslaughter. But should A., of his own impulse, kill C. with a weapon suddenly caught up, B. would not be responsible for the death, he being only liable for acts done in pursuance of the common design of himself and A. *Reg.* v. *Caton*, 12 Cox, C. C. 624.

Cannot be Treated as Receiver.]—A principal in the second degree cannot at the same time be treated as a receiver. *Reg.* v. *Perkins*, 2 Den. C. C. 459 ; 21 L. J., M. C. 152 ; 16 Jur. 481 ; 5 Cox, C. C. 554.

In Misdemeanors all are Principals.]—In misdemeanors all guilty participators are principals. *Reg.* v. *Greenwood*, 2 Den. C. C. 453 ; 21 L. J., M. C. 127 ; 16 Jur. 390 ; 5 Cox, C. C. 521.

J. was charged with "feloniously wounding with intent to do grievous bodily harm," and the prisoner "with aiding and abetting the said J. to commit the said felony." J. was found guilty of the misdemeanor of "unlawfully wounding" :—Held, that the prisoner was rightly convicted of "aiding and abetting" the said J., because, by s. 8 of the Accessories and Abettors Act, 1861, he was liable to be tried, indicted, and punished as a principal offender. *Reg.* v. *Waudby*, 64 L. J., M. C. 231 ; [1895] 2 Q. B. 482 ; 15 R. 564 ; 73 L. T. 352 ; 44 W. R. 64 ; 18 Cox, C. C. 194 ; 59 J. P. 505—C. C. R.

The mere voluntary presence at a prize fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight. *Reg.* v. *Coney*, 51 L. J., M. C. 66 ; 8 Q. B. D. 534 ; 46 L. T. 307 ; 30 W. R. 678 ; 15 Cox, C. C. 46 ; 46 J. P. 404.

Persons who are present at a prize-fight and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants, and it is not at all material which of the combatants struck the first blow. *Rex* v. *Perkins*, 4 Car. & P. 537.

A woman was delivered of a child, which died shortly after its birth ; she concurred with her paramour in endeavouring to conceal the birth, and he, in consequence of her persuasion, she remaining in bed, took the body and buried it in a field, intending thereby to conceal the birth :—Held, that he could be convicted of counselling, aiding, and abetting her in the offence. *Reg.* v. *Bird*, 2 Car. & K. 817. S. P., *Reg.* v. *Skelton*, 3 Car. & K. 119.

B. was summoned before justices for aiding and abetting S. to obtain money by false pretences, and both were committed for trial, S. on the charge of attempting to obtain money by false pretences, and B. on the charge of aiding and abetting S. to commit that offence. B. was found guilty and S. acquitted :—Held, that B. was rightly convicted, as in misdemeanors all are principals. *Reg.* v. *Burton*, 32 L. T. 539 ; 13 Cox, C. C. 71.

When several persons are found out together by night for the common purpose of housebreaking, and one only is in possession of the housebreaking implements, all may be found guilty of the misdemeanor of being found by night in possession of implements of housebreaking, without lawful excuse, under 24 & 25 Vict. c. 96, s. 58, for the possession of one is in such case the possession of all. *Reg.* v. *Thompson*, 21 L. T. 397 ; 11 Cox, C. C. 362.

The prisoner and J. were indicted for a misdemeanor in uttering counterfeit coin. The uttering was effected by J. in the absence of the prisoner, but the jury found that they were both engaged on the evening on which the uttering took place in the common purpose of uttering counterfeit shillings, and that in pursuance of that common purpose J. uttered the coin in question :—Held, that the prisoner was rightly convicted as a principal, there being no accessories in a misdemeanor. *Reg.* v. *Greenwood*, 2 Den. C. C. 453 ; 21 L. J., M. C. 127 ; 16 Jur. 390 ; 5 Cox, C. C. 521.

On an indictment for obtaining money under false pretences, a party who has concurred and assisted in the fraud may be convicted as principal, though not present at the time of making the pretence and obtaining the money. *Reg.* v. *Moland*, 2 M. C. C. 276.

An indictment against H. and W. charged H. with rape, and W. with aiding and abetting the rape. They were found not guilty, but the jury found H. guilty of attempting to commit the rape charged, and W. of aiding and abetting H. in the attempt :—Held, that H. was rightly convicted of a misdemeanor. *Reg.* v. *Wyatt*, or *Hapgood*, 39 L. J., M. C. 83 ; L. R. 1 C. C. 221 ; 21 L. T. 678 ; 18 W. R. 356 ; 11 Cox, C. C. 471.

If A. counsels and encourages B. to set fire to a malthouse, and B. attempts to set it on fire, both may be jointly indicted as principals for the misdemeanor of attempting to set the malthouse on fire, although A. was not present at the time of the attempt. *Reg.* v. *Clayton*, 1 Car. & K. 128.

2. ACCESSORIES.

Before the Fact.]—An accessory before the fact must be absent at the time when the crime is committed, and the act must be done in consequence of some counsel or procurement of his. *Reg.* v. *Brown*, 14 Cox, C. C. 144.

—— **No Felony Committed.**]—A person cannot be indicted under the 24 & 25 Vict. c. 94, s. 2, for counselling another to commit a felony, unless a felony is actually committed by such other person. *Reg.* v. *Gregory*, 36 L. J., M. C. 60 ; L. R. 1 C. C. 77 ; 16 L. T. 388 ; 15 W. R. 774 ; 10 Cox, C. C. 459.

A soliciting and inciting a person to commit an offence where no other act is done except the soliciting and inciting, is a misdemeanor only. *Ib.*

To incite a servant to rob his master is a misdemeanor at common law, and it is no defence that the servant purposely submitted himself to the incitement with intent to betray the master. *Reg.* v. *Quail*, 4 F. & F. 1076.

—— **Pleading — Absence of Principal.**]—A party charged as an accessory before the fact could not be compelled to plead to the indictment if the principal did not appear to take his trial. *Reg.* v. *Ashmall*, 9 Car. & P. 236. *See* 24 & 25 Vict. c. 94, s. 2.

—— **Merger in Felony.**]—If a party incited to commit a felony is not an an innocent agent,

and the act incited be committed, the party inciting is a principal felon, inasmuch as he is an accessory before the fact to the felony, and the misdemeanor merges in the felony. *Reg.* v. *Welham*, 1 Cox, C. C. 192.

—— **In what Cases.**]—A person is not to be convicted of larceny if doubtful whether an accessory before or after the fact. *Reg.* v. *Munday*, 2 F. & F. 170.

A., a married woman, in the lifetime of her husband, married B., a widower:—Held, that if B. knew at the time of his marriage with A. that she was a married woman, he might be convicted of the felony of counselling A. to commit bigamy. *Reg.* v. *Brawn*, 1 Car. & K. 144; 1 Cox, C. C. 33.

A servant pretended to concur with two persons who proposed to him to unite with him in robbing his master's house. The servant, acting under instructions from the police, let one of them into the house, who was immediately placed in confinement. After this the servant fetched the other prisoner and let him into the house in the same way. This person was seized with a basket of plate in his hand:—Held, that the former prisoner might be indicted as an accessory before the fact to the stealing. *Reg.* v. *Jones*, Car. & M. 218.

A servant let a person into his master's house on a Saturday afternoon, and concealed him there all night in order that he might rob the house; and on the Sunday morning left the premises in pursuance of the previous arrangement. The man, in the servant's absence, broke into the bedroom of the master, and stole the contents of the cash-box:—Held, that the man who took the property from the cash-box was rightly charged as a thief, and the servant who let him into the house as an accessory before the fact. *Reg.* v. *Tuckwell*, Car. & M. 215.

If a wife, by the incitement of her husband, knowingly uttered in his absence a forged order and certificate for the reception of prize-money, under 43 Geo. 3, c. 123, they might be indicted together, she as a principal on the statute, and he as an accessory before the fact at common law. *Rex* v. *Morris*, 2 Leach, C. C. 1096.

Persons privy to the uttering of a forged note by previous concert with the utterer, but who were not present at the time of uttering, or so near as to be able to afford any aid or assistance, are not principals, but accessories before the fact. *Rex* v. *Soares*, R. & R. 25; 2 East, P. C. 974.

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not; and the person who furnished her with the poison for that purpose, will, if absent when she took it, be an accessory before the fact only. *Rex* v. *Russell*, 1 M. C. C. 356.

The deceased woman became pregnant by the prisoner, and died from the effects of corrosive sublimate taken by her for the purpose of producing abortion. The prisoner knowingly procured it for the deceased, at her instigation, and under the influence of threats of self-destruction, if the means of producing abortion were not supplied to her. The jury negatived the fact of his having administered it, or caused it to be taken by her:—Held, that he was not guilty of murder as an accessory before the fact. *Reg.* v. *Fretwell*, L. & C. 161; 31 L. J., M. C. 145; 8 Jur. (N.S.) 466; 6 L. T. 333; 10 W. R. 545; 9 Cox, C. C. 152. *But see* 24 & 25 Vict. c. 100. ss. 58, 59.

M. had the charge of the prosecutor's warehouse, in which bags were kept; S. for some years had been in the habit of supplying the prosecutor with bags, which were usually placed outside the warehouse, and shortly after so leaving them either S. or his wife called and received payment for them. M. went into his master's warehouse, and clandestinely removed twenty-four bags which had been marked by his master, and placed them outside the warehouse, in the place where S. used to deposit the bags before payment for them. Soon afterwards the wife of S. came and claimed payment for these bags. The prosecutor then sent for S., who, upon being asked respecting the twenty-four bags, said they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between the prisoners:—Held, that S. was an accessory before the fact to the larceny. *Reg.* v. *Manning*, Dears. C. C. 21; 22 L. J., M. C. 21; 17 Jur. 28; 1 W. R. 40; 5 Cox, C. C. 86.

A man and woman were jointly indicted for feloniously administering to C. a noxious thing to the jurors unknown, with intent to procure miscarriage. C. being in the family way, went to the male prisoner, who said he would giver her some stuff to put her right, and gave her a light-coloured medicine, and told her to take doses of it till she became in pain. She did so, and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L., and gave her some more of the stuff, which he said would take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain, and told the female prisoner of it, whereupon the male prisoner told the latter what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff in the female prisoner's presence, and told her to take it like the other. She did so, and became very ill, and next day had a miscarriage, the female prisoner attending on her:—Held, that there was evidence of the female being an accessory before the fact, and a party, therefore, to the administration of the noxious thing. *Reg.* v. *Hollis*, 12 Cox C. C. 463; 28 L. T. 455.

If a person knowingly invites another to a certain place, in order that he may be murdered, and he is murdered accordingly, that would constitute such person an accessory before the fact to the murder. *Reg.* v. *Manning*, 2 Car. & K. 903.

It is not essential that there should have been any direct communication between an accessory before the fact and the principal felon. It is enough if the accessory directs an intermediate agent to procure another to commit a felony; and it will be sufficient even if the accessory does not name the person to be procured, but merely directs the agent to employ some person. *Rex* v. *Cooper*, 5 Car. & P. 535.

The prisoner had procured certain drugs and gave them to his wife, with intent that she should take them in order to procure abortion. She took them in his absence and died from their effects. On an indictment against him for man-

slaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter:—Held, that he was properly found guilty of manslaughter. *Reg.* v. *Gaylor*, Dears. & B. C. C. 288: 7 Cox, C. C. 253.

Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight; each put down 1*l.*, so that 2*l.* might be paid to the winner. The prisoner consented to hold the 2*l.* and pay it over to the winner. Otherwise he had nothing to do with the fight, and he was not present at it. There was no reason to suppose that the life of either man would be endangered. The men fought, and one of them received injuries of which he afterwards died. The prisoner having been informed who was the winner, but not knowing of the other man's danger, paid over the 2*l.* to the winner:—Held, that the prisoner was not an accessory before the fact to the manslaughter of the man killed. *Reg.* v. *Taylor*, 44 L. J., M. C. 67; L. R. 2 C. C. 147; 32 L. T. 409; 23 W. R. 616; 13 Cox, C. C. 68.

—— **Effect of 24 & 25 Vict. c. 94, s. 2.**]—Section 2 of 24 & 25 Vict. c. 94, only applies where the accessory might at common law have been indicted with or after the conviction of the principal. A person therefore cannot be tried for inciting another to commit suicide, although that other commits suicide. *Rex* v *Russell*. 1 M. C. C. 356. S. P., *Reg.* v. *Leddington*, 9 Car. & P. 79.

After the Fact—In what Cases.]—H. and S. broke open a warehouse, and stole thereout thirteen firkins of butter which they carried along the street thirty yards; they then fetched the prisoner, who was apprised of the robbery, and he assisted in carrying away the property; he was indicted for theft:—Held, that he was only an accessory, and not a principal. *Rex* v. *King*, R. & R. 332.

Where three persons agreed to utter a forged note, and one uttered it at Gosport, and the other two, by previous concert, waited at Portsmouth, they were held to be accessories. *Rex* v. *Soares*, 2 East, P. C. 974; R. & R. 25.

Several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter:—Held, that those charged as accessories might rightly be convicted as accessories to manslaughter. *Reg.* v. *Richards*, 46 L. J., M. C. 200; 2 Q. B. D. 311; 36 L. T. 377; 13 Cox, C. C. 611.

A. & B. were in partnership, and B., in fraud of the partnership, disposed of the goods of the firm to the prisoner, who knowingly received the same. Semble, that the prisoner might have been indicted and convicted as an accessory to or after the fact to the felony, either at common law or under 24 & 25 Vict. c. 94, ss. 1, 3. *Reg.* v. *Smith*, 39 L. J., M. C. 112; L. R. 1 C. C. 266; 22 L. T. 554; 18 W. R. 932; 11 Cox, C. C. 511.

A. was indicted for the wilful murder of B., and C. was indicted for receiving, harbouring, and assisting A., well knowing that he had committed the felony and murder aforesaid:—Held, that if the offence of A. was reduced to manslaughter, C. might, notwithstanding, be found guilty, as accessory after the fact. *Rex* v. *Greenacre*, 8 Car. & P. 35.

Where a person is charged as accessory after the fact to a murder, the question for the jury is, whether such person, knowing the offence had been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice. *Ib.*

To substantiate the charge of harbouring a felon, it must be shown that the party charged did some act to assist the felon personally. *Reg.* v. *Chapple*, 9 Car. & P. 355.

Upon an indictment against a party as an accessory after the fact in robbery, proof of the prisoner's knowledge of the felony, together with proof of his aiding the principal in disposing of the fruits of the robbery, is sufficient evidence of comforting and assisting, to support the indictment. *Reg.* v. *Butterfield*, 1 Cox, C. C. 39.

A prisoner who employed another person to harbour the principal felons may be convicted as accessory after the fact, though he himself did no act of relieving, and the prisoner may be found guilty on the uncorroborated testimony of the person who actually harboured. *Rex* v. *Jarvis*, 2 M. & Rob. 40.

A., a lad who was a clerk in a banking-house, robbed his employers: after doing so, he went to the lodgings of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings; and after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America:—Held, that B. might be convicted as an accessory after the fact, in harbouring, receiving, and maintaining A., the principal felon. *Rex* v. *Lee*, 6 C. & P. 536.

Although a statute which creates a new felony will attach to that felony all the common-law incidents to felony, so that accessories thereto will be included, yet it will go no further. *Rex* v. *Sadi*, 1 Leach, C. C. 468; 2 East, P. C. 748.

A person is not to be convicted of larceny if it be doubtful whether he is an accessory before or after the fact. *Reg.* v. *Munday*, 2 F. & F. 170.

3. Practice relating thereto.

Grand Jury—Different Findings.]—If a charge against an accessory is, that the principal felony was committed by persons unknown, it is no objection that the same grand jury has found a bill imputing the principal felony to J. S. *Rex* v. *Bush*, R. & R. 372.

Trial.]—Where a principal and an accessory are indicted together, they will not be allowed to sever in their challenges so as to be tried separately. *Reg.* v. *Fisher*, 3 Cox, C. C. 68.

An accessory after the fact indicted in the ordinary way with the principal felon, may, since 11 & 12 Vict. c. 46, s. 2, be tried before the principal. *Reg.* v. *Hansill*, 3 Cox, C. C. 597.

The act of aiding and assisting being a felony by 4 Geo. 4, c. 64, s. 43, the defendant might be indicted before the principal had been tried; and the prosecution need not be instituted within one year after the offence committed, as required by 16 Geo. 2, c. 31, s. 4. *Holloway* v. *Reg.*, 2 Den., C. C. 287; 17 Q. B. 319; 15 Jur. 825.

If two are indicted for jointly making a corrupt contract with a third person for the procur-

ing an East India cadetship, one may be convicted, though the other is acquitted. *Rex* v. *Taggart*, 1 Car. & P. 201.

Indictment—Form of.]—In indicting a person for felony, since 11 & 12 Vict. c. 46, it is immaterial whether he is a principal in the first or the second degree, or an accessory before the fact, as in either case he is indictable as a principal. *Reg.* v. *Manning*, 2 Car. & K. 903.

Semble, an indictment of an accessory should contain a positive averment that the principal was guilty. *Reg.* v. *Read*, 1 Cox, C. C. 65.

An accessory after the fact to a felony cannot be convicted upon an indictment charging the commission of the felony only; he should be indicted as an accessory after the fact. *Reg.* v. *Fallon*, L. & C. 217; 32 L. J., M. C. 66: 8 Jur. (N.S.) 1217; 7 L. T. 471; 11 W. R. 74; 9 Cox, C. C. 242.

An indictment in two counts charged A. and B. jointly with stealing. A third count charged A. alone with receiving the stolen goods. At the trial no evidence was offered against B., and he was acquitted, in order that he might be called as a witness against A. A. was an accessory before the fact to the stealing by B., and he afterwards received the stolen goods. The jury returned a verdict of guilty against A., which was entered upon all the counts:—Held, that he was not entitled to an acquittal upon the first two counts by reason of the principal, B., having been acquitted, the 11 & 12 Vict. c. 46, s. 1, having made the crime of being an accessory before the fact a substantive felony. *Reg.* v. *Hughes*, Bell, C. C. 242; 29 L. J., M. C. 71; 6 Jur. (N.S.) 177; 1 L. T. 450; 8 W. R. 195; 8 Cox, C. C. 278.

Held, also, that there was no inconsistency in the verdict found by the jury, and entered upon all the counts, and therefore the conviction could be supported. *Ib.*

Three persons were charged with a larceny, and two others as accessories in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods. The principals were acquitted:—Held, that the receivers might be convicted on the two last counts of the indictment. *Reg.* v. *Pulham*, 9 Car. & P. 280.

Inciting a servant to steal any silk that may be in the servant's care, without further defining the particular silk to be stolen, is sufficiently certain to support a conviction. *Reg.* v. *Quail*, 4 F. & F. 1076.

If two persons are indicted for murder, the one as a principal in the first degree, and the other as being present, aiding and assisting to commit it, the jury may find the principal in the first degree not guilty, and convict the principal in the second degree. *Rex* v. *Taylor*, 1 Leach, C. C. 360. *S. C.*, nom. *Shaw's Case*, 1 East, P. C. 351.

An indictment stated that a certain evil-disposed person stole certain goods; that L. C. incited him to do so; that E. C. did the same; that E. M. received a portion of the property, knowing it to have been stolen; it also charged A. and the before-mentioned E. C. as receivers. All these persons having been found guilty, the conviction was held good against all except L. C., who was merely charged as accessory before the fact, and judgment was given as to the charges of receiving only. *Reg.* v. *Caspar*, 9 Car. & P. 289; 2 M. C. C. 101.

A count charged A. with the murder of B., and also C. and D. with being present, aiding and abetting A. in the commission of the murder. A. was an insane person:—Held, therefore, that C. and D. could not be convicted on this count. *Reg.* v. *Tyler*, 8 Car. & P. 616.

—— **Joinder of Counts.**]—A count charging a person with being accessory before the fact, may be joined with a count charging him with being accessory after the fact to the same felony, and the prosecutor cannot be required to elect upon which he will proceed, as the party may be found guilty upon both. *Rex* v. *Blackson*, 8 Car. & P. 43.

Principal and Accessory.]—Where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed. *Reg.* v. *Brannon*, 14 Cox, C. C. 394.

Evidence.]—A person indicted as an accessory befor the fact cannot be convicted of that charge upon evidence proving him to have been present, aiding and abetting. *Rex* v. *Gordon*, 1 Leach, C. C. 515; 1 East, P. C. 352.

An indictment against an accessory to a felony, committed by a person unknown, cannot be supported if it appears that the principal felon acknowledged his guilt before the grand jury. *Rex* v. *Walker*, 3 Camp. 264.

An accessory may controvert the guilt of the principal, notwithstanding the record of his conviction. *Rex* v. *Smith*, 1 Leach, C. C. 288.

An averment of the conviction of the principal is supported by the production of the record, however erroneous the judgment may be. *Rex* v. *Baldwin*, 3 Camp. 265.

On an indictment against an accessory, a confession by the principal is not admissible in evidence to prove the guilt of the principal. *Rex* v. *Turner*, 1 M. C. C. 347.

It must be proved aliunde, especially if the principal is alive. *Ib.*

Statements made by a principal are not evidence against an accessory before the fact, although the act was the consequence of such previous incitement of the prisoner. *Reg.* v. *Read*, 1 Cox, C. C. 65.

On the trial of an accessory in murder, the principal not being then on his trial, evidence is admissible of statements made by the principal in the absence of the accessory prior to the act charged as the murder, tending to show that it was done with malice; but statements of the principal in the absence of the accessory, describing the occurrence, are not admissible. *Reg.* v. *Pym*, 1 Cox, C. C. 339.

—— **Sufficiency of.**]—Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something, as if it was money, when he left them; that on coming to their lodgings just after the apprehension he endeavoured to escape, and was found to have bad money about him; is not sufficient evidence to implicate him as counselling, procuring, aiding, and abetting the coiners. *Rex* v. *Isaacs*, 1 Russ. C. & M. 216.

A statement by a prisoner that A. had proposed to him to murder B. on the following night, and that he (the prisoner) agreed to go, but did not do so, is not of itself evidence that the prisoner was accessory before the fact to the murder of B. by A. on that night. *Reg.* v. *Tulfourd*, 6 Cox, C. C. 333.

Evidence that A. was privy to a plot to murder B. by explosive machines, is sufficient to go to the jury on counts charging A. with the murder of C. (accidentally killed by the explosion)—with conspiring to murder him, and as an accessory to the fact. *Reg.* v. *Bernard*, 1 F. & F. 240.

B. OFFENCES GENERALLY.

I. FELONY.

1. *Rights of the Crown*, 1133.
2. *Validity of Assignments by Felons*, 1136.
3. *Effect of Pardon*, 1138.
4. *Civil Remedy suspended until Prosecution*, 1139.
5. *Other Points relating to*, 1141.
6. *Compounding Felonies and Informations.* *See* post, col. 1607.
7. *Contracts for Compromise of.* *See* CONTRACT.

1. RIGHTS OF THE CROWN.

Before 33 & 34 Vict. c. 23—Legacies.]—Where the legatee of a promissory note bequeathed by will is convicted of felony, the forfeiture caused by such conviction does not divest the executor of his right to sue the maker, though he is a trustee for the crown in respect of the proceeds of the suit. *Bishop* v. *Curtis*, 18 Q. B. 878: 21 L. J., Q. B. 391; 17 Jur. 23.

A testator devised real estate to his widow for life, and at her death to trustees, to sell and pay part of the proceeds to B, who committed a felony, but had undergone his punishment before the widow's death:—Held, that his interest was not forfeited to the crown. *Thompson, In re*, 22 Beav. 506.

The testator also directed his trustees to provide a fund out of his personalty and other real estate, to secure an annuity for his widow. The fund was provided:—Held, that B.'s interest, being vested, became forfeited to the crown by his conviction for felony in the widow's life, though he had undergone his punishment previously to her death. *Ib.*

A stock legacy, and a share of residuary personalty expectant on the death of a tenant for life, bequeathed to a minor, payable at twenty-one, with a limitation over in the event of his death under twenty-one, are interests which, prior to the 4th July, 1870, were forfeitable to the crown on the conviction of the minor for felony. *Bateman's Trusts, In re*, 42 L. J., Ch. 553; L. R. 15 Eq. 355; 28 L. T. 395; 21 W. R. 435; 12 Cox, C. C. 447.

On a petition by the attorney-general for payment to the crown of personal property of a felon:—Held, that a conviction in New South Wales was sufficient to support the petition. *Ib.*

A father bequeathed to his son S. "the interest of 2,000*l.* to be paid him by my executor yearly so long as he lives, and then the principal to be divided amongst my real sons and daughters that are living except my son that has the interest paid him." The will contained no residuary gift. The father left S., and eight other children, who all predeceased S. One of the eight children was convicted of felony during the life of S, and died in prison. His interest under the will having been claimed by the crown:—Held, that the claim could not be sustained. *Davis's Trusts, In re*, 27 L. T. 477.

Intestacy.]—A., the wife of a felon under sentence of transportation, died intestate, leaving property acquired after the conviction of her husband:—Held, that such property belonged to the crown as accrued to the felon, and not to the next of kin of the wife. *Coombes* v. *Queen's Proctor*, 2 Rob. Ecc. Rep. 547; 16 Jur. 820.

Goods Stolen.]—Goods of an adjudged felon, stolen from his house, in the possession and occupation of his wife, may be described in an indictment for larceny as the goods of the Queen. But the house cannot be so described without office found. *Reg.* v. *Whitehead*, 2 M. C. C. 181.

Right of Action.]—A right of action for damages is not forfeited to the crown upon a conviction for felony. *Fleming* v. *Smith*, 12 Ir. C. L. R. 404.

But a right of action, in respect of money had and received, money paid, and upon an account stated, is forfeited. *Ib.*

Plea to the money counts, that the plaintiff had been convicted of felony, and sentenced to six years' penal servitude; and that the causes of action accrued after the plaintiff was convicted, and before he had endured the punishment to which he was adjudged; and that, by reason of the conviction, the moneys and rights of action for recovery thereof, became forfeited to the crown, and had not since been restored. Replication, that the felony was not punishable with death, and that before action, and after sentence, the sentence and punishment had been commuted, and that the plaintiff had endured the full term of the commuted punishment, is no answer. *Ib.*

Settlements.]—A., upon his marriage with B., settles land of 400*l.* per annum for her jointure, and covenants, that if the particular lands so settled should not yield 400*l.* per annum clear, B. should have so much of the rents of the residue of the settled estate as should make up the said 400*l.* per annum. A., being attainted of high treason, his estate became forfeited, and was granted by the crown to J. S. The particular jointure lands did not amount to 400*l.* per annum:—Held, that the jointress is entitled, as against the grantee of the crown, to have the deficiency made good. *Eustace* v. *Keightley*, 4 Bro. P. C. 588.

Quære, whether a foreign woman who marries a subject of England attainted for high treason shall forfeit her portion to the king. *Drummond* v. *Decker*, 9 Mod. 100.

The income of certain personal property is given to A. for life; and after his decease to B. A. is convicted of a capital felony, and receives sentence of death, which is commuted into transportation for life:—Held, that B.'s interest does not take effect by the forfeiture of A., and that the crown is entitled to the income during the life of A. *Hiett* v. *Att.-Gen.*, 5 L. J. (o.s.) Ch. 69.

A settlement contained a provision, that if any of the children who were the objects of the

settlor's bounty should, previously to the assignment to him of the trust property, have alienated his expectant share, then his share should be forfeited and belong to the others. One of the children, before the assignment to him, and before his share vested, committed a felony, and then executed a deed purporting to be an assignment of his share:—Held, that this operated as a forfeiture to such of the others as were entitled to take under the settlement, and was valid against the crown. *Blake* v. *Burnett*, 2 Drew. & Sm. 117; 31 L. J., Ch. 898; 8 Jur. (N.S.) 812; 6 L. T. 886; 10 W. R. 767.

Freeholds.]—Freeholds of inheritance which, at the time of his death, belong to a man who dies felo de se, do not escheat to the crown, but pass to his heir-at-law. *Norris* v. *Chambres*, 29 Beav. 246; 30 L. J., Ch. 285; 7 Jur. (N.S.) 59. Affirmed on appeal, 7 Jur. (N.S.) 689; 4 L. T. 345; 9 W. R. 794.

Land belonging to several persons was taken under a local act, and the purchase-money paid into court. One of the owners was afterwards convicted of felony, and sentenced to transportation for seven years, after the expiration of which he claimed his share of the purchase-money:—Held, that the money retained its character of realty, and was not forfeited to the crown. *Harrop, In re*, 3 Drew. 726; 26 L. J., Ch. 516; 3 Jur. (N.S.) 380; 5 W. R. 449.

In *Att.-Gen.* v. *Sands* (Hard. 488; 2 Freem. 129; 3 Ch. Rep. 33), it was held that the trust of a term attending on the inheritance was not forfeited by the felony of the cestui que trust, because it was no more than an accessory to the inheritance, which was not forfeited. It is not denied, however, that where a term is attending on the inheritance and the king extends the inheritance, he shall have a right to the term. *Nicholls* v. *How*, 2 Vern. 389.

A., seised of a freehold lease for lives, is indicted and found guilty of coining:—Held, that the whole estate is forfeited to the crown, notwithstanding the proviso in the act of 8 & 9 Will. 3, c. 26, that no offence made treason or felony by that act shall extend to make any corruption of blood. *Horton* v. *Kirton*, 4 Bro. P. C. 141.

A sentence of outlawry for felony does not deprive a party of the right of absolutely disposing of the fee of his property, or directing the execution of a trust. *Macrae* v. *Macrae*, Macl. & R. 645. *S. C.*, nom. *Macrae* v. *Hyndman*, 6 Cl. & F. 212.

Lands being settled by H. on sons of R., successively in tail male, with divers remainders over, and the ultimate reversion to H. and his heirs. H. is attainted of treason; and afterwards B., the issue in tail, being in possession under the limitations, suffers a recovery. Quære, if it is not a bar to the reversion vested in the crown by attainder. *Blosse* v. *Clanmorris*, 3 Bligh, 62.

The feoffee shall retain the land to his own use, sur attainder de felony. *Anon.*, Cary, 11.

On forfeiture of an estate the crown or its grantee takes it subject to all charges fairly binding the party with reference to it, although voluntary, but not subject to debts at large. The crown in such cases has the same equity to be relieved against conveyance on the ground of fraud, etc., as the party would have. *Bedford (Duke)* v. *Coke*, 2 Ves. 116.

Mortgages.]—Where mortgagor was attainted, the court would not decree a foreclosure against the crown, but directed the mortgagee should hold and enjoy till the crown thought proper to redeem the estate. *Powell* v. *Knowles*, 2 Atk. 224.

J. S., having made a mortgage of his estate, was afterwards outlawed for high treason. The attorney-general on behalf of the crown was admitted to redeem. *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136.

The title deeds of a leasehold estate were deposited with bankers by way of equitable mortgage, for securing the balance of a running account. The party making the deposit was subsequently convicted of felony. A bill was filed by the bankers, claiming to be equitable mortgagees by virtue of the deposit against the attorney-general for a sale of the property:—Held, that the court had no jurisdiction, the legal estate being in the crown, to decree a sale of the estate, nor any power to compel a conveyance by the crown of the legal estate, but only to declare the plaintiffs, as equitable mortgagees, entitled to hold possession of the property until the crown should think fit to redeem. *Hodges* v. *Att.-Gen.*, 3 Y. & Coll. 342; 8 L. J., Ex. Eq. 28.

Personal Property.]—Personal property not belonging to a felon convicted of simple larceny, and sentenced to transportation, at the time of his conviction, but accruing due to him afterward, before his time of transportation has expired, is forfeited to the crown. *Roberts* v. *Walker*, 1 Russ. & M. 752.

All the goods and chattels of a person convicted of felony, which he had at the time of his conviction, or which came to him since, and before the expiration of his sentence, or the period of his pardon, and also all moneys in the funds standing in the names of the trustees for the benefit of such person, are forfeited to the crown. *Buckley* v. *Stapleton*, 9 I. J. (O.S.) Ch. 263.

Where the husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate, as orphan to a freeman of London, this personal estate decreed to belong to the wife as to a feme sole. *Newsome* v. *Bowyer*, 3 P. W. 37.

Grantee of goods of a felon shall have an account of them, wherever they are. *Anon.*, Cary, 15.

Practice.]—Order made under the Escheat Act, 4 & 5 Will. 4, c. 23, for a reference to inquire whether a person convicted of felony in the year 1822 was a trustee of stock standing in his name for the petitioner, and whether any grant thereof had been made by the crown:—Held, not necessary to serve the attorney-general on behalf of the crown with notice of the application to the court. *Tyson, In re*, 1 Jur. 281.

The affidavit of one of the clerks of the treasury, that he had searched the registry of grants in the office of the secretary of state, and had found no grant by the crown of the estate of a trustee who had been convicted of forgery, held sufficient evidence of the non-existence of that grant. *Ib.* 472.

2. Validity of Assignments by Felons.

In what Cases.]—After the commission of a felony, and before his conviction, a felon may

sell or assign over his personal property for valuable consideration; and a debt existing at the time of the commission of the offence is a sufficient consideration to support such an assignment. But the sale must be bonâ fide, and not colourable and merely for the purpose of avoiding the forfeiture on conviction. *Chowne* v. *Baylis*, 31 Beav. 351; 31 L. J., Ch. 757; 8 Jur. (N.S.) 1028; 6 L. T. 739; 11 W. R. 5.

The assignment by a felon of his goods and chattels after the offence committed, and before conviction, depends for its validity, as against the claim of the crown, upon valuable consideration and the bona fides of the transaction. *Perkins* v. *Bradley*, 1 Hare, 219; 6 Jur. 254.

A transfer made on the eve of bankruptcy from the fear of criminal process is valid. *De Tastet, Ex parte, Latham, In re*, Mont. 138. And see *id.* 153.

A conveyance made by a felon after he has committed the offence is a fraud. *Buckley* v. *Stapleton*, 9 L. J. (O.S.) Ch. 263.

A voluntary settlement of personal estate, executed in favour of a wife and children, after the commission of a felony, but before and in fear of conviction, is invalid against the crown. *Saunders, In re*, 4 Giff. 179; 1 N. R. 256; 32 L. J., Ch. 224; 9 Jur. (N.S.) 570; 7 L. T. 704; 11 W. R. 276; 9 Cox, C. C. 279.

Although, by contemplation of law, the whole time during which assizes continue at one place is considered for some purposes as one legal day, yet the particular day on which a conviction actually took place may be proved when necessary: and therefore, where a convicted felon made a bonâ fide assignment of goods after the commission-day of the assizes, but before the day on which he was actually convicted:—Held, that the assignee could prove the actual day of the conviction, although the record mentioned only the commission-day, and that the assignment was valid. *Whitaker* v. *Wisbey*, 12 C. B. 44; 21 L. J., C. P. 116; 16 Jur. 411; 6 Cox, C. C. 109.

When a deed is made by a prisoner on the eve of his trial for a capital offence, which assigns his property to another, it cannot be supported without proof of consideration. *Shaw* v. *Bran*, 1 Stark. 319; 18 R. R. 772.

In January, 1815, A. was convicted of bigamy, and sentenced to seven years transportation. In April following, he conveyed away certain estates in which he had a life interest, by lease and release:—Held, that this conveyance was valid against the crown, there having been no attainder. *Rex* v. *Bridger*, 1 M. & W. 145; 1 Tyr. & G. 437; 5 L. J., Ex. 127.

If A., being in custody on a charge of felony, conveys all his property in trust for his wife for life, and then in trust for his son, and on the next day A. is convicted of the felony, this conveyance will be void as against the crown. *Morewood* v. *Wilkes*, 6 Car. & P. 144.

Exercise of Power of Revocation.]—A felon, shortly before his conviction, conveyed real estate to trustees upon certain trusts, reserving to himself a power of revocation. Whilst still undischarged he borrowed a sum of money, and, by a memorandum, agreed that it should be charged upon his settled estate:—Held, that the memorandum of charge was an equitable exercise of the power of revocation, and that such power was duly exercised in favour of the mortgagee. *Mainprice* v. *Pearson*, 25 W. R. 768.

Prisoner Acquitted on Ground of Insanity—Effect of Assignment by.]—A person being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to his brother absolutely. He was tried, found not guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during her Majesty's pleasure:—Held, that the deed, being without consideration, and executed by an insane person under a total misapprehension, was inoperative, and that the representatives of the brother took no interest under it. *Manning* v. *Gill*, 41 L. J., Ch. 736; L. R. 13 Eq. 485; 26 L. T. 14; 20 W. R. 357; 12 Cox, C. C. 274.

Property vested in Mortgagee on Trust.]—Section 8 of the Felony Act, 1870, which renders a convict during the time he is subject to the operation of the act incapable of alienating any property, does not apply to property vested in such convict as trustee or mortgagee. He could consequently alienate such property before the Trustee Act, 1893, by s. 48 of which it is provided that property so vested shall remain in the convict. *Levy and the Debenture Corporation, In re*, 8 R. 820; 42 W. R. 533.

3. Effect of Pardon.

A pardon granted to a felon under the sign manual, has not the effect of a pardon under the great seal. *Gough* v. *Davies*, 2 Kay & J. 623; 25 L. J., Ch. 677; 4 W. R. 618.

The 5 Geo. 4, c. 84, s. 26, protects felons whose sentences have been remitted by the governor of a penal colony, in the enjoyment of property subsequently acquired by them, not only by their own industry, but also by other means. *Ib.*

Therefore, where a convict who had received a conditional free pardon subsequently became entitled, as one of a class which could not be previously ascertained, to a share of personal property bequeathed by a will made long before the date of his conviction, he was entitled to retain this share against the crown. *Ib.*

The 5 Geo. 4, c. 84, s. 26, enables a felon who has obtained a remission of sentence to maintain an action in respect only of property to which he has acquired a title after conviction. *Fleming* v. *Smith*, 12 Ir. C. L. R. 404.

A conditional pardon, under 6 & 7 Vict. c. 7, is valid, although no place is exempted from its operation. *Blake* v. *Barnett*, 2 Drew. & Sm. 117; 31 L. J., Ch. 898; 8 Jur. (N.S.) 812; 6 L. T. 886; 10 W. R. 767.

In 1833, A. was convicted of felony, and transported. At this time his wife was entitled to a fund, contingently on her surviving her mother. In 1846, A. obtained a conditional pardon, available in all places except the United Kingdom. The mother died in 1838, and the wife in 1852. On a petition by the crown for payment, the court, without deciding the right, merely ordered payment to the administrator of the wife. *Harrington, In re*, 29 Beav. 24.

A party sentenced to death for felony, which sentence was commuted to transportation for life, received a conditional free pardon in a penal colony:—Held, that such pardon did not alter

the effect of the attainder in vesting his property in the crown. *Church's Will, In re*, 16 Jur. 517.

A., possessed of a lease for years, is outlawed for treason, the king grants away the term; the outlawry is reversed, the term ought to be restored. *Peyton* v. *Ayliff*, 2 Vern. 312.

Where a legacy was given to a person when he should attain the age of twenty-one, and if he should die under that age, without issue, over; and the legatee committed a felony and underwent the punishment to which he was sentenced for the offence before he attained twenty-one, which punishment, by the 9 Geo. 4, c. 32, s. 3, operates as a pardon, and restores the felon to his civil rights. It was held that the legatee, upon attaining twenty-one, was entitled to the legacy. *Stokes* v. *Holden*, 1 Keen, 145; 5 L. J., Ch. 291.

Where the husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate, as orphan to a freeman of London, this personal estate decreed to belong to the wife as a feme sole. *Newsome* v. *Bowyer*, 3 P. W. 37.

And see post, col. 1920.

4. CIVIL REMEDY SUSPENDED UNTIL PROSECUTION.

When Action Maintainable.]—Where a debt arises out of a felonious act of the debtor, the civil remedy is suspended only until public justice is satisfied. *Dudley and West Bromwich Banking Co.* v. *Spittle*, 1 Johns. & H. 14; 2 L. T. 47; 8 W. R. 351.

Therefore, where a party, who claimed to be a creditor for the amount paid by him on a forged cheque, had commenced a prosecution upon which a true bill was found and the prisoner was arraigned, but the prosecutor had abstained from bringing on the trial by direction of the judge, who thought the ends of justice satisfied by sentencing the prisoner for another forgery, to which he had pleaded guilty:—Held, that he had done enough to satisfy the rule of law, and that his civil remedy revived. *Ib.*

A., a banker's clerk, misappropriated the moneys of his employers, but the false entries relating to the transactions were not discovered until after his death. The banking company having filed a bill in equity against his legal personal representative for an account, the defendant demurred, on the ground that the acts of A. were felonious, and therefore could not be made the ground of a suit in equity. The rule of public policy not applying, the demurrer was overruled. *Wickham* v. *Gatrell*, 2 Sm. & G. 353; 2 Eq. R. 805; 23 L. J., Ch. 783; 18 Jur. 768; 2 W. R. 673.

The civil remedies for suing the felon, which belong to the person whose property has been feloniously taken, are suspended, after the discovery of the commission of the offence, until the conviction of the felon, in order that the dignity of the law may be vindicated by the prosecution and conviction of the felon. But it is indifferent by whom the felon is prosecuted. *Chowne* v. *Baylis*, 31 Beav. 351; 31 L. J., Ch. 757; 8 Jur. (N.S.) 1028; 6 L. T. 739; 11 W. R. 5.

Where a claim is founded upon a matter which might be the subject of criminal proceedings, the person seeking to enforce it must prosecute for the criminal offence before he can sue in a civil action—per Halsbury, L. C. *Vernon* v. *Watson*, 60 L. J., Q. B. 472; [1891] 2 Q. B. 288; 64 L. T. 728; 39 W. R. 520; 56 J. P. 85.

Money embezzled by the felonious act of a clerk, and applied by him in the purchase of property, cannot be recovered in civil proceedings, nor can such property be followed or claimed. *Cox* v. *Paxton*, 17 Ves. 329; 11 R. R. 95.

In an action for the recovery of a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained, on the ground that it appeared that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought therefore to have nonsuited:—Held, that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. *Wells* v. *Abrahams*, 41 L. J., Q. B. 306; L. R., 7 Q. B. 554; 26 L. T. 433; 20 W. R. 659.

An action cannot be maintained where a declaration alleges a case of felony; *secus*, where the declaration alleges only a misdemeanor. *Fissington* v. *Hutchinson*, 15 L. T. 390.

In an action by a woman for assaulting her and forcibly violating her person, whereby she was delivered of a child, the judge, upon her evidence, directed a nonsuit:—Held, that the direction was right, for if a rape had been committed no action would lie until after the defendant had been prosecuted; and if the plaintiff had consented she could not maintain an action for the assault. *Wellock* v. *Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur. (N.S.) 232; 7 L. T. 751. S. P., *Quinlan* v. *Barber*, Beat. 47.

An insurance company granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—Held, that the action for the felony, if it were maintainable, was maintainable without showing that the felon had been prosecuted. *Midland Insurance Co.* v. *Smith*, 50 L. J., Q. B. 329; 6 Q. B. D. 561; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.

In an action for the seduction of the plaintiff's daughter a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion:—Held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute. *Appleby* v. *Franklin*, 55 L. J., Q. B. 129; 17 Q. B. D. 93; 54 L. T. 135; 34 W. R. 231; 50 J. P. 359.

It is not necessary for the owner of stolen goods to prosecute the thief to conviction before he can recover them in an action against an innocent third person. *Lee* v. *Bayes*, or *Robinson*, 18 C. B. 599; 25 L. J., C. P. 249; 2 Jur. (N.S.) 1093. S. P., *White* v. *Spettigue*, 13 M. & W. 603; 1 Car. & K. 673; 14 L. J., Ex. 99; 9 Jur. 70.

Debts Provable in Bankruptcy—Claim Arising out of Felony — No Prosecution.] — Bankers allowed a customer to overdraw his current account on his depositing with them as security for the overdraft some bills of exchange drawn

by him upon, and purporting to be accepted by, a third person. After the customer had overdrawn his account the bankers discovered that the acceptances were forgeries. They then communicated with the customer, and ultimately gave up the forged acceptances to him, receiving from him in exchange joint and several promissory notes of himself and his father. The customer was afterwards adjudicated a bankrupt. The notes were not paid at maturity:—Held, that though the bankers had not prosecuted the bankrupt for the felony, and whether they had or had not agreed not to prosecute him, they were entitled to prove in the bankruptcy for the balance due to them upon the bankrupt's current account. *Leslie, Ex parte, Guerrier, In re*, 51 L. J., Ch. 689; 20 Ch. D. 131; 46 L. T. 548; 30 W. R. 344; 15 Cox, C. C. 125—C. A.

Per James and Bramwell, L.JJ.:—Even if a person injured by a felony is debarred from proving in the bankruptcy of the felon in respect of the injury until he has prosecuted the felon, the obligation to prosecute does not extend to his trustee in bankruptcy, though the injured person himself tendered his proof before his own bankruptcy. *Bull, Ex parte, Shepherd, In re*, 48 L. J., Bk. 57; 10 Ch. D. 667; 40 L. T. 141; 27 W. R. 563; 14 Cox, C. C. 237—C. A.

Per Baggallay, L.J.:—A person who has been injured by a felony is not allowed by the policy of the law to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice. And the trustee in bankruptcy of the injured person stands in no better position than he himself. *Ib.*

But this rule does not apply where the offender has escaped from the jurisdiction, before a prosecution could have been commenced by the exercise of reasonable diligence. *Ib.*

Statement of Claim showing Felony.]—A statement of claim is not demurrable on the ground that it shows the cause of action to be a felony for which the felon has not been prosecuted. *Roope* v. *D'Avigdor*, 10 Q. B. D. 412; 48 L. T. 761; 47 J. P. 248.

—— **Staying Proceedings.**]—In an action for damages for acts amounting to a felony:—Held, that the court should not interfere summarily to stay the action on the ground of the unprosecuted felony in the absence of an application for the purpose by either party. *S.* v. *S.*, or *A.* v. *B.*, 16 Cox, C. C. 566; 24 L. R. Ir. 235.

5. OTHER POINTS RELATING TO.

Act of Bankruptcy—Convicted Felon not complying with Debtor Summons.]—Notwithstanding the provision contained in s. 8 of the act 33 & 34 Vict. c. 23, that every convicted felon shall, during the time while he shall be subject to the operation of the act, be incapable of alienating or charging any property, such a convict can pay a debt which is claimed by a debtor summons issued and served on him after his conviction, and if he fails to pay the debt within the time limited by the summons, he will commit an act of bankruptcy, upon which an adjudication can be made against him. *Graves, Ex parte, Harris, In re*, 51 L. J., Ch. 1; 19 Ch. D. 1; 45 L. T. 397; 30 W. R. 51; 46 J. P. 70; 14 Cox, C. C. 629; 15 Cox, C. C. 118—C. A.

Action by Felon.]—A testatrix by her will, dated in July, 1869, devised and bequeathed all her real and personal estate to T. K. in trust for her sister M. C. for life, and after her decease upon trust to pay to or permit H. C. D. to receive the interest for his life, but if he should become bankrupt, or publicly insolvent, or should compound with his creditors, or should assign or incumber his interest under the trust, or any part thereof, or should otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of the same interest, or any part thereof, then, and in either of such cases, the trust in favour of H. C. D. should be void, and T. K. should thenceforth apply the interest for the maintenance, education, and support of the children of H. C. D. The testatrix died in 1871, and M. C. died in 1881. In July, 1878, H. C. D. was convicted of felony, and sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket-of-leave, and commenced this action for the administration of the estate of testatrix, and claimed the arrears of interest:—Held, that, under s. 30 of the act 33 & 34 Vict. c. 23, he could commence the action. Held also that he had not been deprived of the actual enjoyment of the life interest by any operation of law; and that he was entitled to all arrears of interest. *Dash, In re, Darley* v. *King*, 57 L. T. 219.

A party appointed executor and after the testator's death convicted of felony is not thereby disentitled to maintain a suit for establishing the validity of the will. *Smethurst* v. *Tomlin*, 2 Sw. & Tr. 143; 30 L. J., P. 269; 7 Jur. (N.S.) 763; 4 L. T. 712.

A person attainted could be heard as a suitor in a court of justice only for the direct purpose of reversing the attainder, not in the prosecution of a civil right. *Bullock, Ex parte*, 14 Ves. 452; nom. *Rex* v. *Bullock*, 1 Taunt. 82; 2 Leach, C. C. 966.

Actions against Attainted Persons.]—Ejectment may be maintained for freehold lands, on the demise of a person attainted of felony, when there has been no office found on behalf of the king. *Doe* d. *Griffith* v. *Pritchard*, 5 B. & Ad. 765; 2 N. & M. 489; 3 L. J., K. B. 11.

An action will lie against one attainted of treason. *Ramsay* v. *M'Donald*, 1 W. Bl. 30. *S. C.*, nom. *Ramsden* v. *Macdonald*, 1 Wils. 217.

No Defence to Action against Master for Damage caused by Servant.]—The defence that the act complained of amounted to a felony does not apply to an action against a master for damages sustained through the wrongful act of a servant. *Osborn* v. *Gillett*, 42 L. J., Ex. 53; L. R. 8 Ex. 88; 28 L. T. 197; 21 W. R. 409.

Plea of Conviction.]—Where a plea, that the plaintiff since the last pleading has been convicted of felony, is pleaded darrein continuance, the plaintiff may confess the plea, and sign judgment for his costs. *Barnett* v. *L. & N. W. Ry.*, 5 H. & N. 604; 2 L. T. 250; 8 W. R. 500.

Administration to Estate of Felon, how Granted.]—*See* WILL.

Reward for Apprehending.]—*See* ADVERTISEMENT.

Libel—Calling Person a Convicted Felon.]—*See* DEFAMATION.

Disqualified from becoming Member of Parliament.]—*See* PARLIAMENT.

Order directing Disposal of Property found on Prisoner.]—*See*, infra. LARCENY.

II. MISDEMEANORS.

1. *Where Evidence proves a Felony*, 1143.
2. *At Common Law*, 1143.
3. *Practice*, 1147.

1. WHERE EVIDENCE PROVES A FELONY.

Felony partly Proved.]—Upon an indictment for a misdemeanor, it is no ground for an acquittal that the evidence necessary to prove the misdemeanor also shows it is part of a felony, and that the felony has been completed. *Reg.* v. *Button*, 11 Q. B. 929; 18 L. J., M. C. 19; 12 Jur. 1017; 3 Cox, C. C. 229.

2. AT COMMON LAW.

Attempt to Commit.]—Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. *Reg.* v. *Martin*, 9 Car. & P. 215. S. P., *Reg.* v. *Martin*, 9 Car. & P. 213; 2 M. C. C. 123.

An attempt to commit a misdemeanor is a misdemeanor, whether the offence was created by statute or was an offence at common law. *Rex* v. *Roderick*, 7 Car. & P. 795; *Rex* v. ——, R. & R. 107; *Rex* v. *Butler*, 6 Car. & P. 368.

The moment a man takes one necessary step towards the completion of a misdemeanor, he commits a misdemeanor. *Reg.* v. *Chapman*, infra.

A soliciting and inciting a person to commit an offence where no other act is done except the soliciting and inciting, is a misdemeanor only. *Reg.* v. *Gregory*, 36 L. J., M. C. 60; L. R. 1 C. C. 77; 16 L. T. 388; 15 W. R. 774; 10 Cox, C. C. 459.

To incite a servant to rob his master is a misdemeanor at common law, and it is no defence that the servant purposely submitted himself to the incitement with intent to betray the master. *Reg.* v. *Quail*, 4 F. & F. 1076.

Overseer Removing Pauper pending Special Case.]—It is not indictable if an overseer, without fraud or menace, remove a pauper under an order, after it has been confirmed, on appeal, by the sessions, subject to the opinion of the Queen's Bench and before its final determination by that court. *Reg.* v. *Cooper*, 3 New Sess. Cas. 346; 18 L. J., M. C. 16.

Delivery of Dangerous Article for Carriage.]—It would seem that if persons put on board a ship an unknown article of a combustible and a dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, they are guilty of a misdemeanor. *Williams* v. *East India Co.*, 3 East, 192, 201; 6 R. R. 589.

Obstructing Coroner—Burning Dead Body.]—It is a misdemeanor to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such body of an intended coroner's inquest, and so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold. *Reg.* v. *Stephenson*, 53 L. J., M. C. 176; 13 Q. B. D. 331; 52 L. T. 267; 33 W. R. 44; 49 J. P. 486.

To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanor to dispose of the body so as to prevent the coroner from holding the inquest. *Reg.* v. *Price*, 53 L. J., M. C. 51; 12 Q. B. D. 247; 33 W. R. 45 n.; 15 Cox, C. C. 389.

Owner Burning House.]—Burning by a man of his own house which is contiguous to others is a misdemeanor at common law. *Rex* v. *Probert*, 2 East, P. C. 1030. S. P., *Rex* v. *Isaac*, 2 East, P. C. 1031.

Cheats.]—*See* infra, col. 1236.

Bribery—Common Law Offence.]—Payment or the promise of payment for votes at the election of an assistant overseer of a parish is bribery, and as such is an indictable common law misdemeanor. *Reg.* v. *Lancaster*, 16 Cox, C. C. 737.

The endeavour to bribe a man to commit an offence is itself a very serious offence. *Wade* v. *Broughton*, 3 Ves. & B. 173.

Affidavit of a bribe offered to a police officer, to assist in obtaining possession of a ward of the court, ordered to be laid before the attorney-general. *Ib.*

Being in Possession of Coining Tools.]—It is a misdemeanor at common law to have tools for coining in possession with intent to use them. *Rex* v. *Sutton*, 1 East, P. C. 172.

A., with the intent of coining counterfeit half dollars of Peru, procured dies in this country for stamping and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coin:—Held, that the procuring of dies was an act in furtherance of the criminal purpose, sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin. *Reg.* v. *Roberts*, Dears. C. C. 539; 25 L. J., M. C. 17; 1 Jur. (N.S.) 1094; 7 Cox, C. C. 39.

Base Coin.]—Procuring base coin with intent to utter it as good, is a misdemeanor. *Rex* v. *Fuller*, R. & R. 308.

But having counterfeit coin in possession with intent to utter it as good is no offence, for there is no criminal act done. *Rex* v. *Stewart*, R. & R. 288. S. P., *Rex* v. *Heath*, R. & R. 184.

Attempt to Commit Suicide.]—An attempt to commit suicide is a misdemeanor at common law. *Reg.* v. *Doody*, 6 Cox, C. C. 463.

Attempt to have Carnal Knowledge.]—Attempting to carnally know and abuse a girl between the ages of ten and twelve, if she consented to all that was done, was a misdemeanor. *Reg.* v. *Martin*, 9 Car. & P. 213; 2 M. C. C. 123.

S. P., *Reg.* v. *Johnson*, L. & C. 632 ; 34 L. J., M. C. 192 ; 11 Jur. (N.S.) 532 ; 12 L. T. 503 ; 13 W. R. 815 ; 10 Cox, C. C. 114.

To have Connection by False Pretences.]—A conspiracy to procure by false pretences, false representations, and other fraudulent means a young girl to have illicit carnal connection with a man is a misdemeanor at common law. *Reg.* v. *Mears*, T. & M. 414 ; 2 Den. C. C. 79 ; 20 L. J., M. C. 59 ; 15 Jur. 66 ; 4 Cox, C. C. 425. *See* 24 & 25 Vict. c. 95.

Procuring Indecent Prints with Intent to Publish.]—It is a misdemeanor to procure indecent prints with intent to publish them. *Dugdale* v. *Reg.*, 1 El. & Bl. 425 : Dears. C. C. 64 ; 22 L. J., M. C. 50 ; 17 Jur. 546.

But to preserve and keep them in possession with such intent is not. *Ib.*

Therefore, where some counts charged that the defendant obtained and procured indecent prints, in order and for the purpose of unlawfully publishing and selling them, and thereby corrupting the public morals, and other counts charged that the defendant unlawfully and knowingly preserved and kept in his possession indecent prints, with the same intent :—Held, that the former counts were good, inasmuch as they charged an act done towards the commission of a misdemeanor ; but that the latter counts were bad, inasmuch as they did not charge such an act. *Ib.*

Indecent Exhibition.]—An obscene exhibition in a booth on a racecourse with closed doors, to a number of spectators who have paid for their admission upon the invitation of the keepers of the booth to the general public, is a misdemeanor at common law. *Reg.* v. *Saunders*, 45 L. J., M. C. 11 ; 1 Q. B. D. 15 ; 33 L. T. 677 ; 24 W. R. 348 ; 13 Cox, C. C. 116.

Uttering Bill with Genuine Indorsement.]—The uttering a bill with a genuine indorsement, under pretence of being the indorser, is only a misdemeanor. *Rex* v. *Hevey*, R. & R. 407, n. ; 2 East, P. C. 856, 856 ; 1 Leach, C. C. 229.

Uttering Instrument—Forgery at Common Law.]—Uttering a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud is actually perpetrated by it. *Reg.* v. *Boult*, 2 Car. & K. 604.

Uttering Forged Character.]—Uttering a false testimonial to character, knowing it to be forged, with intent to deceive, and thereby obtaining a situation of emolument, is a misdemeanor at common law. *Reg.* v. *Sharman*, Dears. C. C. 285 ; 23 L. J., M. C. 51 ; 18 Jur. 157 ; 2 W. R. 227 ; 6 Cox, C. C. 312.

Administering Noxious Thing.]—Administering cantharides to a woman, with intent to injure her health, was not a misdemeanor at common law. *Reg.* v. *Hanson*, 2 Car. & K. 912 ; 4 Cox, C. C. 138.

Inciting to Commit Unnatural Offence.]—A count in an indictment charged that the prisoner unlawfully, wickedly, and indecently did write and send to H. a letter, with intent thereby to move and incite H. to attempt and endeavour, feloniously and wickedly, to commit an unnatural offence, and by the means aforesaid did unlawfully attempt and endeavour to incite H. to attempt to commit the crime aforesaid :—Held, that the count charged an indictable misdemeanor. *Reg.* v. *Ransford*, 31 L. T. 488 ; 13 Cox, C. C. 9.

The evidence was, that H. was a boy at school, and that he had received two other letters from the prisoner, which he read, but that when he received the one mentioned in the above count he did not read it, nor was he in any way aware of its contents, but handed it over to the school authorities :—Held, that the sending the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as H. was not aware of its contents. *Ib.*

Demolishing House—Not Feloniously.]—Two men were convicted upon an indictment which averred that they "unlawfully and riotously did assemble, and unlawfully, riotously, and with force, demolish and pull down the house of W., and pull down and scatter a rick of hay of W." :—Held, that, upon the hypothesis that they had demolished the house, not feloniously, but in the assertion of a supposed right, the indictment could be sustained as for a misdemeanor at common law ; that is, for a riot, with a statement of the demolition of the house as matter of aggravation. *Reg.* v. *Casey*, Ir. R. 8 C. L. 408.

Act of Fraud on Public Officer.]—Any one act of fraud upon a public officer, with intent to deceive, whereby a matter required by law for the accomplishment of an act of a public nature is illegally obtained, amounts to an indictable misdemeanor ; and it need not be alleged or proved either that the act was in fact accomplished, or that the party, at the time of committing the fraud, intended that it should be. *Reg.* v. *Chapman*, 2 Car. & K. 846 ; 1 Den. C. C. 432 ; T. & M. 90 ; 18 L. J., M. C. 152 ; 13 Jur. 885 ; 3 Cox, C. C. 467.

A false oath taken before a surrogate, with intent to deceive such surrogate, and to obtain from him a licence for a marriage, is punishable as a misdemeanor, although it is not alleged in the indictment, nor proved in evidence, that the marriage was in fact celebrated, and although the party found guilty was not the person about to be married. *Ib.*

False Oath.]—H. was indicted for perjury in an affidavit under the Bills of Sale Act, 1854, for the purpose of getting a bill of sale filed. The affidavit was sworn before a commissioner for taking affidavits in the court of Queen's Bench :—Held, that this did not constitute perjury, but that he was guilty of taking a false oath, which offence was, under the circumstances, a common-law misdemeanor. *Reg.* v. *Hodgkiss*, 39 L. J., M. C. 14 ; L. R. 1 C. C. 212 ; 21 L. T. 564 ; 18 W. R. 150 ; 11 Cox, C. C. 365. S. P., *Reg.* v. *Stone*, Dears. C. C. 251 ; 23 L. J., M. C. 14 ; 17 Jur. 1106 ; 6 Cox, C. C. 235.

Orders made under Statutory Powers, Disobeying.]—Where a statute relating to matters concerning the public gives certain commissioners power to make orders relating to common lands, and orders are made accordingly, disobedience to them is a misdemeanor at common law. *Reg.* v. *Walker*, 44 L. J., M. C. 169 ; L. R. 10 Q. B. 355 ; 33 L. T. 167 ; 13 Cox, C. C. 94.

3. Practice.

Power of Queen's Bench to enter Verdict for Defendant.]—Where a misdemeanor is tried in the Queen's Bench division, and a verdict of guilty has been found, the court has power on motion to enter a verdict for the defendant. *Reg.* v. *Platts*, 28 W. R. 915.

In Misdemeanors all are Principals.]—*See* ante, col. 1125.

C. PARTICULAR OFFENCES.

I. AGAINST PROPERTY OF INDIVIDUALS.

A. ARSON AND BURNING.

1. *Generally*, 1147.
2. *Dwelling-houses with Persons therein*, 1148.
3. *Houses or Buildings*, 1148.
4. *Goods, &c., in Buildings*, 1151.
5. *By Gunpowder and Explosive Substances*, 1151.
6. *Woods, Stacks, or Straw*, 1152.
7. *Ships and Vessels*, 1153.
8. *Threats to Burn*, 1154.
9. *Indictment*, 1155.
10. *Evidence*, 1157.

1. Generally.

Who may Commit.]—One put by overseers of the poor into a house to live there is merely a servant, and his possession is theirs, and therefore he may commit arson by burning it. *Rex* v. *Gowan*, 2 East, P. C. 1027; 1 Leach, C. C. 246.

One entitled to dower only out of a house, which was leased to another, may commit arson by burning it. *Rex* v. *Harris*, 2 East, P. C. 1023.

A wife was not indictable under 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to her husband's house with intent to injure him; as it is essential that there should be an intent to injure or defraud some third person, and not one identified with herself. *Rex* v. *March*, 1 M. C. C. 182. *See* Married Women's Property Act, 1882, s. 16.

The Offence.]—Burning a man's own house contiguous to others is a misdemeanor at common law. *Rex* v. *Probert*, 2 East, P. C. 1030. S. P., *Rex* v. *Isaac*, 2 East, P. C. 1031.

A sailor on board ship entered the spirit room and stole rum, and, while doing so, a lighted match held in his hand came into contact with the inflammable liquor, whence a conflagration ensued which destroyed the ship:—Held, that he was not rightly convicted of arson. *Reg.* v. *Faulkner*, Ir. R. 11 C. L. 8; 13 Cox, C. C. 550.

The feloniously burning a dwelling-house is arson at common law; but the burning of an out-house is a statutable felony. *Rex* v. *Nash*, 2 East, P. C. 1021.

What is a Burning.]—A small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed; the boards of the floor were scorched black, but not burnt, and no part of the wood of the floor was consumed:—Held, not a sufficient burning to support an indictment for arson. *Reg.* v. *Russell*, Car. & M. 541.

If a person sets fire to a stack, the fire from which is likely to and does communicate to a barn, which is thereby burnt, the person is indictable for burning the barn. *Rex* v. *Cooper*, 5 Car. & P. 535.

To constitute a setting on fire it is not necessary that any flame should be visible. *Rex* v. *Stallion*, 1 M. C. C. 398.

It was proved that the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze:—Held, that this would be a sufficient burning to support an indictment for arson. *Reg.* v. *Parker*, 9 Car. & P. 45.

Setting fire to paper only in a drying loft belonging to a paper-mill, no part of which was burnt, was not setting fire to an out-house within 9 Geo. 1, c. 22. *Rex* v. *Taylor*, 1 Leach, C. C. 49; 5 East, P. C. 1820.

2. Dwelling-houses with Persons Therein.

Prisoner only in House.]—A prisoner may be indicted under 24 & 25 Vict. c. 97, s. 2, with setting fire to a dwelling-house, a person being therein, though the prisoner himself, who set fire to the house, is the only person therein at the time. *Reg.* v. *Pardoe*, 17 Cox, C. C. 715.

Person being therein.]—A. was indicted under this statute for the capital offence of setting fire to B.'s dwelling-house, B. being therein. A. had set fire to an out-house under the same roof as the dwelling-house, and the fire communicated to the dwelling-house and burnt it. At the time that A. set fire to the out-house B. was in the dwelling-house, but had left it before the fire reached the dwelling-house:—Held, that the capital charge could not be sustained, as B. was not in the house at the time it was on fire. *Reg.* v. *Fletcher*, 2 Car. & K. 215. S. P., *Reg.* v. *Warren*, 1 Cox, C. C. 68.

Dwelling-house.]—The house set fire to must be a dwelling-house, and a common gaol occupied by none but prisoners is not a dwelling-house for this purpose. *Reg.* v. *Connor*, 2 Cox, C. C. 65.

Finding Guilty on another Section.]—On an indictment under 7 Will. 4 & 1 Vict. c. 89, s. 2, for the capital offence of setting fire to a dwelling-house, some person being therein (the indictment not charging any intent to injure or defraud any person), the prisoner could not be convicted of the transportable offence of setting fire to the house, under s. 3; as an allegation of an intent to injure or defraud some person was essential to an indictment under that section. *Reg.* v. *Paice*, 1 Car. & K. 73. S. P., *Reg.* v. *Fletcher*, 2 Car. & K. 215.

3. Houses or Buildings.

House, What is.]—An unfurnished structure intended to be used as a house is not a house within the meaning of the 24 & 25 Vict. c. 97, s. 13. *Reg.* v. *Edgell*, 11 Cox, C. C. 132.

A building erected not for habitation, but for workmen to take their meals and dry their clothes in, which has four walls, a roof, a door, but no window, but in which a person slept with the knowledge, but without the permission of the owner, was not a house, the setting fire to which was felony, within 7 Will. 4 & 1 Vict. c. 89, s. 3. *Reg.* v. *England*, 1 Car. & K. 533; 1 Cox, C. C. 79.

A building which never had been inhabited, but was constructed as and intended for a dwelling-house, though only containing straw, boards and implements of husbandry, was not a house within 9 Geo. 4, c. 22, s. 7. *Elsmore* v. *St. Briavels*, 2 M. & Ry. 514; 8 B. & C. 461; 6 L. J. (o.s.) K. B. 372.

A common gaol was a house within 9 Geo. 1, c. 22. *Rex* v. *Donnevan*, 2 W. Bl. 682; 1 Leach, C. C. 69; 2 East, P. C. 1021. But see now *Reg.* v. *Connor*, 2 Cox, C. C. 65, supra.

In order to constitute the offence of setting fire to a house within 7 Will. 4 & 1 Vict. c. 89, the building must be shewn to be a dwelling-house. *Reg.* v. *Kimbrey*, 6 Cox, C. C. 464.

Stable—What is.]—Burning a stable is not supported by proof of burning a shed, which has been built for and used as a stable originally, but has latterly been used as a lumber shed only. *Reg.* v. *Colley*, 2 M. & Rob. 475.

A. was charged with setting fire to a stable: it was proved that some haulm had been carted from a field and stacked in a building originally intended for a stable, but it was afterwards divided into three parts by a wall which reached only to the eaves. One part was used as a stable, but that part was not the part fired:—Held, that the building was improperly described as a stable. *Reg.* v. *Munson*, 2 Cox, C. C. 186.

The prosecutor had built a place for an oven to bake bricks, but it was afterwards roofed and a door put to it. In this a cow was kept; adjoining to it, but not under the same roof, was a lean-to in which a horse was kept:—Held, that the building was not a stable and that if a person set fire to it (the lean-to not being burnt), he was not indictable for arson to a stable. *Rex* v. *Haughton*, 5 Car. & P. 555.

Semble, a building built originally for a stable does not cease to be a stable, though horses have not been kept in it for three years, if nothing has been done in the meantime to show an intention of never again employing it for that purpose. *Reg.* v. *Hammond*, 1 Cox, C. C. 60.

Out-house—What is.]—A. was indicted for setting fire to an out-house. The building set on fire was a thatched pigsty, situate in a yard in the possession of the prosecutor, into which yard the back door of his house opened, and which yard was bounded by fences and by other buildings of the prosecutor, and by a cottage and barn which were let by him to a tenant but which did not open into this yard:—Held, that the pigsty was an out-house within 7 Will. 4 & 1 Vict. c. 89, s. 3. *Reg.* v. *Janes*, 1 Car. & K. 303; 2 M. C. C. 308.

An out-house means something annexed to an in-house. *Reg.* v. *Hammond*, 1 Cox, C. C. 60.

A building separated from the house by a passage, used as a school-room, but within the curtilage, was an out-house within 9 Geo. 1, c. 22, s. 1, although not of the ordinary description of out-houses. *Rex* v. *Winter*, R. & R. 295.

A cart hovel, consisting of a stubble roof supported by uprights, in a field at a distance from other buildings, was not an out-house within 7 & 8 Geo. 4, c. 30, s. 2. *Rex* v. *Parrott*, 6 Car. & P. 402.

A building had been built for an oven to bake bricks, but afterwards was roofed and a door put to it. In this place the prosecutor kept a cow; neither the prosecutor nor the person of whom he rented this building had any house or farmyard near it, nor did any wall connect it with any dwelling-house; the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord:—Held, that the building was not an out-house, and that, if a person set it on fire he was not indictable for arson. *Rex* v. *Haughton*, 5 Car. & P. 555.

An open building in a field at a distance from and out of sight of the owner's house, though boarded round and covered in, was not an out-house within 7 & 8 Geo. 4, c. 30, s. 2. *Rex* v. *Ellison*, 1 M. C. C. 336.

An open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, was an out-house, within 7 & 8 Geo. 4, c. 30, s. 2. *Rex* v. *Stallion*, 1 M. C. C. 398.

A building which had never been inhabited, but which was constructed as and intended for a dwelling-house, although it only contained straw, boards, and agricultural implements, was not an out-house within 9 Geo. 4, c. 22, s. 7. *Elsmore* v. *St. Briavels*, 2 M. & Ry. 514; 8 B. & C. 461; 6 L. J. (o.s.) K. B. 372.

A. was indicted for arson of an out-house; it was proved that some haulm had been carted from a field and stacked in a building originally intended for a stable but which was afterwards divided into three parts by a wall. The fire was kindled in a part containing the haulm and a quantity of tiles of the prosecutor, who was a builder:—Held, that the building was improperly described as an out-house. *Reg.* v. *Munson*, 2 Cox, C. C. 186.

Barn—What is.]—A building which never had been inhabited, but which was constructed as and intended for a dwelling-house, but which contained straw, boards, and implements of husbandry, was not a barn within 9 Geo. 4, c. 22, s. 7. *Elsmore* v. *St. Briavels*, 2 M. & Ry. 514; 8 B. & C. 461; 6 L. J. (o.s.) K. B. 372.

Shed—Building for carrying on Trade.]—A. was indicted for having set fire to a building twenty-four feet square, the sides of which were composed of wood, with glass windows; it was roofed, and was used by a gentleman, who built houses on his own property for the purpose of disposing of them, as a storehouse for seasoned timber, as a place of deposit for tools, and as a place where timber was prepared for use:—Held, that this was a shed, and also an erection used in carrying on trade. *Reg.* v. *Amos*, T. & M. 423; 2 Den. C. C. 65; 20 L. J., M. C. 103; 15 Jur. 90; 5 Cox, C. C. 222.

A first count charged the firing of a certain building used by O. for carrying on his trade as a builder; and other counts laid the arson as of a stable, an out-house, and a stack of haulm. It was proved that some haulm had been carted from a field and stacked in a building originally intended for a stable, but afterwards divided into three parts by a wall which reached only to the eaves. One part was used as a stable, and the part fired contained the haulm and a lot of tiles of the prosecutor, who was a builder. The fire had been kindled on the haulm:—Held, that the building was improperly described as a shed. *Reg.* v. *Munson*, 2 Cox, C. C. 186.

Held, further, that it was a building used by the prosecutor in carrying on his trade. *Ib.*

Building—What is.]—An unfinished house, brick built, of which all the walls external and

internal were built and finished, the roof on and finished, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, is a building within 24 & 25 Vict. c. 97, s. 6, the setting fire to which is a felony. *Reg.* v. *Manning*, 41 L. J., M. C. 11; L. R. 1 C. C. 338; 25 L. T. 573; 20 W. R. 102; 12 Cox, C. C. 106.

4. Goods, &c., in Buildings.

The Offence.]—A person who maliciously set fire to his own goods in his own house with intent, by burning the goods, to defraud an insurance company, but did not set fire to the house, might be convicted of felony under an indictment framed upon 14 & 15 Vict. c. 19, s. 8, and 7 Will. 4 & 1 Vict. c. 89, s. 3. *Reg.* v. *Lyons*, Bell, C. C. 38; 28 L. J., M. C. 33; 5 Jur. (N.S.) 23; 7 W. R. 58; 8 Cox, C. C. 84.

No Intention to Burn House.]—Wilfully throwing a light into a post-office letter-box in a house with the intention of burning the letters, but not the house, is not a felony within 24 & 25 Vict. c. 97, ss. 7, 8. *Reg.* v. *Batstone*, 10 Cox, C. C. 20.

A person maliciously set fire to goods in a house, with intent to injure the owner of the goods, but he had no malicious intention to burn the house or to injure the owner of it. The house did not take fire:—Held, that if the house had thereby caught fire, the setting fire to it would not have been within 24 & 25 Vict. c. 97, s. 7, as under the circumstances it would not have amounted to felony. *Reg.* v. *Child*, 40 L. J., M. C. 127; L. R. 1 C. C. 307; 24 L. T. 556; 19 W. R. 726; 12 Cox, C. C. 64.

The prisoner was indicted under 24 & 25 Vict. c. 97, s. 7, for wilfully and maliciously setting fire to a picture frame in a building, under such circumstances as if the building was thereby set fire to, would amount to a felony. The jury found that the prisoner did not set fire to the house apart from the frame, that he did set fire to the frame, that the probable result would be setting fire to the floor of the house, that he did not intend to set fire to the house, that he was not aware that what he did would probably set the house on fire, and so injure the owner, and that he was not reckless or indifferent whether the house was set on fire or not. Upon these findings a verdict of not guilty was directed by the judge. *Reg.* v. *Harris*, 15 Cox, C. C. 75.

If a person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not amount to a felony under 24 & 25 Vict. c. 97, s. 7, even although the house catches fire, unless the circumstances are such as to show that the person setting fire to the goods knew that by so doing he would probably cause the house also to take fire, and was reckless whether it did so or not; in which case there would be abundant evidence that he intended to bring about the probable consequence of his act, viz., the burning of the house. *Reg.* v. *Nattrass*, 15 Cox, C. C. 73.

5. By Gunpowder and Explosive Substances.

Damaging House—Persons being therein.]—24 & 25 Vict. c. 97, s. 9, was intended to apply to malicious injuries to houses by throwing explosive substances against or into them, with intent to destroy them or injure the inmates, and not to cases of wanton mischief or assault. *Reg.* v. *Brown*, 3 F. & F. 821.

On an indictment under s. 9 of the 24 & 25 Vict. c. 97, for maliciously damaging a building by the explosion of dynamite, whereby the lives of certain persons were endangered:—Held, that the endangering of life, to be within the section, must result from the damage done to the building particularised in the indictment; but that the enactment does not contemplate the necessity of the persons endangered being inside the building, and would include the case of persons outside whose lives were imperilled by anything proceeding from the damaged building. *Reg.* v. *McGrath*, 14 Cox, C. C. 598.

Evidence.]—Held, also, that for the purpose of proving such endangering of life, evidence of damage to other buildings that might be inhabited was not admissible, though such evidence would be admissible for the purpose of showing the nature and character of the explosion, the extent of the damage, and its tendency to injure or destroy the particular buildings. *Ib.*

—— **Exposure to Risk.**]—To endanger within s. 9, includes not only actual injury received by a person, but also exposure to risk or chance of injury, but it is for the jury in each case to say, from all the circumstances, whether or not the lives of persons were imperilled. *Ib.*

Damaging Building—Gunpowder—In what Condition.]—In order to support an indictment under 24 & 25 Vict. c. 97, s. 10, for throwing gunpowder against a house with intent to damage, it is not enough to show simply that gunpowder or other explosive substance was thrown against the house; but it must also be shown that the substance was in a condition to explode at the time it was thrown, although no actual explosion should result. *Reg.* v. *Sheppard*, 19 L. T. 19; 11 Cox, C. C. 302.

6. Woods, Stacks, or Straw.

Woods.]—Setting fire to a single detached tree is not arson of any part of a wood within 7 & 8 Geo. 4, c. 30, s. 17. *Reg.* v. *Davy*, 1 Cox, C. C. 60.

A. and B. were charged with setting fire to a wood. They set fire to a summer-house which was in the wood, and from the summer-house the fire was communicated to the wood:—Held, that they might be convicted on this indictment. *Reg.* v. *Price*, 9 Car. & P. 729.

Stacks—What are.]—A. and B. were convicted for unlawfully and maliciously setting fire to a stack of grain. The stack was of the flax plant, with the seed or grain in it, and the jury found that the flax seed is a grain:—Held, that the stack was a stack of grain within 7 Will. 4 & 1 Vict. c. 89, s. 10. *Reg.* v. *Spencer*, Dears. & B. C. C. 131; 26 L. J., M. C. 16; 2 Jur. (N.S.) 1212; 5 W. R. 70; 7 Cox, C. C. 189.

An indictment for setting fire to a cock of hay cannot be sustained under a statute making it an offence to set fire to a stack of hay. *Reg.* v. *M'Keever*, Ir. R., 5 C. L. 86.

A quantity of straw, packed on a lorry, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within the meaning of 24 & 25 Vict. c. 97, s. 17, and the setting fire thereto wilfully and maliciously is not felony. *Reg.* v. *Satchwell*, 42

L. J., M. C. 63; L. R. 2 C. C. 21; 28 L. T. 569; 21 W. R. 642; 12 Cox, C. C. 449.

A stack, of which the lower part consisted of cole-seed straw and the upper part of wheat stubble was not a stack of straw; and the setting it on fire was not therefore a capital offence within 7 & 8 Geo. 4, c. 29, s. 17. *Rex* v. *Tottenham*, 7 Car. & P. 237.

Setting fire to a score of faggots which were piled one upon another in a loft, which was made by means of a temporary floor put over an archway roofed in between two houses, and under which carts could go, was not setting fire to a stack of wood within 7 & 8 Geo. 4, c. 30, s. 17. *Rex* v. *Aris*, 6 Car. & P. 348.

A count charged an attempt to set fire to a stack of haulm. It was proved that some haulm had been carted from a field, and stacked in a building, originally intended for a stable, but afterwards divided into three parts by a wall, which reached only to the eaves; one part was used as a stable, and the part fired contained the haulm and a lot of tiles:—Held, that the count was sufficient, inasmuch as it is not necessary to the character of a stack that it should be erected out of doors. *Reg.* v. *Munson*, 2 Cox, C. C. 186.

Setting fire to a parcel of unthreshed wheat was not a felony within 9 Geo. 1, c. 22. *Rex* v. *Judd*, 2 Term Rep. 255; 1 Leach, C. C. 484; 2 East, P. C. 1018; 1 R. R. 477.

Straw—What is.]—Sedge and rushes were not straw within 7 Will. 4 & 1 Vict. c. 89, which was confined to the straw of wheat, oats, barley and rye. *Reg.* v. *Baldock*, 2 Cox, C. C. 55.

The prisoners had set fire to a stack of stubble (which, in Cambridgeshire, is called haulm); they were indicted on a first indictment for setting fire to a stack of straw:—Held, that this was not straw. And, on their being again indicted for setting fire to a stack of straw called haulm, the judge intimated that to convict upon such a count would not be safe; and the verdict, in consequence, was taken upon other counts, charging the setting fire to a barn and a wheat stack. *Rex* v. *Reader*, 4 Car. & P. 245; 1 M. C. C. 239.

Attempt to set Stack on Fire—Overt Act.]—It was a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack, under 9 & 10 Vict. c. 25, s. 7, if he went to the stack with the intention of setting fire to it and lighted a lucifer match for that purpose, but abandoned the attempt because he found that he was being watched. *Reg* v. *Taylor*, 1 F. & F. 511.

7. Ships and Vessels.

What are.]—Semble, a small pleasure boat eighteen feet long is a ship or vessel within s. 10 of 7 & 8 Geo. 4, c. 30. *Rex* v. *Bowyer*, 4 Car. & P. 559. See *Rex* v. *Smith*, 4 Car. & P. 569.

Indictment.]—An indictment on 7 & 8 Geo. 4, c. 30, s. 10, for damaging a vessel need not have stated that the damage was done "otherwise than by fire," if it stated how it was done. *Rex* v. *Bowyer*, 4 Car. & P. 559.

Intent to Prejudice Part-owner.]—The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owner, though he has insured the whole ship, and promised that the other part-owner should have the benefit thereof. *Rex* v. *Philp*, 1 M. C. C. 264.

Accessory before Fact.]—A person might be tried under 7 Will. 4 & 1 Vict. c. 89, ss. 6, 11, as an accessory before the fact to the offence of setting fire to a vessel of which he was a part-owner. *Reg.* v. *Wallace*, Car. & M. 200.

—— Convicted though Principal not tried.]—An indictment was properly framed, which stated that the principal felon cast away and destroyed a vessel, and that the accessory incited, moved, aided, counselled, hired and commanded him to do it; and the accessory might be convicted on an indictment so framed, although the principal had not been tried, and did not appear to be amenable to justice. *Ib.*

8. Threats to Burn.

What Property.]—Sending a letter threatening to burn standing corn was not an offence within 4 Geo. 4, c. 54, s. 3. *Reg.* v. *Hill*, 5 Cox, C. C. 233.

Whose House.]—An indictment on 4 Geo. 4, c. 54, s. 3, charging that the prisoner sent a letter to T. L., threatening to burn the house of J. R., was bad—as the threat must be to the owner of the property; and if the letter was sent to T. L. with intent that it should reach J. R., and did reach him, it should have been charged in the indictment as sent to J. R. *Reg.* v. *Jones*, 2 Car. & K. 398; 1 Den. C. C. 218; 1 Cox, C. C. 67.

An indictment for sending a threatening letter stated that one R. had lately built and completed a house; and then charged that the prisoner feloniously sent to one L. a certain letter, threatening to burn the house so built by the said R. Upon objection taken that the indictment ought to have charged a sending to R.:—Held, that the indictment was bad on that ground. *Reg.* v. *Jones*, 2 Cox, C. C. 434.

A conviction on 27 Geo. 2, c. 15, for sending a letter to the prosecutor, threatening "to set fire to his mill, and likewise to do all the public injury they were able to him, in all his farms and seteres," was wrong, when the prosecutor had not then any mill to which the threat of burning would apply (having parted with it three years before); and the threat as to the farm, &c., not necessarily implying a burning. *Rex* v. *Jepson*, 2 East, P. C. 1115.

Sending a letter to A. threatening to burn a house of which he was owner, but let by him to, and occupied by, a tenant, was not an offence within 4 Geo. 4, c. 54, s. 3. *Reg.* v. *Burridge*, 2 M. & Rob. 296.

Indictment for sending a threatening letter under 4 Geo. 4, c. 54, s. 3. First count charged G. with sending to R., and threatening to burn R.'s houses. It was proved that R. had only a reversionary interest in these houses. Quære whether G. could be convicted on that count. *Reg.* v. *Grimwade*, 1 Den. C. C. 30; 1 Car. & K. 592; 1 Cox, C. C. 85.

Threat—Question for Jury.]—It may be left to the jury to say whether the letter sent amounted to a threat to burn. *Rex* v. *Tyler*, 1 M. C. C. 428. See *Reg.* v. *Carruthers*, 1 Cox, C. C. 138.

Sending a Letter.]—If a letter threatening to

burn the premises of A., but directed to B., is left at a gate on a public highway with the intention that it should reach as well A. as B., that was a sending to A. within 4 Geo. 4, c. 54, s. 3. *Reg.* v. *Grimwade*, supra.

9. INDICTMENT.

Owner of House.]—It must appear upon the face of an indictment for arson that the house was that of another; and it must state whose house, and with that the proof should agree. *Rex* v. *Rickman*, 2 East, P. C. 1034. And see *Rex* v. *Glandfield*, 2 East, P. C. 1034.

A house, in part of which a man lives, and other parts of which he lets to lodgers, may be described, in an indictment for setting fire to it, as his house, though he has taken the benefit of the Insolvent Debtors Act, and executed an assignment including the house, if the assignee has not taken possession; at least, no objection can be made, if in other counts it is stated as the house of the assignee, and in others of the lodger whose room was set fire to. *Rex* v. *Bull*, 1 M. C. C. 30.

A common gaol was kept in repair by rates levied upon the inhabitants of the liberty in and for which the gaol was. The keeper of the gaol was appointed by the justices of the liberty. He did not reside at the gaol, but kept the keys and had the charge of it. He was also an inhabitant, and liable to be rated to the repair of the gaol:—Held, that in an indictment under 7 & 8 Vict. c. 62, s. 1, for setting fire to the gaol, it should have been laid to be in the possession of the keeper of the gaol. *Reg.* v. *Connor*, 2 Cox, C. C. 65.

An indictment for setting fire to the dwelling-house of A. and B. is not proved by showing that A. and B. are mortgagees of a house fit for dwelling in, unless it is shown that they reside in it. *Reg.* v. *Allison*, 1 Cox, C. C. 24.

A cottage, the tenant of which left it during the tenancy and removed his furniture to enable the landlord to do some repairs, cannot be described as the house of the landlord, but, semble, can be described as the house or dwelling-house of the tenant. *Reg.* v. *Kimbrey*, 6 Cox, C. C. 464.

—— **Actual Occupier.**]—A house may be described as in the possession of the actual occupier, though his possession is wrongful. *Rex* v. *Wallis*, 1 M. C. C. 344.

Averment of Property.]—Two were indicted, under 24 & 25 Vict. c. 97, s. 3, for feloniously setting fire to a shop "of and belonging to" one of them:—Held, that the averment of property was an immaterial averment which need not be proved. *Reg.* v. *Newboult*, 41 L. J., M. C. 63; L. R. 1 C. C. 344; 25 L. T. 883; 20 W. R. 343; 12 Cox, C. C. 148.

Thereby Burnt.]—It was not necessary to aver in an indictment on 9 Geo. 1, c. 22, for setting fire to a hay-stack, that the stack "was thereby burnt." *Rex* v. *Salmon*, R. & R. 26.

Absence of Malice no Answer.]—In an indictment on 9 Geo. 1, c. 22, for setting fire to a hay-stack, it was no answer to the charge that the prisoner had no malice or spite to the owner of the stack. *Ib.*

Place where Offence Committed.]—On an indictment for setting fire to a stack of beans, a mistake as to the name of the place where the offence was committed is immaterial; the charge is transitory, not local. *Rex* v. *Woodward*, 1 M. C. C. 323.

Intent to Injure or Defraud.]—A prisoner was convicted on an indictment for setting fire with intent to injure A. B. The property fired belonged to A. B. The jury found the intent to injure C. D.:—Conviction held good. *Rex* v. *Newell*, 1 M. C. C. 458.

So an indictment under 7 & 8 Geo. 4, c. 30, s. 17, for setting fire to a stack of straw, was good, without stating any intent to injure. *Ib.*

An indictment for setting fire to a barge, the property of another, ought to contain an averment that it was done with an intent to injure the owner. *Rex* v. *Smith*, 4 Car. & P. 569. Sed quære, see *Rex* v. *Newell*, 1 M. C. C. 458; and 24 & 25 Vict. c. 97, s. 60.

On an indictment for setting fire to a mill, with intent to injure the occupiers thereof:—Held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred, for a man must be supposed to intend the necessary consequence of his own act. *Rex* v. *Farrington*, R. & R. 207.

It is not necessary in a count in an indictment laid under 24 & 25 Vict. c. 97, s. 7, to allege an intent to defraud, and it is sufficient to follow the words of the section without substantively setting out the particular circumstances relied on as constituting the offence. *Reg.* v. *Hesseltine*, 12 Cox, C. C. 404.

A common gaol was kept in repair by rates levied upon the inhabitants of the liberty in and for which the gaol was:—Held, in an indictment under 7 & 8 Vict. c. 62, s. 1, for setting fire to the gaol, that the intent of the prisoner should have been laid to be to injure the inhabitants of the liberty. *Reg.* v. *Connor*, 2 Cox, C. C. 65.

Two persons were indicted under 24 & 25 Vict. c. 97, s. 3, for feloniously setting fire to a shop "of and belonging to" one of them:—Held, that the intent to injure another person as owner might be proved in support of the indictment. *Reg.* v. *Newboult*, 41 L. J., M. C. 63; L. R. 1 C. C. 344; 25 L. T. 883; 20 W. R. 343; 12 Cox, C. C. 148.

Upon an indictment for arson, with intent to injure the person in occupation of the premises, the prisoner may be found guilty, although his intent is proved to have been to obtain a reward for giving the earliest intimation of a fire at the engine station. *Reg.* v. *Regan*, 4 Cox, C. C. 335.

What set on Fire.]—An indictment for setting fire to an out-house was good, though it might have in point of law formed part of the dwelling-house, the burning of which was arson at common law. *Rex* v. *North*, 2 East, P. C. 1021.

Upon a statute which made it capital to set fire to a stack of pulse, it was sufficient to state that the prisoner set fire to a stack of beans. The judges will take notice that beans are pulse. *Rex* v. *Woodward*, 1 M. C. C. 323.

An indictment on 7 & 8 Geo. 4, c. 30, s. 17, charging a party with setting fire to a stack of barley, of the value of 100*l.*, of R. P. W., was good, although the words of the statute creating

the offence were "any stack of corn or grain." *Rex* v. *Swatkins*, 4 Car. & P. 548.

Feloniously, &c.]—Held, also, that if the indictment stated "that the prisoner feloniously, unlawfully, and maliciously did set fire to a certain stack of barley, of the value of 100*l.*, of R. P. W., then and there being," this is sufficient, without stating that the prisoner feloniously, unlawfully, and maliciously did then and there set fire to the stack. *Ib.*

An indictment on 7 & 8 Geo. 4, c. 30, ss 2 & 17, for setting fire to a barn and a stack of straw, charging the offences to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously," was bad. *Rex* v. *Reader*, 4 Car. & P. 245; 1 M. C. C. 239.

10. Evidence.

Notice to Produce Policy.]—On an indictment for arson on the prosecution of an insurance company, their books are not evidence of the insurance, without notice to produce the policy. *Rex* v. *Doran*, 1 Esp. 127.

Upon an indictment for arson, with intent to defraud an insurance company, the nature of the proceedings does not give notice to the prisoner to produce the policy, so as to dispense with actual notice to produce it. *Reg.* v. *Kitson*, Dears. C. C. 187; 22 L. J., M. C. 118; 17 Jur. 422; 6 Cox, C. C. 159.

—— **Length of.**]—A prisoner tried at the assizes for arson, on Wednesday, the 20th of March, was on Monday, the 18th, served at the prison with a notice to produce a policy of insurance. The commission day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—Held, that the notice was served too late. *Rex* v. *Ellicombe*, 5 Car. & P. 522; 1 M. & Rob. 260.

Notice to produce policies of insurance, served on the prisoner's attorney on Tuesday evening, the prisoner then being in Maidstone, and the policies twenty miles off, is sufficient when the trial takes place on Thursday. *Reg.* v. *Barker*, 1 F. & F. 326.

Proof of Actual Ill-will.]—On an indictment for maliciously setting fire to a building, it is not necessary to prove actual ill-will in the prisoner towards the owner. *Reg.* v. *Davies*, 1 F. & F. 69.

Experiments.]—Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set on fire. *Reg.* v. *Hesseltine*, 12 Cox, C. C. 404.

What Admissible to show Motive and Intent.]—A. was indicted for wilfully setting fire to a rick by firing a gun close to it on the 29th of March: evidence that the rick was also on fire on the 28th of March, and that A. was then close to it, having a gun in his hand, is receivable to show that the fire on the 29th was not accidental. *Reg.* v. *Dossett*, 2 Car. & K. 306; 2 Cox, C. C. 243.

On an indictment for arson in setting fire to a rick, the property of A., evidence may be given of the prisoner's presence and demeanour at fires of other ricks, the property respectively of B. and C., occurring the same night, although those fires are the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A.'s rick; but evidence is not admissible of threats, of statements, or of particular acts, pointing alone to other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to that fire. *Reg.* v. *Taylor*, 5 Cox, C. C. 138.

Under an indictment for arson, where the prisoner is charged with wilfully setting fire to her master's house, the previous and abortive attempts to set fire to different portions of the same premises are admissible though there is no evidence to connect the prisoner with either of them. *Reg.* v. *Bailey*, 2 Cox, C. C. 311.

Upon an indictment for arson it is not competent for the prosecutors to show that other fires, of which notice was given by the prisoner, were of a similar nature to the one in question, and different from those of which notice was given by other parties. *Reg.* v. *Regan*, 4 Cox, C. C. 335.

On an indictment for arson, one count laying an intent to defraud, and it being opened for the prosecution that the motive might have been to realise the money insured by the prisoner upon her goods: evidence was received that she was in easy circumstances, with a view to show that she was at all events under no pecuniary temptation to commit such an act. *Reg.* v. *Grant*, 4 F. & F. 322.

On a charge of arson (the case turning on identity) evidence was rejected that, a few days previously to the fire, another building of the prosecutor's was found on fire, and the prisoner was seen standing by, with a demeanour which showed indifference or gratification. *Reg.* v. *Harris*, 4 F. & F. 342.

Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred previously, and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. *Reg.* v. *Gray*, 4 F. & F. 1102.

B. Burglary and Housebreaking.

1. *Breaking and Entering*, 1158.
2. *What is a Dwelling-house*, 1161.
3. *Breaking into Churches and Places of Divine Worship*, 1165.
4. *Intent*, 1166.
5. *Armed with Intent to Break or Enter*, 1166.
6. *Stealing in a Dwelling-house*, 1167.
7. *Breaking into Shops, Warehouses, or Counting-houses*, 1168.
8. *Indictment*, 1169.
9. *Evidence and Trial*, 1174.

1. Breaking and Entering.

Breaking—What Sufficient.]—There must be both a breaking and an entering to constitute a burglary, and the breaking must be such as will afford the burglar an opportunity of entering, so as to commit the intended felony. *Rex* v. *Hughes*, 1 Leach, C. C. 406; 2 East, P. C. 491.

—— **Breaking Inner Door.**]—Though a thief enters a dwelling-house at night through an open door or a window, yet if, when within, he breaks

or opens an inner door with intent to commit felony, it is burglary. *Rex* v. *Johnson*, 2 East, P. C. 488.

—— **Entry by Chimney.**]—A chimney is a part of a dwelling-house, and therefore the getting in at the top is a breaking of the dwelling-house. *Rex* v. *Brice*, R. & R. 450.

—— **Hole in Roof.**]—An entry to a house through a hole in the roof left for the purpose of light, is not a sufficient breaking and entering. *Rex* v. *Spriggs*, 1 M. & Rob. 357.

—— **Lifting Latch.**]—Merely opening a latch is a burglarious breaking. Per Coleridge, J. *Pugh* v. *Griffith*, 7 A. & E. 827, 836.

—— **Breaking by Threats.**]—When the family within the house was forced by threats and intimidations to let in the offenders by one of them opening the door:—Held, that it was as much a breaking by those who made use of such intimidations without, to prevail upon them so to open it, as if they had actually burst the door open. *Rex* v. *Swallow*, 2 Russ. C. & M. 8.

—— **Breaking by Consent of Servant.**]—A servant pretended to concur with two persons, who proposed to him to unite with them in robbing his master's house. The master being away from home, the servant communicated with the police and acted on their instructions. In consequence of this the servant lifted the latch and let in the two persons:—Held, that neither of them could be convicted of burglary. *Reg.* v. *Jones*, Car. & M. 218.

—— **Pushing against Window.**]—Where a window opens upon hinges, and is fastened by a wedge, so that the pushing against it will open it; forcing it open by pushing against it is a sufficient breaking to constitute a burglary. *Rex* v. *Hall*, R. & R. 355.

—— **Broken Pane—Removing Fastening.**]—Removing the fastening of a window by the hand introduced through a partially broken pane of the window, and thereby opening the window and entering is a breaking; not by breaking the residue of the pane, but by unfastening and opening the window. *Rex* v. *Robinson*, 1 M. C. C. 327. S. P., *Ryan* v. *Shilcock*, 7 Ex. 72.

—— **Window Open.**]—A window was a little open, and the prisoner pushed it wide open and got in:—Held, no sufficient breaking. *Rex* v. *Smith*, Car. C. L. 293; 1 M. C. C. 178.

If there is an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *Rex* v. *Lewis*, 2 Car. & P. 628.

—— **Pushing in Cut Pane.**]—A. was charged with breaking into the house of K. and stealing the goods of M. It was proved as to the breaking that the glass of the window had been cut about a month before, but that every portion of the glass remained in its place till he pushed it in, and stole the goods:—Held, a sufficient breaking. *Reg.* v. *Bird*, 9 Car. & P. 44.

—— **Breaking Pane.**]—And it is a sufficient breaking to constitute such an offence, if the party breaks a pane of glass of a window, and puts his hand in for the purpose of opening the shutter, although he did not succeed in doing so. *Rex* v. *Perkes*, 1 Car. & P. 300.

The breaking a pane of glass and the insertion of a knife by which the window fastener was pushed back is a sufficient entry. *Reg.* v. *Tucker*, 1 Cox, C. C. 73.

—— **Window Kept in Position by Weight.**]—Pulling down the sash of a window is a breaking sufficient to constitute burglary, although it has no fastening, and is only kept in its place by the pulley-weight; and it is equally a breaking although there is an outer shutter which is not put to. *Rex* v. *Haines*, R. & R. 451.

Raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking of the dwelling-house. *Rex* v. *Hyams*, 7 Car. & P. 441.

—— **Lifting Flap.**]—Lifting the flap of a cellar usually kept down by its own weight, is a sufficient breaking for the purpose of burglary. *Rex* v. *Russell*, 1 M. C. C. 377.

The lifting up of a trap-door covering a cellar, which was merely kept in its place by its own weight, and which had no fastenings, because, it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary; but unlocking and opening a hall door and running away is a sufficient breaking out of the house. *Rex* v. *Lawrence*, 4 Car. & P. 231.

Where a mill, under the same roof and within the same curtilage as a dwelling-house, had a trap-door over a gateway, which was only fastened by a lid-door kept down by its own weight, without bolts or other interior fastenings:—Held, that an entry into the mill in the night with intention to steal flour by raising the lid-door amounted to burglary. *Rex* v. *Brown*, 2 East, P. C. 487; 2 Leach, C. C. 1016, n.

Breaking and Entry on Different Nights.]—The prisoner broke the glass of a door on a Friday night, with intent to enter at a future time, and actually entered on the next Sunday night:—Held, to be burglary, the breaking and entering being both by night, and the breaking being with intent afterwards to enter. *Rex* v. *Smith*, R. & R. 417.

Breaking Out—Lawfully in House.]—If a person commits a felony in a house, and breaks out of it in the night-time, this is burglary, although he might have been lawfully in the house. *Reg.* v. *Wheeldon*, 8 Car. & P. 747.

If a lodger in a house has committed a larceny there, and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglariously breaking out of the house. *Ib.*

—— **What sufficient.**]—On an indictment for stealing wine out of a cellar, and burglariously breaking out therefrom, it appeared that the prisoner broke out of the cellar by lifting up a heavy flap by which the cellar was closed on the outside next the street; the flap was not bolted, but it had bolts:—Six judges were of opinion that there was a sufficient breaking to constitute burglary, but the remaining six were of a contrary opinion. *Rex* v. *Callan*, R. & R. 157. And see *Rex* v. *Brown*, 2 East, P. C. 487; 2 Leach, C. C. 1016, n.

Unlocking and opening a hall door and running away is a sufficient breaking out of the house to constitute a burglary. *Rex* v. *Lawrence*, 4 Car. & P. 231.

Entry—What sufficient.]—It is not sufficient, to constitute the offence of burglary, that there was an entry without a breaking of the outer door, and a breaking without an entry of an inner one. *Reg.* v. *Davis*, 6 Cox, C. C. 367.

A chimney is a part of a dwelling-house, and therefore where the prisoner, by lowering himself in the chimney, made an entry into the dwelling-house, though he did not enter any of the rooms, it is sufficient to constitute burglary. *Rex* v. *Brice*, R. & R. 450. See *Rex* v. *Spriggs*, 1 M. & Rob. 357.

Introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary. *Rex* v. *Bailey*, R. & R. 341.

Where, in breaking a window in order to steal property in the house, the prisoner's finger went within the house:—Held, that there was a sufficient entry to constitute burglary. *Rex* v. *Davis*, R. & R. 499.

Throwing up a window, and introducing an instrument between such window and an inside shutter, to force open the shutter, if the hand or some part of it is not within the window, is not a sufficient entry to constitute burglary. *Rex* v. *Rust*, 1 M. C. C. 183.

So where the prisoner raised a window which was not bolted, and thrust a crowbar under the bottom of the shutter (which was about half a foot within the window), so as to make an indent on the inside of the shutter, but from the length of the bar his hand was not inside the house:—Held, that it was not a sufficient entry to constitute a burglary. *Rex* v. *Roberts*, Car. C. L. 293; 2 East, P. C. 487.

On an indictment for burglary, it was proved the legs of the prisoner were seen hanging about a foot from the ground, from a window, and no other part of his body was visible till he jumped down and ran away:—Held, that though it appeared there was a hole broken in the window large enough to admit a man's head and shoulders, there was no evidence to show that there had been any actual entry, no property being lost. *Reg.* v. *Meal*, 3 Cox, C. C. 70.

On an indictment for burglary, where any part of the person of the prisoner is within the dwelling-house, no matter with what immediate intent, there is a sufficient entry to constitute the offence, and therefore, where the hand was proved to have been inside the house, it is immaterial whether it was there for the purpose of lifting up a window or of abstracting property. But where no part of the prisoner's body is inside the premises, but he introduces an instrument within it for the mere purpose of effecting an entry, and not with any other object, semble, that the entry is not complete. *Reg.* v. *O'Brien*, 4 Cox, C. C. 400.

2. What is a Dwelling-house.

Permanent Building slept in occasionally.]—A public building used and slept in only for a short time for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it, though unoccupied the rest of the year. *Rex* v. *Smith*, 1 M. & Rob. 256.

Goods in House—No one Sleeping there.]—A house into which the owner has only removed his goods, but has not slept in, is not his dwelling-house as to burglary. *Rex* v. *Thompson*, 2 Leach, C. C. 771; 2 East, P. C. 498.

A nocturnal breaking into a house of which the owner has no farther taken possession than by depositing in it sundry articles of merchandise, neither he nor any servant of his having slept in it, is not burglary, for it cannot be considered as the dwelling-house of the owner. *Rex* v. *Harris*, 2 Leach, C. C. 701; 2 East, P. C. 498.

A house under repair, but not inhabited, is not the dwelling-house of the owner, though part of his property is deposited therein. *Rex* v. *Lyons*, 1 Leach, C. C. 185; 2 East, P. C. 497, differently reported. S. P., *Rex* v. *Fuller*, 1 Leach, C. C. 186, n.

Where the owner of a house has never by himself, or by any of his family or servants, slept in the house, it is not his dwelling-house, so as to make the breaking in and stealing goods thereout burglary, though he has used it for his meals and all the purposes of his business. *Rex* v. *Martin*, R. & R. 108.

Servants Sleeping in House.]—Although a man leaves his house, and never means to reside in it again, yet, if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it, for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family is a habitation by him, and the shop will be considered as part of the dwelling-house, so as to constitute the breaking thereof burglary. *Rex* v. *Gibbons*, R. & R. 422.

A burglary committed in a baker's shop, in which no person slept, but to which there was a communication by a trap-door and a ladder from the upper rooms of the house, in which only a weekly workman and his family lived by the permission of the three partners, who were owners of the whole house, may be laid to have been committed in the dwelling-house of these partners, they inhabiting it by means of their servant. *Rex* v. *Stock*, 2 Leach, C. C. 1015; R. & R. 185; 2 Taunt. 339; 11 R. R. 605.

Buildings separated from the dwelling-house by a public road will not be a parcel of the dwelling-house, but if such buildings are used as a sleeping place for any of the servants of the dwelling-house, they may be deemed a distinct dwelling-house. *Rex* v. *Westwood*, R. & R. 495.

Where the prosecutor left his house without any intention of living in it again, and intending to use it as a warehouse only; though he had persons (not of his family) to sleep in it, to guard the property:—Held, that it could not be considered as the dwelling-house of the prosecutor, so as to support a conviction for stealing therein. *Rex* v. *Flannagan*, R. & R. 187.

The owner of a house puts a person into it to sleep there at nights till he can get a tenant, in order to protect some furniture there, which he had purchased of the last tenant, which servant had so slept there for three weeks before, but the owner never intended to inhabit it himself:—Held, that a thief could not be convicted of stealing goods in the dwelling-house of such owner to the value of 40*s.* within 12 Anne, c. 8. *Rex* v. *Davis*, 2 East, P. C. 499; 2 Leach, C. C. 876.

Or, if the owner of a house has no intention of residing in it himself, it cannot be considered

his dwelling-house, although his servant sleeps in it every night, if his sleeping there be merely to protect the furniture. *Ib.*

A porter lying in a warehouse does not make it a dwelling-house. *Rex* v. *Smith*, 2 East, P. C. 497 ; 2 Leach, C. C. 1018, n. And see *Rex* v. *Brown*, 2 East, P. C. 501 ; 2 Leach, C. C. 1018, n.

Whose Dwelling-House.]—A garret made use of as a workshop, and rented with a sleeping-room by the week, is the mansion of the lodger, if the landlord does not sleep under the same roof. *Rex* v. *Carrell*, 1 Leach, C. C. 287 ; 2 East, P. C. 506.

Lofts over coach-houses and stables, converted into lodging-rooms, are the dwelling-houses of their inhabitants if there is an outer door. *Rex* v. *Turner*, 1 Leach, C. C. 305 ; 2 East, P. C. 492.

Two adjoining houses belonging to two partners, of which the rent and taxes are paid from the joint fund, may still be the respective mansions of each partner, if there is no communication from one to the other but through the outer doors to the street. *Rex* v. *Jones*, 1 Leach, C. C. 537 ; 2 East, P. C. 504.

Part of Dwelling-House—What is.]—*See* 24 & 25 Vict. c. 76, s. 53, *by which many of the following cases are affected, but they are retained as they may still serve to illustrate the subject.*

If the out-house is adjoining to the dwelling-house, and occupied as parcel thereof, though there is no common inclosure or curtilage, it may still be considered as part of the mansion. *Rex* v. *Brown*, 2 East, P. C. 493.

On the trial of an indictment for breaking into a building within the curtilage, under 7 & 8 Geo. 4. c. 29, s. 14, it appeared that the building was in the fold-yard of the prosecutor's farm ; and that, to get from his dwelling-house to the fold-yard, it was necessary to pass through a yard called the pump-yard, into which the back-door of the dwelling-house opened, the pump-yard being separated from the fold-yard by a wall four feet high, in which there was a gate, the fold-yard having another gate leading to fields on one side, a hedge, with a gate leading to the high road, on another, the other sides of the fold-yard being bounded by the farm buildings and a continuing wall from the dwelling-house :—Held, that the building was within the curtilage. *Reg.* v. *Gilbert*, 1 Car. & K. 84.

An out-house in the yard of a dwelling-house will be parcel of the dwelling-house if the yard is inclosed, though the occupier has another dwelling-house opening into the yard, and he lets such dwelling-house with easements in the yard. *Rex* v. *Walters*, 1 M. C. C. 13.

A summer-house used occasionally for tea and retirement, within the same inclosure as the house, though at the distance of about half a mile, was a building within 4 Geo. 2, c. 32. *Rex* v. *Norris*, R. & R. 69. And see *Rex* v. *Parker*, 1 Leach, C. C. 320, n.

A building within the same fence as the dwelling-house, and used with it as parcel of the dwelling-house, though it has no internal communication with the house but through an open passage, is parcel of the dwelling-house. *Rex* v. *Hancock*, R. & R. 170.

And such a building is equally part of the dwelling-house, though used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he was a partner. *Ib.*

The prisoner broke into a goose-house opening into the prosecutor's yard, into which his house also opened ; the yard was surrounded partly by other buildings of the homestead, and partly by a wall ; some of the buildings had doors opening backwards, and there was a gate in one part of the wall opening upon a road ; this goose-house was held part of the dwelling-house, so as to constitute the breaking thereof burglary. *Rex* v. *Clayburn*, R. & R. 360.

Buildings separated from the dwelling-house by a public road, however narrow, will not be a parcel of the dwelling-house, so as to constitute the breaking thereof burglary, if there is no common fence or roof to connect them, although held by the same tenure, and although some of the offices necessary to the dwelling-house adjoin thereto, and although there be an awning extending therefrom to the dwelling-house. *Rex* v. *Westwood*, R. & R. 495.

An area gate, opening into the area only, is not part of the dwelling-house so as to make the breaking thereof burglary, if there is any door or fastening to prevent persons in the area from entering the house, although such door or fastening may not be secured at the time. *Rex* v. *Daris*, R. & R. 322.

A door which only forms part of the outward fence of the curtilage, and opens into no building but into the yard only, is not such a part of the dwelling-house as that the breaking thereof will constitute burglary. *Rex* v. *Bennett*, R. & R. 289.

—— **No Internal Communication.**]—A shutter-box partly projected from a house, and adjoined the side of the shop window, which was protected by wooden panelling, lined with iron :—Held, that the breaking and entering the shutter-box did not constitute burglary. *Rex* v. *Paine*, 7 Car. & P. 135.

The prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and a coach-house adjoined ; all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, so as to be altogether an inclosed yard ; the workshop had no internal communication with the house, and it had a door opening into the street ; its roof was higher than that of the dwelling-house ; the street-door of the workshop was broken open in the night :—Held, the workshop was parcel of the dwelling-house. *Rex* v. *Chalking*, R. & R. 334.

W. let part of his house, viz. a shop, passage, cellar, &c., to his son, who did not sleep therein, and there was a distinct entrance into the son's part, but his passage led to his father's cellars, and they were open to his father's part of the house. The shop was broken into, and the prisoner was convicted thereof :—Held, that by reason of the internal communication, the son's part continued part of the father's house, and therefore that it was burglary. *Rex* v. *Sefton*, R. & R. 202.

A shop adjoining to a house, if under the same roof, and within the curtilage, is part of the dwelling-house, although there is no internal communication between the shop and the house, and although no person sleeps in the shop. *Rex* v. *Gibson*, 1 Leach, C. C. 357 ; 2 East, P. C. 508.

A room in a dwelling, occupied therewith and under the same roof, will be deemed part of the dwelling-house, though it has a separate outer door and no internal communication with the rest of the house. *Rex* v. *Burrows*, 1 M. C. C. 274.

On the trial of an indictment for burglary, it appeared that adjoining to the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house, and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights:—Held, that the dairy was not part of the dwelling-house, and that a burglary could not be committed by breaking into it. *Reg.* v. *Higgs*, 2 Car. & K. 322.

A building used with and under the same roof with a dwelling-house, but having no internal communication with it, although opening into an inclosed yard belonging to the house, and also into an adjoining street, may be parcel of the dwelling-house so as to constitute the breaking and entering thereof a burglary. *Rex* v. *Lithgo*, R. & R. 357.

A manufactory carried on in the centre building of a great pile, in the wings of which several persons dwelt, but having no internal communication with the same, though the roofs of all were connected, and the entrances of all were out of the same common inclosure:—Held, not a dwelling-house in which burglary could be committed. *Rex* v. *Eggington*, 2 East, P. C. 494, 666; 2 Leach, C. C. 913; 2 Bos. & P. 508; 5 R. R. 689.

3. Breaking into Churches and Places of Divine Worship.

Church or Chapel—What is.]—A dissenting meeting-house was not within 7 & 8 Geo. 4, c. 29, s. 10, which made it a capital offence to "break and enter any church or chapel, and steal therein." *Rex* v. *Richardson*, 6 Car. & P. 335. S. P., *Rex* v. *Warren*, 6 Car. & P. 335, n.

A prisoner was indicted under 7 & 8 Geo. 4, c. 29, s. 10, for breaking and entering a chapel, and stealing several fixtures, and a bell not fixed. The chapel was a Wesleyan chapel, and not a chapel of the Church of England:—Held, that the case must be confined to the act of simple larceny, for stealing the bell. *Rex* v. *Nixon*, 7 Car. & P. 442.

Part of Church.]—If a church tower is built higher than the church, and has a separate roof, but has no outer door, and is only accessible from the body of the church, from which it is not separated by any partition; this tower is a part of the church within 7 & 8 Geo. 4, c. 29, s. 10. *Rex* v. *Wheeler*, 3 Car. & P. 585.

The vestry of a church was broken open and robbed. It was formed out of what before had been a church porch, but had a door opening into the churchyard, which could only be unlocked from the inside:—Held, that this vestry was part of the fabric of the church, and within the meaning of an indictment for sacrilegiously breaking and entering the church. *Reg.* v. *Evans*, Car. & M. 298.

At Common Law.]—Burglary may be committed in a church at common law. *Reg.* v. *Baker*, 3 Cox, C. C. 581.

Goods the Subject of Larceny.]—The provisions of 1 Edw. 6, c. 12, s. 10, were not confined to goods used for divine service; they extended to articles kept in the church to keep it in repair, and therefore a conviction on an indictment on that act, for stealing a snatch-block to raise weights in case the bells wanted repairing, and an iron pot for charcoal, used to air the vaults, was held right. *Rex* v. *Rourke*, R. & R. 386.

To warrant a conviction for breaking and entering a church under 7 & 8 Geo. 4, c. 29, s. 10, there must have been a stealing therein of some chattel. Stealing a fixture was not sufficient. But if the stealing of fixtures was averred in such count, the prisoner might be convicted simply thereof under s. 44. *Reg.* v. *Baker*, 3 Cox, C. C. 581.

A. and B. were indicted for sacrilegiously breaking into a church and stealing a box and money:—Held, that the box (under the circumstances) was not affixed to the freehold, but was constructively in the possession of the vicar and churchwardens. *Reg.* v. *Wortley*, 1 Den. C. C. 162; 2 Car. & K. 283; 2 Cox, C. C. 32.

Ownership of Property.]—In an indictment for breaking into a church in the night-time, it is sufficient to allege an intent to steal the property in the church without stating the ownership of such property. *Reg.* v. *Nicholas*, 1 Cox, C. C. 218.

4. Intent.

Breaking and entering a house in the night-time to recover tea, which had been seized, is no burglary, being intended for the benefit of the supposed owner. *Rex* v. *Knight*, 2 East, P. C. 510.

If several agree to commit a burglary, but one communicates the intent to an officer, that he may take the other two, and the officer is upon the watch accordingly; the person who has made that communication to the officer will not be particeps criminis in the burglary, although he is present when it is committed, and pretends to assist the other two, but in fact expedites their apprehension. *Rex* v. *Dannelly*, R. & R. 310; 2 Marsh. 571.

Nor will it make any difference, although his object in detecting is to obtain for himself (by previous agreement with the officer) part of a reward that will be payable on conviction. *Ib.*

5. Armed with Intent to Break or Enter.

What are Implements of Housebreaking.]—Keys are implements of housebreaking within 24 & 25 Vict. c. 96, s. 58; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night, had them without lawful excuse, and with the intention of using them as implements of housebreaking. *Reg.* v. *Oldham*, 2 Den. C. C. 472; 3 Car. & K. 249; 21 L. J., M. C. 134; 16 Jur. 505; 5 Cox, C. C. 551.

Semble, per Maule, J., that the printed copy of the section of the statute is wrongly punctuated, and that the word key is within the express terms of the statute. *Ib.*

Intent to commit Felony Immaterial.]—An intent to commit felony forms no ingredient of the offence of being found by night in the possession of housebreaking instruments without lawful excuse. *Reg.* v. *Bailey*, Dears. C. C. 244; 23 L. J., M. C. 13; 17 Jur. 1106; 2 W. R. 64; 6 Cox, C. C. 241.

Particular House must be specified.]—Where persons are charged, under 24 & 25 Vict. c. 96, s. 58, with being found by night armed with an offensive weapon, with intent to break and enter into a dwelling-house or other building, and to commit a felony therein, the particular house or building must be specified in the indictment, and proof given of their intent to break and enter such house or building. *Reg.* v. *Jarrald*, L. & C. 301; 32 L. J., M. C. 258; 9 Jur. (N.S.) 629; 8 L. T. 515; 11 W. R. 787; 9 Cox, C. C. 307.

Implements of Housebreaking—Possession by one is Possession by all.]—When several persons are found out together by night for the common purpose of housebreaking, and one only is in possession of the housebreaking implements, all may be found guilty of the misdemeanor of being found by night in possession of implements of housebreaking without lawful excuse under 24 & 25 Vict. c. 96, s. 58, for the possession of one is in such case the possession of all. *Reg.* v. *Thompson*, 21 L. T. 397; 11 Cox, C. C. 362.

6. Stealing in a Dwelling-House.

Charge of Stealing Specified Goods.]—A. was indicted for breaking and entering a dwelling-house, and stealing certain specified goods. At the time of breaking and entering, the goods named in the indictment were not in the house, but there were other goods there belonging to the prosecutor. The jury found that he was not guilty of the felony charged, but that he was guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein:—Held, that there was no attempt to commit the felony charged within 14 & 15 Vict. c. 100, s. 9, and therefore the verdict could not be sustained. *Reg.* v. *M'Pherson*, Dears. & B. 197; 26 L. J., M. C. 134; 3 Jur. (N.S.) 523; 5 W. R. 525; 7 Cox, C. C. 281.

No Actual Stealing.]—An indictment for feloniously breaking and entering a dwelling-house, with intent feloniously to steal therein, and not for actually stealing, cannot be sustained, the felony created by 7 & 8 Geo. 4, c. 29, s. 12, being entering and stealing. *Reg.* v. *Wenmouth*, 8 Cox, C. C. 348.

Asportation.]—A. broke into a house and took two half-sovereigns from a bureau, which he, on being disturbed, threw under the grate in the same room:—Held, a sufficient removal to constitute the offence. *Rex* v. *Amier*, 6 Car. & P. 344.

In whom Property in Goods Laid.]—A prisoner was indicted for breaking into the house of Elizabeth A. and stealing her goods. There was a second count laying the property of the goods in the Queen. It was shown by proof of the record that the husband of Elizabeth A. had been convicted of felony, and it was also proved that he was in prison under his sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in possession of the house and goods till they were stolen:—Held, that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the Queen, although there had been no office found, and that he could not be convicted of housebreaking as that part of the indictment which laid the goods and the house to be those of Elizabeth A. could not be supported. *Reg.* v. *Whitehead*, 9 Car. & P. 429.

A. was charged with breaking into the house of K., and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it:—Held, that M. was a bailee, and that the goods in the shop might properly be laid as his property. *Reg.* v. *Bird*, 9 Car. & P. 44.

Prisoner Admitted by Servant.]—A servant pretended to concur with two persons, who proposed to him to unite with them in robbing his master's house. The master being out of town, the servant communicated with the police, and acted under their instructions. In consequence of this, a little after nine o'clock one evening, he let in one of the persons, by lifting the latch; but before that person had taken any property he was seized by the police, and, a crowbar being found upon him, was immediately placed in confinement. After this the servant went out again, and fetched the second person, and let him in in the same manner. This person was seized with a basket of plate in his hand, which he had carried from the kitchen, part of the way upstairs:—Held, that neither of the persons could be convicted of burglary; but that the one who was seized with the plate might be convicted of stealing in a dwelling-house. *Reg.* v. *Jones*, Car. & M. 218.

7. Breaking into Shops, Warehouses, or Counting-Houses.

Shops.]—A shop, to be within the 7 & 8 Geo. 4, c. 29, s. 15, and 7 Will. 4 & 1 Vict. c. 90, s. 2, must be a shop for the sale of goods, and a mere workshop will not be sufficient. *Reg.* v. *Sanders*, 9 Car. & P. 79.

But a person who breaks into a blacksmith's shop and steals goods there might be convicted of breaking into a shop and stealing goods under 7 & 8 Geo. 4, c. 29, s. 15. *Reg.* v. *Carter*, 1 Car. & K. 173.

An opening of a door in a shop under the same roof where the prisoner lived as a servant, for the purpose of committing a felony, was a breaking and entering within 7 & 8 Geo. 4, c. 29, s. 12, *Reg.* v. *Wenmouth*. 8 Cox, C. C. 348.

Warehouses.]—A cellar used merely for the deposit of goods intended for removal and sale is a warehouse. *Reg.* v. *Hill*, 2 M. & Rob. 458.

Counting-houses.]—A building formed part

of premises employed as chemical works; it was commonly called the machine-house, a weighing machine being there, where all the goods sent out were weighed, and a book being kept there in which entries of the goods so weighed were made. The account of the time of the workmen employed in the works was kept in this place, the wages of the men were paid there; the books in which the entries of time and the payment of wages were entered were brought to the building for the purpose of making entries and paying wages, but at other times they were kept in what was called the office, where the general books and accounts of the concern were kept:—Held, that this building was properly described in an indictment as a counting-house within 7 & 8 Geo. 4. c. 29, s. 15. *Reg.* v. *Potter*, 2 Den. C. C. 235; 3 Car. & K. 179; T. & M. 561; 20 L. J., M. C. 170; 15 Jur. 498; 5 Cox, C. C. 187.

8. INDICTMENT.

Owner of House—Name is Essential.]—The name of the owner of the house is essential in an indictment for burglary, and for stealing in the dwelling-house. *Rex* v. *White*, 1 Leach, C. C. 252; 2 East, 513, 780. S. P., *Rex* v. *Woodward*, 1 Leach, C. C. 253, n.

—— **Actual Occupier.**]—A. an insolvent lived in a house taken by his daughter who carried on business there for her parent's benefit but she did not live there:—Held, to be rightly laid as the dwelling house of A. *Reg.* v. *Bridges*, 1 Cox, C. C. 261.

—— **Club—Whose Dwelling-house and Goods.**] A member of a club was indicted for stealing some of the plate used at the club-house. The house-steward slept in the house, and stated that he had the charge of all the plate, and was responsible for it; but the plate was delivered every night to the under-butler, who was appointed by the club, and by him placed in a chest in the pantry. The indictment described the goods as the property of the house-steward, and alleged it to have been stolen in his dwelling-house:—Held, that upon the evidence, it was wrong in both respects, inasmuch as his sleeping in the house was only as a servant of the club, and his alleged responsibility was not coupled with any custody of the property, either by himself or his own servants. *Reg.* v. *Ashley*, 1 Car. & K. 198.

—— **Caretaker.**]—A prisoner was indicted for burglary in the dwelling-house of B. B. worked for W., who did carpenter's work for a public company, and put B. into the house, which belonged to the company, to take care of it, and some mills adjoining. B. received no more wages after than before he went to live in the house:—Held, not rightly laid. *Rex* v. *Rawlings*, 7 Car. & P. 150.

—— **Workhouse.**]—In an indictment for burglary in the workhouse of a poor law union, the workhouse, being under 5 & 6 Will. 4, c. 69, s. 7, may be described as the dwelling-house of the guardians of the poor of that union. Semble, that the workhouse cannot be described as the dwelling-house of the master of the workhouse. *Reg.* v. *Frowen*, 4 Cox, C. C. 266.

—— **Tenant at Will.**]—If the owner of a house suffers a person to live in it rent-free, it may be stated, in an indictment for breaking into such house in the day-time, to be that person's house; such person being tenant at will, *Rex* v. *Collett*, R. & R. 498.

—— **Joint Tenants.**]—If a house is let to A., and a warehouse under the same roof, with an internal communication to the house, to A. and B.; the warehouse, in an indictment for burglary, cannot be described as the dwelling-house of A. *Rex* v. *Jenkins*, R. & R. 244.

If two or more rent of the same owner different parts of the same house, so as to have amongst them the whole house, and the owner does not reserve or occupy any part of it, the separate part of each may be described as the dwelling-house of each. *Rex* v. *Bailey*, 1 M. C. C. 23.

A house the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of them resides in it. *Rex* v. *Athea*, 1 M. C. C. 329. See *Rex* v. *Jones*, 1 Leach, C. C. 537; 2 East, P. C. 504.

—— **Married Women.**]—If a married woman takes a house, in which a burglary is committed, the house must be laid as the house of the husband, although she is living separate from him. *Rex* v. *Smyth*, 5 Car. & P. 201. *See* Married Women's Property Act, 1882.

The house of a husband in which he allows his wife to live separate from him may be described in an indictment for burglary as the house of the husband, although the wife lived there in adultery with another man who paid the housekeeping expenses; and although the husband suspected a criminal intercourse between his wife and the other man when he allowed her to live separate. *Rex* v. *Wilford*, R. & R. 517.

Where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use:—Held, that a house which she had hired to live in was, in an indictment for burglary, properly described as her husband's dwelling-house, although she paid the rent out of her separate property, and the husband had never been in it. *Rex* v. *French*, R. & R. 491.

—— **Lodgers.**]—The apartments of lodgers will be considered as their respective dwelling-houses, if the owner of the premises does not sleep under the same roof. *Rex* v. *Rogers*, 1 Leach, C. C. 89; 2 East, P. C. 506. See *Rex* v. *Carrell*, 1 Leach, C. C. 287; 2 East, P. C. 506.

A house, the whole of which is let out in lodgings, and has only one outer door common to all its inmates, is the mansion-house of its several inhabitants. *Rex* v. *Trapshaw*, 1 Leach, C. C. 427; 2 East, P. C. 506, 780. See *Rex* v. *Turner*, 1 Leach, C. C. 305; 2 East, P. C. 492.

—— **Innkeeper or Guest.**]—Where one, under pretence of being robbed, forced the door of a guest's chamber in an inn, at night, and stole his goods:—Held, that the burglary must be laid to be in the dwelling-house of the innkeeper, and not of the guest. *Rex* v. *Prosser*, 2 East, P. C. 502.

—— **Company or Officer or Agent.**]—If a burglary is committed in the house of a trading company, in the house belonging to which an

agent of the company resides, with his family, for the purpose of carrying on the business, it may be laid to be the dwelling-house of the agent, although the rent is paid and the lease is held by the company. *Rex* v. *Margetts*, 2 Leach, C. C. 930.

Though a servant lives rent-free in a house belonging to an insurance company, and the company pays the taxes, and the company's business is carried on in the house, yet if the servant and his family are the only persons who sleep in the house, and the part in which the company's business is carried on is at all times open to those parts in which the servant lives, it may be stated as the servant's house, though the only part entered by the thief was that in which the company's business was carried on; and though the judges would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as the house of the servant. *Rex* v. *Witt*, 1 M. C. C. 248.

A burglary in the apartments of officers of a public company must be laid to be in the mansion-house of such company. *Rex* v. *Hawkins*, 2 East, P. C. 501.

—— **Rooms in College.**]—So of the apartments of a college not occupied by the students, as the buttery. *Rex* v. *Maynard*, 2 East, P. C. 501.

—— **Master or Servant.**]—Though a servant lives rent free for the purpose of his service in a house provided for that purpose; yet, if he has the exclusive possession, and it is not parcel of any premises which his master occupies, it may be described as the house of the servant; especially if the house belongs not to his master, but to some person paramount to his master; as in the case of a toll-collector's house, occupied by the servant of the lessee of the tolls for the purpose of collecting the tolls. *Rex* v. *Camfield*, 1 M. C. C. 42.

If the owner of a cottage lets one of his workmen, with his family, live in the cottage free of rent and taxes, and he lives there principally, if not wholly, for his own benefit, it may be described as the workman's dwelling-house in an indictment for burglary. *Rex* v. *Joblin*, R. & R. 525.

A. was in the service of B. and lived in a house close to B.'s place of business. B. did not live in the house himself, but he paid the rent and taxes. A. paid nothing for his occupation. Part of the house was used as store-rooms for B.'s goods:—Held, that this was the dwelling-house of B., and was improperly described in the indictment as the dwelling-house of A. *Reg.* v. *Courtenay*, 5 Cox, C. C. 218.

A gardener lived in a house of his master, quite separate from the dwelling-house of his master, and the gardener had the entire control of the house he lived in, and kept the key:—Held, that on an indictment for burglary, the gardener's house might be laid either as his or as his master's. *Rex* v. *Rees*, 7 Car. & P. 568.

If a servant lives in a house of his master's at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, and although the servant has it because of his services. *Rex* v. *Jarvis*, 1 M. C. C. 7.

Where a servant had part of a house for his own occupation, and the rest, in which a burglary is committed, is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house. *Rex* v. *Wilson*, R. & R. 115.

And it will be the same if any other person has part of the house, and the rest is reserved. *Ib.*

See also cases ante, col. 1162.

Place.]—It is sufficient to allege that the burglary was committed at a place, naming it, e.g. "at Norton-juxta-Kempsey, in the county aforesaid," without stating the place to be a parish, vill, chapelry, or the like. *Reg.* v. *Brookes*, Car. & M. 544.

An indictment for breaking into a warehouse, and stealing goods, stated the offence to have been committed in "the parish of St. Peter the Great, in the county of W." Part only of the parish of St. Peter the Great is in the county of W.:—Held, that indictment could not be supported for the breaking into the warehouse, but that it was sufficient for the larceny; and that to be good as to the breaking, it should have charged the offence to have been committed "in that part of the parish of St. Peter the Great which lies within the county of W." *Ib.*

A dwelling-house situated partly in parish A. and partly in parish B. is rightly described as being in parish A., where the part broken is in that parish. *Reg.* v. *Howell*, 1 Cox, C. C. 190.

An indictment for housebreaking, after charging the breaking and entering in the usual form, charging that the prisoner, "forty-two pieces of the current gold coin of this realm, called sovereigns, of the value of 42*l.*, in the same dwelling-house then and there being found, then and there feloniously did steal and carry away": is good, and the words "then and there," in the last allegation, are sufficient without the words "in the same dwelling-house" being added to them. *Reg.* v. *Andrews*, Car. & M. 121.

An indictment alleging that J. F., late of the parish of F., in the county of M., with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of the guardians of the poor of the P. Union, there situate, feloniously did break and enter, is a sufficient description of the situation of the workhouse, the words "there situate" referring not to the union but to the parish before mentioned. *Reg.* v. *Frowen*, 4 Cox, C. C. 266.

Time at which Offence Committed.]—It is sufficient in an indictment for burglary to allege that the offence was committed burglariously, without stating the time at which the offence was committed, or even that it was done in the night time. *Reg.* v. *Thompson*, 2 Cox, C. C. 377, 445. Contra, *Rex* v. *Waddington*, 2 East, P. C. 513.

Property in Goods.]—An indictment for burglary charged the prisoner with breaking, in the night time, into the dwelling-house of E. B., "with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal, and stealing the goods of E. B." It was proved that the house was that of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others:—Held, that if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient

to sustain the charge of burglary contained in the indictment, without proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal. *Reg.* v. *Clarke*, 1 Car. & K. 421.

An indictment for burglariously breaking and entering the house of A., with intent to steal the goods of B., is bad, if no person of that name had any property in the house. *Rex* v. *Jenks*, 2 Leach, C. C. 774; 2 East, P. C. 514.

An indictment which charges that the prisoner unlawfully broke and entered the dwelling-house of R. P. P., "with intent the goods and chattels in the dwelling-house then and there being then and there feloniously to steal, take and carry away," is good, although it does not state whose goods the prisoner intended to steal. *Reg.* v. *Lawes*, 1 Car. & K. 62.

A. and B. were indicted for sacrilegiously breaking into a church and stealing a box and money:—Held, that the property was rightly laid in the vicar and others, in their individual names. *Reg.* v. *Wortley*, 1 Den. C. C. 162; 2 Car. & K. 283; 2 Cox, C. C. 32.

Breaking out.]—An indictment for burglary stating in one count that the prisoner "did break to get out" and in another that he did break and get out was sufficient, since the 7 & 8 Geo. 4, c. 29, s. 11, which used the words break out. *Rex* v. *Compton*, 7 Car. & P. 139.

Burglary and Striking.]—An indictment on 7 Will. 4 & 1 Vict. c. 86, s. 2 for the capital offence of burglary and striking, must have charged both the burglary and the striking, and the proof must correspond with the indictment. *Reg.* v. *Parfitt*, 8 Car. & P. 288.

A. was indicted for a burglary in the house of S. W., and striking D. James. The burglary was proved as laid, but the person struck was D. Jones:—Held, that the prisoner must be acquitted of the capital charge, and convicted of burglary only. *Ib.*

Intent to Commit Felony.]—It must be alleged and proved either that a felony was committed in the dwelling-house, or that the party broke and entered with intent to commit some felony within the same. *Rex* v. *Dobbs*, 2 East, P. C. 513.

And whatever be the felony really intended, the same must be laid in the indictment and proved agreeably to the fact. *Rex* v. *Vandercomb*, 2 East, P. C. 514, 517; 2 Leach, C. C. 708.

But the same fact may be laid with several intents. *Rex* v. *Thompson*, 2 East, P. C. 515; 2 Leach, C. C. 1105, n.

An indictment for burglary, charging in one count an intent to steal the goods of the owner, and in another an intent to murder him, is good, for it is the same fact and evidence, only laid in different ways. *Ib.*

Against the Form of the Statute.]—The alterations made in the law with respect to burglary, by 7 Will. 4 & 1 Vict. c. 86, as to the hours, and as to the punishment, did not make it necessary for an indictment for that offence to conclude contra formam statuti, as the alteration with respect to the hours did not alter the offence, and the mere diminution of the punishment did not make that conclusion necessary. *Reg.* v. *Polly*, 1 Car. & K. 77. *See now* 14 & 15 Vict. c. 100, s. 24.

9. EVIDENCE AND TRIAL.

For what Offence Prisoners may be Convicted.]—On an indictment for burglary by breaking into a house in the night-time and stealing to the value of 5*l.* or more, the prisoner might be convicted of burglary, or of housebreaking, under 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l.* *Rex* v. *Compton*, 3 Car. & P. 418.

On an indictment for burglary, the prisoner may be acquitted of the breaking, and found guilty of stealing in the dwelling-house. *Rex* v. *Withal*, 1 Leach, C. C. 88; 2 East, P. C. 515, 517.

On an indictment for burglariously breaking and entering a dwelling-house (omitting the words "with intent to steal"), and then and there stealing goods therein, the prisoner may be well convicted of the burglary if the larceny be proved: secus if not. *Rex* v. *Furnival*, R. & R. 445.

Where the felony is laid to constitute the burglary, an acquittal of the burglary is an acquittal of stealing in the dwelling-house. *Rex* v. *Comer*, 1 Leach, C. C. 36.

Where a party is indicted both for burglary and feloniously stealing in the dwelling-house, and is acquitted of the burglary, but found guilty of the stealing, the verdict should be entered thus:—"Jury say not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing (the property) in the dwelling-house." *Rex* v. *Hungerford*, 2 East, P. C. 518; 1 Leach, C. C. 88.

—— **Indictment against Two Persons.**]—Upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only. *Rex* v. *Butterworth*, R. & R. 520.

Day in Indictment not Proved.]—If a prisoner is charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that the larceny was committed on a prior day. *Rex* v. *Vandercomb*, 2 Leach, C. C. 708; 2 East, P. C. 519.

Impression of Shoe—When made not Proved.]—In an indictment for burglary, the entry was proved to have been effected by breaking open a window at the back of a house:—Held, that the correspondence of the prisoner's shoe with an impression in the front garden, not proved to have been made during that night, was not any evidence to go to the jury to show a connection with such entry. *Reg.* v. *Coots*, 2 Cox, C. C. 188.

Possession of Goods as Evidence.]—On the night following the commission of a burglary, two boys were found concealed in a corn-chest in an open gig-house with which they were not in any way connected, and half a mile from the house of the prosecutor. Outside the corn-chest was found some of the stolen property, and on the loft over the gig-house was found another portion of the stolen property:—Held, that there was no evidence to go to the jury of possession by the boys of any of the stolen articles. *Ib.*

On a charge of burglary, possession by the

prisoners of part of the stolen property very soon after the burglary, with an account given of it not reasonable or credible, is sufficient primâ facie evidence, without express evidence to falsify it. It is so, however, only if, upon all the circumstances in the case, the account given is not reasonably credible. *Reg.* v. *Exall*, 4 F. & F. 922.

Other Offences of same Character.]—Upon a trial for breaking into a booking-office at a railway station, evidence was admitted that the prisoners had, on the same night, broken into three other booking-offices belonging to three other stations on the same railway, the four cases being all mixed up together. *Reg.* v. *Cobden*, 3 F. & F. 833. See *Reg.* v. *Rearden*, 4 F. & F. 76.

C. EMBEZZLEMENT.

1. *What May be Embezzled*, 1175.
2. *What is Embezzlement*, 1176.
3. *By Whom Offence Committed.*
   a. Clerk or Servant, 1184.
   b. Trustees, 1192.
   c. Brokers and Agents, 1193.
   d. Persons Employed in Public Service, 1198.
4. *Indictment.*
   a. Averment as to whose Service, 1199.
   b. Averment as to whose Money or Goods, 1202.
   c. Other Points, 1204.
5. *Trial and Evidence*, 1205.

1. WHAT MAY BE EMBEZZLED.

Debts Assigned to Trustees.]—B. being in difficulties, assigned all his book debts, estate, and effects to trustees for the benefit of his creditors. He was employed by the trustees at a salary to manage the business and to collect the debts for them. He received the amount of two of the debts, but did not account for the sums received:—Held, that, inasmuch as the debts, being choses in action, could not be legally assigned, he had received only money which was in law, though not in equity, his own; and, therefore, that he could not be guilty of embezzling it. *Reg.* v. *Barnes*, 8 Cox, C. C. 129.

Halves of Bank-notes.]—The halves of country bank-notes, sent in a letter, are goods and chattels; and a person who embezzles them is indictable for such embezzlement. *Rex* v. *Mead*, 4 Car. & P. 535.

Exchequer Bills.]—If an indictment charges the prisoner with having embezzled "certain bills, commonly called Exchequer Bills," and it appears that the person who signed them on the part of government was not legally authorised so to do, the indictment is bad; for they are not the things which they are averred to be. *Rex* v. *Aslett*, 2 Leach, C. C. 954, 958; 1 Bos. & P. (N.R.) 1; R. & R. 67.

Game.]—The prisoner being employed as a gamekeeper, and having no authority to kill rabbits for his own use, killed and removed wild rabbits in and from a wood belonging to his master with the intention of selling them. The killing, removing, and selling were one continuous act:—Held, that he was not guilty of embezzlement. *Reg.* v. *Read*, 47 L. J., M. C. 50; 3 Q. B. D. 131; 37 L. T. 722; 26 W. R. 283; 14 Cox, C. C. 17.

2. WHAT IS EMBEZZLEMENT.

Goods in Possession of Master.]—A. had agreed to buy straw from B. and had sent his servant C. to fetch it. C. did so, and put down the whole quantity at the door of A.'s stable which was in the court-yard of A. Part of the straw was put into the hay-loft, but part was taken away by C. and sold:—Held, that this was larceny and not embezzlement, as the delivery was complete when the straw was put down at the stable door. *Reg.* v. *Hayward*, 1 Car. & K. 518.

The prisoner was sent with his master's cart for some coals. The coals were delivered to the prisoner and deposited in the cart; on the road home the prisoner disposed of a portion of them:—Held, no embezzlement, as the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, the possession from that time became the master's. *Reg.* v. *Reed*, Dears. C. C. 257; 2 C. L. R. 607; 23 L. J., M. C. 25; 18 Jur. 67; 2 W. R. 190; 6 Cox, C. C. 284.

Employment as Servant or Authority to Receive.]—An indictment for embezzlement cannot be supported, unless there is either an employment of the prisoner as a servant by the prosecutor, or an express authority be given to him to demand and receive the money charged to have been embezzled by him. *Reg.* v. *Beareock*, 1 Cox, C. C. 187.

Proportional part of Price as Wages.]—If a servant receive money for his master for an article made of his master's material, it will be within 39 Geo. 3, c. 85, if he embezzle it, though he made the article and was to have a given proportion of the price for making it. *Rex* v. *Hoggins*, R. & R. 145.

Alleged Right to Keep Sums admittedly Received.]—Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping is no embezzlement. *Reg.* v. *Norman*, Car. & M. 501.

Wilful Omission to Account.]—It was the duty of a servant authorised to receive money for his employer to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums nor paid them over. He never denied the receipt of them, or tendered any written account in which they were omitted:—Held, that if he wilfully omitted to account for these sums and pay them over on the respective days on which he received them, these were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them. *Reg.* v. *Jackson*, 1 Car. & K. 384.

Particular Sum or Part thereof must be Proved.]—It was the duty of a clerk to receive money for his employer and pay wages out of it, and to make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he from time to time paid over his balances to his employer. The clerk having entries of weekly payments in his first book amounting to 25*l.*, he entered them in the second book as 35*l.*; and, two months after, in accounting with his employer, by these means made his balance 10*l.* too little, and paid it over accordingly:—Held, that he could not be convicted of embezzlement, without it being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of that sum to his own use. *Reg.* v. *Chapman*, 1 Car. & K. 119; 1 Cox, C. C. 48. See *Reg.* v. *Lambert*, 2 Cox, C. C. 309.

Absconding after Accounting for all Sums Received.]—If a person whose duty it is to receive money for his employer receives money and renders a true account of all the money he has received, he is not guilty of embezzlement if he absconds and does not pay over the money; but, if he had received the money, and had rendered an account in which it was omitted, this would be evidence to show that he had embezzled the amount. *Reg.* v. *Creed*, 1 Car. & K. 63.

Money received from Master — Debiting Master with Amount Expended.]—The prisoner who was clerk to the prosecutor, was indicted for embezzling certain moneys belonging to his master. The evidence showed that the prisoner had received at different times several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins. The prisoner obtained the skins on credit, and applied the money to his own use, but debited prosecutor in his day-book with several sums of money as having been paid for the skins:—Held, guilty of embezzlement. *Reg.* v. *Goodenough*, Dears. C. C. 210; 1 W. R. 417; 6 Cox, C. C. 206.

—— More stated to have been Paid Away than actually done.]—If a clerk receives money from his master to pay away on his master's account, and he states in his accounts that one of the payments was to a greater amount than it really was, this will be no embezzlement. *Rex* v. *Murray*, 5 Car. & P. 145; 1 M. C. C. 276.

—— Entry of Smaller Sum—Payment over of Money Received.]—If a servant, immediately on receiving a sum for his master, enters a smaller sum in his master's books, and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry; and it will make no difference though he received other sums for his master on the same day, and in paying those and the smaller sum to his master together he might give his master every piece of money or note he received at the time he made the false entry. *Rex* v. *Hall*, R. & R. 463; 2 Stark. 67.

Entry in Ledger of Remittance—No Entry of Receipt.]—The prisoner was convicted of embezzlement. It was his duty to receive remittances from the customers of his masters, to enter them to the credit of such customers in a day or cash-book, and to enter the whole amount received by him on the credit side of a banker's deposit account, and to pay in the amount to the credit of the prosecutors with their bankers; and it was his duty afterwards to post the amounts in a ledger, which contained the accounts of the different customers. The prisoner received a remittance, which he appropriated to his own use; he made an entry of this amount, in the ledger to the credit of the customer, but he made no entry of its receipt:—Held, that the conviction was right, as the entry made in the ledger did not exempt the prisoner from the operation of the 47th section of the 7 & 8 Geo. 4, c. 29. *Reg.* v. *Lister*, Dears. & B. 118; 26 L. J., M. C. 26; 2 Jur. (N.S.) 1124; 5 W. R. 50; 7 Cox, C. C. 203.

Entries Correct, but no Remittance.]—It was the duty of a clerk to receive moneys daily at N., to enter all such moneys so received in a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the moneys; but he did not remit them to L., as was his duty:—Held, no embezzlement. *Rex* v. *Hodgson*, 3 Car. & P. 422.

Entries Correct, but Less Paid Over.]—B. was employed to drive a coach and it was his duty to inform a book-keeper how much he had received during the day; the book-keeper then entered the amount in a book and on the way bill. B.'s duty then was to pay over the money received to his employer. B. gave true accounts to the book-keeper who made these entries, but B. accounted to his employer for smaller sums and paid them over to him, saying that they were all he received:—Held, that this was embezzlement. *Reg.* v. *White*, 8 Car. & P. 742.

Entry in Ledger by Banker's Clerk.]—A banker's clerk taking money from the till, intending to embezzle it, is guilty of felony, although the cheque of a customer is left in lieu of it, if that customer has really no cash in the banker's hands, though both he and the banker may suppose he has, and if the cheque is drawn by the customer, not to pledge his own credit with the bank, or draw out money of his own, but to draw out money the prisoner falsely pretends to have in his name. *Rex* v. *Hammon*, R. & R. 221; 2 Leach, C. C. 1083; 4 Taunt. 304; 13 R. R. 596.

Entries in Books—Fraudulently obtaining Receipts.]—G. was convicted upon an indictment for embezzlement. It was his duty, as the assistant overseer of a township, to collect the rates; and the course was, upon receipt, to pay them into a bank to the account of the overseers' receipts for the sums so paid. It was his duty also to enter the rates when received in a book, and at the audit he charged himself by the entries in his book and discharged himself by the receipts of the overseers. Having misappropriated certain moneys, which he duly entered in the book when received, he fraudulently obtained from the overseers receipts for the several sums stated in the indictment, by falsely telling them that he had paid the money into the bank. These receipts he produced to the auditor, and so deceived him as to his having handed over the moneys:—Held, that he was rightly convicted, and that the fact of his entering the sums, when received, in his book, did not

alter the character of his offence. *Reg.* v. *Guelder*, Bell, C. C. 284; 30 L. J., M. C. 34; 6 Jur. (N.S.) 1214; 3 L. T. 337; 9 W. R. 38; 8 Cox, C. C. 372.

Goods given by Master to Servant to Sell—Servant deferring Payment.]—A person hired by a market gardener to do a day's work was requested by him to take some vegetables to market, sell them, and bring back the money; the prisoner thereupon sold four pots of potatoes, and received the money. He sold four other pots, but did not receive the money. On his return to his master, he stated correctly the price he sold the potatoes for, but said that he would settle with him on a subsequent day, as he had not received the money, and did not offer the sum received, or say he had been paid for a part, and subsequently made the same excuse, and never paid any part of the money:—Held, that this was not embezzlement, unless he, when he said he had not received the money, meant that he had not received any part of it. *Reg.* v. *Winnall*, 5 Cox, C. C. 326.

A miller's foreman employed to sell goods for his master, sold some to a customer, received the money but did not account for the money in any way:—Held, that the prisoner was guilty of embezzlement. *Reg.* v. *Betts*, Bell, C. C. 90; 28 L. J., M. C. 69; 5 Jur. (N.S.) 274; 7 W. R. 239; 8 Cox, C. C. 140.

Goods or Notes given by Master to Servant.]—Where the prosecutor gave his servant a five-pound note to get changed, which he did, and made off with the change:—Held, that it was an embezzlement and not a larceny. *Rex* v. *Sullens*, Car. C. L. 319; 1 M. C. C. 129.

The prisoner, having been intrusted by his master with a number of articles of soldiers' clothing for the purpose of selling them, and ten pounds in silver, to enable him to give change, sailed in a ship for the coast of Africa, having, before his departure, written to his master to say that he would send the account, together with a remittance, from Madeira:—Held, that he could not be convicted of embezzlement, having received the goods from his master himself, and not from another for and on account of his master; but that he might have been convicted of larceny. *Reg.* v. *Hawkins*, 1 Den. C. C. 584; T. & M. 328; 14 Jur. 513; 4 Cox, C. C. 224.

Money received from Fellow Servant.]—The prisoner had, as a servant, in the course of his duty, received from a fellow-servant money paid to that servant for his master by another servant, who had received it from the customers. It was the duty of the prisoner, after such receipt, to hand the money to another servant (the cashier) of his master, but instead of handing it over, he fraudulently retained it:—Held, that this was embezzlement. *Reg.* v. *Masters*, 1 Den. C. C. 332; T. & M. 1; 2 C. & K. 930; 3 New Sess. Cas. 326; 18 L. J., M. C. 2; 12 Jur. 942; 3 Cox, C. C. 178.

Marked Money given by Master to Third Person to pass at Shop.]—The prosecutor gave some marked money to J. W. to expend at his (the prosecutor's) shop, for the purpose of detecting a servant, of whom the master had suspicions. The servant was convicted of embezzling a portion of the marked money:—Held, that the conviction was right. *Reg.* v. *Gill*, Dears. C. C. 289; 23 L. J., M. C. 50; 18 Jur. 70; 2 W. R. 222; 6 Cox, C. C. 295.

If a servant secretes moneys which his master has marked and sent by a friend to make a purchase at his shop, with a view to try the honesty of his servant, it is a felonious breach of trust, and an embezzling, and not a larceny at common law. *Rex* v. *Headge*, 2 Leach, C. C. 1033; R. & R. 160. S. P., *Rex* v. *Whittingham*, 2 Leach, C. C. 912.

When Society or Partnership is illegally or irregularly Constituted.]—Where a society, in consequence of administering to its members an unlawful oath, is an unlawful combination and confederacy under 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; and 57 Geo, 3, c. 19; a person charged with embezzlement, as clerk and servant to such society, cannot be convicted. *Reg.* v. *Hunt*, 8 Car. & P. 642.

It is embezzlement in the clerk of a friendly society fraudulently to withhold the rents of a house collected in the course of his duty as clerk. It is no defence that the business of the society has not been conducted according to the statute. *Reg.* v. *Miller*, 2 M. C. C. 249.

An officer of a friendly society, some of whose rules were in restraint of trade, embezzled its money:—Held, that rules in restraint of trade are not criminal, although they may be void as being against public policy, and that a society having such rules is entitled to the protection of the criminal law for its funds, and, consequently, that the officer might legally be convicted of embezzlement. *Reg.* v. *Stainer*, 39 L. J., M. C. 54; L. R. 1 C. C. 230; 21 L. T. 758; 18 W. R. 439; 11 Cox, C. C. 483. *See* 32 & 33 Vict. c. 61.

A. was secretary and cashier to a company calling themselves "The R. M. & H. Coal Co. (Limited)"; the number of members exceeded twenty, but no certificate of incorporation was put in evidence:—Held, that A. was rightly convicted of embezzlement as servant of B. and others, there being no evidence which ought to have been left to the jury that the company was incorporated. *Reg.* v. *Frankland*, L. & C. 276; 32 L. J., M. C. 69; 9 Jur. (N.S.) 388; 7 L. T. 799; 11 W. R. 346; 9 Cox, C. C. 273.

—— **Property Laid in Joint Beneficial Owners.**]—Where, in a prosecution for embezzlement by one of two or more beneficial owners, the property in the money embezzled is laid in the individual beneficial owners, the indictment is good, notwithstanding that such beneficial owners together form an unregistered association which, as it consists of more than twenty persons for the acquisition of gain, is made illegal by s. 4 of the Companies Act, 1862. *Reg.* v. *Tankard*, 63 L. J., M. C. 61; [1894] 1 Q. B. 548; 10 R. 149; 70 L. T. 42; 42 W. R. 350; 17 Cox, C. C. 719; 58 J. P. 300—C. C. R.

Where Master has no Right to Money Received.]—If a servant receives money on his employers' account, and embezzles it, he is guilty of a felony, although they had no right to it, and were wrong-doers in receiving it. *Rex* v. *Beacall*, 1 Car. & P. 454.

What Sum Embezzled—Weekly Aggregates.]—The prisoner was a member of a co-partnership. It was his duty to receive money for the co-partnership, and once a week to render an

account and pay over the gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money: —Held, that he might properly be charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to show how these aggregates were made up. *Reg.* v. *Balls*, 40 L. J., M. C. 148; L. R. 1 C. C. 328; 24 L. T. 760; 19 W. R. 876; 12 Cox, C. C. 96.

A person received 7*l.* 2*s.* 6*d.* in his capacity of clerk to overseers of a parish, and made an entry in a book of the receipt of that sum accordingly, and placed the money with other sums in his possession; the entry of 7*l.* 2*s.* 6*d.* was afterwards erased, and 5*l.* 6*s.* 10½*d.* substituted for it, and the prisoner only accounted to the parish officers for 5*l.* 6*s.* 10½*d.* On an indictment for embezzling 1*l.* 15*s.* 7*d.*, and conviction thereon: —Held, that as the prisoner might have paid over the whole of what he received for the 7*l.* 2*s.* 6*d.*, and have taken the 1*l.* 15*s.* 7*d.* from other moneys he received, he was improperly convicted. *Rex* v. *Tyers*, R. & R. 402.

Time of Embezzlement not Fixed.]—A treasurer to guardians of the poor not accounting for a portion of money received for the guardians is an embezzlement, although no precise time could be fixed at which it was the prisoner's duty to pay over the money alleged to be embezzled. *Reg.* v. *Welch*, 2 Car. & K. 296; 1 Den. C. C. 199; 2 Cox, C. C. 85.

Receipt by Servant for or in the Name of or on the Account of his Master.]—Embezzlement of money by a servant under 24 & 25 Vict. c. 96, s. 68, must be in respect of money delivered to or received, or taken into possession by the servant for or in the name of or on the account of his master. *Reg.* v. *Cullum*, 42 L. J., M. C. 64; L. R. 2 C. C. 28; 28 L. T. 571; 21 W. R. 687; 12 Cox, C. C. 469.

When a servant, whose duty it was to take a barge belonging to his master with cargo from A. to B., and receive back such return cargo, and from such persons as his master should direct, and such only, contrary to the express orders of his master, which were to return empty from B. to C., part of the return voyage to A., took, nevertheless, a return cargo from B. to C., and received the freight from the owner of the cargo, who knew only the servant in the transaction, and did not account to his master for the freight, and denied having carried such return cargo: —Held, that the money was not received by him for or in the name of or on the account of his master, and that he was not guilty of embezzlement. *Ib.*

It was part of the duties of the prisoner as head manager of a fire insurance company at the head office to receive remittances and cheques sent to the head office from the managers of district branches. These cheques were usually drawn on the local bank and made payable to prisoner's order. On receipt it was also part of his duty to indorse them and hand them over to the cashier, who paid them into the company's bankers and accounted for them in his books. He received two cheques for the company from district managers of the amounts respectively of 400*l.* and 200*l.* Instead of handing them over to the cashier, he indorsed and cashed the cheques through private friends of his own, and later in the day paid the amount, viz. 600*l.*, to the cashier to be put against his salary account, which was overdrawn to that amount. The cashier did so, and returned him I O U's to that amount. After some interval of time the fraud was discovered. The prisoner was indicted for embezzling the two sums of 400*l.* and 200*l.*: —Held, that he had been guilty of embezzlement of the money, notwithstanding that the cash was paid to him by his friends on his own account. *Reg.* v. *Gale*, 46 L. J., M. C. 134; 2 Q. B. D. 141; 35 L. T. 526; 13 Cox, C. C. 340. Cp. *Reg.* v. *Wheeler*, 14 W. R. 848.

The prosecutor had contracted with a railway company for finding and providing them with necessary horses and carmen for the purpose of conveying and delivering to the customers of the company the coals of the company in their own waggons, and that he or his carmen should day by day duly account for and deliver to the company's coal manager all moneys received in payment for coals so delivered. The delivery notes, as well as receipted invoices of the coals, were handed to the carmen of the prosecutor, and the former were taken to his office, but the invoices receipted by the company were left with the customers on payment of the amount. The prisoner was the servant of the prosecutor, employed as his carman in the delivery of coals pursuant to the contract, and it was his duty to pay over direct to the clerks of the company such moneys as he might receive for coals. He delivered coals to one of the company's customers, and brought the delivery order to the office to be entered; he received for the coals 5*l.* 10*s.*, leaving the receipted invoice with the customer, which sum he converted to his own use. He was convicted of embezzling the moneys of the prosecutor, who had contracted with the company:—Held, that there was such privity between the prisoner and the company as to make the prisoner the agent of the company in receiving the money, and that such money was not received for or on account of the prosecutor, but for and on account of the company, and that he was wrongly convicted of embezzling the prosecutor's money. *Reg.* v. *Beaumont*, Dears. C. C. 270; 2 C. L. R. 614; 23 L. J., M. C. 54; 18 Jur. 159; 2 W. R. 235; 6 Cox, C. C. 629.

The prosecutor was agent to a railway company for delivering goods. He employed his own servants, of whom the prisoner was one, his own drays and horses, and was answerable to the company for the money received by his servants for the carriage of goods. It was the prisoner's duty to go out with the dray, to take with him goods, and a delivery book handed to him by a clerk of the company, to deliver the goods and receive the amount of carriage, and to account for moneys received to the clerk of the company. The prisoner embezzled certain sums which he had received as due to the company, and for which he had given receipts in the company's name:—Held, that although the money was received in the name of the company, it was received on the account of the prosecutor, his master, and that a conviction for embezzlement was right. *Reg.* v. *Thorpe*, Dears. & B. 62; 27 L. J., M. C. 264; 4 Jur. (N.S.) 466; 6 W. R. 502; 8 Cox, C. C. 29.

The prisoner was employed to superintend the grinding of corn at the mill of the county gaol. It was his duty to direct any person bringing grain to be ground at the mill to obtain a ticket at the porter's lodge. This ticket was his order for grinding the grain so brought to him, and it would have been a breach of his duty to have ground any grain without a ticket. Having ground the corn, he was to receive the money, and hand it over to the governor of the gaol. The prisoner had received money from different persons, whose corn he had ground without the production of a ticket, and appropriated it to his own use:—Held, that he had not received the money on account of his master, and was not therefore guilty of embezzlement. *Reg.* v. *Harris*, Dears. C. C. 344; 2 C. L. R. 464; 23 L. J., M. C. 110; 18 Jur. 408; 2 W. R. 413; 6 Cox, C. C. 363.

Where the defendant was employed as a town traveller and collector to receive orders from customers and enter them in the books and receive the money therefor, but had no authority to take or direct delivery of goods from his master's shop, and a customer having ordered two articles of the defendant, he entered one of them only in the order book for which an invoice was made out by the prosecutor to the customer, but the defendant entered the price of the other at the bottom of the invoice, and having caused both to be delivered to the customer, received the price of both and accounted to the prosecutor for the former article only, this was held to be larceny and not embezzlement. *Reg.* v. *Wilson*, 9 Car. & P. 27.

Constructive Receipt.]—It was the duty of police constables to account for and pay over weekly to their superintendent all moneys received by them, the superintendent making a weekly return to the chief constable of such moneys and paying the constables wages weekly. The practice was for the superintendent to set-off the sums received by the constables against their wages, the balance struck going over to the next week, and no money actually passing. The superintendent fraudulently omitted in the weekly account to the chief constable a sum for which a constable accounted to him:—Held, that there was a constructive receipt of the sum by the superintendent from the constable, that the superintendent was the clerk and servant of the chief constable and not of the county treasurer to whom the chief constable transmitted all sums received by him from the superintendent. *Reg.* v. *Baxter*, 5 Cox, C. C. 302.

Receipt by Servant by Virtue of Employment.]—Embezzlement of money by a servant not authorised to receive it, was not within 7 & 8 Geo. 4, c. 29, s. 47. *Rex* v. *Thorley*, 1 M. C. C. 343.

If a servant generally employed by his master to receive sums of one description, and at one place only, is employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum was to be considered as received by him by virtue of his employment, within 39 Geo. 3, c. 85. *Rex* v. *Smith*, R. & R. 516.

A clerk, intrusted to receive money at home from outdoor collectors, received it abroad from outdoor customers:—Held, that such a receipt of money might be considered by virtue of his employment, within 39 Geo. 3, c. 85, although it was beyond the limits to which he was authorised to receive money for his employers. *Rex* v. *Beechey*, R. & R. 319.

A. was convicted on an indictment charging him with embezzlement. He was storekeeper and clerk of a county gaol, and it was no part of his duty (which was defined by written instructions) to receive money, but he had from time to time received moneys in the absence of the governor of the gaol, and to the knowledge of some of the justices. It was submitted that he had not received the money by virtue of his employment, and that that question ought to be left to the jury; but the recorder directed the jury that if they believed that A. received the money, he did receive it by virtue of his employment:—Held, that the question whether he received the money by virtue of his employment ought to have been left to the jury, and that the conviction was wrong. *Reg.* v. *Arman*, Dears. C. C. 575; 1 Jur. (N.S.) 1115, 1117; 7 Cox, C. C. 45.

A. was employed to lead a stallion, and he was to charge 30*s.* a mare, and not take less than 20*s.* He received the sum of 6*s.* for the covering of a mare:—Held, no embezzlement, as the sum was not received by virtue of his employment. *Rex* v. *Snowley*, 4 Car. & P. 390.

A collector of poor-rates, as a servant of the overseers, has authority to receive the rates from the landlord, if he will pay them to him; and therefore receives such sums by virtue of his employment. *Reg.* v. *Adey*, 4 New Sess. Cas. 360; 1 Den. C. C. 571; T. & M. 296; 3 Car. & K. 339; 19 L. J., M. C. 149; 14 Jur. 556; 4 Cox, C. C. 208.

3. By whom Offence Committed.

a. Clerk or Servant.

Question for Jury.]—On an indictment for embezzling moneys, it is for the jury to say whether the relation of master and clerk existed between the prosecutor and prisoner. *Reg.* v. *Chater*, 9 Cox, C. C. 1.

Assignment for Benefit of Creditors—Employment of Assignor by Trustee.]—B., being in difficulties, assigned all his book debts, estate and effects to trustees for the benefit of creditors. He was employed by the trustees at a salary to manage the business and to collect the debts for them. He received the amount of two of the debts and did not account for it:—Held, that he was not a clerk or servant within the meaning of the act. *Reg.* v. *Barnes*, 8 Cox, C. C. 129.

Of Corporation—Appointment.]—If the party embezzling is employed as the servant of a corporation, although not duly appointed their servant, nor even under their common seal, he may be guilty of embezzlement. *Rex* v. *Wellings*, 1 Car. & P. 459.

Bank of England—"Entrusted" with Note.]—A clerk of the Bank of England employed to post into the ledger and read from the cash book bank notes from 100*l.* in value up to 1,000*l.*, in the course of his employment had access to a file upon which paid notes of every description were filed, and took from that file a paid bank note for 50*l.*:—Held, that he could not be considered as "entrusted" with this note within a section corresponding to s. 73 of 24 & 25 Vict. c. 96. *Rex v. Bakewell*, R. & R. 35.

Female.]—A female servant is within 39 Geo. 3, c. 85, similar in terms to s. 68 of 24 & 25 Vict. c. 96. *Rex* v. *Smith*, R. & R. 267.

Apprentice.]—An apprentice, though under age, is within the 39 Geo. 3, c. 85. *Rex* v. *Mellish*, R. & R. 80.

Distraining Broker—Sole Service.]—A person employed as a distraining broker, if engaged in the service of the prosecutor only, and paid a salary by him, is a servant within s. 67 of 24 & 25 Vict. c. 96. *Reg.* v. *Flanagan*, 10 Cox, C. C. 561.

Assistant Overseer.]—Upon an indictment under 24 & 25 Vict. c. 95, s. 68, for embezzlement by a clerk or servant, it is necessary to prove that the prisoner was appointed or employed to collect or receive money for his employer. C., having been nominated by the inhabitants of a township as an assistant overseer, and the nomination not specifying as one of the duties he was to perform the duty of collecting or receiving money:—Held, that inasmuch as under 59 Geo. 4. c. 12, s. 7, an assistant overseer can only be appointed by justices for such purposes as are specified in the nomination, C. could not be convicted of embezzling rates collected by him as a clerk or servant of the inhabitants within the meaning of 24 & 25 Vict. c. 95, s. 68. *Reg.* v. *Coley*, 56 L. T. 747; 16 Cox, C. C. 226; 51 J. P. 710—C. C. R.

An assistant overseer, appointed under 59 Geo. 3, c. 12, s. 7, is not a clerk or servant to the overseers so as to be guilty of embezzlement. *Reg.* v. *Sampson*, 1 Cox, C. C. 355.

Collector of Poor-rate.]—The prisoner agreed with one of the overseers of a parish to collect the poor-rate and keep the books connected therewith. The overseer left the method of collection and of keeping the books entirely in the hands of the prisoner, and gave him no orders during his management of the business. The prisoner applied to his own use a portion of the moneys so received:—Held, that the prisoner was not a "clerk or servant" within the meaning of s. 68 of 24 & 25 Vict. c. 96, and could not be convicted of embezzlement. *Reg.* v. *Bowers* (L. R. 1 C. C. 41) discussed. *Reg.* v. *Harris*, 5 R. 402; 69 L. T. 25; 17 Cox, C. C. 656; 57 J. P. 729—C. C. R.

Accountant and Treasurer to Overseers.]—One who was employed at a yearly salary under the appellation of accountant and treasurer to the overseers of a township, whose duty it was to receive all moneys receivable or payable by them, was a clerk and servant within 39 Geo. 3, c. 85. *Rex* v. *Squire*, 2 Stark. 348; R. & R. 349.

Person in the Service of a Company of which he is a Director.]—A director and shareholder of a limited company who was employed by the company, at a salary, to superintend the business of the company and to collect moneys due to them, may be convicted of having, while employed as a servant to the company, received moneys on their account and embezzled the same. *Reg.* v. *Stuart*, 63 L. J., M. C. 63; [1894] 1 Q. B. 310; 10 R. 124; 70 L. T. 44; 42 W. R. 303; 17 Cox, C. C. 723; 58 J. P. 299—C. C. R.

Captain of Barge Employed to Sell Coal.]—Where the owner of a colliery employed the prisoner, as captain of one of his barges, to carry out and sell coal, and paid him for his labour by allowing him two-thirds of the price for which he sold the coals above the price charged at the colliery:—Held, that the prisoner was a servant within the meaning of 39 Geo. 3, c. 85; and having embezzled the price, he was guilty of larceny within the meaning of that act. *Rex* v. *Hartley*, R. & R. 139.

Payment of Commission.]—B., in answer to an application, was informed by letter from the prosecutors, "We are not disposed to appoint any agent at N., but for all business you do for us we shall be happy to pay you a commission." He afterwards obtained some orders, and misappropriated some moneys received by him. The jury found that it was his duty to account to the prosecutors for any money he might receive for them immediately on receipt of it:—Held, that B. was not a clerk or a servant, and could not be convicted of embezzlement. *Reg.* v. *May*, L. & C. 13; 30 L. J., M. C. 81; 7 Jur. (N.S.) 147; 3 L. T. 680; 9 W. R. 256; 8 Cox, C. C. 421.

A. was indicted for embezzlement. He was engaged by the prosecutor as a commercial traveller, to be paid by commission, and he was at liberty to obtain orders for other persons:—Held, that there was evidence of his being a servant to the prosecutor. *Reg.* v. *Tite*, L. & C. 29; 30 L. J., M. C. 142; 7 Jur. (N.S.) 556; 4 L. T. 259; 9 W. R. 554; 8 Cox, C. C. 458.

Solicitor Employed to Collect Rents.]—An indictment charged a person, who was a solicitor, with embezzlement. It appeared from his appointment, as entered in the minute-book of the company, that he was a land agent to the company, and that in the course of his duties he collected the rents of houses, refreshment-stalls, book-stalls, &c., and should have paid the sums over to the company, and that he managed the parochial assessments, as to the justness of claim. His salary was 300*l.* a year, and an extra sum was allowed for travelling expenses:—Held, that he was a clerk or a servant. *Reg.* v. *Gibson*, 8 Cox, C. C. 436.

No Remuneration Agreed upon.]—A., who had been a farm servant of B., but who had ceased to be so, was employed by B. to collect his debts, it being B.'s intention to go to America, and to take A. with him and set him up there in business for himself. There was no agreement for any remuneration to be paid by B. to A. for collecting the debts:—Held, that A. could not be convicted of embezzling the sums received by him on behalf of B. *Reg.* v. *Hoare*, 1 F. & F. 647.

Drover of Cattle.]—A drover of cattle was employed by a grazier in the country to drive eight oxen to London; his instructions were that if he could sell them on the road, he might do so; and that those he did not sell on the road he was to take to a particular salesman in Smithfield Market, who was to sell them for the grazier; the drover received the money for the beasts and applied it to his own use:—Held, that he could not be convicted of embezzlement. *Reg.* v. *Goodbody*, 8 Car. & P. 665.

Treated as Debtor, not as Servant.]—The prisoner kept a refreshment-house at B., and

whilst doing so was engaged by the prosecutors, manure manufacturers, to get orders, which they supplied from their stores. He was to collect the money and send it at once to them, and also to furnish weekly accounts. He was paid by commission, and it did not appear that he had undertaken to give any definite time or labour to the business, but he was to act in a particular district, and was called agent for the B. district. He was to go through the country, see the farmers and get orders, and during the season was to be continually among the farmers. Subsequently the prosecutors rented stores at B., which were placed under the prisoner's control, and from them he supplied orders he obtained. The first mode, however, or the mixed mode, might have been resorted to, according to the convenience of the prosecutors. After some time a proposal was made to a guarantee society to insure the prosecutors in respect to their connection with the prisoner. This proposal was signed by the prisoner. It was a printed form issued by the society, and contained a notice that some salary must be payable, or the society would not insure. It stated that the prisoner's salary was 1*l.* a year besides commission, estimated at 65*l.* a year. At this time the prosecutors had agreed to give the salary of 1*l.* a year. The prisoner was allowed to get in arrear, and was treated by the prosecutors as a debtor in respect of the arrears. Having, however, received money from certain customers, he fraudulently returned their names as not having paid, and for this he was tried and convicted of embezzlement:—Held, that the conviction could not be sustained, as it was not established by the evidence that the prisoner was the servant of the prosecutors. *Reg.* v. *Walker*, Dears. & B. 600; 27 L. J., M. C. 207; 4 Jur. (N S) 465; 6 W. R. 505; 8 Cox, C. C. 1.

Where Duty not Compulsory.]—A butty collier, who received a certain sum for every ton of coal he raised, was also allowed to sell coal for his employer, the owner of the colliery. It was his duty to pay over the gross money received on such sales, and he was subsequently allowed a poundage thereon. Having converted money received for coal to his own use, he neglected to account for it:—Held, that although the sale of the coal was not compulsory, he was servant to the owner of the colliery, so as to support an indictment for embezzlement. *Reg.* v. *Thomas*, 6 Cox, C. C. 403.

A person whose duty it is to obtain orders when and where he likes, and to forward them to his principal for execution, and then has three months within which to collect the money for the goods sent, is not a clerk or a servant. *Reg.* v. *Mayle*, 11 Cox, C. C. 150.

If such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement if he does not pay over or account for the money so received. *Ib.*

A person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within 24 & 25 Vict. c. 96, s. 68. *Reg.* v. *Bowers*, 35 L. J., M. C. 206; L. R. 1 C. C. 41; 12 Jur. (N.S.) 550; 14 L. T. 671; 14 W. R. 803; 10 Cox, C. C. 250.

A person was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. He had no salary, but was paid by commission. He might get orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time—the whole of every day, to their service:—Held, that he was a clerk and servant within 24 & 25 Vict. c. 96, s. 68. *Reg.* v. *Bailey*, 24 L. T. 477: 12 Cox, C. C. 56.

The prisoner was employed by a coal merchant under an agreement "that he was to receive 1*s.* per ton procuration fee, payable out of the first payment, 4 per cent. for collecting, and 3*d.* on the last payment. Collections to be paid on Friday evening before 5 p.m., or Saturday before 2 p.m." He received no salary, was not obliged to be at the office except on Friday or Saturday to account for what money he had received. He was at liberty to go where he pleased for orders:—Held, that he was not a clerk or servant within the 24 & 25 Vict. c. 96, s. 68, relating to embezzlement. *Reg.* v. *Marshall*, 21 L. T. 796; 11 Cox, C. C. 490.

A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to his employers, who was at liberty to apply for orders when he thought most convenient, and was not to employ himself for any other persons, is not a clerk or servant within 24 & 25 Vict. c. 96, s. 68. *Reg.* v. *Negus*, 42 L. J., M. C. 62; L. R. 2 C. C. 31; 28 L. T. 646; 21 W. R. 687; 12 Cox, C. C. 492.

An accountant and debt collector was employed by the prosecutors to collect certain debts specified in a list given to him. The time and mode of collecting the debts were in his discretion, and he was authorised to sue for them, if necessary, but at his own charge. In no case was he to receive from the prosecutors more than five per cent. on the amount collected by him and paid over to the prosecutors. The jury having found, on these facts, that he was employed in the capacity of clerk, and convicted him of embezzlement of certain sums received by him and not paid over to the prosecutors:—Held, that the finding was wrong, and that he was not employed as a clerk. *Reg.* v. *Hall*, 31 L. T. 883; 13 Cox, C. C. 49.

Occasional Employment.]—A man was sufficiently a servant within 39 Geo. 3, c. 85, although he was only occasionally employed when he had nothing else to do. *Rex* v. *Spencer*, R. & R. 299.

And it is sufficient, if he was employed to receive the money he embezzled, although receiving money may not be in his usual employment, and although it was the only instance in which he was so employed. *Ib.*

A., who was convicted of embezzlement, was secretary of a money club. His duties were cognate to that of receiving money, although the receipt of money was not expressly named as one of them in the rules, which were in writing. He was directed by the club to sue upon a joint promissory note, their property, or get better security, and the note was handed to him by the treasurer, not a member of the club, who desired that his name should not be used in legal proceedings. The note was payable to the treasurer's order, and A. indorsed the treasurer's name on the note, and employed an attorney, who issued a writ at the suit of A. In con-

sequence of the action money was paid to him by one of the makers of the note, the receipt of which he denied, and fraudulently withheld the money from the club, and appropriated it:—Held, that he was rightly convicted. *Reg.* v. *Tonque*, Bell, C. C. 289; 30 L. J., M. C. 49; 3 L. T. 415; 9 W. R. 59; 8 Cox, C. C. 386.

Embezzlement by one who is neither clerk nor servant, nor in any respect under the control of the person by whom he is in a single instance only requested to receive moneys, was not punishable under 7 & 8 Geo. 4, c. 29, s. 49, as he did not come within the description of clerk, or servant, or a person employed for the purpose of, or in the capacity of a clerk or servant. *Rex* v. *Nettleton*, 1 M. C. C. 259.

A person employed to collect the sacrament money from the communicants is not the servant of the minister, churchwardens or poor, so as to be within 7 & 8 Geo. 4. c. 29, s. 47, if he embezzles the money. *Rex* v. *Burton*, 1 M. C. C. 237.

The prisoner had worked for the prosecutor, sometimes as a regular labourer and sometimes as a roundsman; but at the time in question, he not being at all in the prosecutor's service, was sent by the prosecutor to get a cheque cashed at a banker's, for doing which he was to be paid sixpence. He got the cash, and made off.—Held, no embezzlement, as the prisoner was not a servant of the prosecutor within 7 & 8 Geo. 4, c. 29, s. 47. *Rex* v. *Freeman*, 5 Car. & P. 534.

A person hired by a market gardener to do a day's work, and who is requested by his employer to take some vegetables to market and sell them, and bring back the produce, is a servant to his employer in respect of such employment, within 7 & 8 Geo. 4, c. 29, s. 47. *Reg.* v. *Winnall*, 5 Cox, C. C. 326.

A. was secretary to a benefit building society. It was no part of his duty, as prescribed by the rules, to receive money for the society; but, according to the course of business, the subscriptions were frequently received by him, and when mortgages were redeemed the money was paid to him as secretary, but for and upon receipts signed by the trustees. Having embezzled the redemption-money upon a mortgage so paid to him, he was indicted under 7 & 8 Geo. 4, c. 29, s. 47:—Held, that there was evidence for the jury that he was employed by the trustees as their servant to receive money on their behalf. *Reg.* v. *Hastie*, L. & C. 269; 32 L. J., M. C. 63; 9 Jur. (N.S.) 235; 7 L. T. 695; 11 W. R. 293; 9 Cox, C. C. 264.

A servant may be found guilty of embezzlement, though he is not a general servant, and is employed to receive in a single instance only. *Rex* v. *Hughes*, 1 M. C. C. 370.

Employment by other Masters.]—A person employed by A. to sell goods for him at certain wages may be convicted of embezzlement as the servant of A., though at the same time employed by other persons and for other purposes. *Reg.* v. *Batty*, 2 M. C. C. 257.

The prisoner agreed with a manufacturer of earthenware to act as his traveller, and "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by him, and that he would not, without his consent in writing, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid, for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts. The manufacturer subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement under 24 & 25 Vict. c. 96, s. 68:—Held, that he was a clerk or servant of the prosecutor within that statute. *Reg.* v. *Turner*, 22 L. T. 278; 11 Cox, C. C. 551.

A person employed upon commission to travel for orders and collect debts, was a clerk within 39 Geo. 3, c. 85, and might have been indicted for embezzlement, although he was employed by many different houses on each journey, and paid his own expenses out of his commission on each journey, and did not live with any of his employers, nor act in any of their counting-houses. *Rex* v. *Carr*, R. & R. 198.

Employment by Father—Father Clerk to Local Board.]—The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father; and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use:—Held, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement. *Reg.* v. *Foulkes*, 44 L. J., M. C. 65; L. R. 2 C. C. 150; 32 L. T. 407; 23 W. R. 696; 13 Cox, C. C. 63.

Servant or Partner.]—An instrument in the following form is a contract for service by a labourer, and not a contract of partnership:—"S. W. engages to take charge of the glebe land of the Rev. A. B., his wife undertaking the dairy and poultry, at 15*s.* a week, till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profits, after all the expenses of rent, rate, labour and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which the cottage to be vacated by S. W., who occupies it as bailiff, in addition to his salary.—March 12th. 1850.—(Signed) A. B., S. W."—The prisoner was directed to account, and was in the habit of accounting, with the wife of the prosecutor. On the 4th October, the prisoner, in accounting with her, denied the receipt of two sums of money which he had received for and on account of his master, and appropriated them to his own use:—Held, that he was properly convicted of embezzlement, although Michaelmas was the time agreed upon when a valuation was to take place and the profits were to be ascertained. *Reg.* v. *Wortley*, T. & M. 636; 2 Den. C. C. 333; 21 L. J., M. C. 44; 15 Jur. 1137; 5 Cox, C. C. 382.

A. was a cashier and collector to commission agents. He was paid partly by salary and partly by percentage on the profits, but was not to contribute to the losses, and had no control over the management of the business:

—Held, that he was a servant within the 7 & 8 Geo. 4, c. 29, s. 47, and not a partner. *Reg.* v. *M'Donald*, L. & C. 85 ; 31 L. J., M. C. 67 ; 7 Jur. (N.S.) 1127 ; 5 L. T. 330 ; 10 W. R. 21 ; 9 Cox, C. C. 10.

By Members of Partnerships or by Joint Beneficial Owners.]—A treasurer who was also a member of a friendly society (duly enrolled and the rules of which had been certified by the barrister appointed in that behalf), whose duty it was to receive the moneys paid into the society, and hold them to the order of the secretary, countersigned by the chairman or a trustee, and to account whenever called upon, to which office no salary was attached, is not a clerk or a servant liable to be indicted for embezzlement under 24 & 25 Vict. c. 96, s. 68. *Reg.* v. *Tyree*, 38 L. J., M. C. 58 ; L. R. 1 C. C. 177 ; 19 L. T. 657 ; 17 W. R. 334 ; 11 Cox, C. C. 241.

A member of a friendly society was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in the contribution and cash books a large number of the sums so received. On being called upon for an explanation, he admitted that he had received the sums so omitted :—Held, that he was guilty of embezzlement. *Reg.* v. *Proud*, L. & C. 97 ; 31 L. J., M. C. 71 ; 8 Jur. (N.S.) 142 ; 5 L. T. 331 ; 10 W. R. 62 ; 9 Cox, C. C. 22.

A member of two unenrolled benefit clubs, paid as secretary and intrusted with the funds to deposit in the bank in the joint names of himself and the treasurer, dishonestly appropriated the sums so intrusted to him :—Held, that he could not be convicted of embezzlement as a servant. *Reg.* v. *Marsh*, 3 F. & F. 523.

Two friendly societies appointed a committee, of which the defendant was a member, to conduct an excursion ; the committee employed him and several others to sell tickets. It was his duty to pay over the money so received, which was to belong to the two societies, to a person appointed by the committee, but he received no remuneration for his services :—Held, that he was a joint owner of the money, and not a clerk or servant within 24 & 25 Vict. c. 96, s. 68, liable to be indicted for embezzlement, *Reg.* v. *Bren*, L. & C. 346 ; 33 L. J., M. C. 59 ; 9 L. T. 452 ; 12 W. R. 107 ; 9 Cox, C. C. 398.

A clerk of a banking company, established under 7 Geo. 4, c. 46, may be convicted of embezzling the money of the company, although he is a shareholder or partner in such company, *Reg.* v. *Atkinson*, Car. & M. 525 ; 2 M. C. C. 278.

—— **Moneys of "Copartnership"—Association not for Purposes of Gain.**]—An association having for its object, not the acquisition of gain, but the spiritual and mental improvement of its members, is not a "copartnership," within the meaning of the term as used in 31 & 32 Vict. c. 116, s. 1. Consequently a member of such an association who has embezzled moneys belonging to it cannot be convicted under the above-mentioned act of embezzling the moneys of a "copartnership." *Reg.* v. *Robson*, 55 L. J., M. C. 55 ; 16 Q. B. D. 137 ; 53 L. T. 823 ; 34 W. R. 276 ; 15 Cox, C. C. 772 ; 50 J. P. 488—C. C. R.

Servant or Independent Officer.]—Under an order of the Poor Law Commissioners, in pursuance of 4 & 5 Will. 4, c. 76, s. 46, the board of guardians of a union appointed A. to the office of collector of rates for the S. district, which district formed a part of the union. In the order of the poor law commissioners, the duties of the collector, and the compensation he was to receive, were fully set forth, and upon the receipt of the order the guardians appointed him verbally, which appointment was afterwards submitted for approval to the poor law commissioners, and ratified by them. The power of dismissal rested with the poor law commissioners alone. The collector, on his appointment, gave a bond for the proper performance of his duties to the guardians, and to them he was bound to give in a statement of his accounts weekly. There were separate rates for each parish or district of the union, and the duty of the collector was to collect the rates of the S. district, and pay in the amount to a banker, to the credit of the overseers of that district, they alone having the right of disposing of it. Out of this sum the overseers paid the collector a percentage for his services :—Held, that an indictment for embezzlement was not sustainable, there being no such service to any one as the 7 & 8 Geo. 4, c. 29, s. 47, required, the collector being, under the circumstances, an independent officer. *Reg.* v. *Truman*, 2 Cox, C. C. 306.

Servant or Trustee.]—A. was a carrier, residing at Somerton and going from that place to Stoke and back, employed, however, only between the glove sewers at Somerton and the manufacturers at Stoke, in carrying the gloves from and to the one and the other. The manufacturers knew nothing of the sewers, but A. gave the name of and took out a number for any woman desiring to be employed, received unsewn gloves from the manufacturers, and conveyed them to the women at Somerton, taking back the gloves when finished and receiving the amount due to the women for their work. The manufacturers looked to the women for the work ; but if any were missing, and the women not found, they held the prisoner accountable for it. In accordance with this course of proceeding, A. received sewn gloves from two of the women, delivered them to the manufacturers, and received the amount due for the work, but fraudulently applied the money so received to his own use. He was tried for, and convicted of, embezzling the money of the two women :—Held, that the relation of master and servant did not subsist, but A. was a mere trustee, and was only guilty of a breach of trust, and not of embezzlement, and therefore the conviction was wrong. *Reg.* v. *Gibbs*, Dears. C. C. 445 ; 24 L. J., M. C. 62 ; 1 Jur. (N.S.) 118 ; 6 Cox, C. C. 455.

b. Trustees.

Who is Trustee.]—A person, who was trustee, treasurer and secretary of a savings bank, was indicted for misappropriation as a trustee. As secretary he received the money deposited, which, by the rules of the savings bank, it was his duty to hand over to the treasurer, who was required by the Savings Bank Acts to pay it over, when demanded, to the trustees, whose duty, as defined by the rules, was to vest it in the public funds in the names of the commissioners for the reduction of the national debt. He falsified his accounts, and appropriated to his own purposes part of the money so deposited

with him as secretary, with intent to defraud :—Held, first, that he was a trustee for the benefit of other persons. *Reg.* v. *Fletcher*, L. & C. 180 ; 31 L. J., M. C. 206 ; 8 Jur. (N.S.) 649 ; 6 L. T. 545 ; 10 W. R. 753 ; 9 Cox, C. C. 189. See *Reg.* v. *Gibbs*, supra.

—— **Creation of Express Trust.**]—Held, secondly, that there was an express trust created by the rules, although they were made before the appointment of the trustee and the existence of the trust fund. *Ib.*

By Trustee.]—T., a fruit broker, applied to his bankers for an advance as against certain goods which had been consigned to him and were then at sea, he depositing with them the indorsed bills of lading. Before making the advance the bankers required him to sign a letter of hypothecation, by which he undertook to hold the goods in trust for the bankers, and to hand over to them the proceeds, "as and when received," to the amount of the advance :—Held, that this letter contained a declaration of an express trust, such as would make the giver of it a trustee of the proceeds within the meaning of s. 80 of the Larceny Act, and his appropriation of them to his own use an offence against that section. *Reg.* v. *Townshend*, 15 Cox, C. C. 466.

Instrument in Writing.] — The rules of a savings bank are an instrument in writing. *Reg.* v. *Fletcher*, supra.

Indictment—Whose Property.]—A trustee of a friendly society (a lodge of oddfellows) was appointed, by resolution of the society, to receive money from the treasurer and carry it to the bank. He received the money, but instead of taking it to the bank, he applied it to his own purposes. He was indicted as a bailee of the moneys of the treasurer R. C., feloniously converting the money to his own use ; and also for a common law larceny of the money of R. C. The 18 & 19 Vict. c. 63, s. 18, vests the property of such societies in the trustees, and directs the property to be laid in the names of the trustees in indictments :—Held, that the prisoner could not be convicted of feloniously converting or stealing the moneys of R. C., as charged in the indictment. *Reg.* v. *Lowse*, Bell, C. C. 259 ; 29 L. J., M. C. 132 ; 6 Jur. (N.S.) 513 ; 2 L. T. 254 ; 8 W. R. 422 ; 8 Cox, C. C. 302.

Sanction of Court of Chancery to Proceedings.]—The Court of Chancery sanctioned criminal proceedings upon an affidavit, stating that a trustee had paid 1,409*l.* into his private bankers, had drawn out the whole, with the exception of 28*l.*, and had paid a private debt of 150*l.* out of the trust funds. *Wadham* v. *Rigg*, 1 Drew. & Sm. 216.

c. Brokers and Agents.

Agents Intrusted in Course of Business.]—The 52 Geo. 3, c. 63, applied only to persons to whom securities were intrusted in the exercise of their function or business. *Rex* v. *Prince*, 2 Car. & P. 517.

Whilst in treaty with Messrs. G. & P. for the sale and transfer of a public-house licence, the prisoner was required by them to give security for the purchase-money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which the latter was to deposit with G. & P. by way of security, and not negotiate or use for any other purpose, and if the transfer was not effected, was to return to the prosecutor. The prisoner, instead of depositing them with G. & P., converted two of them to his own use :—Held, that he was not an agent within s. 75 of 24 & 25 Vict. c. 96, and could not be convicted under that section. *Reg.* v. *Cosser*, 13 Cox, C. C. 187.

Where a party established a savings bank, consisting of 130 members, each of whom paid a weekly subscription of 2*s.* 1*d.*, the odd penny being paid to him for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by a lottery, consisting of 129 blanks, and one prize amounting to 13*l.*, which was to go to the holder of the fortunate ticket ; and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of 10*l.* 8*s.*, without receiving any benefit therefrom :—Held, that he was not indictable under the 52 Geo. 3, c. 63, for embezzling the money as an agent, or as a person having the possession of money for safe custody. *Rex* v. *Mason*, D. & R. N. P. C. 22.

A. placed valuable securities in the hands of B., with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." No accident did happen to A., and the proceeds were by B. converted to his own use :—Held, that B. was not indictable under 52 Geo. 3, c. 63 (repealed) ; and it seemed that he would not be so under 7 & 8 Geo. 4, c. 29, s. 49. *Rex* v. *White*, 4 Car. & P. 46.

Sale by Agent after Authority Countermanded.]—If any chattel or valuable security is intrusted to any broker or agent originally for the purpose of sale, but the authority to sell is afterwards countermanded, and the broker or agent, notwithstanding that countermand, sells the goods in violation of the orders of his principal, such broker or agent might be convicted of misdemeanour, under 7 & 8 Geo. 4, c. 29, s. 49. *Reg.* v. *Gomm*, 3 Cox, C. C. 64.

Misappropriation of Property Intrusted for Safe Custody to Agent.]—N., a solicitor, was intrusted by a client with money to invest on mortgage on the client's behalf ; he, instead of so doing, fraudulently appropriated the money to his own use :—Held, that N. was not intrusted with such money for "safe custody" within s. 76 of 24 & 25 Vict. c. 96. *Reg.* v. *Newman*, 51 L. J., M. C. 87 ; 8 Q. B. D. 706 ; 46 L. T. 394 ; 30 W. R. 530 ; 46 J. P. 612.

An attorney was employed to raise a loan of money on mortgage, of which he was to employ a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor. He prepared the mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use :—Held, that no offence had been committed under 24 & 25 Vict. c. 96, s. 75 or 76. *Reg.* v. *Cooper*, 43 L. J., M. C. 89 ; L. R. 2 C. C. 123 ; 30 L. T. 303 ; 22 W. R. 555 ; 12 Cox, C. C. 600.

An insurance broker was employed to effect three policies upon a vessel, which he did, advancing the premiums. A total loss having occurred the broker received the necessary docu-

ments to collect the moneys insured, and thereupon collected the amounts due upon two of the policies, by cheques payable to his order, which he paid into his own bank to his own credit. The premiums advanced by the broker and his commission on effecting the policies and receiving the losses were unpaid to him. The broker on being asked for the moneys after they had been received, said they were not due until a future day, and subsequently made excuses, and did not pay over the sums received on account of the losses to the prosecutor. The jury, in answer to a question left to them, found that the policies had been intrusted to the broker for a special purpose, viz. that he should receive the moneys due on them, and forthwith pay them over to the prosecutor. There was no evidence to support such a finding in the case:—Held, that there was a miscarriage, and as the court had no power to direct a new trial, the conviction should be quashed. *Reg.* v. *Tatlock*, 46 L. J., M. C. 7; 2 Q. B. D. 157; 35 L. T. 520; 13 Cox, C. C. 328.

Trust money having been invested on mortgage, the mortgage was paid off and the money left in the hands of the family solicitor, and was subsequently appropriated by him:—Held, that this was a fraudulent conversion to his own use of property intrusted to the solicitor for safe custody within s. 76 of 24 & 25 Vict. c. 96. *Reg.* v. *Fullagar*, 14 Cox, C. C. 370; 44 J. P. 57.

—— **Security for Payment of Money—Bill of Exchange.**]—A document which is a complete bill of exchange in all respects except that of the signatnre of the drawer is, when in the hands of the intended drawer, a valuable security; and is also by virtue of s. 18 of the Bills of Exchange Act, 1882, a bill of exchange. Such a document is therefore a security for the payment of money within s. 75 of 24 & 25 Vict. c. 96. *Reg.* v. *Bowerman*, 60 L. J., M. C. 13; [1891] 1 Q. B. 112; 63 L. T. 532; 39 W. R. 207; 17 Cox, C. C. 151; 55 J. P. 373.

Money intrusted for Specific Purpose—Conversion of Money by Stockbroker]—On the 2nd November, 1885, W., by letter instructed the prisoner, a stockbroker, to buy for him on the following day certain stock at 90, to hold for a rise, the time to close to be left open, and inclosed a cheque for 21*l.* 5*s.* "for cover and commission." On the 3rd November the stock specified was at 91¼, and the prisoner paid the cheque into his bank without purchasing, and subsequently spent the money for his own use, the balance standing to his credit at his banker's on the 14th November being only 8*l.* Upon a case reserved at the trial of an indictment under 24 & 25 Vict. c. 96, s. 75, which charged the prisoner for that he having been intrusted as a broker and agent with a security for the payment of money, with a direction in writing to apply it for a specific purpose, in violation of good faith, and contrary to the terms of such direction, converted to his own use such security:—Held, that the prisoner was merely the agent of W. to hold and apply the money for which the cheque was sent for a specific purpose, and that he was rightly convicted under the circumstances of having converted the cheque to his own use, as charged in the indictment. *Reg.* v. *Cronmire*, 54 L. T. 580; 51 J. P. 104; 16 Cox, C. C. 42—C. C. R.

Direction in Writing—Vendee of Goods.]—B. agreed to purchase corn from S. and T. at a certain price, and received delivery orders for the same. Before actually taking delivery, B. signed an undertaking directed to S. and T. to the following effect:—"In consideration of your delivering to me the Indian corn bought this day, I hereby undertake to hand you the proceeds of the same as and when received, and to hold myself responsible for deficiency should there be any." B. subsequently sold the corn and appropriated the proceeds to his own use:—Held, that B. was not an agent but the vendee of the goods, and that s. 75 of 24 & 25 Vict. c. 96, did not apply. *Reg.* v. *Bredin*, 15 Cox, C. C. 412.

"Or other Agent."]—In 24 & 25 Vict. c. 69, s. 75—which enacts that whosoever, having been intrusted as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, &c., was intrusted to him, sell, negotiate, &c., or in any manner convert to his own use or benefit such chattel or security, shall be guilty of a misdemeanour—the words "or other agent" apply to persons whose occupation is similar to those enumerated in the section, and do not include any ordinary agent who may from time to time be intrusted with valuable securities. Where, therefore, the prisoner, who was not a banker, merchant, broker, or attorney, was employed by the prosecutors, who were railway contractors, to procure for them a contract for the construction of a foreign railway, and was charged under s. 75 with having misappropriated valuable securities with which the prosecutors had intrusted him in the course of his employment:—Held, that the facts disclosed no offence within the meaning of the section, and that the prisoner was not liable to be committed with a view to his extradition. *Reg.* v. *Portugal* or *De Portugal, In re*, 55 L. J., Q. B. 567; 16 Q. B. D. 487; 34 W. R. 42; 50 J. P. 501.

Broker or Agent—Question for Jury.]—Whether a person intrusted with a security for the payment of money with a direction in writing as to its application, or as to the application of the proceeds thereof, was so intrusted as a broker or agent within the meaning of s. 75 of 24 & 25 Vict. c. 96, is a question of fact for the jury; and the mere fact that such person had an interest in the transaction greater than that of a mere agent would not deprive him of his capacity of agent. *Reg.* v. *Bowerman*, supra.

"Direction in Writing to apply Money."]—Trust money had been invested on mortgage. The mortgage was paid off, and the money left in the hands of the family solicitor, who wrote to the person beneficially interested, "R.'s money was paid on Saturday, the 6th day of April, 2,500*l.* and interest. . . . . Let me know how you would like to have the 2,500*l.* invested, whether in the funds or on mortgage. I can get you 4 per cent. on a good security, but no more. More than 4 per cent. is not to be obtained upon such securities as trustees would be justified in investing." The answer was dated the 9th day of April: "Will consult C. at once about the money, and

let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it is well secured by this time." At or near the date of these letters it was clear that the money had been fraudulently appropriated to his own use by the solicitor:—Quære, whether the above letters amounted to a direction in writing to apply the money within s. 75 of 24 & 25 Vict. c. 96. *Reg.* v. *Fullagar*, 14 Cox, C. C. 370; 44 J. P. 57.

Where money was intrusted, without any direction in writing, to the prisoner as a notary, with a view to re-investment as soon as either he or his customer should have found a suitable investment, and he misappropriated such money:—Held, that there was no evidence of any offence against 24 & 25 Vict. c. 96, s. 75, because the first part of that section requires that the money should have been intrusted with a direction in writing, and the second part does not apply to money. *Bellencontre, In re*, 60 L. J., M. C. 83; [1891] 2 Q. B. 122; 64 L. T. 461; 39 W. R. 381; 55 J. P. 694; 17 Cox, C. C. 253.

A stock and share dealer was employed by a lady to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I inclose a contract note for 300*l.*, Japanese bonds, at 112, 336*l.*;" and the contract note ran, "Sold to Mrs. S. 300*l.* J. at 112, 336*l.*," and was signed by him. She wrote in reply, "I have just received your note and contract note for the Japanese shares, and inclose a cheque for 336*l.* in payment." The dealer never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque:—Held, that the letter was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they had still to be paid for, within the meaning of 24 & 25 Vict. c. 96, s. 75; and that he was rightly convicted of a misdemeanour under that section. *Reg.* v. *Christian*, 43 L. J., M. C. 1; L. R. 2 C. C. 94; 29 L. T. 654; 22 W. R. 132; 12 Cox, C. C. 502.

An agent was employed to sell goods on commission, and as soon as he received moneys from customers he was to remit them to his employers. During the employment his employers wrote to him, "We will send H., B., and P. their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month":—Held, that this letter was not a direction in writing as to the application or disposition of moneys received by the agent within s. 75 of the 24 & 25 Vict. c. 96. *Reg.* v. *Brownlow*, 39 L. T. 479; 14 Cox, C. C. 216.

—— **Evidence.**]—An allegation in an indictment that A. placed valuable securities in the hands of B. "with an order in writing to invest the proceeds in the government funds," is not supported by proof of an order in writing, directing B. to invest the proceeds in the government funds, in case of any unexpected accident happening to A. *Rex* v. *White*, 4 Car. & P. 46.

Indictment—Written Direction.]—An indictment on 7 & 8 Geo. 4, c. 29, s. 49, against a broker for embezzlement of a security for money, must have alleged a written direction to him as to the application of the proceeds. *Reg.* v. *Golde*, 2 M. & Rob. 425.

Disclosure of Circumstances—In what Cases Applicable.]—Semble, a disclosure of any illegal act to which the statute relates must, to be rendered available as a protection, be made bonâ fide, and must not be a mere voluntary statement made for the express purpose of screening the person making it from the consequences of his acts. *Strahan, Paul and Bates, In re*, 7 Cox, C. C. 85.

An agent intrusted with a bill of lading, without authority of his principals, and in violation of good faith, deposited it with bankers for his own benefit, as a security for advances. He was charged with this offence before a magistrate. The depositions which were taken in support of the charge contained ample evidence to support it. Having become bankrupt, he was taken by his creditors and examined respecting the subject-matter of the charge before a commissioner in bankruptcy, and then made a statement in every respect in accordance with the evidence in the depositions. He was afterwards indicted on the same charge. On the trial, his examination in bankruptcy was offered by him as a defence, as showing that he had disclosed the act before a commissioner in bankruptcy previously to being indicted for the offence, and that therefore he was not liable to conviction, by virtue of 5 & 6 Vict. c. 39, s. 6. This evidence of a disclosure was held to be admissible under not guilty. *Reg.* v. *Sheen*, Bell, C. C. 97; 28 L. J., M. C. 91; 5 Jur. (N.S.) 151; 7 W. R. 255; 8 Cox, C. C. 143.

The majority of the court was, however, of opinion, that as the agent only stated before the commissioner matter which had been previously known, and previously proved before the magistrate, he had not made any disclosure within the meaning of the statute, and consequently was not entitled to protection. The minority held, that as the statement of the agent was obtained on a compulsory examination, instituted bonâ fide by the creditors for their own interest, it was a disclosure before a commissioner within the act, notwithstanding the previous publicity of the matter there inquired into. *Ib.*

d. Persons employed in Public Service.

Who are—County Court Bailiff.]—The high bailiff of the county court appointed one Parsons, under the powers contained in the county court acts, a bailiff to assist him in his duties. Parsons acted under the orders of the high bailiff; his duties thus prescribed were to execute writs of fi. fa., and to return the proceeds to the registrar of the county court within twenty-four hours:—Held, that Parsons was not a person "employed in the public service of Her Majesty" within the meaning of 24 & 25 Vict. c. 96, s. 70, but was the servant of the bailiff. *Reg.* v. *Glover* (9 Cox, C. C. 501); *Reg.* v. *Graham* (13 Cox, C. C. 57), distinguished. *Reg.* v. *Parsons*, 16 Cox, C. C. 498.

—— **Inspector of Prisons.**]—An inspector of prisons duly authorised to receive the contributions of parents towards the maintenance of their

children committed to reformatory and industrial schools under 29 & 30 Vict. cc. 117, 118, and instructed to pay the amount received into the Bank of England, to the credit of the paymaster-general, employed the prisoner, a member of the police force of a borough, as his agent in taking proceedings against the parents of such children for the recovery of such contributions on his behalf, and for generally carrying out the provisions of the Reformatory and Industrial Schools Act. Under this employment the prisoner received and misappropriated moneys, the contributions of parents, ordered by magistrates to be paid for the maintenance of their children in the schools:—Held, that he was, while so employed, in the public service of her Majesty, so as to render him amenable to an indictment for embezzlement under 24 & 25 Vict. c. 96, s. 70. *Reg.* v. *Graham*, 32 L. T. 38; 23 W. R. 326; 13 Cox, C. C. 57.

Money received by Virtue of Employment.]—It was proved that a post-office letter-carrier was in the daily habit of calling at the lodge of an infirmary, and there receiving letters, with a penny on each, to prepay the postage of them; and that he took them, with the penny, to the post-office; and that, during his illness, a person who had performed his duties did the like. There was no evidence of any appointment:—Held, in an indictment under 2 & 3 Will. 4, c. 4, s. 1, for embezzling some of the pence thus received, that this was evidence to go to the jury, that the pence were received by the prisoner by virtue of his employment as a letter-carrier. *Reg.* v. *Townsend*, Car. & M. 178.

Evidence of Service.]—On an indictment for embezzlement against a letter-carrier, as a person employed in the public service of her Majesty, it is not necessary to prove his appointment as a letter-carrier, but evidence of his having acted as such is sufficient. *Rex* v. *Borrett*, 6 Car. & P. 124.

If the wife of a party to whom a letter is directed pays the postage of the letter, she is entitled to demand an overcharge made for it; and a refusal on the part of the letter-carrier to account for it to her is evidence of an embezzlement by him. *Ib.*

4. Indictment.

a. Averment as to whose Service.

Whilst Prisoner a Clerk.]—An indictment for embezzlement of money received by a clerk, whilst such, was good under 2 & 3 Will. 4, c. 4, without alleging the embezzling to have taken place whilst he was clerk. *Rex* v. *Lovell*, 2 M. & Rob. 236.

Against Clerks of Joint-Stock Companies.]—A. was indicted for embezzlement whilst clerk to B. and others. A. was secretary and cashier to a company calling themselves "The R., M. and H. Coal Company (Limited);" the number of members exceeded twenty; the name of the company was over the door; the shares were transferable without the consent of the other shareholders; and a minute-book, in which the resolutions were entered, was kept. No certificate of incorporation was put in evidence:—Held, that he was rightly convicted as the servant of B. and others, there being no evidence which ought to have been left to the jury that the company was incorporated. *Reg.* v. *Frankland*, L. & C. 276; 32 L. J., M. C. 69; 9 Jur. (N.S.) 388; 7 L. T. 799; 11 W. R. 346; 9 Cox, C. C. 273.

Against Persons Employed by Partners.]—A servant in the employment of two persons, as partners, must be considered as the servant of each. *Rex* v. *Leech*, 3 Stark. 70.

A., being one of several proprietors of a coach, employed B. to drive it when he did not himself drive it. It was B.'s duty, on each day he drove, to tell a book-keeper how much money he had taken; the book-keeper entering that sum in a book and also on the way-bill; B.'s duty then was to pay over the sums to A. B. gave true accounts to the book-keeper, who made true entries; but B. accounted for smaller sums to A., saying that those were all, and paid over to A. these smaller sums. All the proprietors were interested in the money, but A. was the person to receive it, and he was accountable to his co-proprietors:—Held, on an indictment for embezzlement, that B. was rightly described in the indictment as the servant of A. *Reg.* v. *White*, 8 Car. & P. 742.

Collector of Poor-Rates.] — A collector of poor-rates, employed by the overseers, is properly charged with embezzlement, as servant to the overseers, although there are churchwardens for the same parish, who took part in making the rate. *Reg.* v. *Adey*, 1 Den. C. C. 571; 4 New Sess. Cas. 360; T. & M. 296; 3 Car. & K. 339; 19 L. J., M. C. 149; 14 Jur. 556; 4 Cox, C. C. 208.

Assistant Overseer.]—An assistant overseer, appointed by a parish council, is properly described in an indictment for embezzlement as the servant of the inhabitants of the parish. *Reg.* v. *Smallman*, 66 L. J., Q. B. 82; [1897] 1 Q. B. 4; 75 L. T. 594; 45 W. R. 249; 18 Cox, C. C. 451; 61 J. P. 312—C. C. R.

An assistant overseer of a parish, elected by the parishioners in vestry, under 59 Geo. 3, c. 12, s. 7, who fix his duties and salary, is to be deemed the servant of the inhabitants of the parish, and to receive money collected by him for the poor-rate levied upon the parish as such servant, and may be so described in an indictment for embezzling such moneys so received. *Reg.* v. *Carpenter*, 35 L. J., M. C. 169; L. R. 1 C. C. 29; 12 Jur. (N.S.) 380; 14 L. T. 572; 14 W. R. 773; 10 Cox, C. C. 246.

Under an order of the Poor Law Commissioners, founded on 4 & 5 Will. 4, c. 76, s. 46, the board of guardians of a union appointed A. an assistant overseer of a district in the union, of which the township of F. formed a part, and his duty was to assist the overseers of each of the townships of the district. A. was paid a salary by the guardians. A. received sums for poor-rate from ratepayers of the township of F., which he ought to have paid over to the bankers of the overseers of that township, instead of which he embezzled them:—Held, that A. was not indictable for embezzling this money as the money of the overseers, as he was not their servant; and that he was not indictable for this embezzlement as the servant of the guardians, because, if he was their servant, it was not their money. *Reg.* v. *Townsend*, 2 Car. & K. 168; 1 Den. C. C. 167; 2 Cox, C. C. 24.

Treasurer to Guardians.]—The treasurer to the

guardians of the poor of Birmingham, appointed under a local and personal act, is a servant of the guardians, and as such is indictable for embezzlement. *Reg.* v. *Welch*, 2 Car. & K. 296 ; 1 Den. C. C. 199 ; 2 Cox, C. C. 85.

Bailiff of County Court.]—A bailiff of a county court who has fraudulently appropriated the proceeds of levies made under the process of the county court, cannot for this misconduct be convicted as a servant of the high bailiff with having embezzled the moneys of the high bailiff his master. *Reg.* v. *Glover*, L. & C. 466 ; 33 L. J., M. C. 169 ; 10 Jur. (N.S.) 710 ; 10 L. T. 582 ; 12 W. R. 885 ; 9 Cox, C. C. 500.

Servant of Joint Committee.]—A. was employed at a railway station belonging to four different companies, and which was maintained out of a joint fund. The servants at this station were appointed and paid, and might be dismissed, by a committee of directors of the several companies. A.'s duty was to deliver parcels which arrived at the station by the trains of the different companies, and to pay over the money received for them to the chief clerk of the parcels office. The chief clerk then paid over such money to the cashier of the committee, who kept a separate account for each company, and paid the money over directly to the company to which it belonged, or its bankers. A. having embezzled money received by him in the course of his duty, he was charged in different counts of an indictment as being the servant of the particular company whose money he had embezzled, of the four companies, of the committee, and of the station-master :—Held, that, at all events, he was properly charged as being the servant of the four companies. *Reg.* v. *Bayley*, Dears. & B. 121 ; 26 L. J., M. C. 4 ; 2 Jur. (N.S.) 1171 ; 5 W. R. 48 ; 7 Cox, C. C. 179.

Effect of Reassignment by Creditor's Trustee to Debtor.]—The prisoner was engaged by U. at weekly wages to manage a shop. U. assigned all his estate and effects to R., and a notice was served on the prisoner to act as the agent of R. in the management of the shop. For fourteen days afterwards R. received from U. the shop moneys. Then the shop money was taken by U. as before. The prisoner received his weekly wages from U. during the whole time. Some time after a composition deed was executed by R. and U., and U.'s creditors, by which R. reconveyed the estate and effects to U. ; but this deed was not registered until after the embezzlement charged against the prisoner :—Held, that he was the servant of U. at the time of the embezzlement. *Reg.* v. *Dixon*, 19 L. T. 384 ; 17 W. R. 180 ; 11 Cox, C. C. 178.

Officers of Friendly Societies, &c.—Trustees.]—The trustees of a benefit building society borrowed money for the purposes of their society on their individual responsibility (there being no rule of the society authorising them to borrow money). The money on one occasion was received by the secretary, and embezzled by him :—Held, that he might be charged in an indictment for embezzlement as the servant of W. and others, W. being one of the trustees and a member of the society. *Reg.* v. *Redford*, 21 L. T. 508 ; 11 Cox, C. C. 367.

In an indictment against the clerk of a savings bank for embezzlement, he is properly described as clerk to the trustees, though elected by the managers. *Rex* v. *Jenson*, 1 M. C. C. 434.

A member of and secretary to a society fraudulently withholding money received from a member to be paid over to the trustees, may be indicted for embezzlement, and may be stated to be the clerk and servant of the trustees ; and the money may be properly stated to be their property, though the society is not enrolled, and though the money ought in the ordinary course to have been received by a steward. *Rex* v. *Hall*, 1 M. C. C. 474.

A. was indicted for embezzlement as being a clerk and a servant of B., C. and D. A. was a member of, and secretary to, a properly certified friendly society, of which B., C. and D. were the trustees, and had, from time to time, received (though not in his capacity of secretary) funds belonging to the society, some part of which he appropriated :—Held, that A. was properly convicted of embezzlement as the clerk and servant of B., C. and D. *Reg.* v. *Proud*, L. & C. 97 ; 31 L. J., M. C. 71 ; 8 Jur. (N.S.) 142 ; 5 L. T. 331 ; 10 W. R. 62 ; 9 Cox, C. C. 22.

It is embezzlement in the clerk of a friendly society fraudulently to withhold the rents of a house collected in the course of his duty as clerk ; and he may be laid to be the clerk or servant of the trustees to whom the house was conveyed, if appointed either by them or the society. *Reg.* v. *Miller*, 2 M. C. C. 249.

The secretary of an unenrolled friendly society, whose duty it is to receive the weekly contributions of the members, to enter them in a book, and hand over the amount to the treasurer, who in his turn pays it into a bank in the names of the trustees of the society, may be properly described as the servant of the trustees in an indictment charging him with embezzling sums so received, and he cannot be described as the servant of the treasurer. *Reg.* v. *Woolley*, 4 Cox, C. C. 251.

A secretary of a friendly society under 18 & 19 Vict. c. 63, in which no trustee had ever been appointed, was convicted on an indictment for embezzlement, the indictment describing him as the servant of the treasurer, and also as the servant of C. (a member) and others :—Held, that the conviction was wrong. *Reg.* v. *Diprose*, 19 L. T. 292 ; 17 W. R. 180 ; 11 Cox, C. C. 185. S. P., *Reg.* v. *Blackburn*, 11 Cox, C. C. 157.

A member of and secretary to a benefit society, deriving a percentage from the funds of the society, received in the course of his duty certain money from the members of the society, which it was his duty to pay into an account in the savings bank kept in the names of certain other members of the society. Instead of paying the money into the bank he appropriated it :—Held, that he could not be convicted of embezzling the money upon an indictment charging him to be the servant of "A. B. and others," and laying the money to be that of "A. B. and others," A. B. being an ordinary member of the society. *Reg.* v. *Taffs*, 4 Cox, C. C. 169.

b. Averment as to whose Money or Goods.

That Money Embezzled is Property of Master.]—In an indictment under 39 Geo. 3, c. 85, against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation that the

money was the property of the master. *Rex* v. *M'Gregor*, 3 Bos. & P. 106; R. & R. 23. S. P., *Rex* v. *Beacall*, 1 M. C. C. 15.

Against Collectors of Rates.]—A. was employed by the overseers of a parish to collect poor-rates on their account. As their agent he demanded the amount of a rate from the landlord of a house who usually paid his tenants' poor-rates; he entered the amount in his book as uncollected and as legally excused, and embezzled the sum:—Held, that although the overseers might not have been able to enforce the payment of the sum so embezzled, he received it in virtue of his employment, and on account of his employers, and that it was not necessary to lay the money as the joint property of the churchwardens and overseers. *Reg.* v. *Adey*, 4 New Sess. Cas. 360; 1 Den. C. C. 571; T. & M. 296; 3 Car. & K. 339; 19 L. J., M. C. 149; 14 Jur. 556; 4 Cox, C. C. 208.

In such case it is sufficient to describe the money received by the collector for the rate as the property of the overseers only, naming them. *Ib.*

Against Servant Employed by Partners.]—A., being one of several proprietors of a Hereford and Birmingham coach, horsed it from Hereford to Worcester, and employed B. to drive it when he did not himself drive it; B. having all the gratuities as well when A. drove as when B himself did so. It was the duty of B., on each day when he drove, to tell the book-keeper at Malvern how much money he had taken; the book-keeper entering that sum in a book and on the way-bill, together with what he had taken himself; and he then had to pay over the latter to B., who was to give the two sums to A. B. gave true accounts to the book-keeper, who made true entries; but B. accounted for smaller sums to A., saying that those were all, and paid over to A. these smaller sums. All the proprietors were interested in the money; but A. was the person to receive it, and he was accountable to his co-proprietors:—Held, that the money embezzled was properly laid as the money of A. *Reg.* v. *White*, 8 Car. & P. 742.

Savings Bank.]—The property of a savings bank may be laid as the property of A. B. (a trustee of the bank) and others, under s. 14 of 7 Geo. 4, c. 64, notwithstanding s. 8 of 9 Geo. 4, c. 9, requires it to be stated as the property of the trustees in their proper names. *Reg.* v. *Bull*, 1 Cox, C. C. 137.

Against Secretary of Friendly Society.]—Where, by the rules of certain unenrolled friendly societies, the members of one lodge were at liberty to pay their contributions to another lodge, if more convenient to them so to do:—Held, that in an indictment against the secretary of a lodge for embezzling moneys received from a member of another lodge, the moneys may be laid as the property of the trustees of his lodge, to whose account all moneys received by him ought to be paid, although the trustees, in their turn, would, in this instance, have to account to the other lodge for the particular sum received on its behalf. *Reg.* v. *Woolley*, 4 Cox, C. C. 255.

A member of and secretary to a society fraudulently withholding money received from a member to be paid over to the trustees, may be indicted for embezzlement, the money being stated to be the trustees' property, though the society is not enrolled, and though the money ought in the ordinary course to have been received by a steward. *Rex* v. *Hall*, 1 M. C. C. 474.

Amendment.]—The secretary of a friendly society, of which A. B. and others were trustees, was charged with embezzling money belonging to the society. In the indictment the property was laid as "of A. B. and others," without alleging that they were trustees of the society:—Held, that the indictment might be amended by adding the words "trustees of," &c. *Reg.* v. *Marks*, 10 Cox, C. C. 367.

c. Other Points.

Within Six Calendar Months.]—An indictment, which charges in one count that within six calendar months the prisoner received three sums, laying a day to the receipt of each, and that, "on the several days aforesaid," he embezzled these sums, is bad, because it does not show that the sums were embezzled within six months of each other; and this objection ought to be taken on demurrer. *Reg.* v. *Purchase*, Car. & M. 617.

An indictment which contains three charges of embezzlement should not only aver that the moneys which are the subject of the charges were received within six months, but should also aver that they were embezzled within six months. *Reg.* v. *Noake*, 2 Car. & K. 620.

From whom Money Received.]—In an indictment for embezzling money, it is not necessary to state from whom the money so embezzled was received. *Rex* v. *Beacall*, 1 Car. & P. 313, 454.

Exact Sum not Necessary.]—An indictment for embezzling need not have specified the exact sum embezzled. *Rex* v. *Carson*, R. & R. 303. S. P., *Rex* v. *Grove*, 1 M. C. C. 447.

"Clerk or Servant" or "In the Capacity of Clerk or Servant."]—The secretary of an unenrolled friendly society, who is paid a yearly salary out of its funds, is properly described in the indictment as clerk and servant to the trustees, and it would be incorrect to designate him as employed in the capacity of clerk and servant. The latter description only applies where the prisoner is employed on temporary occasions, and does not usually fill the situation of clerk or servant. *Reg.* v. *Woolley*, 4 Cox, C. C. 255.

Feloniously.]—An indictment is sufficient that states in the conclusion that the prisoner feloniously did steal, &c., though the word feloniously was not inserted in the former part of the indictment before the word embezzled. *Rex* v. *Crighton*, R. & R. 62.

Joinder of Counts.]—A count for embezzling bank-notes upon the statute may be joined with a count for larceny. *Rex* v. *Johnson*, 3 M. & S. 539.

Where, in an indictment for embezzlement, there is a second count charging another act of embezzlement within six months from the first, under 7 & 8 Geo. 4, c. 29, s. 48, but alleging the money to be the property of a different person from that mentioned in the first count, the words connecting the second count with the first may be rejected as surplusage, and the second count

dealt with as an independent count. *Reg.* v. *Woolley*, 4 Cox, C. C. 251.

A prisoner was indicted in the first count for embezzlement, and in the second for larceny, as a bailee. After plea pleaded and the jury was charged, and in the course of the trial, it was objected for the prisoner that the indictment was bad for misjoinder of counts. The court overruled the objection, and directed the prosecutor to elect upon which count he would proceed, and the prosecutor having elected to proceed upon the second count, the prisoner was found guilty thereon:—Held, that the conviction was right. *Reg.* v. *Holman*, L. & C. 177; 8 Jur. (N.S.) 1082; 6 L. T. 474; 10 W. R. 718; 9 Cox, C. C. 201.

Where an indictment for embezzlement could not be supported because the offence was not an embezzlement but a larceny, and the larceny count stated the larceny to have been committed "in manner and form aforesaid":—Held, that the prisoner could not be convicted. *Rex* v. *Murray*, 5 Car. & P. 145; 1 M. C. C. 276.

5. Trial and Evidence.

Venue.]—A clerk, whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex letters, making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex:—Held, that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex. *Reg.* v. *Rogers*, 47 L. J., M. C. 11; 3 Q. B. D. 28; 37 L. T. 473; 26 W. R. 61; 14 Cox, C. C. 22.

It was the duty of a commercial traveller to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. He, on the 1st and 2nd March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him, and taxed him with receiving moneys and not accounting to them for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned to Grantham on either of the days, or at what time of the respective days he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money:—Held, that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham. *Reg.* v. *Treadgold*, 39 L. T. 291; 14 Cox, C. C. 220.

An indictment for embezzlement may be either laid in the county in which the money was received, or in the county where the prisoner disowned having received the money. *Rex* v. *Hobson*, R. & R. 56; 1 East, P. C. Add. xxiv.; 2 Leach, C. C. 975.

If a servant receives money for his master in the county of A., and being called upon to account for it in the county of B., there denies the receipt of it, he may be indicted for the embezzlement in the latter county. *Rex* v. *Taylor*, 3 Bos. & P. 596.

A prisoner, who was employed as a travelling salesman by a tradesman living at Nottingham, received two sums of money for his master in the county of Derbyshire, and, having appropriated them to his own use, neglected to return and account to his master for the money, as it was his duty to do; and having been, about two months after the receipt of the money, met by his master in Nottingham, and on being asked by him respecting the two sums of money, said he was sorry for what he had done—that he had spent the money:—Held, that there was evidence to go to the jury of an embezzlement in Nottingham, and that the prisoner was rightly tried there. *Reg.* v. *Murdock*, 2 Den. C. C. 298; T. & M. 604; 21 L. J., M. C. 22; 16 Jur. 19; 5 Cox, C. C. 360.

Particulars of Charges—Contents.]—If a prisoner does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and if it is refused, the judge will, on motion supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary. Such particular ought at least to state the persons from whom money is alleged to have been received. *Rex* v. *Hodgson*, 3 Car. & P. 422. S. P., *Rex* v. *Bootyman*, 5 Car. & P. 300.

—— **Jurisdiction to Order.**]—The Court of Queen's Bench has no jurisdiction to make an order upon a prosecutor to deliver the particulars. The application should be made to the judge at the assizes. *Reg.* v. *Haslam*, 1 Jur. (N.S.) 1139; 4 W. R. 122.

Evidence—That Prosecutor a Trustee of Bank.]—A clerk to a savings bank was convicted on an indictment charging him with embezzlement, the property being laid in A. In order to prove that A. was a trustee of the bank, he was called, and stated that since the commission of the offence he had been acting as a trustee, but that before that date he had attended only one meeting, having on that occasion been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was done by him at that meeting which he might not have done as a manager:—Held, that this was insufficient evidence of acting to support the inference of the legal appointment of A. as a trustee, and that the conviction was wrong. *Reg.* v. *Essex*, Dears. & B. 369; 27 L. J., M. C. 20; 4 Jur. (N.S.) 15; 6 W. R. 82; 7 Cox, C. C. 384.

—— **That Prisoner a Servant.**]—If a person receives money as steward of another, proof of that circumstance is sufficient evidence of his being a steward, to support an indictment for embezzling such money. *Rex* v. *Beacall*, 1 Car. & P. 312, and *Rex* v. *Wellings*, 1 Car. & P. 454, 457.

A person indicted as servant to guardians of the poor of a parish:—Held, that the admission by him contained in the condition of his bond for the performance of his duties as treasurer,

coupled with an act of parliament specifying those duties, was sufficient evidence of the nature of his appointment, viz. that he was to receive money for the guardians, and account to them for his receipts. *Reg.* v. *Welch*, 1 Den. C. C. 199 ; 2 Car. & K. 296 ; 2 Cox, C. C. 85.

—— **That particular Sum Received.**]—On an indictment for embezzlement it is not necessary to prove that any particular sum or sums were received from any particular person. Where a prisoner had debited himself with an amount, forming the balance of a large number of receipts and payments, the indictment was held sufficient. *Reg.* v. *Lambert*, 2 Cox, C. C. 309. Contrà, *Reg.* v. *Jones*, 8 Car. & P. 288 ; *Reg.* v. *Chapman*, 1 Car. & K. 119 ; 1 Cox, C. C. 48.

—— **Counterfoil of Cheque.**]—The prisoner was the managing director of a company, and had promised to send a cheque for 4,000*l.* to A. on 16th August. The cheque could not be found, but in the counterfoil book was one for 4.000*l.* in favour of A., following a counterfoil dated 16th August :—Held, that this counterfoil was admissible as evidence against the prisoner. *Reg.* v. *Wilkinson*, 10 Cox, C. C. 537.

—— **Admissibility of other Cases to Show Intent.**]—An indictment charged the prisoner with having embezzled three sums of twenty-one pounds, the moneys of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion :—Held, that such evidence was admissible. *Reg.* v. *Richardson*, 2 F. & F. 343 ; 8 Cox, C. C. 448.

An indictment charged a prisoner with having as a booking clerk of certain steamship owners embezzled the moneys of his masters on three separate occasions, the charges being contained in three counts of the same indictment. In support of the first count, it was proved, amongst other things, that the prisoner received money for the carriage of animals by steamer which it was his duty to pay over to his masters' cashier ; in support of the second count, that he was supplied with a number of tickets for issue to passengers by his masters' steamers, which purported to be numbered consecutively, but were not examined before they were delivered to him. The tickets were tied up in bundles, and were in the prisoner's charge, he alone having a key of the case in which they were kept. Certain tickets, bearing numbers corresponding to the numbers of certain of the tickets in one of the bundles delivered to the prisoner, assuming such bundle to have been complete, were put in evidence, which tickets were stamped in a manner similar to other tickets which the prisoner had issued to passengers by one of the steamers, and which were notched as they would have been had they been used by passengers on board such steamer, and evidence was given that the prisoner had not handed over to the cashier any money in respect of such tickets. Evidence was also given in support of the third count, but upon this count the jury found the prisoner not guilty, while they convicted him upon the first and second counts. The jury were directed, as to the first count, that they might take into consideration the evidence given as to the prisoner's conduct in relation to the matters charged in the second and third counts ; and as to the second count, that if they were of opinion, from the whole of the evidence, that the prisoner had issued the tickets for money in the ordinary way, and taken the money he had received for his own use, making false entries in his books to conceal it, they might find him guilty :—Held, that the jury were justified in presuming from the evidence in support of the second count that the prisoner had issued tickets and received money for them, which he had appropriated ; and that they were at liberty, in order to arrive at a conclusion upon any one of the charges, to take into consideration the evidence given in support of the other charges, notwithstanding the fact that upon one of such charges they found a verdict of not guilty. *Reg.* v. *Stephens*, 58 L. T. 776 ; 16 Cox, C. C. 387 ; 52 J. P. 823—C. C. R.

A member of a friendly society was employed to receive weekly payments made by other members, and appropriated certain sums thus paid. Upon the trial, the books of the society were tendered generally in evidence, and received, although it was objected that the evidence ought to be confined to the entries forming the subject of the indictment :—Held, that they were rightly admitted. *Reg.* v. *Proud*, L. & C. 97 ; 31 L. J., M. C. 71 ; 8 Jur. (N.S.) 142 ; 5 L. T. 331 : 10 W. R. 62 ; 9 Cox, C. C. 22.

—— **Whether confined to Days Stated.**]—A. was indicted for embezzlement as being a clerk and a servant of B., C. and D. A first count laid the offence, to wit, on the 18th of August, 1861. A second count laid a second act of embezzlement within six months, to wit, on the 1st of September. A third count laid a third act of embezzlement, also within six months, under the same videlicet. A. was a member of, and secretary to, a properly certified friendly society, of which B., C. and D. were the trustees, and had, from time to time, received, though not in his capacity of secretary, funds belonging to the society, some part of which he had appropriated : —Held, that the evidence of the acts of embezzlement need not to be confined to the days stated under the videlicets. *Ib.*

—— **To Show that Cheque Cashed.**] — An indictment for embezzling money under 24 & 25 Vict. c. 96, s. 68, is not proved by showing merely that the prisoner embezzled a cheque, without evidence that he has converted the cheque into money. *Reg.* v. *Keena*, 37 L. J., M. C. 43 ; L. R. 1 C. C. 113 ; 17 L. T. 515 ; 16 W. R. 375 ; 11 Cox, C. C. 123.

Sufficiency of Evidence.]—A conductor of a tramway car was charged with embezzling 3*s.* It was proved that on a certain journey there were fifteen threepenny fares and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way-bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way-bills for each journey to a

clerk, and to hand him all the money received during each day on the following morning. The prisoner's money should have been 3*l.* 1*s.* 9*d.*, according to his way-bill for the day, but he paid in only 3*l.* 0*s.* 8*d.*:—Held, that there was sufficient evidence of the receipt of 7*s.* 11*d.*, the total amount of fares of the particular journey, and of the embezzlement of 3*s.*, part thereof *Reg* v. *King*, 24 L. T. 670; 12 Cox, C. C. 73.

To support a charge of embezzlement against the secretary of a company, whose duty it was to receive moneys and pay wages, &c., out of the moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money. *Reg.* v. *Wolstenholme*, 11 Cox, C. C. 313. See *Reg.* v. *Lambert*, supra.

Upon the trial of an indictment under 2 & 3 Will. 4, c. 4, s. 1, charging that A., being intrusted by virtue of his employment in the public service with the receipt and custody of certain money, the property of the crown, did fraudulently and feloniously apply the same to his own use, it was proved that A., being a receiver of taxes, had kept in his own hands a balance very much exceeding that which he was allowed to retain; and upon being asked whether he was prepared to pay over that balance or any part of it, he replied that he was not. He was then reminded that there was a balance of excise duties alone of about 300*l.* standing against him from the previous Monday, which was a receipt-day at a particular place in his district. He then produced 25*l.*, and said that was all he had in the world; and that the rest he had spent in an unfortunate speculation:—Held, that there was evidence of the receipt of a particular sum of 300*l.* by virtue of his employment, and of a misapplication by him of a part of it; and that, therefore, the conviction was right, even if evidence of a general deficiency on a balance of accounts would not alone have supported such an indictment. *Reg.* v. *Moah*, Dears. C. C. 626; 25 L. J., M. C. 66; 2 Jur. (N.S.) 213; 4 W. R. 255; 7 Cox, C. C. 60.

Upon an indictment for embezzling 6*s.* it was proved that the prisoner was a drayman in the employment of the prosecutors, who were brewers, and that his duty was to sell porter at a certain fixed price only, viz. 9*s.* 6*d.* per dozen. He sold some at 6*s.*, but did not receive the money for some time. In the interval the customer had informed the prosecutors of the transaction, and they told him to pay the money when the prisoner came for it. The prisoner accordingly received it, and did not account for it:—Held, that the evidence was sufficient to support the indictment. *Reg.* v. *Aston*, 2 Car. & K. 413; 2 Cox, C. C. 234.

It was the duty of a banking clerk to receive money, and to pay it either into a box or a till, of each of which he kept the key, and to make entries of his receipts in a book; the balance of each evening being the first item with which he debited himself in the book the next morning. On the morning of the day in question he had thus debited himself with 1,762*l.*; and on being called on in the evening by his employer to produce his money, he threw himself on his employer's mercy, and said he was about 900*l.* short. Upon an indictment for embezzling:—Held, that this was evidence upon which the jury might convict, although no evidence was given of the persons from whom the money was received, or of the coin of which it consisted. *Rex* v. *Grove*, 7 Car. & P. 635; 1 M. C. C. 447.

It is not enough to prove that a clerk has received a sum of money and not entered it in his book, unless there is also evidence that he has denied the receipt of it, or the like. *Rex* v. *Jones*, 7 Car. & P. 833.

A., a servant of B., was sent to receive rent due to B.; A. received it, and immediately went off with it to Ireland:—Held, that A.'s thus leaving her place and going off to Ireland, was evidence from which the jury might infer that A. intended to embezzle the money. *Rex* v. *Williams*, 7 Car. & P. 338.

—— **Written Agreement—Parol Evidence of.**]—Where there has been a written agreement between master and servant, in which the nature of the service is defined, on an indictment for embezzlement against the latter, parol evidence of the service is not admissible, unless notice has been given to produce the agreement. *Reg.* v. *Clapton*, 3 Cox, C. C. 126.

Verdict of Larceny on Indictment for Embezzlement.]—Upon an indictment under 31 & 32 Vict. c. 116, against a partner or a joint beneficial owner for stealing, charging him with being a partner in one set of counts, and in another with being a beneficial owner of the property stolen:—Held, that if upon the evidence it turned out that he was guilty of embezzlement and not of larceny, he might, upon a proper direction to the jury, be found guilty of embezzlement upon the indictment, by virtue of 24 & 25 Vict. c. 96, s. 72. So also, if the charge in the indictment had been one of embezzlement, and not larceny, he could have been found guilty of larceny if the evidence warranted it. *Reg.* v. *Rudge*, 31 L. T. 590; 13 Cox, C. C. 17.

—— **Cases before Larceny Act.**]—A. was indicted for larceny as a servant. At the trial there was evidence of embezzlement, but none of larceny:—Held, that although by 14 & 15 Vict. c. 100, s. 13, a person indicted for larceny might be convicted of embezzlement, yet he could not be convicted of larceny if there was only evidence of embezzlement. *Reg.* v. *Gorbutt*, Dears. & B. 166; 26 L. J., M. C. 47; 3 Jur. (N.S.) 371; 5 W. R. 294; 7 Cox, C. C. 221.

On a charge for receiving goods knowing them to have been feloniously stolen and carried away, the prisoner may be convicted if the goods have been embezzled, and he received them knowing them to have been embezzled, for by 7 & 8 Geo. 4, c. 29, s. 47, embezzlement is deemed stealing. *Reg.* v. *Frampton*, Dears. & B. 585; 27 L. J., M. C. 229; 4 Jur. (N.S.) 566; 6 W. R. 514; 8 Cox, C. C. 16.

D. FALSE PRETENCES AND CHEATS.

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1. General Principles.

Existing Fact — What is.] — The prisoner obtained money by representing that he was collecting information for a new county directory that W. & Co. were getting up, and that by paying one shilling the prosecutor could have his name inserted in large type, and would receive other advantages. There were several similar charges. W. & Co., an existing firm, were now getting up a new county directory, and the prisoner was not employed by them to canvass or collect information. The prisoner's defence before the magistrate (in evidence at the trial) was, that he was going to bring out a directory, and that he was not aware he was doing wrong in using the name of W. & Co. At the trial the prisoner's counsel urged that there was no misrepresentation of any existing fact, but only a promise to do something in future:—Held, that this was a misrepresentation of an existing fact. *Reg.* v. *Speed*, 46 L. T. 174; 15 Cox, C. C. 24; 46 J. P. 451. See *Reg.* v. *Woolley*, 3 Car. & K. 98; 1 Den. C. C. 559; T. & M. 279; 4 New Sess. Cas. 341; 19 L. J., M. C. 165; 14 Jur. 465; 4 Cox, C. C. 193.

The defendant was convicted of attempting to obtain money upon the false pretence that he had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he then was; and also that he had power to produce and cause to be present, such spirits as aforesaid in a materialised or other form; and also that divers musical instruments, by the sole means of such spirits so caused to be present, produced musical and other sounds:—Held, that the defendant was thereby charged with falsely pretending an existing fact; and that the indictment so alleging the false pretence was good and valid within 24 & 25 Vict. c. 96. *Reg.* v. *Lawrence*, 36 L. T. 404.

Although to constitute the statutable offence of obtaining money by means of false pretences the pretence must be false at the time: Semble, it need not necessarily be of some alleged existing fact, capable of being disproved by positive testimony, but may depend on the bonâ fide intention and willingness of the defendant at the time of entering into a contract to perform it, or to do some act at a future period. *Reg.* v. *Jones*, 6 Cox, C. C. 467.

The prosecutor lent 10*l.* to the prisoner on the false pretence that he was going to pay his rent, and if the prisoner had not told him that he was going to pay his rent, the prosecutor would not have lent the money:—Held, that this was not a false pretence of any existing fact to warrant a conviction. *Reg.* v. *Lee*, L. & C. 309; 8 L. T. 437; 11 W. R. 761; 9 Cox, C. C. 304.

To have constituted an offence within 30 Geo. 2, c. 24, s. 1. money or goods must have been obtained by a false pretence with an intention to defraud; but the pretence might have related to a future transaction. *Rex* v. *Young*, 1 Leach, C. C. 505; 2 East, P. C. 82, 833; 3 Term Rep. 98.

—— Combined with Future Promises.] — Where an indictment charges a false pretence of an existing fact calculated to induce the confidence which led to the prosecutor's parting with his property, though mixed up with false pretences as to the prisoner's future conduct, it is sufficient. *Reg.* v. *Bates*, 3 Cox, C. C. 201.

Where the false pretence is as to the status of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment. *Ib.*

A false pretence as to an existing, essential fact will sustain an indictment for obtaining money by false pretences, although it is united with false promises, which alone would not have supported the conviction. *Reg.* v. *Jennison*, L. & C. 157; 31 L. J., M. C. 146; 8 Jur. (N.S.) 442; 6 L. T. 256; 10 W. R. 488; 9 Cox, C. C. 158.

Money was obtained by the prisoner from an unmarried woman on the false representations that he was a single man, and that he would furnish a house with the money, and would then marry her:—Held, that the false representation of an existing fact (that he was a single man) was sufficient to support a conviction for false pretences, although the money was obtained by that representation, united with the promise to furnish a house and then marry her. *Ib.*

A fraudulent misrepresentation of an existing matter of fact, accompanied by an executory promise to do something at a future period, as that the prisoner had bought certain skins, and would sell them to the prosecutor, is a false pretence within the statute, although it appears that the promise, as well as such misrepresentations of fact, induced the prosecutor to part with the money. *Reg.* v. *West*, Dears. & B. 575; 27 L. J., M. C. 227; 4 Jur. (N.S.) 514; 6 W. R. 506; 8 Cox, C. C. 12.

A. was indicted for obtaining goods by false pretences. He obtained the goods from the prosecutor by pretending that he wanted them for S., whom he represented as living at N., and being a person to whom he would trust 1,000*l.*, and who went out twice a year to New Orleans to take goods to his sons. The jury found that all these representations were false, and that the prosecutor, believing that A. was connected with S., and employed by him to obtain the goods, contracted with A., and not with the supposed S., and delivered the goods to A. for himself, and not for S.:—Held, that A. was rightly convicted. *Reg.* v. *Archer*, Dears. C. C. 449; 3 C. L. R. 623; 1 Jur. (N.S.) 479; 6 Cox, C. C. 515.

An attorney, who had appeared for a person who was fined 2*l.* on a summary conviction, called on a person's wife and told her that he had been with another person, who was fined 2*l.* for a like offence to Mr. B. and Mr. L., and that he had prevailed upon Mr. B. and Mr. L. to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.* he would go and do the same for her. She gave the attorney a sovereign, and afterwards paid him for his trouble. It was proved that

the attorney never applied to either Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full:—Held, that he was guilty of obtaining money by false pretences. *Rex* v. *Asterley*, 7 Car. & P. 191.

A defendant was tried upon an indictment for obtaining money by false pretences, in which it was alleged that she had represented that she kept a shop, and that the prosecutrix might go and live with her till she got a situation. It was proved that the defendant did not keep a shop, and the prosecutrix stated that she lent the defendant the money because the latter had said that she kept the shop, and that she, the prosecutrix, should have the money when she got home with her. The jury returned a special verdict, finding the defendant guilty of fraudulently obtaining the money, the prosecutrix parting with it under the belief that the defendant kept a shop, and that the prosecutrix should have it when she went home with her:—Held, that the defendant was properly convicted of obtaining money by false pretences. *Reg.* v. *Fry*, Dears. & B. 449; 27 L. J., M. C. 68; 4 Jur. (N.S.) 266; 6 W. R. 245; 7 Cox, C. C. 394.

Express Words not Necessary.]—It is not necessary that the false pretences should be made in express words, if it can be inferred from all the circumstances attending the obtaining of the property. *Reg.* v. *Giles*, L. & C. 502; 34 L. J., M. C. 50; 11 Jur. (N.S.) 119; 11 L. T. 643; 13 W. R. 327; 10 Cox, C. C. 44.

Hewers and putters in a colliery had tokens differently marked, which they placed on the tubs of coal drawn up the pit, and which were then taken off and put into a box, and their wages calculated according to the number of tokens sent up by them. The putter fetched the empty tub to the hewer, and took it when full to the station to be drawn up to the bank; before the tub was filled he placed his token on it, to denote the sum he was entitled to for his labour in putting and removing the tub to the station, and the hewer put his token also to denote the amount he was entitled to for hewing the coal and filling the tub. A hewer removed the putter's token after the tub was brought to him and substituted one of his own, and then put an additional token of his own for hewing and filling the tub. The tub was then drawn up, and the two tokens thrown into the box. The contents of the box were then taken away by the tokenman, and the accounts of the different workmen made up according to the number of tokens found with their initials on. In that way the hewer obtained money for hewing and filling two tubs of coal instead of one only:—Held, that this amounted to an indictable false pretence. *Reg.* v. *Hunter*, 17 L. T. 321; 16 W. R. 342; 10 Cox, C. C. 642—C. C. R.

A., employed in a tannery, clandestinely removed certain skins of leather from the warehouse to another part of the tannery, for the purpose of delivering them to the foreman and getting paid for them as if they had been his own work:—Held, that this did not amount to larceny, but to an attempt to commit the misdemeanour of obtaining money by false pretences. *Reg.* v. *Holloway*, 1 Den. C. C. 370; T. & M. 40; 3 New Sess. Cas. 410; 2 Car. & K. 942; 18 L. J., M. C. 60; 13 Jur. 86; 3 Cox, C. C. 241.

If a person at Oxford, who is not a member of the university, goes to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtains goods; this appearing in a cap and gown is a sufficient false pretence to satisfy the statute, although nothing passes in words. *Rex* v. *Barnard*, 7 Car. & P. 784.

The prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service he knowingly and fraudulently delivered up, as part of his uniform, to an officer of the company, a great coat belonging to a fellow servant, and so obtained the wages due to him:—Held, that he was properly convicted of obtaining the money by false pretences. *Reg.* v. *Bull*, 36 L. T. 376: 13 Cox, C. C. 608.

It was a false pretence within 30 Geo 2, c. 24, s. 1, where the prisoner obtained money from the keeper of a post-office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did not make any false declaration or assertion in order to obtain the money. *Rex* v. *Story*, R. & R. 81.

Where a prisoner, who had previously pledged ingots of silver with the prosecutor, brought bars of worthless metal, similar in appearance, saying "eight ounces each, at four shillings an ounce, the same as before," and the prosecutor, without testing them, advanced money upon them:—Held, a sufficient false pretence. *Reg.* v. *Stevens*, 1 Cox, C. C. 83.

When Prosecutor knows Pretences are False—Attempt to Obtain.]—The prisoner wrote a begging letter to the prosecutor, in which, by certain false statements, he attempted to obtain money. The prosecutor sent the prisoner five shillings, but stated at the trial that he knew the pretences were false:—Held, that he might be convicted of an attempt to obtain money by false pretences. *Reg.* v. *Hensler*, 22 L. T. 691; 19 W. R. 108; 11 Cox, C. C. 570. See also *Reg.* v. *Keighley*, Dears. & B. 145; 7 Cox, C. C. 217.

An indictment for obtaining money by false pretences cannot be sustained, if the prosecutor when he parted with his money knew the representation to be false. *Reg.* v. *Mills*, Dears. & B. 205; 26 L. J., M. C. 79; 3 Jur. (N.S.) 447; 5 W. R. 528; 7 Cox, C. C. 263.

The defendant represented to the prosecutor that he had done a certain quantity of work, and claimed a certain sum as due to him in respect of such work. The prosecutor paid him the amount claimed, although he knew that the representation was untrue:—Held, that this was not an obtaining money by means of false pretences. *Ib.*

When Prosecutor might have known Pretence was False.]—A false pretence must be the false pretence of an existing fact, and if the person to whom it is made is defrauded by it, it makes no difference that he might have known that the pretence was false, or that it is not such a pretence as would be likely to defraud a person of ordinary caution. *Reg.* v. *Woolley*, 3 Car. & K. 98; 1 Den. C. C. 559; T. & M. 279; 4 New Sess. Cas. 341; 19 L. J., M. C. 165; 14 Jur. 465; 4 Cox, C. C. 193.

Therefore, where A., the secretary of a lodge of oddfellows, told B., a member of the lodge, that he owed the society 13*s.* 9*d.*, when in fact

B. only owed 2*s.* 3*d.*; and A., by this false pretence, obtained the money of B.:—Held, that this was an obtaining of money by false pretences. *Ib.*

If the prosecutor, a brickmaker, has after inspection been induced to take a field by false representations by the defendant as to specific matters of fact relating to the quality and character of the soil—e.g. that the defendant had himself made good bricks therefrom—this is sufficient to sustain an indictment for false pretences. *Reg.* v. *English*, 12 Cox, C. C. 171.

When too Remote.]—The prisoner was charged with obtaining a prize in a certain swimming race by false pretences. He obtained his competitor's ticket for the race by representing himself to be member of a certain club, and by a letter purporting to be written by the secretary of that club. On the faith of these representations, which turned out to be false, he was allowed twenty seconds' start in the race, and won the prize:—Held, that the false pretences were too remote, and that the count charging them could not be sustained. *Reg.* v. *Larner*, 14 Cox, C. C. 497.

An indictment alleged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that he saw the prosecutor and gave him his card, "J. Willot & Co., timber and coal merchants," and said that he was largely in the timber and coal way, and inspected some coal bags, but objected to the price. The next day he called again, showed the prosecutor some correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. The prosecutor had only forty bags ready, and it was arranged that the defendant was to have them, and pay for them in a week. They were delivered to the defendant, and the prosecutor said he let the defendant have the bags in consequence of his having the trucks of coal under demurrage at the station. There was evidence as to his having taken premises, and doing a small business in coal, but he had no trucks of coal on demurrage at the station. The jury convicted the defendant:—Held, that the false pretence charge was not too remote to support the indictment, and that the evidence was sufficient to sustain it. *Reg.* v. *Wilmot*, 24 L. T. 758; 12 Cox, C. C. 68—C. C. R.

When a contract has been entered into by reason of false representations, and goods or money obtained under the contract, it is too remote to charge the obtaining of the goods or money by the false pretences. *Reg.* v. *Bryan*, 2 F. & F. 567.

A., by means of false pretences, engaged with the prosecutrix for lodging at 10*s.* a week. He accordingly became a lodger in her house, and a few days afterwards expressed a wish to become a boarder. He was then supplied with board as well as lodging at 1*l.* 1*s.* per week. He was afterwards indicted for obtaining goods (the board) by means of false pretences, and convicted:—Held, that the conviction could not be supported, as the goods were supplied too remotely from the false pretence. *Reg.* v. *Gardner*, Dears. & B. 40; 25 L. J., M. C. 100; 2 Jur. (N.S.) 598; 4 W. R. 526; 7 Cox, C. C. 136.

Obtaining Gift of Money.]—Obtaining a gift of money by means of false statements is obtaining money by false pretences. *Reg.* v. *Jones*, T. & M. 270; 4 New Sess. Cas. 353; 1 Den. C. C. 551; 3 Car. & K. 346; 19 L. J., M. C. 162; 14 Jur. 533; 4 Cox, C. C. 198.

A begging letter, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence. *Ib.*

Intention to Pay for Goods when Able.]—The crime of obtaining goods by false pretences is complete, although at the time when the prisoner made the pretence, and obtained the goods, he intended to pay for them when it should be in his power to do so. *Reg.* v. *Naylor*, 35 L. J., M. C. 61; L. R. 1 C. C. 4; 11 Jur. (N.S.) 910; 13 L. T. 381; 14 W. R. 58; 10 Cox, C. C. 149.

Question on whose behalf Goods Ordered.]—Where a prisoner, being employed at a hospital, wrote to the prosecutor, as manager, for a small quantity of linen, not saying it was for the hospital, and in point of fact he was not manager, and the goods were really ordered for himself, but not sent, on an indictment for an attempt to obtain them, the question left to the jury was, whether he ordered the goods as for and on behalf of the hospital or in his own name, there being no evidence of an intention to pay cash, but evidence of its absence. *Reg.* v. *Franklin*, 4 F. & F. 94.

Prosecutor Laying Trap for Prisoner.]—If a party obtains money by a false pretence, knowing it to be false at the time, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offence. *Rex* v. *Ady*, 7 Car. & P. 140.

Intention to Permanently Deprive Owner of Chattel.]—To constitute an obtaining by false pretences, it is essential that there should be an intention to deprive the owner wholly of the property in the chattel, and, consequently, the obtaining by false pretences the use of a chattel for a limited time only, without an intention to deprive the owner wholly of the chattel, is not an obtaining by false pretences within 24 & 25 Vict. c. 96, s. 88. *Reg.* v. *Kilham*, 39 L. J., M. C. 109; L. R. 1 C. C. 261; 22 L. T. 625; 18 W. R. 957; 11 Cox, C. C. 561.

With what Object.]—To constitute the offence of obtaining any chattel, money, or valuable security by false pretences, the obtaining must be in accordance with the wish, or for the advantage, or for the purpose of effecting some object of the party making the false pretence. *Reg.* v. *Garrett*, Dears. C. C. 232; 2 C. L. R. 106; 23 L. J., M. C. 20; 17 Jur. 1060; 2 W. R. 97; 6 Cox, C. C. 260.

Property Obtained before False Pretence.]—A carrier, having ordered a cask of ale, said, after he had possession of it, "This is for W.":—Held, that an indictment for obtaining it by falsely pretending that he was sent for it by W. could not be sustained. *Reg.* v. *Brooks*, 1 F. & F. 502.

Property parted with by reason of Inducement Charged.]—A prisoner was charged with obtain-

ing a filly by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had bought twenty horses in Brecon fair. It appeared that he bought the filly of the prosecutor for 11*l.*, making him this statement, which was false, and also telling him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant:—Held, that if the prosecutor did not part with his filly by reason of the false pretence charged, or any part of it, the prisoner must be acquitted. *Rex* v. *Dale*, 7 Car. & P. 352

Pretences made by Others besides Accused.]—If it appears that money has been obtained partly by false pretences actually made by the accused, and partly by those made by another person with whom the accused is proved to have been connected for the purpose of conspiring to obtain the money, a conviction will be upheld. *Reg.* v. *Kerrigan*, L. & C. 383; 33 L. J., M. C. 71; 9 L. T. 843; 12 W. R. 416; 9 Cox, C. C. 441.

Pretences to whom made.]—The pretence need not be made to the person from whom the money is obtained, the mode in which the pretence to A. affects an obtaining of money from B. being a matter of evidence. *Reg.* v. *Brown*, 2 Cox, C. C. 348.

Prosecutor partly influenced by Pretences.]—Where a prosecutor is influenced partly and materially but not entirely by the false pretences, that is sufficient to sustain a charge of obtaining money, &c., thereby. *Reg.* v. *English*, 12 Cox, C. C. 171.

Pretence whether continuing.]—It is not necessary that the chattel should be in existence when the false pretence is made, but the obtaining is within the statute if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; the question whether the pretence is or is not such a continuing one, is one of fact for the jury. *Reg.* v. *Martin*, 36 L. J., M. C. 20; L. R. 1 C. C. 56; 15 L. T. 54; 15 W. R. 358; 10 Cox, C. C. 383.

Pretence by Advertisement — Question for Jury.]—The following advertisement was inserted by the prisoner in a newspaper, viz.: "Barnardo.—2*l.*, 1*l.*, 10*s.*, for most words from Barnardo. No single letters to be used. All others in heavy black type from Nuttall's 1886 Dict. Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists, with 1*s.* 3*d.*, to Rev. A. Brient, Holt, Trowbridge, Wilts, by March 5. Result, 8th." No such person as the Rev. A. Brient existed at the address given, and sums of money which certain persons were induced to send in the belief that a bonâ fide competition was indicated by the advertisement, were received and appropriated by the prisoner:—Held, that the advertisement was capable of the construction put upon it in the indictment; that it was intended to convey the impression that there was a person named A. Brient, living at Holt, Trowbridge, in the county of Wilts, who was a minister of religion, and that he had instituted a bonâ fide competition, and had made arrangements to present prizes to the successful competitors, and to give the proceeds derived from the entrance fees of competitors, after deducting the prizes, to a charitable institution; and that it was a question for the jury whether the persons who had sent the moneys, with the obtaining which the prisoner was charged, had sent them acting under that impression. *Reg.* v. *Randell*, 57 L. T. 718; 16 Cox, C. C. 335; 52 J. P. 359—C. C. R.

Sufficiency and Character of False Pretence.]—An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that he was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills; and that three days afterwards he came to T. and induced the prosecutor to part with goods on the representation that he had just come from abroad, and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T. and was going to furnish it:—Held, that the false pretences charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction. *Reg.* v. *Howarth*, 23 L. T. 503; 11 Cox, C. C. 588.

A money-lender having a claim for a small sum against a borrower for money lent and high interest, caused an attorney to issue process for a sum double the amount, making up the difference by items charged on various pretences, and after receiving payment from a third party of the sum lent, so that only a sum of 5*l.* remained due for interest, still prosecuted the suit for the whole amount indorsed on the process, and then tried to get from the debtor a charge on property of far greater value, and represented to the third party that the whole sum claimed was really due. The money-lender and the attorney being indicted for attempting to obtain money from the third party by means of false pretences, it was held, that there was a case for the jury; and that if the jury believed the two combined together to enforce by legal process payment of sums they knew not to be due, and falsely represented them to be due, in order to obtain payment, they were liable to be convicted, as they accordingly were. *Reg.* v. *Taylor* (No. 1), 15 Cox, C. C. 265.

On a motion for a new trial on behalf of two defendants, an attorney and his client, indicted for atempting to obtain money by false pretences, there being evidence that they combined together to enforce, by means of the abuse of legal process, payment of sums they must have known not to be due, and also made false representations with that object:—Held, that there was evidence for the jury on the charge, that a direction to the jury that if they were satisfied of these facts they ought to convict was correct, and that the conviction, therefore, was right, *Reg.* v. *Taylor* (No. 2), 15 Cox, C. C. 268.

The prosecutor lent money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of the prisoner and another person, and a declaration made by the prisoner that the furniture was unencumbered. The declaration was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the

furniture to another person, but not to its full value:—Held, that the e was evidence in support of a charge of obtaining money by false pretences. *Reg.* v. *Meakin*, 11 Cox, C. C. 270; 20 L. T. 544; 17 W. R 683.

A., by falsely representing that a house and some shops had been built upon certain land, obtained from the prosecutor an advance of money. A. deposited the lease of the land, signed an agreement to execute a mortgage and executed a bond as security for the money:—Held, that he was rightly convicted of obtaining money by false pretences. *Reg.* v. *Burgon*, Dears. & B. 11, 25 L J., M. C 105, 2 Jur. (N.S) 596; 4 W. R. 525; 7 Cox, C C 131.

A. owed B. a debt, of which B. could not get payment. C., a servant of B., went to A.'s wife and obtained two sacks of malt from her, saying that B. had bought them of A. C knew this to be false, but took the malt to B, his master, to enable him to pay himself the debt:—Held, that if C. did not intend to defraud A., but merely to put it into his master's power to compel A. to pay him a just debt, C ought not to be convicted of obtaining the malt by false pretences. *Rex* v. *Williams*, 7 Car & P. 354.

B. was indicted for having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, and thereby obtaining 5*s.* with intent to defraud G P. B. made the pretence, and thereby induced the prosecutor to buy, at the expense of 5*s.*, a bottle containing something which he said would cure the eye of the prosecutor's child. It was proved that B. was not Mr. H.:—Held, that this was a false pretence. *Reg.* v. *Bloomfield*, Car. & M. 537; 6 Jur. 224.

A person who makes a false pretence of having a power to do something, whether the power is physical, moral, or supernatural, for the purpose of obtaining money or goods, is indictable for false pretences. *Reg.* v *Giles*, L. & C. 502; 34 L. J., M. C. 50; 11 Jur. (N.S.) 119; 11 L. T. 643; 13 W. R. 327; 10 Cox, C. C. 44.

A pretence that a person would do an act that he did not mean to do (as a pretence to pay for goods on delivery), was not a false pretence within 30 Geo. 2, c. 24, s. 1. *Rex* v. *Goodhall*, R. & R. 461.

But pretending to have been intrusted by one to take his horses from Ireland to London, and to have been detained by contrary winds till all his money was expended, was within 30 Geo. 2, c. 24, s 1. *Rex* v. *Villeneuve*, 2 East, P. C. 830.

A pretence to a parish officer, as an excuse for not working, that the party has not clothes, when he really has, although it induces the officer to give him clothes, was not obtaining goods by false pretences within 30 Geo. 2, c. 24, s. 1. *Rex* v. *Wakeling*, R. & R. 504.

The offence of obtaining money under false pretences, created by 30 Geo. 2, c. 24, s. 1, was complete only where the money was obtained. *Rex* v. *Buttery*, cited 5 D. & R. 616; 3 B. & C. 700.

It is a false pretence if a carrier obtains the carriage-money by pretending to have delivered the goods and lost the bailee's receipt for them. *Rex* v. *Airey*, 2 East, P. C. 831; 2 East, 30. S. P., *Rex* v. *Coleman*, 2 East, P. C. 672.

2. In respect of what Chattels or Securities.

Dogs.]—Dogs, not being the subject of larceny at common law, were not chattels within 7 & 8 Geo. 4, c. 29, s. 53. *Reg.* v. *Robinson*, Bell, C. C. 34; 28 L. J., M. C. 58; 5 Jur. (N.S) 203; 7 W. R. 203; 8 Cox, C. C. 115.

Valuable Security.]—G., secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer in the following form: "Bolton United Burial Society, No. 23 Bolton, September 1st, 1853. Mr. A. Entwistle, treasurer; please to pay the bearer 2*l.* 10*s.*, Greenhalgh, and charge the same to the society. Robert Lord Benjamin Beswick, president":—Held, that this was a valuable security under 7 & 8 Geo. 4. c. 29, s. 53, as explained by s. 5. *Reg.* v. *Greenhalgh*, 1 Dears. C. C. 267; 2 W. R. 171; 6 Cox, C. C. 257.

Bank Notes.]—Bank notes were not money, goods, wares or merchandises, within 30 Geo. 2, c. 24, s. 1. *Rex* v. *Hill*, R. & R. 190. *But 7 & 8 Geo. 4, c. 29, s. 53, extended 30 Geo. 2, c. 24, to persons obtaining, by false pretences, any valuable security.*

Ticket.]—B. was indicted for obtaining by false pretences from a railway company a printed ticket, with intent to defraud the company of the same; the ticket enabled the prisoner to travel free from B. to H., and was to be given back to the company at H.:—Held, that the ticket was a chattel within 7 & 8 Geo. 4, c. 29, s. 53, and that the attempt to defraud the company of the same was not affected by the fact of the ticket having to be returned at the end of the journey. *Reg.* v. *Boulton*, T. & M. 201; 3 New Sess Cas. 705; 1 Den. C. C. 508; 2 Car & K. 917; 19 L. J., M. C. 67; 13 Jur. 1034; 3 Cox, C. C. 576.

Chattel not in Existence at time of Pretence made.]—A conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time of the pretence being made, provided the subsequent delivery of the chattel is directly connected with the false pretence. *Reg.* v. *Martin*, 36 L. J., M. C. 20; L. R. 1 C. C. 56; 15 L. T. 54; 15 W. R. 358; 10 Cox, C. C. 383.

Meal Consumed at Restaurant without Means to Pay for it.]—A person who orders and consumes a meal at a restaurant without being possessed of the means to pay for it does not obtain goods by false pretences under s. 88 of the Larceny Act, 1861, but does incur a debt or liability by fraudulently obtaining credit so as to constitute an offence within the meaning of s. 13 of the Debtors Act, 1869. *Reg.* v. *Jones*, 67 L. J., Q. B. 41; [1898] 1 Q. B. 119; 77 L. T. 503—C. C. R.

3. As to Quantity or Weight of Articles of Merchandise.

What is.]—The defendant had contracted with the guardians of a poor law union to deliver loaves of a specified weight to any poor persons bringing a ticket from the relieving officer. The tickets were to be returned by the defendant at the end of each week, with a statement of the number of tickets sent back, whereupon he would be credited for the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the speci-

fied weight, returned the tickets with a note of the number sent, and obtained credit in account for the loaves so delivered, but before the time for payment had arrived the fraud was discovered:—Held, that the delivery of a less quantity of bread than that contracted for was a mere private fraud, no false weights or tokens having been used, and therefore not an indictable offence: that the defendant was properly convicted of attempting to obtain money, for although he had only obtained credit in account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt: and that this was a case within 7 & 8 Geo. 4, c. 29, s. 53, because it was an attempt to obtain money by a false and fraudulent representation of an antecedent fact; it was not a mere sale of goods by a false pretence of their weight. *Reg.* v. *Eagleton*, Dears. C. C. 515; 3 C. L. R. 1145; 24 L. J., M. C 158; 1 Jur. (N.S.) 940; 4 W. R. 17; 6 Cox, C. C. 559.

The defendant agreed with the prosecutrix to sell and deliver to her a load of coals, at a certain price per cwt. He accordingly delivered a quantity of coals, to his knowledge weighing 14 cwt. He, however, falsely and fraudulently represented that the quantity he had delivered weighed 18 cwt., and thereby obtained the price of 18 cwt.:—Held, that he was properly convicted of the offence of obtaining money by false pretences. *Reg.* v. *Sherwood*, Dears. & B. 251; 26 L. J., M. C. 81; 3 Jur. (N.S.) 547; 5 W. R. 577; 7 Cox, C. C. 270.

A prisoner was convicted on an indictment for obtaining money by false pretences. The prosecutors bought of the prisoner and paid him for a quantity of coal, upon a false representation by him that there were 14 cwt., whereas, in fact, there were only 8 cwt., but so packed in the cart in which they were as to have the appearance of a larger quantity:—Held, that the false representation as to the quantity of coal was an indictable false pretence, and that the conviction was right. *Reg.* v. *Rugg*, Bell, C. C. 215; 29 L. J., M. C. 86; 6 Jur. (N.S.) 178; 1 L. T. 337; 8 W. R. 193; 8 Cox, C. C. 262.

If a man is selling an article by weight, and falsely represents the weight to be greater than it is, and thereby obtains payment for a quantity greater than that delivered, he is indictable for obtaining money by false pretences. Secus, if he is selling the article for a lump sum, and merely makes the false representation as to weight in order to induce the purchaser to conclude the bargain. *Reg.* v. *Ridgway*, 3 F. & F. 838.

A false affirmation of the weight of an article sold by weight, with intent to defraud, is indictable as a false pretence. *Reg.* v. *Lee*, L. & C. 418; 33 L. J., M. C. 129; 10 L. T. 348; 12 W. R. 750; 9 Cox, C. C. 460.

Upon indictment for obtaining money by falsely pretending that certain loads of soot weighed certain tons, whereas they did not, the evidence was that the prisoners weighed at a public weighing machine some cartloads of what apparently was soot, but amongst which were bags of old bricks, and having obtained tickets of the weights, subsequently removed the bags containing bricks, and on selling the soot to the prosecutor represented to him that the weight ascribed in the tickets was the weight of what they sold:—Held, that this false representation of the weight was within the statute. *Ib.*

An indictment charged, that H. R. having in his possession a certain weight of 28 lbs., did falsely pretend to C. that a quantity of coals which he delivered to C. weighed 16 cwt. (meaning 1,792 lbs. weight), and were worth 1*l.*, and that the weight was 56 lbs.; by means of which he obtained a sovereign from C., with intent to defraud him of part thereof, to wit, 10*s.*; whereas the coals did not weigh 1,792 lbs., and were not worth 1*l.*; and whereas the weight was not 56 lbs.; and whereas the coals were of the weight of 896 lbs. only, and were not worth more than 10*s.*; and whereas the weight was of 28 lbs. only. It was objected that all the pretences, except that respecting the weight, were false affirmations, and that, as to the weight, there was no allegation to connect the sale of the coals with the use of the weight. The defendant was convicted, and the conviction was held to be wrong. *R. v. Reed*, 7 Car. & P. 848.

4. As to Quality or Value of Articles of Merchandise.

Specific Fact stated which is Untrue.]—The prisoner induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15-carat gold, when, in fact, it was only of a quality a trifle better than 6-carat, knowing at the time that he was falsely representing the quality of the chain as 15-carat gold:—Held, that the statement that the chain was 15-carat gold, not being mere exaggerated praise, or relating to a mere matter of opinion, but a statement as to a specific fact within his knowledge, was a sufficient false pretence to sustain an indictment for obtaining money under false pretences. *Reg.* v. *Ardley*, 40 L. J., M. C. 85; L. R. 1 C. C. 301; 24 L. T. 193; 19 W. R. 478; 12 Cox, C. C. 23.

On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer from Leicester, and induced her to buy certain packages which he stated contained good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted:—Held, that the conviction was right. *Reg.* v. *Foster*, 46 L. J., M. C. 128; 2 Q. B. D. 301; 36 L. T. 34; 13 Cox, C. C. 393.

A false representation that a stamp on a watch was the hall mark of the Goldsmiths' Company, and that the number 18, part thereof, indicated that the watch was made of 18-carat gold, is an indictable offence, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition. *Reg.* v. *Suter*, 17 L. T. 177; 16 W. R. 141; 10 Cox, C. C. 577.

A man went into a pawnbroker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying, "I want 5*s.* on them;" the pawnbroker's assistant asked the man if they were silver, and he said they were. The assistant tested them, and found they were not silver, and

in consequence did not give the man any money, but sent for a policeman, and gave him into his custody —Held, that the conduct of the man who presented the thimbles amounted to an attempt to commit the statutable misdemeanour of obtaining money under false pretences, and by consequence that if the money had been obtained that statutable offence would have been complete *Reg* v *Ball* Car & M 249

A falsely pretended to a pawnbroker that a chain was silver The pawnbroker lent A 10*s* on the chain, without placing any reliance upon the statement of A, but relying on his own examination and test The chain was made of a composition worth about one farthing an ounce — Held, that he was properly convicted of attempting to obtain money by false pretences, the statement being a false pretence within the statute *Reg* v *Roebuck* Dears & B 24 25 L J, M C 101, 2 Jur (N S) 597 4 W R 514, 7 Cox, C C 126

A wilful misrepresentation of a definite fact with intent to defraud, cognisable by the senses —where the seller by manœuvring contrives to pass off tasters of cheese as if extracted from the cheese offered for sale, whereas it is not—is a false pretence *Reg* v *Goss* Bell C C 208 29 L J, M C 86, 6 Jur (N S) 178, 1 L T 337 8 W R 193 8 Cox, C C 262

Knowingly exposing to sale and selling wrought gold under the sterling alloy, as and for gold of the true standard weight, which is indictable in a goldsmith, is a private imposition only in a common person *Rex* v *Bower*, Cowp 323

B was in the habit of selling baking powders wrapped in printed wrappers, entitled "B s Baking Powders' and having his printed signature at the end The prisoner got printed a quantity of wrappers in imitation of those of B, only leaving out B's signature, and sold spurious powders wrapped up in these labels as B's powders —Held, that the prisoner was not guilty of forging the wrappers, or uttering forged wrappers, though he might be indictable for the fraud, on a charge of obtaining money by false pretences *Reg* v *Smith*, Dears & B 566, 27 L J, M C 225 4 Jur (N S) 1003, 6 W R 495, 8 Cox, C C 32

An indictment charged that the defendant knowingly and falsely pretended that a horse was sound and that he himself was a farmer at O, negativing both pretences in the usual way The defendant was convicted, but a case reserved in which, after stating that the various allegations in the indictment were proved, and that the defence was that this was a case of giving a false warranty, and therefore not indictable, the question was put, whether the conviction could be sustained The court having directed an amendment, the facts proved were set out more specifically, but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated from which that inference might be drawn nor was it stated what direction had been given to the jury —Held, that, as the case was framed, the conviction must be quashed as the court, not knowing what direction had been given, could not answer the question put in the affirmative, and as it was consistent with the case that the jury might have been told that even if the defendant did not know that the horse was unsound, he might be convicted upon the other false pretence alone *Reg* v *Keighley*, Dears. & B. 145, 7 Cox, C. C. 217.

An indictment for false pretences will be sustained by evidence that the prisoner had sold to the prosecutor blacking which he had asserted to be "Everett's Premier and which bore a label nearly but not precisely imitating Everett s labels, the said blacking not being Everett s Premier, but a spurious manufacture of his own *Reg* v *Dundas*, 6 Cox, C C 380

Exaggerated Praise not Sufficient to Constitute]—A simple misrepresentation of the quality of goods is not a false pretence provided the goods are in specie that which they are represented to be *Reg* v *Bryan*, Dears & B 265, 26 L J, M C 84 3 Jur (N S) 620, 5 W R 598, 7 Cox, C C 312

For the purpose of procuring advances of money by way of pledge a party produced spoons to the prosecutors who were pawnbrokers, and falsely and fraudulently stated that "they were of the best quality that they were equal to Elkington s A that the foundation was of the best material, and that they had as much silver on them as Elkington s A —Held, that the representations being merely as to the quality of the articles were not false pretences within the statute, as the articles delivered to the pawnbrokers were the same in specie as he had professed them to be, though of interior quality to what he had stated *Ib*

On the trial of an indictment for false pretences, it was proved that the prisoner offered a chain in pledge to a pawnbroker and required money to be advanced upon it representing that it was gold On being tested it turned out to be a compound of brass, silver and gold but the gold was very minute in quantity —Held, not a false pretence *Reg* v *Lee* 8 Cox, C C 233

L & W induced the prosecutor to buy certain plated goods at an auction, at which L was acting as auctioneer, for 7*l*, on the representation that they were the best silver plate, lined with gold, and worth 20*l* the foundation of the goods was Britannia metal, instead of nickel, as in the best goods, covered with a transparent film of silver, and they were worth only about 30*s* —Held that there was no false pretence, and that an agreement between two persons to dispose of these goods in the way they were disposed of was not a conspiracy *Reg* v *Levine*, 10 Cox, C C 371

5 By Promises of Marriage

When it Lies]—An indictment will lie for fraudulently obtaining goods under a pretence of a treaty of marriage *Anon*, Lofft 146

An indictment for obtaining money from H under the false pretence that the prisoner intended to marry H, and wanted the money to pay for a wedding suit he had purchased is not sufficient to sustain a conviction *Reg* v *Johnston*, 2 M. C C 254.

A, obtaining money from the prosecutrix by falsely pretending that he was unmarried, that he would furnish a house with the money, and would then marry her, is properly convicted of obtaining money under false pretences *Reg* v *Jennison*, L & C 157, 31 L. J, M C 146, 8 Jur (N S) 442, 6 L T 256, 10 W R 488, 9 Cox, C C 158

Evidence]—The prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she afterwards refused to ratify. He then threatened her with

an action, and by this means obtained money from him During the whole of the transactions the prisoner had a wife On an indictment against him for obtaining money under false pretences the pretences laid were first that he was unmarried, and secondly, that he was entitled to bring and maintain his action against her for a breach of promise of marriage —Held per Lord Denman, C J, and Maule J that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence that he was a single man and in a condition to marry and per Maule, J that there was sufficient evidence on which to find the falseness of the other pretence that he was entitled to maintain his action for breach of promise of marriage and that such latter false pretence was a sufficient false pretence within the statute *Reg* v *Copeland*, Car & M 516

6 Representations as to Business

Question for Jury as to Prisoner's Meaning]—C was convicted of obtaining potatoes by falsely pretending that he was then in a large way of business that he was in a position to do a good trade in potatoes and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him The evidence that C had so pretended was the following letter written by him to the prosecutor — Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter let them be good quality then I am sure a good trade will be done for both of us I will remit you cash on arrival of goods and invoice Yours &c—P S —I may say if you use me well I shall be a good customer An answer will oblige saying when they are put on —Held that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged and that it was a question for the jury whether the writer intended the prosecutor to put that construction upon them *Reg* v *Cooper* 46 L J M C 219, 2 Q B D 510, 36 L T 671, 25 W R 696, 15 Cox, C C 617

Deposit by Prosecutor as Security]—On an indictment for obtaining money by false pretences it appeared that the prisoner on engaging an assistant from whom he received a deposit represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt —Held, that the indictment could not be sustained upon either of the representations *Reg* v *Williamson*, 21 L T 444, 11 Cox, C C 328

A prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and a house agent and that he wanted a clerk and that the money was to be deposited as security for the prosecutor's honesty as such clerk The jury found that the prisoner was not carrying on any such business at all —Held that this was an indictable false pretence *Reg* v *Crab*, 18 L T 370, 16 W R 732, 11 Cox, C C 85

Prisoner's Knowledge of Conduct of Business]—On an indictment for obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public-house and that the prisoner conveyed to the minds of the market people that she had engaged such a room and that they parted with their goods on such belief —Held, there being no evidence that the prisoner knew of such a practice and the case being consistent with a promise only on her part to engage such a room and pay for the goods there a conviction could not be sustained *Reg* v *Burrow*, 20 L T 499, 17 W R 682, 11 Cox C C 258

7 Arising out of Contracts

Effect of False Pretence on]—A false pretence knowingly made to obtain money is indictable, though the money is obtained by means of a contract which the prosecutor was induced to make by the false pretence of the prisoner *Reg* v *Abbott* 1 Den C C 273 2 Car & K 630, 2 Cox C C 430 5 P *Reg* v *Burk* 1 Den C C 276, *Reg* v *Kenrick* D & M 208 5 Q B 49, 12 L J, M C 135

Delivering less than Contracted for]—Delivering less beer in a cask than contracted for as the due quantity is not an indictable offence *Rex* v *Wheatley* 1 W Bl 273 2 Burr 1129

Nor is delivering less oats than the quantity contracted for as the due quantity *Rex* v *Dunnage*, 2 Burr 1130

Previous Sale of Goods Contracted to be Sold]—If one professes to sell an interest in property, and receives the purchase money the vendee taking the usual covenant for title, and it turns out that the vendor has in fact previously sold his interest in the property to a third person, this is not sufficient to support an indictment for obtaining money by false pretences *Rex* v *Codrington*, 1 Car & P 661

Effect of Ratification of]—The prisoner pretended to sell goods to A which he pretended to have bought for him from B, the goods having been sent by B to A, the prisoner got the money from A —Held not indictable for obtaining goods from B by false pretences *Reg* v *Martin* 1 F & F 501

The prisoner by false and fraudulent representations made to the prosecutor, as to his business customers and profits, induced the prosecutor to enter into a partnership with him, and to advance 500*l* as part of the capital of the concern and the prosecutor after such advance, recognized and acted upon such partnership — Held that this was not an obtaining of money by false pretences *Reg* v *Watson*, Dears & B 348 27 L J, M C 18 4 Jur (N S) 14, 6 W R 67, 7 Cox, C C 364

Partnership Accounts]—The prisoner entered into partnership with the prosecutors, and it was subsequently agreed that he should travel about the country to obtain orders, and have a commission upon all orders he might receive, such commission to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits He falsely represented to his partners that he had obtained a certain order, and in consequence was paid his commission thereon —Held that this was a mere matter of account between the partners, and that the

prisoner was, therefore, not guilty of obtaining money by false pretences. *Reg.* v. *Evans*, L. & C. 252; 32 L. J., M. C. 38; 9 Jur. (N.S.) 184; 7 L. T. 507; 11 W. R. 125; 9 Cox, C. C. 238.

8. By Means of False Orders.

Of Innocent Agent.]—B. was one of many persons employed whose wages were paid weekly at a pay-table. On one occasion when B.'s wages were due, the prisoner said to a little boy, "I will give you a penny if you will go and get B.'s money." The boy innocently went to the pay-table, and said to the treasurer, "I am come for B.'s money;" and B.'s wages were given to him. He took the money to the prisoner, who was waiting outside, and who gave the boy the promised penny:—Held, that the prisoner could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, the prisoner, had authority from B. to receive his money, or of obtaining it from the treasurer and the boy, by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like false pretence to the boy; but that he might have been convicted on a count charging him with obtaining it from the treasurer, by falsely pretending to the treasurer that the boy had the authority from B. to receive the amount. *Reg* v. *Butcher*, Bell, C. C. 6; 28 L. J., M. C. 14; 4 Jur. (N.S.) 1155; 7 W. R. 38; 8 Cox, C. C. 77.

Order given by Person having Authority to Order for Another.]—A surveyor of highways, having authority to order gravel for the roads, ordering gravel as usual, and applying it for his own use, is not liable to a charge of obtaining it by false pretences; nor for larceny, unless it appears that he did not mean to pay for it. *Reg.* v. *Richardson*, 1 F. & F. 488.

Order given without Authority.]—An indictment that B. obtained twenty yards of carpet by falsely pretending that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him about some carpet, and had asked him to procure a piece of carpet, whereas no such person had been at him about any carpet, nor had any such person asked him to procure any piece of carpet. The evidence was that B. obtained twenty yards of carpet by stating to the prosecutor, who was a shopkeeper in a village, that he wanted some carpeting for a family living in a large house in the village who had had a daughter lately married; that B. afterwards sold the carpeting so obtained to two different persons, and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent B. to the prosecutor's shop for the carpet:—Held, that there was a sufficient false pretence alleged and proved, and that it was sufficiently negatived by the evidence. *Reg.* v. *Burnsides*, Bell, C. C. 282; 30 L. J., M. C. 42; 6 Jur. (N.S.) 1310; 3 L. T. 311; 9 W. R. 37; 8 Cox, C. C. 370.

E. was convicted for stealing a cheque. He was a clerk to a savings bank, and received the cheque from the manager of the bank, upon a false representation that one of the depositors had given notice of withdrawal and for the purpose of handing it over to the depositor. According to the usual course of business, if a depositor could not attend at a proper time to receive the cheque, it was handed to E. as the agent of the depositor:—Held, that the case was one of false pretences, and not larceny. *Reg.* v. *Essex*, Dears. & B. 371; 27 L. J., M. C. 20; 4 Jur. (N.S.) 16; 6 W. R. 82; 7 Cox, C. C. 384.

An indictment charged that the prisoner was living separately from her husband, and receiving an income from him for her separate maintenance under a deed of separation, which stipulated that he should not be liable for her debts; and that she falsely pretended to U., a servant of W., that she was living under the protection of her husband, and was authorised to apply to W. for goods on the credit of her husband, and that he was willing to pay for them; and that she wanted them to furnish a house in his occupation. It was proved that on the 4th of August she called at W.'s shop, and on being served by U., selected certain goods, and, being asked for a deposit, said it was a cash transaction, that her husband would give a cheque as soon as the goods were delivered. The deed was proved, and it was also proved that the annuity covenanted to be paid by the husband was duly paid; that the house which she gave as her address, and which was found shut up after the goods had been sent to it, had been taken by her whilst in company with a man with whom she had been living as his wife from the middle of July till the end of August:—Held, that there was abundant evidence to support a conviction. *Reg.* v. *Davis*, 19 L. T. 325; 17 W. R. 127; 11 Cox, C. C. 181.

Effect of Forged Order.]—A person who obtained goods on delivering a forged letter—"Please to let the bearer, W. T., have for J. R. four yards of linen," signed J. R., was not indictable for obtaining goods by false pretence, as this was uttering a forged request for the delivery of goods, which was a felony under 11 Geo. 4 & 1 Will 4, c. 66, s. 10. *Rex* v. *Evans*, 5 Car. & P. 553.

9. By Means of False Accounts.

Larger Sum of Money Obtained.]—A workman, employed by clothiers, was to keep an account of the number of shearmen employed, and the amount of their earnings and wages, which he was to deliver weekly to a clerk, in writing, who paid him the amount; he delivered in a false account, charging for more work, and of other men, than was actually done, by which he obtained a larger sum than was actually due:—Held, an obtaining money under false pretences, within 30 Geo. 2, c. 24, because without the false pretence he would not have obtained the credit, and it was not like a case of money paid generally on account. *Rex* v. *Mitchell*, 2 East, P. C. 830.

Where a manufacturer's foreman, who received from his master money to pay the workmen's wages, obtained by means of false accounts more than the men had earned or he had paid to them, this was held to be within the statute, for where the false pretence creates the credit, it is within the statute, and the defendant would not have obtained the excess above what was really due to the workmen were it not for the false account delivered. *Ib.*

Credit not Money Obtained.]—The prisoner having entered into an agreement to act as captain of a vessel belonging to the prosecutor, upon receiving two-thirds of the net profits of the

vessel, delivered in a bill for repairs to a larger amount than he had actually paid, and was allowed the amount in the settlement of accounts:—Held, no indictment would lie, since the prisoner did not by false pretence obtain that amount of money but only credit for the difference between the amount actually paid and the amount which he charged. *Reg.* v. *Crosby*, 1 Cox, C. C. 10.

Part of Total Sum only Appropriated.]—A., the servant of B., rendered an account to B. of 14*l.* 1*s.* 2*d.*, as due from A. to his workmen, and B. gave A. a cheque for the amount. All that sum was so due except 7*s.*, which A. kept, when he got the cheque cashed, and paid the workmen the residue. In an indictment it was charged that by this false pretence, A. obtained the cheque from B., with intent to defraud him of the same. It was objected, that the intent was only to defraud B. of a part of the proceeds of the cheque. A. was convicted, and the judges held the conviction right, and that the evidence supported the count. *Reg.* v. *Leonard*, 2 Car. & K. 514; 1 Den. C. C. 304; 3 Cox, C. C. 284.

Receipt Required.]—A servant of A. applied to B. for payment of 17*s.* due from B. to A. B. refused to pay it without A.'s receipt. The servant went away and returned with this document, whereupon B. paid the debt:—Held, a question for the jury, whether the servant tendered the receipt as the handwriting of A., which would make him liable on this indictment, or as his own, which would make his act a false pretence. *Reg.* v. *Inder*, 1 Den. C. C. 325; 2 Car. & K. 635.

False Pretences or Larceny.]—It was the prisoner's duty, as bailiff to the prosecutor, to pay and receive moneys. Upon an account rendered of such payments and receipts, it appeared he had charged his master with five payments of 1*l.* 8*s.*, instead of 1*l.* 4*s.*, the sums he had actually paid. There was also a similar over-charge of two other amounts:—Held, that the prisoner was wrongly convicted of larceny, the offence, if any, being that of obtaining money by false pretences. *Reg.* v. *Green*, Dears. C. C. 323; 2 C. L. R. 603; 18 Jur. 158; 2 W. R. 264; 6 Cox, C. C. 296.

It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion he falsely stated to the chief clerk that he had paid 2*s.* 3*d.* for kitchen stuff which he had bought for his masters, and demanded to be paid for it. The clerk on this paid him 2*s.* 3*d.* out of the money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use:—Held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining by false pretences. *Reg.* v. *Barnes*, T. & M. 387; 2 Den. C. C. 59; 20 L. J., M. C. 34; 14 Jur. 1123; 5 Cox, C. C. 112.

It was the duty of a servant to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues. On one occasion, by representing falsely to the cashier that the amount was larger than it really was, as he well knew, he obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference:—Held, that his offence was not larceny, but obtaining money by false pretences. *Reg.* v. *Thompson*, L. & C. 233; 32 L. J., M. C. 57; 8 Jur. (N.S.) 1162; 7 L. T. 393; 11 W. R. 41; 9 Cox, C. C. 222.

Obtaining Cheque.]—By means of a false wages sheet the prisoner obtained from his master a cheque for the amount stated in the sheet to pay the men's wages. The cheque was informally drawn, and refused payment by the bank. The prisoner returned it to his master, telling him of the cause of its non-payment, and the master tore it up and gave another, which the prisoner cashed, and appropriated the difference between what was really due for wages and what was falsely stated to be due. On an indictment charging him with obtaining 8*s.* 6*d.*, the actual sum appropriated by him, it was objected that the above evidence did not prove the charge, for that he had only obtained a valueless piece of paper:—Held, that the false pretence was a continuing one, and that the second valuable cheque was obtained thereby equally with the first, and that the charge was proved. *Reg.* v. *Greathead*, 38 L. T. 691; 14 Cox, C. C. 108.

Substitution by Prisoner of Proper Accounts for other Purposes.]—An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value 11*s.* 6*d.*, of which 4*s.* 6*d.* had been paid on account, and that 10*s.* only was due, was a bill of parcels of another coat of the value of 22*s.* The evidence was that the prisoner's wife had selected the 14*s.* 6*d.* coat for him, subject to its fitting him, and had paid 4*s.* 6*d.* on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and the prisoner was then measured for one to cost 22*s.* When that was made it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner, when the coat was given to him, handed the bill of parcels for the 14*s.* 6*d.* and 10*s.*, saying, "There is 10*s.* to pay." The bill was receipted, and the prisoner took the 22*s.* coat away with him. The prosecutor stated that believing the bill of parcels to refer to the 22*s.* coat, he parted with that coat on payment of 10*s.*, otherwise he should not have done so:—Held, that there was evidence to support a conviction. *Reg.* v. *Steels*, 17 L. T. 666; 16 W. R. 341; 11 Cox, C. C. 5.

10. By Means of Cheques, Bills of Exchange, and Promissory Notes.

At Common Law.]—A person who, under a mere false pretence of purchasing lottery tickets, bargains with the holder of them, and obtains the delivery of them by giving a draft on a banker, with whom he had no cash, for the amount of them, is not indictable for a fraud at common law; for, in order to constitute this offence, the property must be obtained either by conspiracy, or by means of a false token as well as a false pretence, and not, as in this case, by a mere false assertion, or a bare naked lie. *Rex* v. *Lara*, 2 Leach, C. C. 652; 2 East, P. C. 819, 827; 6 Term Rep. 565.

Knowledge that Cheque, &c., will not be Paid.]—Obtaining goods by means of a cheque which the party knows will not be paid, is an indictable offence. *Rex* v. *Jackson*, 3 Camp. 370 ; 14 R. R. 756.

Prosecutor agreed to sell a mare, warranted sound, to the prisoner for 20*l.* 10*s.* The prisoner came and took the mare away on a Thursday, giving a cheque for the price, which, at his request, the prosecutor agreed not to cash till Saturday. He, however, paid the cheque to his bankers on the same Thursday ; they returned it to him on the Saturday indorsed "no account." The prisoner had no effects at the bank on the Saturday, or on any day for a long time previously. For the prisoner, B. a witness, proved that he had requested prisoner to buy a horse for him (B.), and that prisoner had told B. that he thought he knew of a mare that would suit, and asked B. for a cheque, which B. did not give, as he had not his cheque-book with him ; that the prisoner, on the Monday after the Saturday, told B. he had bought a horse for him for 20*l.* 10*s.*, and that B. sent a cheque to him on the following day for the amount. On the Wednesday the mare was sent back to the prosecutor, with a veterinary certificate that she was not sound, a summons against the prisoner having been taken by the prosecutor and left at the prisoner's house on the previous Monday. The prisoner's counsel contended that the prisoner ought to be acquitted, first, because the prosecutor having broken the contract, the charge of false pretences could not be maintained ; secondly, because there was no false pretence of an existing fact, as the prisoner did not allege he had funds at the bank at the time he drew the cheque ; and thirdly, because, upon B.'s evidence, the prisoner had reasonable cause to believe that the cheque would be paid on the Saturday. The court overruled the objections, and directed the jury that if they believed that the prisoner knew he had no funds at the bank at the time he gave the cheque, and that the prosecutor had parted with the mare upon the belief that the cheque was a good and valid one, they must find the prisoner guilty. The jury thereupon found the prisoner guilty.—Held, that the direction was wrong, and that the case ought not to have been left to them, and that the conviction ought to be quashed. *Reg.* v. *Walne*, 23 L. T. 748 ; 11 Cox, C. C. 647.

A man who makes and gives a cheque for the amount of goods purchased in a ready money transaction, saying that he wishes to pay ready money, makes a representation that the cheque is a good and valid order for the amount inserted in it ; and if such person has only a colourable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonoured on presentation, and intends to defraud, he may be convicted of obtaining such goods by such false pretences. *Reg.* v. *Hazelton*, 44 L. J., M. C. 11 ; L. R. 2 C. C. 134 ; 31 L. T. 451 ; 23 W. R. 139 ; 13 Cox, C. C. 1.

A. was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, by means of which he obtained a watch and a chain. It was found by the jury that, before the completion of the sale, and the delivery of the watch by the prosecutor to the prisoner, the prisoner represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false ; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, or that he could provide funds to pay it. The prisoner was convicted, and the judges held the conviction right. *Rex* v. *Parker*, 7 Car. & P. 825 ; 2 M. C. C. 1.

Obtaining credit in account from the party's own banker, by drawing a bill of exchange on a person on whom the party has no right to draw, and which has no chance of being paid, is not a false pretence within 7 & 8 Geo. 4, c. 29, s. 53, though the banker pays money for him in consequence to an extent that he would not otherwise have done. *Rex* v. *Warell*, 1 M. C. C. 224.

—— **Payment by Bank Cashier.**]—To constitute larceny, there must be a taking of the property against the will of the owner. But the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness. Therefore, a cashier, who, deceived by a forged order, purporting to be drawn by a customer, pays money to the payee, who presents it knowing it to be forged, thereby parts with the property in the money of the bank to the payee so as to bind his employer, and the payee is therefore not guilty of larceny, but of obtaining money by false pretences. *Reg.* v. *Prince*, 38 L. J., M. C. 8 ; L. R. 1 C. C. 150 ; 19 L. T. 264 ; 17 W. R. 179 ; 11 Cox, C. C. 193.

Cheque Signed in Fictitious Name.]—R. M., in payment for a pony and cart, purchased by him from the prosecutor, drew a cheque in the name of W. M., in the presence of the prosecutor, upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own cheque, drawn in his own name. At the time he drew the cheque the prisoner knew that it would be, as in fact it was, dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name :—Semble, that R. M. was guilty of obtaining the pony and cart by false pretences. *Reg.* v. *Marton*, 49 L. J., M. C. 11 ; 5 Q. B. D. 34 ; 41 L. T. 531 ; 28 W. R. 232 ; 14 Cox, C. C. 375 ; 44 J. P. 74.

Bill not Due till After Time Stated.]—Where a prisoner obtained goods on the faith of a false statement that a bill which he gave for the price of them would be paid on the following day, he may be convicted of obtaining goods under false pretences, though such bill on the face of it was not due till after that day. *Reg.* v. *Hughes*, 1 F. & F. 355.

Indictment—Form and Contents of.]—If an indictment for attempting to obtain money under false pretences, charges it to have been attempted by means of a paper writing purporting to be an order for money, and the instrument cannot be considered as stated in the indictment to be such an order, it is bad. *Rex* v. *Cartwright*, R. & R. 106.

But an indictment that A. unlawfully did falsely pretend that a printed paper was a good and valid promissory note, is sufficient, without setting out the paper. *Reg.* v. *Coulson*, T. & M.

332; 1 Den. C. C. 592; 19 L. J., M. C. 182; 14 Jur. 557; 4 Cox, C. C. 227.

An indictment stated that the defendant falsely pretended to W. that he was a captain in the East India Company's service, and that a promissory note which he "then and there produced and delivered to W., purporting to be made for the payment of 21*l.*, not saying by whom it purported to be drawn, nor otherwise describing it, was a good and valuable security for 21*l.*; by which false pretences he obtained," &c.: whereas the defendant was not a captain in the company's service: and whereas the promissory note which he then and there produced, and delivered to W., "was not a good and valuable security for 21*l.*, or for any other sum":—Held, that the indictment did not sufficiently describe the note, or show how it was wanting in value; and that a conviction could not be supported on the representation as to the defendant's character, because the false pretences were so connected on the record, that one could not be separated from the other. *Reg.* v. *Wickham*, 2 P. & D. 333; 10 A. & E. 34; 8 L. J., M. C. 87.

11. Inducing Persons by Fraud to Execute Valuable Securities.

Obtaining Valuable Security.]—Inducing a person by a false pretence to accept a bill of exchange, was not an obtaining a valuable security by a false pretence within 7 & 8 Geo. 4, c. 29, s. 53. *Reg.* v. *Danger*, Dears. & B. 307; 26 L. J., M. C. 185; 3 Jur. (N.S.) 1011; 5 W. R. 738; 7 Cox, C. C. 303. *See* 24 & 25 Vict. c. 96, s. 90.

If a person, by false pretences, obtains a cheque on a banker on unstamped paper, payable to D. F. J., and not payable to bearer, it is not an obtaining a valuable security by false pretences. *Rex* v. *Yates*, Car. C. L. 333; 1 M. C. C. 170.

But obtaining, as a loan, from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, is an offence within 7 & 8 Geo. 4, c. 29, s. 53, the prisoner being shown not to be so prepared, and not intending so to apply the money. *Rex* v. *Crossley*, 2 M. & Rob. 17; 2 Lewin, C. C. 164.

Security of no Value till Delivered to Prisoner.]—The offence of fraudulently causing a person to "make a valuable security" within 24 & 25 Vict. c. 96, s. 90, is complete, although the promissory note in question might not be of value until it had been delivered into the hands of the prisoner. *Reg.* v. *Gordon*, 58 L. J., M. C. 117; 23 Q. B. D. 354; 60 L. T. 872; 16 Cox, C. C. 622; 53 J. P. 807—C. C. R.

False Pretences or Larceny.]—The prisoner was convicted upon an indictment, charging him with stealing a cheque. It was proved that he was clerk to a savings bank, and received the cheque from a manager of the bank, upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. It was found that, according to the usual course of business, if a depositor could not attend at a proper time to receive the cheque, it was handed to the prisoner, as the agent of the depositor:—Held, that the case was one of false pretence, and not larceny, and that the conviction was wrong. *Reg.* v. *Essex*, Dears. & B. 371; 27 L. J., M. C. 20; 4 Jur. (N.S.) 16; 6 W. R. 82; 7 Cox, C. C. 384.

12. By Passing off Flash or Worthless Bank Notes.

Counterfeit Notes.]—The fact of uttering a counterfeit note as a genuine one is tantamount to a representation that it was so: and it is a false pretence, notwithstanding the note upon the face of it would have been good for nothing in point of law, even if true. *Rex* v. *Freeth*, R. & R. 127. *See* 14 & 15 Vict. c. 100, s. 12.

Passing off a flash note as a Bank of England note on a person unable to read, and obtaining from him in exchange for it five pigs of the value of 3*l.* 17*s.* 6*d.*, and 1*l.* 2*s.* 6*d.* change, is a false pretence. *Reg.* v. *Coulson*, T. & M. 332; 1 Den. C. C. 592; 19 L. J., M. C. 182; 14 Jur. 557; 4 Cox, C. C. 227.

The defendant fraudulently offered a 1*l.* Irish bank note as a note for 5*l.*, and obtained change as for a 5*l.* note. The person from whom the change was obtained could read, and the note itself upon the face of it clearly afforded the means of detecting the fraud:—Held, that this was obtaining money by means of false pretences. *Reg.* v. *Jessop*, Dears. & B. 442; 27 L. J., M. C. 70; 4 Jur. (N.S.) 1153; 6 W. R. 245; 7 Cox, C. C. 399.

Halves of Bank Notes.]—A person who obtains goods by sending by post half notes in payment, but sends the corresponding halves to another person in payment for other goods, is properly convicted of obtaining the first mentioned goods under false pretences. *Reg.* v. *Murphy*, Ir. R. 10 C. L. 308; 13 Cox, C. C. 298.

Proof that Notes are Valueless.]—The prisoner, knowing that some old country banknotes had been taken by his uncle forty years before, and that the bank had stopped payment, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. The man passed the notes and the prisoner obtained value for them. It appeared that the bankers were made bankrupt:—Held, that he was guilty of obtaining money by false pretences, and that the bankruptcy proceedings need not be proved. *Reg.* v. *Douey*, 37 L. J., M. C. 52; 17 L. T. 481; 16 W. R. 344; 11 Cox, C. C. 115.

On an indictment for obtaining money by falsely pretending that the promissory note of a bank that has stopped payment by reason of bankruptcy, was a good and valuable security for the payment of the amount mentioned in it, and was of that value, it is not necessary to prove the proceedings in bankruptcy. It is sufficient to prove the time when the bank stopped payment, and that cash could not be obtained for the note on its being presented for payment at the place where it was made payable. *Reg.* v. *Smith*, 6 Cox, C. C. 314.

On an indictment for delivering in payment for a horse certain promissory notes, as for good and available promissory notes, which the prisoner knew to be not good, nor of any value; the notes purported to be the notes of a country bank which

was supposed to have failed :—Held, that at all events it was necessary to prove that the notes were bad and of no value. *Rex* v. *Flint*, R. & R. 460.

Where the prisoner in 1857 gave in exchange for the sum of 5*l.* a promissory note for the payment of 5*l.* on a bank and stated that the note was a good one though the bank had in 1851 to the prisoner's knowledge stopped payment :—Held, that he could not be convicted of obtaining the 5*l.* by false pretences. *Reg.* v. *Williams*, 7 Cox, C. C. 351.

Evidence that Notes may be of some Value.]—Indictment for false pretences, in passing a note of a bank that had stopped payment as a good note. The prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not :—Held, that the prisoner must be acquitted. *Rex* v. *Spencer*, 3 Car. & P. 420.

If a person pass a note of a country bank for 5*l.* payable on demand as a good note, and as of the value of 5*l.*, knowing that the bank is insolvent, and has stopped payment, and cannot pay the note in full, he may be indicted for obtaining money by false pretences. *Reg.* v. *Evans*, Bell, C. C. 187; 29 L. J., M. C. 20; 5 Jur. (N.S.) 1361; 1 L. T. 108; 8 W. R. 48; 8 Cox, C. C. 257.

But where the evidence shows that the bank has paid a dividend, the direction to the jury that there is evidence that the note is not of any value, will be wrong. *Ib.*

Indictment—Form and Contents of.] — An indictment charging that the defendant unlawfully did pretend to S. that a paper writing which he produced to S. was a good 5*l.* Ledbury Bank note, by means whereof he unlawfully obtained money from S., with intent to cheat and defraud him of the same; whereas, in truth and in fact, the paper writing was not a good 5*l.* note of the Ledbury Bank,—is bad, as it does not charge that the defendant knew that it was not a good 5*l.* note of the Ledbury Bank, and is not aided by the allegation of the intent to defraud. *Reg.* v. *Philpotts*, 1 Car. & K. 112.

The prisoner was convicted of attempting to obtain a sewing machine by false pretences. The indictment alleged that she did falsely pretend that a paper partly in print and partly in writing, produced by her to the prosecutor, and purporting to be a banknote for the payment to the bearer of 5*l.*, was then a good, genuine and available order for the payment of 5*l.*, and was then of the value of 5*l.*; by means of which false pretence the prisoner did unlawfully attempt to obtain a sewing machine. The evidence was that the prisoner bargained for the purchase of the sewing machine for 35*s.*, and said that a friend had told her to get one, and had sent her the money to pay for it, and at the same time gave a worthless banknote for 5*l.* payable to the bearer, of the Devonshire Bank, which had stopped payment many years before. The prisoner knew at the time that the bank had stopped payment, and that the note was of no value :—Held, that the indictment, though inartificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and of the value of 5*l.*, and that the evidence supported the conviction. *Reg.* v. *Jarman*, 38 L. T. 460; 14 Cox, C. C. 48.

13. CHEATS.

Obtaining Money by Trick—Purse Trick.]—In support of an indictment for the larceny of three shillings and sixpence, it was proved that the prisoner had obtained possession of a shilling and then of a half-crown, from the prosecutor by means of what is known as the purse trick. That is to say, he had induced the prosecutor to give him a shilling for a purse, into which he had dropped three coins, by first showing the prosecutor three shillings, and then making it appear as if he had dropped them into the purse. In the same way he had induced the prosecutor to give him a half-crown for a purse into which he had made it appear that he had dropped two half-crowns. Having been convicted of obtaining the money by means of trick, upon a case reserved for the opinion of this court :—Held, that the prosecutor having parted with the property in his shilling and half-crown in exchange for the purses and their contents, the prisoner had been guilty, if at all, of obtaining the coins by means of a false pretence, and could not be convicted of larceny. *Reg.* v. *Solomons*, 62 L. T. 672; 17 Cox, C. C. 93—C. C. R.

Pretending to be a Merchant.]—It is an indictable offence if two effect a cheat by means of one pretending to be a merchant and the other a broker, and as such bartering pretended wines for hats. *Rex* v. *Macarty*, 2 East, P. C. 823.

Picture with spurious Name attached.]—If a man in the course of his trade, openly carried on, puts a false mark or token upon a spurious article, so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is guilty of a cheat at common law. *Reg.* v. *Closs*, Dears. & B. 460; 27 L. J., M. C. 54; 3 Jur. (N.S.) 1309; 6 W. R. 109; 7 Cox, C. C. 494.

If a person knowingly sells as an original, a copy of a picture, with the painter's name imitated upon it, and by means of the imitated name, knowingly and fraudulently induces another to buy and pay for the picture as a genuine work of the artist, he may be indicted for a cheat at common law, by means of a false token; but he cannot be indicted for forging, or uttering the forged name of the painter; for the crime of forgery must be committed with some document in writing, and does not extend to the fraudulent imitation of a name put on a picture merely as a mark to identify it as the painter's work. *Ib.*

Wagering by Tossing with Coins.]—The prisoners were indicted and convicted under the 8 & 9 Vict. c. 109, s. 17, of obtaining by fraud and unlawful device and ill-practice in playing at a certain game or sport, to wit, in and by wagering on the event of a certain game or sport, a watch and other things from the prosecutor. The evidence was that the prosecutor was induced to go to a public-house and drink and toss for wagers with one of the prisoners, and the event was that the prosecutor lost, and the prisoners took away the property stated :—Held, that this was a sport, pastime or exercise, if not a game, within the meaning of s. 17 of 8 & 9 Vict. c. 109. *Reg.* v. *O'Connor*, 45 L. T. 512; 15 Cox, C. C. 3; 46 J. P. 214.

Indictment.]—An indictment for obtaining money by selling an article which was marked with a spurious mark or token must contain an averment that it was by means of such false mark or token that he was enabled to pass off the article and obtain the money. *Reg.* v. *Closs*, Dears. & B. 460; 27 L. J., M. C. 54; 3 Jur. (N.S.) 1309; 6 W. R. 109; 7 Cox, C. C. 494.

In an indictment under 8 & 9 Vict. c. 109, s. 17, for winning money at cards by fraud, unlawful device and ill-practice, it is not necessary to state to whom the money belonged. *Reg.* v. *Moss*, Dears. & B. 104; 26 L. J., M. C. 9; 2 Jur. (N.S.) 1196; 5 W. R. 49; 7 Cox, C. C. 200.

14. No Acquittal if Offence be Larceny.

False Pretences must be Proved.]—To prevent a person indicted for false pretences from being acquitted on the ground that the offence is that of felony, the false pretences laid must be proved, for under the 24 & 25 Vict. c. 96, s. 88, he is to be found guilty of the misdemeanour. *Reg.* v. *Bulmer*, L. & C. 476; 33 L. J., M. C. 171; 10 Jur. (N.S.) 684; 10 L. T. 580; 12 W. R. 887; 9 Cox, C. C. 492.

15. Indictment.

a. Parties Indictable.

Where the offence is conveyed by words spoken by one defendant in the presence of others who are acting in concert together, they may be all indicted jointly. *Young* v. *Rex*, 2 East, P. C. 82, 833; 1 Leach, C. C. 505; 3 Term Rep. 98; 1 R. R. 660.

b. Form and Contents of.

To whom Pretence made—Advertisement.]—In an indictment for false pretences by an advertisement in a newspaper, an allegation that "S. did falsely pretend to the subjects of her Majesty the Queen . . . . by means of which said false pretence the said S. did then unlawfully obtain from one C. a certain valuable security," &c., is sufficient because it becomes an allegation of a false pretence to a particular person by virtue of the words which immediately follow. *Reg.* v. *Sowerby* (infra), distinguished. *Reg.* v. *Silverlock*, 63 L. J., M. C. 233; [1894] 2 Q. B. 766; 10 R. 431; 72 L. T. 298; 43 W. R. 14; 18 Cox, C. C. 104; 58 J. P. 788—C. C. R.

—— **From whom Money obtained.**]—In an indictment for obtaining or attempting to obtain money by false pretences it is necessary to state to whom the false pretence was made, and from whom the money was obtained or attempted to be obtained. *Reg.* v. *Sowerby*, 63 L. J., M. C. 136; [1894] 2 Q. B. 173; 10 R. 233; 71 L. T. 300; 42 W. R. 608; 17 Cox, C. C. 767; 58 J. P. 577—C. C. R.

False Pretence on one Person, Deceit on Another.]—An indictment for a fraud at common law, charging the false pretence to have been made to one person, and the deceit to have been practised on a different person, is bad. *Rex* v. *Lara*, 2 Leach, C. C. 647; 2 East, P. C. 819, 824; 6 Term Rep. 565.

"Feloniously" Pretend.] — An indictment on a charge of obtaining goods under false pretences, is bad, if it states that the prisoner "unlawfully, knowingly, and designedly, did feloniously pretend," &c. *Rex* v. *Walker*, 6 Car. & P. 657. See *Rex* v. *Howarth*, 3 Stark. 26.

Prisoner's Knowledge of Fraud not Alleged.]—An indictment for obtaining money under false pretences must allege, that the defendant knew the falsehood; "falsely and fraudulently" is not enough. *Reg.* v. *Henderson*, 2 M. C. C. 192; Car. & M. 328.

In an indictment for obtaining money by false pretences under 7 & 8 Geo. 4, c. 29, it was alleged that the defendant "did unlawfully falsely pretend," &c.:—Held, that the omission of the word "knowingly" was no ground for arresting the judgment. *Reg.* v. *Bowen*, 4 New Sess. Cas. 62; 13 Q. B. 790; 19 L. J., M. C. 65; 13 Jur. 1045; 3 Cox, C. C. 483.

False Pretence must be Stated.]—An indictment charging the defendant with obtaining money by false pretences, is insufficient, if it does not show what the false pretences were. *Rex* v. *Mason*, 1 Leach, C. C. 487; 2 East, P. C. 837; 2 Term Rep. 581; 1 R. R. 545. And *see* 15 R. R. 282, n.

Sufficiency of False Pretence.]—A first count charged that the defendant unlawfully did falsely pretend to J. L. that he, the defendant, was sent by W. P. for an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B. a pair of shoes, of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the moneys of J. L. The second count charged that he falsely pretended to J. L., that W. P. had said that J. L. was to give him, the defendant, an order to go to J. B. for a pair of shoes by means of which false pretence he did obtain from J. B. in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—Held, that both of these counts were bad in arrest of judgment, as neither of them charged a sufficient false pretence. *Reg.* v. *Tully*, 9 Car. & P. 227. Sed quære, see *Reg.* v. *Brown*, 2 Cox, C. C. 348.

An indictment stating that, by the rules of a benefit society, every free member was entitled to 5*l.* on the death of his wife; and that the defendant falsely pretended that a paper which he produced was genuine, and contained a true account of his wife's death and burial, and that he further falsely pretended that he was entitled to 5*l.* from the society, by virtue of their rules, in consequence of the death of his wife, by means of which last-mentioned false pretence he obtained money, is good. *Reg.* v. *Dent*, 1 Car. & K. 249.

A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretences. *Reg.* v. *Williamson*, 11 Cox, C. C. 328; 21 L. T. 444.

An indictment stated that A. did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company, a large sum of money, to wit, 22*l.* 10*s.*, with intent to cheat and defraud the company:—Held, that the nature of the attempt was not sufficiently set forth. *Reg.* v. *Marsh*, 1 Den. C. C. 505; T. & M. 192; 3 New Sess. Cas. 699; 19 L. J., M. C. 12; 13 Jur. 1010; 3 Cox, C. C. 570.

Truth of Pretences Negatived.]—The indictment must negative by special averment the

truth of the pretences, and for want of such an averment the court reversed the judgment. *Rex* v. *Perrott*, 2 M. & S. 379 ; 15 R. R. 280.

An indictment for obtaining money under false pretences, averring that the prisoner obtained the money by means of certain alleged pretences, but, instead of negativing the truth of those pretences, negatived the truth of other alleged pretences, is bad, in arrest of judgment *Reg.* v. *Kelleher*, 2 L. R. Ir. 11.

Several Inducements.]—A man was convicted on an indictment charging that he did falsely pretend that he then lived at, and was the landlord of, a beerhouse, and thereby obtained goods The evidence was, that he said he was the nephew of a man in the prosecutor's employ, which was true ; and that he lived at the beerhouse ; but he did not say he was the landlord of that house. The prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of his servant, and the statement that he lived at the beerhouse, and that therefrom he believed him to be the landlord of the beerhouse : —Held, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant. *Reg.* v. *Lince*, 28 L. T. 570 ; 12 Cox, C. C. 451.

Held, also, that the allegation that he lived at and was the landlord of the beerhouse was divisible, and that the part, "that he lived at the beerhouse," being false, he was rightly convicted. *Ib.*

Upon a charge of obtaining money by false pretences, it is sufficient if the actual substantial pretence, which is the main inducement to part with the money, is alleged in the indictment, and proved ; although it may be shown by evidence that other matters not laid in the indictment in some measure operated upon the mind of the prosecutor as an inducement to him to part with his money. *Reg.* v. *Hewgill*, Dears C. C. 315 ; 2 C. L. R. 630 ; 18 Jur. 158 ; 2 W. R. 278.

Averment that Money Obtained by Pretence Alleged.]—An indictment for obtaining money under false pretences, negativing the truth of certain alleged pretences, but not averring that the prisoner obtained the money by means of those pretences, is bad, in arrest of judgment. *Reg.* v. *Kelleher*, 2 L. R. Ir. 11.

"With Intent to Defraud."]—If in an indictment for false pretences the words "with intent to defraud" are omitted, the indictment is bad, and cannot be amended under 14 & 15 Vict. c. 100, s. 1. *Reg.* v. *James*, 12 Cox. C. C. 127.

Part of Money only Obtained.]—A., the servant of B., rendered an account to B. of 14*l.* 1*s.* 2*d.* as due from A. to his workmen, and B. gave A. a cheque for the amount. All that sum was so due except 7*s.*, which A. kept when he got the cheque cashed, and paid the workmen the residue. In one count of an indictment for false pretences it was charged that, by this false pretence, A. obtained the cheque of B. with intent to defraud him of the same. It was objected that the intent was only to defraud B. of a part of the proceeds of the cheque. A. was convicted ; and the judges held the conviction right, and that the evidence supported the count. *Reg.* v. *Leonard*, 2 Car. & K. 514; 1 Den. C. C. 304 ; 3 Cox, C. C. 284.

Averments as to Existing Fact.]—A mere overcharge for work done is not the subject of an indictment for false pretences. Where, therefore, an indictment alleging that the defendant falsely pretended a sum of money, parcel of a certain larger sum, was due and owing to him for work which he had executed for the prosecutors, is not an allegation of a false pretence of an existing fact, as the allegation might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law ; and therefore the indictment is bad. *Reg.* v. *Oates*, Dears. C. C. 459 ; 3 C. L. R. 661 ; 24 L. J., M. C. 123 ; 1 Jur. (N.S.) 429 ; 3 W. R. 402 ; 6 Cox, C. C. 540.

An indictment for obtaining goods by false pretences must state the false pretences with certainty, so that it may clearly appear that there was a false pretence of an existing fact. *Reg.* v. *Henshaw*, L. & C 444 ; 33 L. J., M. C. 132 ; 10 Jur. (N.S.) 595 ; 10 L. T. 428 ; 12 W. R. 751 ; 9 Cox, C. C. 472.

In an indictment alleging that the prisoner pretended to A's representative that she was to give him 20*s.* for B., and that A. was going to allow B. 16*s.* per week, it does not sufficiently appear that there was any false pretence of an existing fact. *Ib.*

An indictment charged A. with falsely pretending to B, whose mare and gelding had strayed, that A would tell B. where they were, if B. would give him a sovereign down. B gave the sovereign, but A. refused to tell B. where they were :—Held, that the conviction must be quashed. The indictment should have stated that A. pretended to know where they were. *Rex* v. *Douglas*, 1 M. C. C. 462.

An indictment charged one Gregory with having obtained 30*l.* from prosecutor, Woodman, on the false pretence that he, the said Gregory, then wanted the loan of 30*l.* to enable him to take a public-house at Melksham ; by means of which said false pretences the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman with intent to defraud. Whereas the said Gregory was not then going to take a public-house at Melksham . . . . as he the said Gregory well knew. And whereas the said Gregory did not then want a loan of 30*l.* or any money to enable him to take the said house :—Held, not sustainable. *Reg.* v. *Woodman*, 14 Cox, C. C. 179.

—— **Necessary Inference as to.**]—The prisoner was convicted on an indictment charging that by the false pretence to the prosecutors that he "was prepared to pay to them or one of them" 100*l.*, he did then unlawfully and fraudulently induce the prosecutors to "make a certain valuable security," to wit, a promissory note for 100*l.*, with intent thereby to defraud them :—Held, that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner of an existing fact, viz. that he was prepared to pay the prosecutors 100*l.*, and had the money ready for them on their signing the promissory note. *Reg.* v. *Gordon*, 58 L. J., M. C. 117 ; 23 Q. B. D. 354 ; 60 L. T. 872 ; 16 Cox, C. C. 622 ; 53 J. P 807.

Allegation of Ownership of Property.]—An indictment for obtaining goods by means of false pretences, with intent to defraud a specified

person, was bad. unless it stated whose property the goods were, and the defect was not aided after verdict, under 7 Geo. 4, c. 64, s. 21. *Reg.* v. *Martin*, 3 N. & P. 472 ; 8 A. & E. 481 ; 1 W. W. & H. 380 ; 7 L. J., M. C. 89 ; 2 Jur. 515. S. P., *Reg.* v. *Norton*, 8 Car. & P. 196. *See* 24 & 25 Vict. c. 96, s. 88, which renders an allegation of ownership unnecessary.

By 14 & 15 Vict. c. 100, s. 8, it shall be sufficient, in an indictment for obtaining property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person. By s. 25, every objection to an indictment for any formal defect apparent on the face thereof shall be taken before the jury shall be sworn :—Held, that s. 8 did not render it unnecessary, in an indictment for obtaining money by false pretences, to state whose property the money was, and that the omission was not a formal defect within s. 25. *Sill* v. *Reg.*, Dears. C. C. 132 ; 1 El. & Bl. 553 ; 22 L. J., M. C. 41 ; 17 Jur. 207 ; 1 W. R. 147.

An indictment for false pretences, alleging that the prisoner obtained "from A. a cheque for the sum of 8*l.* 14*s.* 6*d.* of the moneys of B.," is a sufficient allegation that the cheque was the property of B. *Reg.* v. *Godfrey*, Dears. & B. 426 ; 27 L. J., M. C. 151 ; 4 Jur. (N. S.) 146 ; 6 W. R. 251 ; 7 Cox, C. C. 392.

In an indictment framed upon 8 & 9 Vict. c. 109, s. 17, charging that the prisoner, by fraud in playing at cards, did win from A. to B. a sum of money with intent to cheat A., it is not necessary to allege that the money won was the property of A. *Reg.* v. *Moss*, Dears. & B. 104 ; 26 L. J., M. C. 9 ; 2 Jur. (N.S.) 1196 ; 5 W. R. 49 ; 7 Cox, C. C. 200.

But an indictment for a conspiracy to obtain goods by false pretences, not stating whose property the goods were which it was the object of the conspiracy to obtain, is bad, in arrest of judgment. *Reg.* v. *Parker*, 2 G. & D. 709 ; 3 Q. B 292 ; 11 L. J., M. C. 102.

An indictment, charging (in substance) "that N. W. and others did conspire by false pretences to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money," was, on a writ of error, held bad for vagueness and uncertainty. *White* v. *Reg.*, Ir. R. 10 C. L. 523 ; 13 Cox, C. C. 318.

Effect of Vexatious Indictments Act.]—B. was summoned before justices for aiding and abetting S. to obtain money by false pretences, and both were committed to take their trial, S. on the charge of attempting to obtain money by false pretences, and B. on the charge of aiding and abetting S. to commit that offence. At the sessions an indictment against S. and B. for jointly attempting to obtain money by false pretences was preferred, without the leave required by the Vexatious Indictments Act (22 & 23 Vict. c. 17), and found by the grand jury, upon which they were tried jointly, and S. acquitted and B. found guilty. At the trial the objection was taken and overruled, that the indictment having been preferred against B. for an offence upon which he had not been committed for trial, the indictment should be quashed :—Held, that the Vexatious Indictments Act, s. 1, was inapplicable, as that applied only to the offence of "obtaining money or other property by false pretences," and not to the offence of "attempting to obtain money or other property by false pretences." *Reg.* v. *Burton*, 32 L. T. 539 ; 13 Cox, C. C. 71.

False Cheque.]—Precedents of counts in an indictment for presenting a false cheque and obtaining money thereon. 11 Cox, C. C. App. xi.

Weight of Goods.]—An indictment alleging that the prisoners falsely pretended to A. that some soot which they then delivered to A. weighed one ton and seventeen cwt., whereas it did not weigh one ton seventeen cwt., but only weighed one ton and thirteen cwt., they well knowing the pretence to be false, by means of which false pretence they obtained from A. 8*s.* with intent to defraud, is good and sufficiently describes an indictable false pretence. *Reg.* v. *Lee*, L & C. 418 ; 33 L. J., M. C. 129 ; 10 L. T. 348 ; 12 W. R. 750 ; 9 Cox, C. C. 460.

Aider by Verdict.]—An indictment charging that the defendant, contriving and intending to cheat W., on a day named, did falsely pretend to him that he, the defendant, then was a captain in her Majesty's fifth regiment of dragoons : by means of which false pretence he did obtain of W. a valuable security, to wit, an order for the payment of 500*l.*, of the value of 500*l.*, the property of W., with intent to cheat W. of the same ; whereas, in truth, he was not, at the time of making such false pretence, a captain in her Majesty's regiment ; and the defendant at the time of making such false pretence, well knew that he was not a captain,—is a good indictment after conviction and judgment ; for it was not necessary to allege more precisely that the defendant made the particular pretence with the intent of obtaining the security ; nor how the particular pretence was calculated to effect, or had effected, the obtaining ; and the truth of the pretence was well negatived, it appeared sufficiently that the pretence was, that the defendant was a captain at the time of his making such pretence, which was the fact denied ; and it was unnecessary to aver expressly that the security was unsatisfied, at any rate since 7 Geo. 4, c. 64, s. 21, the objection being taken after verdict, and the indictment following the words of the statute creating the offence. *Hamilton* v. *Reg.*, 9 Q. B. 271 ; 16 L. J., M. C. 9 ; 10 Jur. 1028 ; 2 Cox, C. C. 11.

An indictment under 24 & 25 Vict. c. 96, s. 95, for "unlawfully receiving goods which have been unlawfully and knowingly, and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud as in this count before mentioned," omitted to set out what the particular false pretences were :—Held, that the objection, not having been taken before plea, was cured by the verdict of guilty. *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94 ; L. R. 2 C. C. 74 ; 28 L. T. 881 ; 21 W. R. 791 ; 12 Cox, C. C. 479.

Indictments under Particular Circumstances.]—*See previous sub-divisions of this head.*

16. Evidence.

Who Admissible as a Witness.]—B. was charged in a first count with obtaining money from the trustees of a savings bank by falsely pretending that a document presented to the bank by the

wife of D. had been filled up by the authority of D.; and in a second count, he was charged with conspiring with the wife of D. to cheat the bank. The evidence of D. was received, in proof of the first count, to show that he had given no authority to fill up the document or to withdraw the deposit. The jury found him guilty on the first count, and not guilty on the second count:—Held, first, that the evidence of D. was properly received in proof of the first count, his wife not being indicted, although she was alleged to be one of the parties to the conspiracy charged in the second count. *Reg.* v. *Halliday*, Bell, C. C. 257; 29 L. J., M. C. 148; 6 Jur. (N.S.) 514; 2 L. T. 254; 8 W. R. 423; 8 Cox, C. C. 298.

Held, secondly, that finding him guilty on the first count was consistent with finding him not guilty on the second count. *Ib.*

Two were jointly indicted for obtaining money by conspiracy and by false pretences. On being arraigned, one pleaded guilty, and the other not guilty. On the trial of the indictment, the one who had pleaded guilty was admitted as a witness against the other, although it was objected that the evidence of a co-conspirator could not be received under the count for conspiracy. The jury found him not guilty on the count for conspiracy, but guilty on the counts for false pretences:—Held, that the co-conspirator was admissible as a witness, and that the conviction was right. *Reg.* v. *Gallagher*, 32 L. T. 406; 13 Cox, C. C. 61.

Alleged False Pretence must be Proved.]—On a trial of an indictment which charged the prisoner with obtaining a horse of the prosecutor by falsely representing himself to be the servant of Hardman, of Stickley, the evidence was that the prisoner at first represented himself as a servant of Hardman, of Stickley Farm, but that afterwards, learning that the prosecutor had mistakenly supposed that he had said he was the servant of Harding, late of Benwell Lodge, he adopted that view, and virtually said that he was the servant of Harding, late of Benwell Lodge, and now of Stickley Farm. It was proved that the prosecutor parted with his horse in the belief that the prisoner was the servant of Harding:—Held, that the conviction could not be supported, as the real pretence that operated on the prosecutor's mind was not alleged in the indictment. *Reg.* v. *Bulmer*, L. & C. 476; 33 L. J., M. C. 171; 10 Jur. (N.S.) 684; 10 L. T. 580; 12 W. R. 887; 9 Cox, C. C. 492.

From whom Money obtained.]—A prisoner was indicted for obtaining money from A. by false pretences. A.'s wife, by her husband's direction, delivered the money to the prisoner in the absence of her husband:—Held, that the money was obtained from A. *Reg.* v. *Moseley*, L. & C. 92; 31 L. J., M. C. 24; 7 Jur. (N.S.) 1108; 5 L. T. 328; 10 W. R. 61; 9 Cox, C. C. 16.

The money of a benefit society, whose rules were not inrolled, was kept in a box, of which E., one of the stewards, and two others had keys. The prisoner, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained rom the hands of E. out of the box 5*l.*:—Held, that, in an indictment, the pretence might be laid as made to E., and the money, the property of "E. and others," obtained from E. *Reg.* v. *Dent*, 1 Car. & K. 249.

By the rules of a friendly society the families of deceased members became entitled to certain moneys on presentation of a certificate to the secretary; a forged certificate having been presented to the secretary and money having been obtained under it, the indictment charged the prisoner with having made the false pretence to the secretary and obtaining the money from him; the evidence showed that the secretary accompanied the defendant to the treasurer from whose hand the defendant received the money:—Held, that, as the secretary was the responsible party and the treasurer was merely a mechanical medium the indictment was good. *Reg.* v. *Rouse*, 4 Cox, C. C. 7.

Goods obtained from B. "and Others"—Evidence only as to B.]—A. was charged with an attempt, by false pretences made to "John Baggally and others," fraudulently to obtain goods the property of the same parties. The evidence was, that the representation was made to John Baggally alone:—Held, that there was no variance, as the words "and others" might be rejected as surplusage. *Reg.* v. *Kealey*, T. & M. 405; 2 Den. C. C. 69; 20 L. J., M. C. 57; 15 Jur. 230; 5 Cox, C. C. 193.

Continuing Pretence.]—Upon an indictment for obtaining money by false pretences, where it appears that statements were made on different occasions, it is a question for the jury whether they are so connected as to form one continuing representation. *Reg.* v. *Welman*, Dears. C. C. 188; 22 L. J., M. C. 118; 17 Jur. 421; 1 W. R. 361; 6 Cox, C. C. 153.

Proof of Falsity of Pretence.]—The defendant, who was agent to an insurance company, and whose business it was to collect the annual premiums from persons insured in the company, collected from one Vellam, in 1883, the annual premium then due for renewal of Vellam's policy of life assurance. The defendant did not account to the company for this premium, but appropriated it, and notified to the company that Vellam had failed to renew his policy. The company thereupon treated the policy as lapsed. On the 7th of April, 1884, the defendant called on Vellam for his annual premium as usual. Vellam was unable to pay the amount on that day, and requested the defendant to call later. The defendant came again on the 21st of April, and received from Vellam a sum of money on account of the annual premium. It was for obtaining this amount that the defendant was indicted, the indictment charging that by falsely pretending to Vellam that his policy was then in full force, and that the current year's premium thereon was then due and payable, and that he, the defendant, was then authorised to receive the same, he induced Vellam to pay the amount. On the 21st of April the days of grace within which the premium had to be paid had expired. Vellam was aware of this, but the defendant told him that the payment would be effectual:—Held, by a majority of the court, that there was evidence for the jury in support of the indictment. *Reg.* v. *Powell*, 54 L. J., M. C. 26; 51 L. T. 713; 15 Cox, C. C. 568; 49 J. P. 183—C. C. R.

A postman falsely pretended that the sum of 2*s.* was payable on a post letter intrusted to him for delivery, whereas 1*s.* only was payable:—Held, that the offence was complete when he made the pretence, and therefore the absence of

any evidence to show positively that he did not pay over the extra 1*s.* to the superior officer was quite immaterial to his guilt or innocence. *Reg.* v. *Byrne*, 10 Cox, C. C. 369.

An indictment alleged that the prisoner obtained goods by falsely pretending that a person who lived in a large house down the street, and had had a daughter married some time back, had asked him to procure the goods. The prisoner made the statement alleged to a shopkeeper in a village, and thereby obtained the goods; but the only evidence to disprove the truth of the statement was that of a lady who lived in the village, whose daughter had been married a year previously, who stated that she had not sent the prisoner to the prosecutor's shop for the goods. The jury having found him guilty:—Held, that the conviction might be sustained. *Reg.* v. *Burnsides*, Bell, C. C. 282; 30 L. J., M. C. 42; 6 Jur. (N.S.) 1310; 3 L. T. 311; 9 W. R. 37; 8 Cox, C. C. 370.

On an indictment for obtaining money by false pretences, if it is consistent with the evidence for the prosecution that the object of the false pretence was something else than the obtaining of the money, the charge will not be sustainable. *Reg.* v. *Stone*, 1 F. & F. 311.

Whole of alleged Pretence need not be Proved.]—It is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part is sufficient. *Rex* v. *Hill*, R. & R. 190. S. P., *Brenning* v. *Stevens*, 5 L. J. (O.S.) K. B. 48.

Admissibility—Opinion upon Letter sent to Prosecutor.]—Upon an indictment for false pretences, where the false pretence alleged consists of an untrue statement of the prisoner with reference to his position and occupation, the opinion of the person defrauded as to the position and occupation of the prisoner, formed upon a letter received by him from the prisoner, is admissible as evidence of the belief of the person defrauded in the truth of the false pretence, although it is not necessarily conclusive. *Reg.* v. *King*, 66 L. J., Q. B. 87; [1897] 1 Q. B. 214; 75 L. T. 392; 18 Cox, C. C. 447; 61 J. P. 329—C. C. R.

Proof that Goods or Money parted with on Faith of Pretence.]—On an indictment for obtaining goods by false pretences, the false pretence charged and proved being that the prisoner was daughter of a lady of the same name, residing at a certain place, there being no evidence that the goods were not delivered to the prisoner before her name and address were asked for:—Held, that there was no sufficient evidence to sustain the indictment, it being essential on a prosecution for obtaining goods by false pretences to prove that the goods were delivered on the faith of the false pretence charged. *Reg.* v. *Jones*, 50 L. T. 726; 15 Cox, C. C. 475; 48 J. P. 616—C. C. R.

H. offered drapery stock to R. for a sum, stating it was all right, and not encumbered, and R. paid the money and took possession. It was discovered that a third party held a bill of sale for double the sum paid, and he entered and seized the stock. H. being indicted for obtaining money under false pretences:—Held, by a majority of the court, that the conviction must be quashed, inasmuch as it did not sufficiently appear that the money was parted with in consequence of the false pretence. *Reg.* v. *Hazlewood*, 48 J. P. 151—C. C. R.

The prisoner went to the house of the prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him, and did supply him, with meat and drink as a boarder. A few days after the prisoner decamped without paying for his accommodation. At the trial of an indictment for obtaining goods by false pretences the jury were directed that they must be satisfied that the pretence was false; that it was acted on by the prosecutrix in supplying the articles in question; and that it was made by the prisoner with intent to defraud. The jury having found a verdict of guilty, the question was reserved for the court, whether upon the facts the prisoner was entitled to an acquittal:—Held, that the direction was substantially accurate; that upon the evidence the jury might fairly infer that the prosecutrix had acted on what she believed; and that from the facts stated it was to be inferred that the jury meant she so acted because she believed to be true the statement of the prisoner, which was in fact false. *Reg.* v. *Burton*, 54 L. T. 765; 16 Cox, C. C. 62—C. C. R.

Onus of Proof—Consent—Sale of Farm Stock subject to Bill of Sale.]—S. was tenant of a farm, over all the live and dead stock on which, and all other live and dead farm stock which at any time thereafter should be in or about the premises, he had granted a bill of sale. In the ordinary course of business S. would have been at liberty to sell stock on the farm, but two months after the granting of the bill of sale he sold all the farm stock which was upon the farm, without anything being said as to the ownership of the stock, or as to the existence of the bill of sale. No evidence was given by S. at the trial of an indictment against him for false pretences to prove that he had obtained the leave of the bill of sale holder to the selling of the stock in question:—Held, that the onus lay upon S. of proving that he had leave to sell the stock, and not upon the prosecution; that S. had by the act of selling the stock represented himself as being the absolute owner thereof; and that the prosecutor had paid for the stock in the belief that S. had authority to sell the same, and was guilty of the offence of obtaining money by false pretences. *Reg.* v. *Sampson*, 52 L. T. 772; 49 J. P. 807—C. C. R.

—— **Master of Vessel.**]—An indictment charging defendants with obtaining money under the false pretence that they were the master and mate of a vessel then lying in a certain port is proved by showing that no vessel had arrived in that port, or had been heard of answering the defendants' description. *Reg.* v. *Baroisse*, 5 Cox, C. C. 559.

Evidence of guilty Knowledge.]—Bonds which had been stolen in 1883 were found in the prisoner's possession in 1890. Under an assumed name, he was dealing with them and selling them to innocent purchasers:—Held, that there was evidence of guilty knowledge, on which a magistrate in this country might commit the prisoner for trial; and that, on the assumption that he

knew that the bonds had been stolen, his conduct amounted to a false representation of their genuineness, which could not be cured by the fact that, the bonds passing freely from hand to hand, the innocent purchaser from whom he obtained the money would be able to get it back again. *Pinter, In re*, 66 L. T. 324 ; 17 Cox, C. C. 497.

Admissibility of other Cases to show Intent.]—C. was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts ; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts and obtaining money thereby. It was shown at the trial that he had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1*s*.," and giving an address. Six envelopes were found in his possession on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage-stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to C. under the address given in the advertisement, and had been received at the post-office like the other letters ; but having been stopped by the post office authorities, none of them had ever been in his possession or custody ; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post-office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted :—Held, that, under the circumstances, the letters were rightly received in evidence. *Reg.* v. *Cooper*, 45 L. J., M. C. 15 ; 1 Q. B. D. 19 ; 33 L. T. 754 ; 24 W. R. 279 ; 13 Cox, C. C. 123.

On the trial of an indictment for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so. The ring was not produced :—Held, that the evidence was properly admitted. *Reg.* v. *Francis*, 43 L. J., M. C., 97 ; L. R. 2 C. C. 128 ; 30 L. T. 503 ; 22 W. R. 663 ; 12 Cox, C. C. 612.

A. was indicted for obtaining a specific sum of money from B. by false pretences. He was employed by his master to take orders, but not to receive moneys, and he was proved to have obtained the specific sum from B. by representing that he was authorised by his master to receive it. Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the purpose of proving the intent when he committed the acts charged in the indictment. *Reg.* v. *Holt*, Bell, C. C. 280 ; 30 L. J., M. C. 11 ; 6 Jur. (N.S.) 1121 ; 3 L. T. 310 ; 9 W. R. 74 ; 8 Cox, C. C. 411.

S. and H. were jointly indicted for false pretences, and for a conspiracy. S. was convicted for false pretences, and both for conspiracy. The evidence was, that they were ostensibly carrying on business as publishers under the name of B. & Co., and that H. was the author of a book published by them. To force the sale of the book, S. got M. to write letters purporting to come from a titled lady ordering a copy of the book, and to address them to country booksellers. These letters were delivered by M. to S., and found their way by post to different country booksellers, and inclosed with them was a printed circular from the firm, offering reduced terms for an order of seven copies or more. At the trial two witnesses produced a number of such letters, some of which had been given to them by the booksellers (other than those named in the indictment) who received them, and some came to them from such booksellers by post. There were no counts in the indictment alleging any intent to defraud these particular booksellers. It was also proved that H., after the frauds charged, had represented himself as B. & Co. :—Held, that the letters were admissible without calling the booksellers who actually received them. *Reg.* v. *Stenson*, 25 L. T. 666 ; 12 Cox, C. C. 111.

Representations made after Fraud committed.]—Representations of the accused after the frauds charged, are admissible. *Reg.* v. *Stenson*, 25 L. T. 666 ; 12 Cox, C. C. 111.

Evidence is admissible of false pretences distinct from and made prior to those charged. A reiteration by the defendant of the false pretence alleged, made subsequently to obtaining the money, and to persons other than the prosecutor may be proved in evidence. *Reg.* v. *Hamilton*, 1 Cox, C. C. 244.

Letter Written by Prisoner's Solicitor—Privilege.]—A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case. But in order to make a client criminally responsible for a letter written by his solicitor it must be shewn that the letter was written in pursuance of the instructions of the client. A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. *Reg.* v. *Downer*, 43 L. T. 445 ; 14 Cox, C. C. 486 ; 45 J. P. 52.

Letter Lost—Parol Evidence of Contents.]—When a false pretence is contained in a letter which is lost, the prisoner may be convicted, if parol evidence is given of the contents of the letter. *Rex* v. *Chadwick*, 6 Car. & P. 181.

Deed put in—Parol Evidence of Representations not Excluded.]—A. was indicted for obtaining 200*l*. by falsely pretending that he had obtained from Lord S. the appointment of emigration agent, which was worth 600*l*. a year, and that for 200*l*. he would give the prosecutor one-third of the agentship. The prosecutor proved that he gave the money on this pretence, which was false ; but that, before he parted with his money, the prisoner prevailed on him to execute a deed of co-partnership with him, in which the consideration was stated to be 200*l*., and in which nothing was said of the agentship, or how it was

obtained:—Held, that the putting in of this deed on the part of the prosecution did not exclude the parol evidence of the false pretences; and that, if the deed was a part of the scheme to effect the fraud, the prisoner should be found guilty. *Reg.* v. *Adamson*, 1 Car. & K. 192; 2 M. C. C. 286.

Letters—Duty of Prosecuting Counsel to have them Read.]—On an indictment for obtaining money by a false pretence that a parcel contained all letters written by the prosecutrix to the prisoner, and which he had promised, in consideration of the money, to give up, the counsel for the prosecution is not bound to have the letters read, although the counsel for the prisoner may cross-examine as to the contents of any of them, and have any read for that purpose. *Reg.* v. *Colucci*, 3 F. & F. 104.

Infancy of Prisoner—How Proved.]—On an indictment against a defendant for obtaining goods by falsely pretending that he was of full age, a plea of infancy in an action brought against him is not admissible for the purpose of proving that he was a minor. *Reg.* v. *Simmonds*, 4 Cox, C. C. 277.

17. Trial.

Inconsistent Verdict—No Intention to Defraud.]—Upon an indictment for false pretences the jury found the following verdict: "Guilty of obtaining food and money under false pretences. But whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." Upon a case reserved, held that the verdict was not separable, and that as the latter part of it negatived the intent to defraud, without which the previous portion of the verdict could not have been found, the conviction must be quashed. *Reg.* v. *Gray*, 17 Cox, C. C. 299—C. C. R.

18. Venue.

Posting Letter.]—A false pretence was made by letter in Nottingham, England, and posted there to and received by a person in France. In consequence of the letter that person drew a cheque in France payable at Nottingham, and sent it to the prisoner at Nottingham, who cashed the cheque in England:—Held, that the prisoner was properly indicted and tried at Nottingham. *Reg.* v. *Holmes*, 53 L. J., M. C. 37; 12 Q. B. D. 23; 49 L. T. 540; 32 W. R. 372; 15 Cox, C. C. 343.

Where a prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requesting him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent:—Held, that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the postmaster in Middlesex his agent to receive it there for him; and that, consequently, there was a receipt of the money order by the prisoner within the county of Middlesex. *Reg.* v. *Jones*, 1 Den. C. C. 551; 4 New Sess. Cas. 353; 19 L. J., M. C. 162; 14 Jur. 533; 4 Cox, C. C. 198.

The prisoner wrote and posted in a county a letter containing a false pretence to the prosecutor, who received it in a borough. The prosecutor in the borough posted to the prisoner in the county a letter containing the money obtained by the false pretence, and which the prisoner received in the county:—Held, that under 7 Geo. 4, c. 64, s. 12, which authorises the trial in any jurisdiction where the offence is begun or completed, the prisoner might be tried for the offence of obtaining the money by false pretence, at the borough quarter sessions; part of the offence being the making the false pretence, and the false pretence being made to the prosecutor in the borough, where the letter containing the false pretence was delivered to him by the post-office authorities, whom the prisoner made his agents for that purpose. *Reg.* v. *Leech*, Dears. C. C. 642; 25 L. J., M. C. 77; 2 Jur. (N.S.) 428; 4 W. R. 482; 7 Cox, C. C. 100.

On an indictment for obtaining money by a false pretence which was alleged to have been by sending a certain false return of fees to the commissioners of the treasury, it appearing that the return was received by them in Westminster, with a letter dated Northampton, and an affidavit sworn there; and that they, on the faith of it, drew up a minute, which operated as an authority to the paymaster-general to pay a certain amount to the prisoner (as compensation under 7 & 8 Vict. c. 96) at Westminster, the venue laid being Northamptonshire:—Held, that there was reasonable evidence that the false representation was forwarded from Northampton; that it was, if false and fraudulent, a false pretence within the statute; that in effect the money was obtained by means of the minute, being a mere matter of regulation, and not a judicial proceeding; and that, therefore, the venue was right, and the indictment was supported. *Reg.* v. *Cooke*, 1 F. & F. 64.

Other Cases.]—One who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the county, but must be indicted in the county where the goods were obtained. *Reg.* v. *Stanbury*, L. & C. 128; 31 L. J., M. C. 88; 8 Jur. (N.S.) 84; 5 L. T. 686; 10 W. R. 236; 9 Cox, C. C. 94.

Where a misdemeanor consists of different parts, so much of the charge as amounts to a misdemeanor in law must be proved in the county in which the venue is laid. *Rex* v. *Buttery*, 3 B. & C. 700; 5 D. & R. 616.

19. Receiving Property obtained by False Pretences.

Receiver—When Guilty.]—On the trial of an indictment for receiving goods, knowing them to have been obtained by false pretences, if the jury is not satisfied that the prisoner knew that the goods were obtained by false pretences, the receiver is entitled to be acquitted. *Reg.* v. *Rymes*, 3 Car. & K. 327.

Indictment.]—Where an indictment charges a person with having received goods, knowing them to have been obtained by false pretences, it is not necessary to set out in the indictment the false pretences by which they were obtained. *Taylor* v. *Reg.*, 64 L. J., M. C. 11; [1895] 1 Q. B. 25; 15 R. 86; 71 L. T. 571; 43 W. R. 24; 18 Cox, C. C. 45.

Per Charles, J.: It is only necessary to set out

with "reasonable certainty" the ingredients of the offence with which the prisoner is charged. *Ib.*

20. Effect of False Pretences on Contracts.

Conviction—Revesting of Property—Sale in Market overt.]—The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce* v. *Newington* (4 Q. B. D. 32) overruled. *Bentley* v. *Vilmont*, 57 L. J., Q. B. 18; 12 App. Cas. 471; 57 L. T. 854; 36 W. R. 481; 53 J. P. 68—H. L. (E.)

W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. *Moyce* v. *Newington*, 48 L. J., Q. B. 125; 4 Q. B. D. 32; 39 L. T. 535; 27 W. R. 319; 14 Cox, C. C. 182. See also *Cundy* v. *Lindsay*, 45 L. J., Q. B. 381; 1 Q. B. D. 348; 34 L. T. 314; 24 W. R. 730; 13 Cox, C. C. 162; and 46 L. J., Q. B. 233; 2 Q. B. D. 96; 36 L. T. 345; 25 W. R. 417; 13 Cox, C. C. 583—C. A. But this point was not raised in *S. C.*, 47 L. J., Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406.

E. FALSIFICATION OF ACCOUNTS.

Making and concurring in making False Entry.]—B., a collector in the employment of N., collected on the 22nd February from Sheppard 8*l.* 14*s.* 10*d.* due to N. The ordinary course of business was for B., at the end of each day, to account to E., N.'s cash clerk, for moneys collected during the day, E.'s duty being to enter payments accounted for by B. in the cash-book. On the evening of the 22nd February B. gave E. a slip of paper on which he had written, "Sheppard, on account, 5*l.*," which E. copied into the cash-book, believing it represented the whole amount collected by B. from Sheppard:—Held, that B. was rightly convicted under s. 1 of the Falsification of Accounts Act, 1875. *Reg.* v. *Butt*, 51 L. T. 607; 15 Cox, C. C. 564; 49 J. P. 233.

Embezzlement by.]—*See* ante, col. 1176, et seq.

Obtaining by False Pretences.]—*See* ante, col. 1228.

F. FORGERY AND UTTERING FORGED INSTRUMENTS.

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B. Uttering Forged Instruments.

1. *What is an Uttering*, 1298.
2. *Evidence and Trial*, 1303.

C. Effect of Forgery, 1306.

A. *FORGERY.*

1. General Principles.

Definition.]—Forgery is the false making of an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons. *Rex* v. *Jones*, 2 East, P. C. 991.

There must be a Document.]—A forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist, is not a forgery. *Reg.* v. *Closs*, Dears. & B. 460; 27 L. J., M. C. 54; 3 Jur. (N.S.) 1309; 6 W. R. 109; 7 Cox, C. C. 494.

B. was in the habit of selling certain powders, wrapped in printed papers, describing their use, and having a printed signature at the end. The prisoner had a number of wrappers printed in

imitation of B.'s, so as to deceive persons of ordinary observation, and to make them believe them to be B.'s; he then sold spurious powders, wrapped up in these papers, as B.'s powders; and all this was done with intent to defraud:—Held, that there was no forgery. *Reg.* v. *Smith*, Dears. & B. 566; 27 L. J., M. C. 225; 4 Jur. (N.S.) 1003; 6 W. R. 495; 8 Cox, C. C. 32.

Primâ facie Resemblance.]—In forgery there need not be an exact resemblance; it is sufficient if the instrument is primâ facie fitted to pass for a true instrument. *Rex* v. *Elliot*, 1 Leach, C. C. 175, 179; 2 East, P. C. 951. S. P., *Reg.* v. *Mahony*, 6 Cox, C. C. 487.

By making Mark.]—To make a mark in the name of another person, with intent to defraud the person whose name is assumed, is forgery. *Rex* v. *Dunn*, 1 Leach, C. C. 57; 2 East, P. C. 962.

Mark made with Marksman's Assent.]—The 11 & 12 Vict. c. 63, directs that the votes for the election of members of local boards of health shall be given by means of voting papers, and by s. 25, "if any voter cannot write, he shall affix his mark at the foot of a voting paper in the presence of a witness, who shall attest and write the name of the voter against the same, as well as the initials of such voter against the name of every candidate for whom the voter intends to vote." The defendants, who took an active part on behalf of some of the candidates, went to the houses of voters who were marksmen, to assist in filling up the voting papers, and having obtained the express or implied consent of voters or members of their families, filled up the papers with the proper names and marks of the voters, and put their own names as attesting witnesses without obtaining the actual signatures or marks of the parties themselves:—Held, that this did not constitute the offence of forgery at common law. *Reg.* v. *Hartshorn*, 6 Cox, C. C. 395.

Affixing Seal—Genuine Signature.]—Affixing a seal to a genuine signature to a document which is invalid without a seal is a forgery. *Reg.* v. *Collins*, 1 Cox, C. C. 57.

One of several Signatures.]—Forgery will lie for one signature only to a joint and several bond, though the other signatures be genuine. *Reg.* v. *Richards*, 1 Cox, C. C. 62.

Alteration of Document.]—It is a forgery to alter a document which a party has previously forged himself; and he may be convicted of forging and uttering it in the state to which it was so altered. *Rex* v. *Kinder*, 2 East, P. C. 856.

—— Contents Unknown by Party Signing.]—It is not forgery fraudulently to procure a party's signature to a document, the contents of which have been altered without his knowledge. *Reg.* v. *Chadwick*, 2 M. & Rob. 545.

Nor is it forgery fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. *Reg.* v. *Collins*, 2 M. & Rob. 461.

No Uttering Necessary.]—A person may be convicted of forgery with intent to defraud, although the note was found in his custody when apprehended, and never, in fact, uttered by him. *Rex* v. *Crocker*, 2 Leach, C. C. 987; 2 Bos. & P. (N.R.) 87; R. & R. 97.

Fraud not Effected.]—Forging an order from one to charge certain goods contained in a schedule to his account, and to appropriate part of the proceeds to the forger's own use, done with intent to defraud the principal, is forgery at common law, though the fraud is not effected. *Rex* v. *Ward*, 2 East, P. C. 861.

Where no Person to be Defrauded.]—A man may be convicted of forging and uttering an instrument, with intent to defraud, though there is no person in a situation to be defrauded by his act. *Reg.* v *Nash*, 2 Den. C. C. 448; 21 L. J., M. C. 147; 16 Jur. 553.

Where a person had made alterations in a diploma of the College of Surgeons, to make it appear to be a document issued by the college to him, and had hung it up in his house, and showed it to certain persons, it was found by the case reserved for the court that he had no intent in forging to commit any particular fraud or specific wrong to any individual:—Held, that he could not be convicted of forgery. *Reg.* v. *Hodgson*, Dears. & B. 3; 25 L. J., M. C. 78; 2 Jur. (N.S.) 453; 4 W. R. 509; 7 Cox, C. C. 122.

2. Particular Offences.

a. Bank Notes.

Putting off.]—Giving to a confederate a forged bank note, that he may utter it, is a disposing and putting away thereof. *Rex* v. *Palmer*, R. & R. 72; 1 Bos. & P. (N.R.) 96; 2 Leach, C. C. 978. And see *Brooks* v. *Warwick*, 2 Stark. 380; 20 R. R. 697.

What is Forging.]—The changing the figure 2 into the figure 5, in a bank note (220*l.* to 250*l.*), is forging and counterfeiting a bank note. *Rex* v. *Dawson*, 1 Stra. 19; 2 East, P. C. 978.

So, the altering a banker's one-pound note, by substituting the word "ten" for the word "one," is a forgery, although it thereby purports to be a note for ten "pound," and not pounds. *Rex* v. *Post*, R. & R. 101.

A forged bank note, although the word "pounds" is omitted in the body of it, and there is no water-mark in the paper, is a counterfeit note for the payment of money. *Rex* v. *Eliot*, 2 East, P. C. 951. See *Sanderson* v. *Piper*, 7 Scott, 408; 5 Bing. (N.C.) 425; 2 Arn. 58; 7 D. P. C. 632; 3 Jur. 773.

Expunging, by a certain liquor, a notification of payment of part of the contents of a bank bill, written on the face of it, would sustain an indictment on 8 & 9 Will. 3, c. 20, s. 36, for rasing out an indorsement on such bill. *Rex* v. *Bigg*, 2 East, P. C. 882; 3 P. Wms. 419.

The counterfeit making of any part of a genuine note, which may give it a greater currency, is forgery; therefore, if a note is made payable at a country banker's or at his banker's in London, who fails, it is forgery to alter the name of that London banker to the name of another London banker, with whom the maker makes his other notes payable after the failure of the first. *Rex* v. *Treble*, 2 Taunt. 328; 2 Leach, C. C. 1040; R. & R. 164.

Engraving—Whether Act extends to Scotch

Banks.]—The 24 & 25 Vict. c. 98, s. 16, extends to the engraving in England without authority of notes purporting to be notes of a banking company carrying on business in Scotland only, notwithstanding that s. 55 enacts that nothing in the act contained shall extend to Scotland. *Reg.* v. *Brackenridge*, 37 L. J., M. C. 86; L. R. 1 C. C. 133; 18 L. T. 369; 16 W. R. 816; 11 Cox, C. C. 96. *See also* 33 & 34 Vict. c. 58, s. 7.

"Note," what is.]—Engraving a plate for a portion of a note is, within s. 19 of 1 Will. 4, c. 66, similar to s. 19 of 24 & 25 Vict. c. 98. *Reg.* v. *Valler*, 1 Cox, C. C. 84.

A. cut out the centre part of a one-pound note of a banking company, and took the ornamental border to an engraver, representing that he wanted to have a plate made to this border, intending to fill up the centre with the title of some oil or cosmetic, of which the firm in whose employ he represented himself to be were the vendors. A plate was accordingly made and delivered to him, when he was immediately apprehended with the plate in his possession, and was tried and convicted upon an indictment framed upon the 11 Geo. 4 & 1 Will. 4, c. 66, s. 18:—Held, that by the word "note" is not meant merely the obligation or writing, but the whole paper or thing which circulates as a note; and therefore the border or ornamental margin is part of a note within the meaning of the statute. *Reg.* v. *Keith*, Dears. C. C. 486; 3 C. L. R. 692; 24 L. J., M. C. 110; 1 Jur. (N.S.) 454; 3 W. R. 412; 6 Cox, C. C. 533.

—— **Extrinsic Evidence.**]—In order to ascertain whether that which was engraved on the plate purported to be part of the note, extrinsic evidence is admissible, and for that purpose the jury may compare the plate with a genuine note of the company. *Ib.*

Engraving plates for Foreign Note.]—Making on a glass plate a positive impression of an undertaking of a foreign state for the payment of money by means of photography, without lawful authority or excuse, is a felony within 24 & 25 Vict. c. 98. *Reg.* v. *Rinaldi*, L. & C. 330; 33 L. J., M. C. 28; 9 L. T. 395; 12 W. R. 87; 9 Cox, C. C. 391.

—— **Jointly employing Innocent Agent.**]—Three foreigners were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The plates were engraved by an Englishman, who was an innocent agent in the transaction. Two of the prisoners only were present at the time when the order was given for the engraving of the plates; but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction. The questions left to the jury were—first, whether the other two, who gave the order for the engraving, knew the nature of the instrument; and secondly, whether all three concurred in the order given. The judge told the jury that, in order to find all three guilty, they must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and that all three concurred in the employment of the engraver. The jury found the two guilty who gave the order. The third prisoner was acquitted. *Reg.* v. *Mazeau*, 9 Car. & P. 676.

—— **What is a Foreign Note.**]—The 11 Geo. 4 & 1 Will. 4, c. 66, s. 18, applied to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada. *Reg.* v. *Hannon*, 9 Car. & P. 11; 2 M. C. C. 11.

The forging and uttering a Prussian treasury note for the payment of one dollar was within 43 Geo. 3, c. 139, s. 1. *Rex* v. *Goldstein*, 7 Moore, 1; 3 Br. & B. 201; 10 Price, 88; R. & R. 473.

The 43 Geo. 3, c. 139, made to prevent forgery in Great Britain of foreign securities, was not to be understood to require that such securities should possess the technical properties required by the law of England, it being sufficient if they imported on the face of the whole instrument an undertaking or order for payment of money. *Ib.*

—— **Indictment—Form and Contents.**]—In an indictment for forging, the words, "purporting to be a bank note," mean that the instrument upon the face of it appears to be a bank note; and the want of such appearance cannot be supplied by the representation of the party uttering it. *Rex* v. *Jones*, 1 Leach, C. C. 204; 2 East, P. C. 883; 1 Dougl. 302.

Where an indictment on 41 Geo. 3, c. 57, s. 2, stated that the prisoner knowingly and without any authority from a certain corporate company called, &c., had in his custody a certain plate on which was engraved part of a promissory note, purporting to be the promissory note of the company; and it appeared that this company carried on the business of bankers, although incorporated for a totally different purpose:—Held, that the indictment was bad, having omitted to aver that the company "carried on the business of bankers." *Rex* v. *Catapodi*, R. & R. 65.

A bank post bill cannot, in an indictment for forging or uttering, be described as a bill of exchange; but it may be described as a bank bill of exchange. *Rex* v. *Birkett*, R. & R. 251.

b. Bills of Exchange and Promissory Notes.

i. The Offence, 1256.
ii. Indictment, 1262.
iii. Evidence, 1264.

i. *The Offence.*

What are.]—An instrument payable to the order of A., and directed "at Messrs. P. & Co., bankers," may be described as a bill of exchange in an indictment for forgery. *Reg.* v. *Smith*, 2 M. C. C. 295.

A writing directed to A. & Co., requiring them to pay the bearer on demand a sum of money, is not, on an indictment for forgery, a bill of exchange. *Reg.* v. *Curry*, 2 M. C. C. 218.

A document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee, cannot, in an indictment for forgery and uttering, be treated as a bill of exchange. *Reg.* v. *Bartlett*, 2 M. & Rob. 362.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum, at a certain time, "without acceptance," is a bill, and may be so described in an indictment for forgery. *Reg.* v. *Kinnear*, 2 M. & Rob. 117.

A promissory note for the payment of one guinea in cash, or Bank of England note, was not a note for the payment of money within 2 Geo. 2, c. 25. *Rex* v. *Wilcocks*, 2 Russ. C. & M. 905.

A person forging a seaman's advance note cannot be indicted for forging or uttering it as a promissory note. *Reg.* v. *Howie*, 11 Cox, C. C. 320.

A promissory note made payable to a number of persons associated together under the name of the Temple of Peace United Lodge of Odd-Fellows is good on the face of it, and will support an indictment for forgery. *Reg.* v. *Clarkson*, 1 Cox, C. C. 110.

A bill payable ten days after sight, purporting to have been drawn upon the commissioners of the navy by a lieutenant for the amount of certain pay due to him, was a bill of exchange within 2 Geo. 2, c. 25. *Rex* v. *Chisholm*, R. & R. 297.

Invalid in Form.]—Forging a bill or a note for less than 20*s.* or 5*l.*, which does not comply with the requisites of 17 Geo. 3, c. 30, or any other bill or note which the legislature has declared void, is not within the statutes against forgery. *Rex* v. *Moffatt*, 1 Leach, C. C. 431; 2 East, P. C. 954.

On an indictment for forging a note, it appeared that it was not payable to the bearer on demand, or payable in money; that the maker only promised to take it in payment, and that the requisitions of the 17 Geo. 3, c. 30, were not complied with:—Held, that the forgery of such an instrument was not the subject of an indictment at common law. *Rex* v. *Burke*, R. & R. 496.

An order for the payment of prize-money, signed in the name of a seaman, was a bill of exchange within 7 Geo. 2, c. 22, the forgery of which was felony, although the requisites of 32 Geo. 3, c. 34, s. 2, had not been complied with. *Rex* v. *M'Intosh*, 2 East, P. C. 942, 956; 2 Leach, C. C. 883.

Signature need not be a Fac-simile.]—In order to complete the offence of forgery, the signature need not be an exact fac-simile of that of the person represented, and a slight variance, if not such as would under the circumstances put a person on inquiry, will not suffice to take such a forgery out of the definition of the offence, when applied to the falsely putting the name of an existing person to an instrument, without authority, for the purpose of fraud. P. M. promised to get his mother-in-law, "C. W.'s." name to two notes. He brought the two notes, which in the meantime he had got his wife to sign by her maiden name, "A. W.," and handing them over, saying, "Here are the notes." On his trial for forging and uttering these notes, the jury found him guilty, being of opinion that, when he got his wife's signature to them, he intended to pass them as the notes of his mother-in-law:—Held, that the conviction was right, and the question which had been thus put to the jury was the correct way of leaving it to them. *Reg.* v. *Mahony*, 6 Cox, C. C. 487.

Inchoate Negotiable Instrument—No Drawer's Name.]—H. purchased goods upon the terms that he should give to the vendors his acceptance for the price, indorsed by a solvent third party. The vendors sent to him for such acceptance and indorsement a document in the form of a bill of exchange, for the price, but without any drawer's name thereon. H. returned this document accepted by himself, and with what purported to be an indorsement by a solvent third party. This indorsement was fictitious and had been forged by H. No drawer's name was ever placed upon the document:—Held, that the document was not a bill of exchange, as it bore no drawer's name, and that H. could not be convicted of feloniously forging or feloniously uttering an indorsement on a bill of exchange. *Reg.* v. *Harper*, 50 L. J., M. C. 90; 7 Q. B. D. 78; 44 L. T. 615; 29 W. R. 743; 14 Cox, C. C. 574.

Semble, that he might have been convicted of a common-law forgery. *Ib.*

The acceptance to what purported to be a bill of exchange was forged. At the time, however, this was so forged, the document had not been signed by the drawer:—Held, that the document, not having the signature of the drawer attached to it at the time the acceptor's name was forged, was not a bill of exchange. *Reg.* v. *Mopsey*, 11 Cox, C. C. 143.

To constitute the forgery of a bill of exchange, the instrument must be a complete forging; an acceptance to an instrument in the form of a bill, but without the drawer's name, is not within the statute. *Reg.* v. *Butterwick*, 2 M. & Rob. 196.

The forging a note which, for want of a signature, was incomplete, was not within the statute which made forging notes capital. *Rex* v. *Pateman*, R. & R. 455.

—— **No Drawee's Name.**]—An indictment for uttering a false bill of exchange is supported by proof of uttering an instrument in form of a bill with a forged acceptance on it, though there is no person named as drawee in the bill. *Reg.* v. *Hawkes*, 2 M. C. C. 60. See *Peto* v. *Reynolds*, 9 Ex. 410. *S. C.* (*in error*), 11 Ex. 418; and *Fielder* v. *Marshall*, 9 C. B. (N.S.) 606; 30 L. J., C. P. 158; 7 Jur. (N.S.) 777; 3 L. T. 858.

—— **Payable to —— or Order.**]—Where a prisoner was indicted for forging a bill, and the bill was payable to —— or order:—Held, that there must be a payee; forging an instrument payable to —— or order is not sufficient. *Rex* v. *Randall*, R. & R. 195.

—— **On Unstamped Paper.**]—Forging on unstamped paper a bill or a note which requires a stamp, is as much an offence as if it was on stamped paper. *Rex* v. *Hawkeswood*, 2 Term Rep. 606, n. S. P., *Rex* v. *Morton*, 2 East, P. C. 955; *Rex* v. *Reculist*, 2 Leach, C. C. 703; 2 East, P. C. 956.

Negotiability of, not Essential.]—It was not necessary that a note should be negotiable, in order to be a note within 2 Geo. 2, c. 25, so as to be the subject of an indictment for forging or uttering it. *Rex* v. *Box*, R. & R. 300; 6 Taunt. 325.

Bill made after Signature forged by another.]—If the prisoner writes another's name across a blank stamp, on which, after he is gone, a third

person who is in league with him, writes a bill of exchange:—Semble, that this is not a forgery of the acceptance of a bill of exchange by the prisoner. *Reg.* v. *Cooke*, 8 Car. & P. 582.

Indorsement, when Forgery.]—Discharging a genuine indorsement, and inserting another, is altering the indorsement, and forgery. *Rex* v. *Birkett*, R. & R. 251.

A bill of exchange made payable to A., B., C., D., or order, executrices. The indictment charged, that the prisoner forged on the back of the bill a certain forged indorsement, which indorsement was as follows (naming one of the executrices):—Held, a forged indorsement. *Reg.* v. *Winterbottom*, 2 Car. & K. 37; 1 Den. C. C. 41.

The forging of an indorsement in this country on a bill drawn abroad on a person in this country and payable in this country was an offence within 39 Geo. 3, c. 63. *Reg.* v. *Roberts*, 7 Cox, C. C. 422; 7 Ir. C. L. R. 325.

Where a prisoner put a fictitious name on a bill he may be convicted of forging the indorsement, although it does not correspond with the name in the body of the bill, if the jury find that he did so for the purpose of defrauding any of the persons mentioned in the indictment. *Reg.* v. *Parke*, 1 Cox, C. C. 4.

Indorsing a bill in a fictitious name is a forgery, though the bill would have then been equally negotiable if indorsed by the prisoner in his own name, if the fictitious name was used in order to defraud. *Rex* v. *Marshall*, R. & R. 75. S. P., *Rex* v. *Taft*, 1 Leach, C. C. 172; 2 East, P. C. 959.

—— By Person knowing he has no Title.]—If a bill of exchange, payable to A. or order, gets into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorses it, he is guilty of a forgery. *Mead* v. *Young*, 4 Term Rep. 28; 2 R. R. 314.

Alteration of Amount.]—Altering a bill from a lower to a higher sum is forging it; and a person might have been indicted on 7 Geo. 2, c. 22, for forging such an instrument, although the statute had the word "alter" as well as "forge." *Rex* v. *Teague*, R. & R. 33; 2 East, P. C. 979.

Filling in Larger Sum than Authorised.]—If a person, having the blank acceptance of another, is authorised to write on it a bill of exchange for a limited amount, and he writes a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person; this is forgery. *Rex* v. *Hart*, 7 Car. & P. 652; 1 M. C. C. 486. S. P., *Reg.* v. *Bateman*, 1 Cox, C. C. 186.

What is or is not a false making of a bill of exchange, is a question of law. *Ib.*

Alteration of Date.]—A., being in want of 1,000*l.*, applied to B., who drew a bill for that amount, which A. accepted, payable at three months after date. In a few days B. came to A., and said that he could not get the 1,000*l.* bill discounted, as it was too large, and proposed that two bills for 500*l.* each should be substituted; one for 500*l.* was drawn by B., and accepted by A.: B., upon this, pretended to destroy the 1,000*l.* bill in A.'s presence, but did not in fact destroy it; on the contrary, he altered it from a bill at three, to a bill at twelve months:—Held, that this was forgery in B., with intent to defraud A. *Rex* v. *Atkinson*, 7 Car. & P. 669.

Drawing Bill or Note in Name of Non-existent or Fictitious Person or Firm.]—If a person authorises another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person in whose name it is drawn represents it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exists, this is forgery, for it is a false making of an instrument in the name of a non-existing person. *Rex* v. *Parkes*, 2 Leach, C. C. 775; 2 East, P. C. 963, 992.

A person who has for many years been known by a name which was not his own, and afterwards assumes his real name, and in that name draws a bill of exchange, is not guilty of forgery, though the bill was drawn for the purposes of fraud. *Rex* v. *Aickles*, 1 Leach, C. C. 438; 2 East, P. C. 968.

Assuming and using a fictitious name, though for the purposes of concealment and fraud, will not amount to forgery, if it was not for that very fraud, or system of fraud, of which the forgery forms a part. *Rex* v. *Bontien*, R. & R. 260.

Where a prisoner fraudulently used the name of another person for the purposes of his trade, and afterwards accepted a bill in that name:—Held, that he could not be convicted of forgery, unless when he first assumed the fictitious name he contemplated the making of that specific bill. *Reg.* v. *Whyte*, 5 Cox, C. C. 290.

A bill drawn in fictitious names, where there are no such persons existing as the bill imports, may be a forgery. *Rex* v. *Wilkes*, 2 East, P. C. 957.

It is felony to forge the name of a person, although such person never existed. *Rex* v. *Bolland*, 1 Leach, C. C. 83; 2 East, P. C. 958.

Writing the acceptance of an existing person to a bill of exchange without authority, or the name of a firm or person non-existing, in acceptance of a bill, with intent to defraud, is forgery; and if a person writes an acceptance in his own name to represent a fictitious firm, with intent to defraud, it is a forged acceptance; for if an acceptance represents a fictitious firm, it is the same as if it represented a fictitious person. *Reg.* v. *Rogers*, 8 Car. & P. 629.

If a person gets another to accept a bill in his true name, intending at the time to represent such name to be the name of another person, for the purposes of fraud, it is a forgery. *Reg.* v. *Mitchell*, 1 Den. C. C. 282.

A receipt indorsed on a bill of exchange in a fictitious name is a forgery, although it does not purport to be the name of any particular person. *Rex* v. *Taylor*, 1 Leach, C. C. 215; 2 East, P. C. 690.

Signing a money order in an assumed name is forgery, if the name was assumed to defraud the person to whom such order was given, though the prisoner had borne other names unknown to the prosecutor, who knew him only by the assumed name. *Rex* v. *Francis*, R. & R. 209.

If, on an indictment for forging a bill of exchange, it is proved that the prisoner assumed a false name for the purpose of pecuniary fraud, connected with the forgery, the drawing, accepting, or indorsing of such bill of exchange, in such false or assumed name, is forgery. *Rex* v. *Peacock*, R. & R. 278.

Where a name made use of by a prisoner in a forged instrument is assumed by him with the intention of defrauding the prosecutor, it is forgery, though the prisoner's real name would have carried with it as much credit as the assumed name. *Rex* v. *Whiley*, R. & R. 90.

Adding Address to Name of Drawer.]—Putting an address to the name of a drawer of a bill of exchange while the bill is in the course of completion, with intent to make the acceptance appear to be that of a different existing person, is forgery. *Reg.* v. *Blenkinsop*, 1 Den. C. C. 276; 2 Car. & K. 531; 17 L. J., M. C. 62; 2 Cox, C. C. 420.

Address of different Person given, though Name the same.]—If there are two persons of the same name, but of different descriptions or additions, and one signs his name with the description or addition of the other for the purpose of fraud, it is forgery. *Rex* v. *Webb*, Bayl. Bills, 432.

Addition of False Address, but no Description.]—A nurseryman and seedsman got his foreman to accept two bills, the acceptances having no addition, description, or address, and afterwards, without the acceptor's knowledge, he added to the direction a false address, but no description, and represented in one case that the acceptance was that of a customer, and in the other case that it was that of a seedsman, there being in fact no such person at the supposed false address:—Held, that in the one case (the former) he was not guilty of forgery of the acceptance, but that in the other case he was. *Reg.* v. *Epps*, 4 F. & F. 81.

Bill Drawn and Accepted by Person not Living at Address given.]—Where a bill was drawn by the prisoner, and addressed to "Mr. T. B., Baize Manufacturer, Romford," and purported to have been accepted by him, payable when due at No. 40, Castle Street, Holborn, and it was proved that no such person resided at Romford, and that there was no baize manufactory there, and that he did not live at Castle Street; and the prisoner produced witnesses to prove that the acceptance was of the handwriting of T. B., but that he had never carried on the business of a baize manufacturer at Romford, nor resided at Castle Street:—Held, that, although this was a case of gross fraud, it did not amount to forgery, as the acceptance was written by a person of the name of T. B. *Rex* v. *Webb*, 6 Moore, 447, n.; 3 Br. & B. 228; R. & R. 405.

Under Presumption or Assumption of Authority.]—If A. puts the name of B. on a bill of exchange as acceptor, without B.'s authority, expecting to be able to meet it when due, or expecting that B. will overlook it; this is forgery. But if A. either had authority from B., or from the course of their dealings, bonâ fide considered that he had such authority, it is not forgery. *Rex* v. *Forbes*, 7 Car. & P. 224. S. P., *Reg.* v. *Parish*, 8 Car. & P. 94.

The fact that on three or four previous occasions, when he had drawn bills in that way, the party whose name was used had paid them, even without remark or remonstrance, would afford fair ground for the belief that he had such authority. *Reg.* v. *Beard*, 8 Car. & P. 143.

If a person, wishing to raise money, puts the name of another on a bill without his authority, intending to pay the bill when due, and believing that he should be able to do so; this is forgery. *Ib.*

So, if a person, relying on the kindness of another (a near relation for instance), uses his name on a bill without authority, trusting that the person will pay it, rather than there should be a criminal prosecution on the subject; this also is a forgery. *Ib.*

If a person knows the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act: and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser; and the fact that the bill has been since paid by the forger will make no difference, if the offence was complete at the time of the uttering. *Reg.* v. *Geach*, 9 Car. & P. 499.

By Procuration.]—Before 24 & 25 Vict. c. 98, s. 24, a prisoner falsely averring an authority to indorse a bill of exchange for T. Tomlinson, wrote on the back of the bill, "Per procuration Thomas Tomlinson, Emanuel White." The bill was thereupon discounted, and the prisoner went off with the money:—Held, no forgery. *Reg.* v. *White*, 1 Den. C. C. 208; 2 Car. & K. 404; 2 Cox, C. C. 210.

ii. *Indictment.*

Form and Validity of.]—A count charging a prisoner with uttering a forged bill, with intent to defraud A., and setting out the bill with the acceptance upon it, is not supported by proving that the prisoner uttered the bill, and that the acceptance on it was a forgery. *Rex* v. *Horwell*, 6 Car. & P. 148; 1 M. C. C. 405.

In an indictment for forgery, a count which, since 11 Geo. 4 & 1 Will. 4, c. 66, charged, that the prisoner "did falsely make, forge and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging and counterfeiting" a bill of exchange, was good; as were counts charging that he did utter and publish as true, and did after dispose of and put away the bill. *Rex* v. *Brewer*, 6 Car. & P. 363.

An indictment on 2 Geo. 2, c. 25, charging that the prisoner feloniously altered a bill by making, forging, and adding a cipher, was good, though the words of the statute were, "if any person shall falsely make or forge, counterfeit," &c. *Rex* v. *Elsworth*, 2 East, P. C. 986.

Intent to Defraud.]—A forged bill of exchange, given in payment to one of two known partners, may be laid to be forged with intent to defraud that one, the partnership dealing having been conducted by him only. *Reg.* v. *Hanson*, 2 M. C. C. 245; Car. & M. 334.

Purport and Tenor Repugnant.]—An indictment for forging a bill of exchange directed to Ransom, Moreland and Hammersley, stating that it purported to be directed to George Lord Kinnaird, William Moreland and Thomas Hammersley, by the names and description of Ransom,

Moreland and Hammersley, is bad; for the purport and tenor are repugnant. *Rex* v. *Gilchrist*, 2 Leach, C. C. 657; 2 East, P. C. 982.

"Purporting."]—An indictment, charging that the defendant, having in his possession a bill of exchange, purporting to be directed to one J. King, by the name and description of J. Ring, forged the acceptance of the said J. King, is bad, because the word "purport" means what appears on the face of the instrument, and the bill did not purport to be drawn on J. King. *Rex* v. *Reading*, 1 East, 180, n.

An indictment for forging a bill of exchange, stating it to be signed by H. H. instead of purporting only to be so signed, the signature itself being a forgery, is bad. *Rex* v. *Carter*, 2 East, P. C. 935.

Attestation after Prisoner's Signature.]—An indictment stating the tenor of a note is sustained by proof that the attestation of the witness, and the words "M. W., her mark," were added after the prisoner's signature, though on the same occasion. *Rex* v. *Dunn*, 2 East, P. C. 976.

Date not Stated.]—In an indictment for forging a promissory note, the forged note might, under 2 & 3 Will. 4, c. 123, s. 3, be described as "a certain forged promissory note, for the payment of 29*l*.," without stating the date. *Rex* v. *Burgiss*, 7 Car. & P. 490.

On Foreign Notes or Bills.]—An indictment for uttering a forged bill of exchange set out as follows:—"à 4 mois de date par cette lettre de change, à l'ordre de nous-même la somme de 500 livres sterling,"—and translated,—"at four months' date by this bill of exchange, to the order of ourselves, the sum of five hundred pounds sterling," is good. *Rex* v. *Szudurskie*, 1 M. C. C. 429.

—— Translation Necessary.]—Where a prisoner was convicted of forging an instrument (purporting to be a Prussian note) in a foreign language, but no count in the indictment contained an English translation of the note: judgment was ordered to be arrested. *Rex* v. *Goldstein*, 7 Moore, 1; 10 Price, 88; 3 Br. & B. 201; R. & R. 473.

Foreign notes were set out in an indictment in the original language, but the translation omitted some words which were in the margin or a border round the body of the note, and denoted the year in which the notes were issued, and it appeared that without these words the notes would not be capable of being circulated in the country to which they belonged:—Held, that the translation was imperfect. *Rex* v. *Harris*, 7 Car. & P. 429.

Describing a foreign note wholly in the English language is not sufficient in an indictment for forgery, notwithstanding the 2 & 3 Will. 4, c. 128, s. 3; but this objection, provided the description was in the words of the statute creating the offence, could only be taken advantage of by demurrer. *Ib.*

An indictment under 11 Geo. 4 & 1 Will. 4, c. 66, s. 19, for feloniously having in possession plates upon which were engraved a promissory note for payment of money of a foreign prince inaccurately setting out the note in the foreign language and the translation, and with fac-similes of the note not ingrossed in the indictment, but attached thereto on paper, was bad. *Rex* v. *Warshaner*, 1 M. C. C. 466.

Setting out Notes.]—Sewing to the parchment on which the indictment is written impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. *Rex* v. *Harris*, 7 Car. & P. 429.

Upon an indictment under s. 19 of 1 Will. 4, c. 66, for engraving on a plate several parts of a promissory note, it is not necessary that the promissory note itself, of which they are alleged to be parts, should be set out. *Reg.* v. *Fuderman*, 4 Cox, C. C. 361.

Allegation that it is Payable in England.]—An indictment under 11 Geo. 4 & 1 Will. 4, c. 66, for uttering a forged foreign promissory note, need not allege it to be payable in England. *Reg.* v. *Lee*, 2 M. & Rob. 281.

Aider by Verdict.]—Counts under 2 & 3 Will. 4, c. 123, s. 3, stating the plates to have engraved on them, in the Polish language, a promissory note for payment of money, to wit, for the payment of five florins, purporting to be a promissory note for payment of money of a certain foreign prince, without stating the value, were good after verdict. *Rex* v. *Warshaner*, 1 M. C. C. 466.

Describing a foreign note wholly in the English language is not sufficient, but this objection is cured after verdict by 7 Geo. 4, c. 64, s. 21, if the description was in the words of the statute creating the offence. *Rex* v. *Harris*, 7 Car. & P. 429.

iii. *Evidence.*

To Show that Prisoner thought he had Authority.]—A letter which had passed through the post-office before an alleged forgery, is admissible for the prisoner, in order to show that he supposed he had a right to cause a name to be signed. *Reg.* v. *Clifford*, 2 Car. & K. 202.

A letter from the prisoner to the prosecutor left unanswered is sufficient to warrant the jury in presuming a bonâ fide belief in an implied authority. *Reg.* v. *Beardsall*, 1 F. & F. 629.

On an indictment for forging and uttering a bill, knowing it to be forged, it appearing that the person whose name was used was informed of it at the time, and did not repudiate it; the jury was directed to acquit, though he was called as a witness, and denied any previous authority. *Reg.* v. *Smith*, 3 F. & F. 504.

To Negative Express or Implied Authority.]—Proof that a prisoner on uttering a note represented the maker as living at a particular place, and in a particular line of business, the evidence that it is not that person's note is sufficient to prove it a forgery, especially if the prisoner is the payee of the note; and proof that there is another person of the name in a different line of business will not make it necessary for the prosecutor to show that it was not that person's note. *Rex* v. *Hampton*, 1 M. C. C. 255.

Where a bill purported to be accepted by "Samuel Knight, Market Place, Birmingham": —Held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the

jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used. *Rex* v. *King*, 5 Car. & P. 123.

The prisoners were indicted for forging a bill of exchange. The bill purported to be accepted by one George Smith, and was directed to George Smith, draper, Birmingham. The direction was in the handwriting of the prisoner, White, but the acceptance was not. George Smith, a draper, at Birmingham, proved that the acceptance was not his; that he had made personal inquiries, and consulted a directory, and could not discover that there was any other George Smith, a draper, at Birmingham. Letters were produced from White to Davis, in which the former requested the latter to get him blank bills, signed by men of straw:—Held, first, that there was evidence to go to the jury that the George Smith who was called was the only draper of that name in Birmingham; and, secondly, that there was evidence for the jury that the name, George Smith, in the acceptance was fictitious, and that the acceptance was not the genuine acceptance of a man of straw signing his real name. *Reg.* v. *White*, 2 F. & F. 554.

On an indictment for uttering a forged cheque, it is sufficient to disprove the handwriting of the supposed maker; and he need not be called to disprove an authority to others to use his name; circumstances showing guilty knowledge are enough. *Reg.* v. *Hurley*, 2 M. & Rob. 473.

Proof of Acceptance.]—If a bill purporting to be accepted by J. K. is shown to him, and he declares it to be a good bill, that is a sufficient proof that he wrote the acceptance. *Rex* v. *Hevey*, 1 Leach, C. C. 232.

c. Cheques.

See and compare cases under preceeding subhead.

What is a Cheque.]—A forged draft on a banker was an order for the payment of money within 7 Geo. 2, c. 22, although the person whose name was forged never kept cash with, or was known to, the banker. *Rex* v. *Lockett*, 1 Leach, C. C. 94; 2 East, P. C. 940.

A cheque in which the order of the words is transposed (e.g. to "pay A, B. seventeen or bearer pounds") is still a cheque, and an order for the payment of money, for the forgery of which an indictment will lie. *Reg.* v. *Borcham*, 2 Cox, C. C. 189.

—— **Incomplete Instrument.**]—The practice was for a majority of the officers of a parish to draw cheques on the treasurer of a union; and one of their blank cheques, filled up for 1*l.* 3*s.* 6*d.*, had a note at the bottom—"Unless this cheque is signed by a majority of the parish officers, it will not be cashed." This cheque was signed by one of the officers while it was for 1*l.* 3*s.* 6*d.*; it was altered to 3*l.* 3*s.* 6*d.*, and when cashed by the treasurer had the signatures of a majority of the officers to it:—Held, that if the cheque was fraudulently altered when it had only one signature to it, this was no forgery, as it was then an incomplete instrument. *Reg.* v. *Turpin*, 2 Car. & K. 820.

—— **When Post-Dated.**]—A post-dated cheque is an order for the payment of money. *Reg.* v. *Taylor*, 1 Car. & K. 213.

Forged Indorsement of valid Cheque.]—Forging and uttering an indorsement on a cheque, with a view to get it cashed by the credit of the name, will support a conviction for forgery, although the cheque is valid. *Reg.* v. *Wardell*, 3 F. & F. 82.

Alteration after Cheque Cashed.]—The drawer of a cheque on a bank which was duly honoured, and returned to him by the bank, afterwards altered his signature in order to give it the appearance of forgery, and to defraud the bank and cause the payee of the cheque to be charged with forgery:—Held, that this alteration did not constitute a forgery. *Brittain* v. *Bank of London*, 3 F. & F. 465; 8 L. T. 382; 11 W. R. 569. *But see* 2 Russ. C. & M. 573.

Filling in larger Amount than Authorised.]—Where a party receives a blank cheque, signed, with directions to fill in a certain amount, and he fraudulently fills in a larger amount, and devotes the proceeds of the cheque to other purposes, he is guilty of forgery. *Reg.* v. *Wilson*, 1 Den. C. C. 284; 2 Car. & K. 527; 17 L. J., M. C. 82; 2 Cox, C. C. 426.

A. gave to B., his clerk, a blank cheque, and directed him to fill it up with the amount of a bill of exchange, and expenses (for which A. had to provide, and which amount B. was to ascertain), and get the cheque cashed, and pay the amount to Mr. W., and take up the bill. The bill was for 156*l.* 9*s.* 9*d.*, the expenses about 10*s.* B. filled up the cheque with the sum of 250*l.*, got it cashed, and kept the whole amount, alleging that it was due to him for salary:—Held, that this was a forgery, and that this was so even if B. bonâ fide believed that the sum of 250*l.* was due to him from A., or even if it was really due to him. *Ib.*

So filling in a form of cheque already signed, with blanks left in it for the sum, without authority, is a forgery. *Flower* v. *Shaw*, 2 Car. & K. 703.

Cheque signed in Fictitious Name.] — The prisoner, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own cheque drawn in his own name. At the time he drew the cheque the prisoner knew that it would be, as in fact it was, dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name:—Held, that the prisoner was not guilty of the offence of forgery. The resolution in *Dunn's Case* (1 Leach, C. C. 59): "In all forgeries the instrument supposed to be forged must be a false instrument itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person," followed and approved. *Reg.* v. *Martin*, 49 L. J., M. C. 11; 5 Q. B. D. 34; 41 L. T. 531; 28 W. R. 232; 14 Cox, C. C. 375; 44 J. P. 74.

Evidence to go to Jury that Drawer a Fictitious Person.]—On an indictment for forging a cheque

purporting to be drawn by G. A. upon Messrs. J. L. & Co., proof that no person named G. A. keeps an account with or has any right to draw on Messrs. J. L. & Co., is primâ facie evidence that G. A. is a fictitious person. *Rex* v. *Bickler*, 5 Car. & P. 118.

Upon an indictment for the forgery of a cheque, dated Knighton, and purporting to be drawn by John Hust, it was proved that no John Hust lived at Knighton, who would be likely to keep an account with a banker:—Held, evidence to go to the jury that John Hust was a fictitious person. *Reg.* v. *Ashby*, 2 F. & F. 560.

Evidence of Intent to Defraud—Presentment.]—A forged cheque on the W. bank was presented for payment at the S. bank, where the supposed drawer never kept cash:—Held, that this was sufficient evidence of an intent to defraud the partners of the bank, although there was no probability of their paying the cheque, even if it had been genuine. *Rex* v. *Crowther*, 5 Car. & P. 316.

d. Deeds or Bonds.

Bond—What is.]—On an indictment for forgery of an administration bond on administration granted of the effects of S., it was objected, that 22 & 23 Car. 2, c. 10, requiring the bond to be given by the party to whom administration was granted, and not by the party that was entitled to administration, no forgery was made out; but the bond was a good one within the statute, having been given by the party to whom, in fact, administration was granted:—Held, that this was not a good objection. *Reg.* v. *Barber*, 1 Car. & K. 434.

Deed—What is—Power of Attorney.]—A power of attorney to transfer government stock, signed, sealed and delivered, was a deed within 2 Geo. 2, c. 25, s. 1. *Rex* v. *Fauntleroy*, 1 M. C. C. 52; 2 Bing. 413; 10 Moore, 1; 1 Car. & P. 421. S. P., *Rex* v. *Pringle*, 1 M. C. C. 68. *See now* 24 & 25 Vict. c. 98, ss. 2, 4.

Forging a power of attorney to receive a seaman's wages, in the name of a supposed child as administratrix of such seaman, who, in fact, died childless, is a forgery. *Rex* v. *Lewis*, 2 East, P. C. 957.

——Forgery of—Particular Statutory Provisions as to Form.]—Forging a deed was within 2 Geo. 2, c. 25, s. 1, although there may have been subsequent directory provisions by other statutes, that instruments for the same purpose as such forged deed shall be in a particular form, or shall comply with certain requisites, and the forged deed was not in that form, and did not comply with those requisites; for the directory provisions do not make the deed (although out of the form prescribed, and without the requisites) wholly void. *Rex* v. *Lyon*, R. & R. 255.

—— Fraudulent Mortgage by one Executor.]—A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrices with him, and who had proved the will. The mortgage deeds purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The son took a beneficial interest under the trusts of the father's will. Semble, per Lindley, L.J.:—The son could have been convicted of forgery by reason of his executing the mortgage deeds. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A.

Transfer—Stock never Accepted nor Tranfer Witnessed.]—An indictment for forging a transfer of stock is good, although the stock has never been accepted by the person in whose name it stood, and although the transfer was not witnessed according to the rules and directions of the bank. *Rex* v. *Gade*, 2 Leach, C. C. 732; 2 East, P. C. 874.

Antedating Deed with Intent to Defraud.]—A deed really executed by the parties between whom it purports to be made, but antedated with intent fraudulently to defeat a prior deed, is a forgery. *Reg.* v. *Ritson*, 39 L. J., M. C. 10; L. R. 1 C. C. 200; 21 L. T. 437; 18 W. R. 73; 11 Cox, C. C. 352.

A. by deed, bearing date on the 7th May, 1868, conveyed on that day certain lands to B., in fee. Subsequently, on the 26th April, 1869, C. produced a deed, bearing date the 12th of March, 1868, purporting to be a demise of the same land for a long term of years, as from the 25th of March, 1868, from A. to C. The alleged lease was executed after A.'s conveyance to B., and ante-dated for the purpose of defrauding B.:—Held, that A. and C. were guilty of forgery. *Ib.*

Forging Letters of Orders issued by Bishop.]—The forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein, A. B. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict. c. 98, s. 20, although such forgery is a misdemeanor at common law. *Reg.* v. *Morton*, 42 L. J., M. C. 58; L. R. 2 C. C. 22; 28 L. T. 452; 21 W. R. 629; 12 Cox, C. C. 456.

Indictment—Superfluous Description.]—A superfluous description of the instrument forged is not material. Therefore an indictment for forging a bond, laying it to be "a bond and writing obligatory," was good upon 2 Geo. 2, c. 25, though both terms were used in the statute; and a bond is a writing obligatory, though the converse does not hold generally. *Rex* v. *Dunnett*, 2 East, P. C. 985; 2 Leach, C. C. 581.

—— Intent to Defraud generally.]—Since 14 & 15 Vict. c. 100, s. 8, it is sufficient, upon an indictment for forgery and uttering a bond, to lay the intent generally to defraud, and the prisoner may be convicted, though it does not appear that he had any intention ultimately to defraud the party whose signature he had forged,

he having defrauded the party to whom he uttered the instrument. *Reg.* v. *Trenfield*, 1 F. & F. 43.

—— **Who is Person Defrauded.**]—A., a share-broker, had bought twenty shares in a railway company of L., a broker, which stood in the name of P.; but L. did not send A. the deed of transfer, as A. was in embarrassed circumstances, and owed L. money. A. procured a boy to execute a deed of transfer of the shares in the name of P.; all the calls on the shares had been paid up:—Held, a forgery, and that A. could be convicted on counts laying an intent to defraud P. and the railway company. *Reg.* v. *Heatson*, 2 Car. & K. 777.

—— **Shares in Companies—Evidence that Individual is Shareholder.**]—On an indictment for forging and uttering a transfer of shares in a railway company, the register of shareholders bearing the seal of the company, and kept according to 8 & 9 Vict. c. 16, s. 9, is evidence to show that an individual is a shareholder, without further authentication; and in order to prove that such individual is liable to be defrauded by the forging and uttering of a transfer of the shares, it is not necessary to give further proof of his title to the shares. *Reg.* v. *Nash*, 2 Den. C. C. 493; 21 L. J., M. C. 147; 16 Jur. 553.

—— **Deed need not be set out Verbatim.**]—A count for uttering a forged deed describing it as "a certain deed purporting to be made on the 1st day of March, 1837, between R. W. of the one part, and D. G. of the other part, purporting to be an under lease by the said R. W. to the said D. G. of certain lands, tenements and premises therein mentioned, subject to the payment of the yearly rent of 8*l.*, payable on the first day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment by the said D. G. to the said R. W. of the yearly rent of 8*l.*," is good, under 2 & 3 Will. 4, c. 123, s. 3. *Reg.* v. *Davies*, 9 Car. & P. 427; 2 M. C. C. 177.

A count for forging or uttering a deed, purporting to be a lease of certain premises, described shortly, is good, without setting it out verbatim. *Ib.*

The instrument forged may be described as a deed, without setting it out, or averring facts to show that it was such a deed as might be the subject of larceny. *Reg.* v. *Collins*, 2 M. & Rob. 461.

e. Orders and Proceedings of Magistrates.

Forging Order not in accordance with Statutory Provisions.]—Forging a magistrate's order to pay money under hand only was not a capital offence, as the 17 Geo. 2, c. 5, under which the magistrate had power to make it, required it to be under hand and seal. *Rex* v. *Rushworth*, R. & R. 317; 1 Stark. 396.

And so, if it was addressed to the treasurer of the county, instead of the high constable, the magistrate having no power by the act to make it upon the former. *Ib.*

The 7 Geo. 2, c. 22, was not confined to commercial transactions, but would have applied to an order made by a justice to a high constable or treasurer to pay a reward. *Rex* v. *Graham*, 2 East, P. C. 945.

Signature—No such Magistrate in County.]—An order was made under 48 Geo. 3, c. 75, s. 6, purporting on the face of it to be an order of a magistrate on the treasurer of a county, to allow one J. C. the expenses of burying a dead body cast on shore:—Held, that this was a forgery, although there was no such magistrate in the county of the name of the person who signed the order, and although J. C. was not therein stated to be a parish officer, or that the expenses incurred were necessary. *Rex* v. *Fromd*, 3 Moore, 645; 7 Price, 609; 1 Br. & B. 300; R. & R. 389.

Order to Gaoler to discharge Prisoner.]—Forging an order from a magistrate to a gaoler to discharge a prisoner as upon bail having been given, is forgery at common law. *Rex* v. *Harris*, 1 M. C. C. 393; 6 Car. & P. 129.

f. Records, Judicial and Curial Process.

Where Process a Nullity.]—One who was committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor to the sheriff and gaoler, under which he obtained his discharge:—Held, a misdemeanor at common law, although the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for his discharge. *Rex* v. *Fawcett*, 2 East, P. C. 862.

Process issued in Blank.]—The practice of issuing (ancient common law) county court process in blank, for the attorneys to fill up after they had been issued by the county clerk, was highly irregular. And semble, that the filling up of a county court summons or altering a distringas into a summons, after it had been so issued in blank, was a forgery at common law. *Rex* v. *Collier*, 5 Car. & P. 160.

Acting or Professing to Act under Pretence of Process.]—The prisoner had obtained a blank form used in a county court for the plaintiff to fill in particulars as instructions for issuing summonses; this he filled up and signed it, without any authority, "W. G., registrar of the Taunton Court." On the back of the form he wrote, "Unless the whole amount claimed by A. R., draper, of T., is paid on Saturday, an execution warrant will be immediately issued against you. Witness my signature, W. G." The prisoner sent the form thus filled up to a person who was indebted to him:—Held, that this was acting, or professing to act, under the false colour or pretence of the process of the County Court, within 9 & 10 Vict. c. 95, s. 57. *Reg.* v. *Richmond*, Bell, C. C. 142; 28 L. J., M. C. 188; 5 Jur. (N.S.) 521; 7 W. R. 417; 8 Cox, C. C. 200.

But the 9 & 10 Vict. c. 95, s. 57, does not apply to mere false representations or assertion of authority to receive a debt. *Reg.* v. *Myott*, 6 Cox, C. C. 406.

—— **Existence of Process Unnecessary.**]—To constitute the offence of acting, or professing to act, under false colour or pretence of the process of the county court, it is not necessary that there should be any actual process in existence, or anything on the face of it purporting to be such. *Reg.* v. *Evans*, Dears. & B. 236; 26 L. J., M. C.

92 ; 3 Jur. (N.S.) 594 ; 5 W. R. 652 ; 7 Cox, C. C. 293.

—— **What is—Notice to Produce.**]—A notice to produce given in a pretended cause in a county court, is not process of the court within 9 & 10 Vict. c. 95, s. 57. *Reg.* v. *Castle*, Dears. & B. 363 ; 27 L J., M. C. 70 ; 3 Jur. (N.S.) 1303 ; 6 W. R. 83 ; 7 Cox, C. C. 375.

Indictment—Intent to Defraud]—The 24 & 25 Vict. c. 98, s. 28, enacts that whosoever shall forge or fraudulently alter any process of any court (with certain exceptions) shall be guilty of felony :—Held, that an indictment for forgery under that section must allege an intent to defraud. *Reg.* v. *Powner*, 12 Cox, C. C. 235.

Accountant-General and Other Officers' Names.] Forging a paper writing, purporting to be an office copy of a report of the accountant-general's, of money being paid into the bank, and also an office copy of a certificate of one of the cashiers of the bank, was within 12 Geo. 1, c. 32, s. 9. *Rex* v. *Gibson*, 1 Leach, C. C. 61 ; 2 East, P. C. 899.

g. Registers of Births, Marriages, and Deaths.

Offence.]—If a person knowing his name to be A., signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two witnesses. *Reg.* v. *Asplin*, 12 Cox, C. C. 391.

What is an Injuring.]—Indictment under 11 Geo. 4 & 1 Will. 4. c. 66, s. 20, for destroying, defacing and injuring a register of baptisms, marriages and burials. Objection, that there was neither a destroying, defacing nor injuring, because the register, when produced, had the torn piece pasted in, and was as legible as before :—Held, that the indictment was good. *Reg.* v. *Bowen*, 1 Den. C. C. 22 ; 1 Car. & K. 501 ; 1 Cox, C. C. 88.

Indictment—Intent to Defraud.]—Upon an indictment under the 24 & 25 Vict. c. 98, s. 37, for making a false entry in a marriage register, it is not necessary that the entry should be made with an intent to defraud, and it is no defence that the marriage solemnised was null and void, being bigamous. *Reg.* v. *Asplin*, 12 Cox, C. C. 301.

Indictment under 11 Geo. 4 & 1 Will. 4, c. 66, s. 20, for destroying, defacing and injuring a register of baptisms, marriage and burials. It was objected, that, as it did not contain an express averment of a scienter, it was bad. But held, that the objection was without foundation. *Reg.* v. *Bowen*, 1 Den. C. C. 22 ; 1 Car. & K. 501 ; 1 Cox, C. C. 88.

—— **Number of Offences Charged.**]—Another objection raised was, that, as three distinct and different offences were charged, it was bad for uncertainty. This objection was also overruled. *Ib.*

—— **Setting out Instrument.**]—The latter act made it an offence to utter any writing as and for a copy of an entry in any register of marriage made or kept by the vicar of any parish in England :—Held, first, that the indictment for that offence need not set out the instrument, as the words of 2 & 3 Will. 4, c. 123, s. 3, stating it to be sufficient in forgery to describe the instrument as in an indictment for stealing it, were applicable to such a case, although the instrument itself could not be the subject of an indictment for larceny. *Reg.* v. *Sharpe*, 8 Car. & P. 436.

Trial—Judicial Notice.]—Held, secondly, that the judges could take official notice that the parish of Seighford, in the county of Stafford, is a parish in England, and that the indictment need not aver that fact. *Ib.*

False Statements and Entries.]—*See* post, PERJURY.

h. Stamps and Marks on Plate.

Stamps—Part Dissimilar Concealed.]—If a person engraves a counterfeit stamp, similar in some parts, dissimilar in others, to the legal stamp, and, cutting out the dissimilar parts, utters the similar parts as genuine, concealing the space whence the dissimilar part is cut out ; this amounts to a forgery and uttering. *Rex* v. *Collicott*, R. & R. 212 ; 2 Leach, C. C. 1048 ; 4 Taunt. 300.

—— **Transposing Stamps.**]—It was the duty of a clerk in the stamp office to cut off the corners of parchments which bore the blue paper stamps allowed for as spoiled by the commissioners of stamps, and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment on which the words "This indenture" had been written. The jury found that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment ; and that he then intended to apply the stamp to a parchment intended to be used as an indenture :—Held, that this was a capital offence. *Rex* v. *Smith*, 5 Car. & P. 107 ; 1 M. C. C. 314.

—— **Transferring Stamps.**]—Quære, whether a person who took some of the stamps from a writ, and then fixed them to another writ of the same kind, and then sold it for the purpose of its being used by such persons as might buy it from his vendee, was within 12 Geo. 3, c. 48. *Rex* v. *Field*, 1 Leach, C. C. 383.

—— **Intent—Using the same Stamp more than Once.**]—To constitute a felony under 12 Geo. 3, c. 48, s. 1, of writing some matter or thing liable to stamp duty on paper on which had been before written some other matter liable to stamp duty, before the paper had been again stamped, it was essential that the party writing should do it with some fraudulent intent. *Reg.* v. *Allday*, 8 Car. & P. 136.

Indictment.]—It being uncertain whether the stamp so separated was impressed before or after 54 Geo. 3, c. 184 :—Held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used "in

pursuance of the statute made and provided for denoting a certain duty, being one of those under the management of the commissioners of stamps." *Rex* v. *Smith*, 5 Car. & P. 107 ; 1 M. C. C. 314.

In describing the offence of forging a stamp, it is enough to describe it as a stamp provided and used in pursuance of an act of parliament, without setting out the impression or inscription, or naming the amount of duty denoted thereby. *Rex* v. *Collicott*, R. & R. 212 ; 2 Leach, C. C. 1048 ; 4 Taunt. 300.

—— **Trial—Venue—Having False Stamped Paper.**]—Where on an indictment for having in possession certain reams of paper, with counterfeit marks, and impressions of certain stamps used to denote the duty imposed in respect of paper, on the covers or wrappers, it was proved that the paper came from the prisoner at Exeter, and was brought thence by his servant to Topsham, in the county of Devon, and seized by the custom officer on board a vessel at Topsham :—Held, that this was in law a custody and possession in the prisoner in the county of Devon sufficient to maintain the indictment in that county. *Rex* v. *Pim*, R. & R. 425.

Plate—Marks on—Selling, when Forged.]—Knowingly selling plate with the king's mark forged on it, was not capital, but only subject to transportation. *Rex* v. *Hope*, 1 M. C. C. 396.

—— **Transposing Mark.**]—A person might be found guilty under 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 69, s. 7, if proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both rings were genuine, and although the jury might be of opinion that he did so without any fraudulent intention. *Rex* v. *Ogden*, 6 Car. & P. 631.

i. Trade Marks.

Forgery or False Pretences.]—The prosecutor, Borwick, sold powders called "Borwick's baking powders," and "Borwick's egg powders," wrapped up in printed papers. The prisoner procured 10,000 wrappers to be printed similar to Borwick's, except that the name of Borwick was omitted on the baking powders. In these wrappers the prisoner inclosed powders of his own, which he sold for Borwick's powders. The jury found that the wrappers so far resembled Borwick's as to deceive persons of ordinary observation, and that they were procured and used by the prisoner with an intent to defraud :—Held, that he could not be convicted of forgery, though he was liable to be indicted for false pretences. *Reg.* v. *Smith*, Dears. & B. 566 ; 27 L. J., M. C. 225 ; 4 Jur. (N.S.) 1003 ; 6 W. R. 495 ; 8 Cox, C. C. 32.

j. Warrants, Orders, Undertakings, Requests, and Receipts for Goods or for Money.

i. In respect of Goods, 1273.
ii. In respect of Money, 1276.
iii. Indictment and Evidence, 1284.

i. *In respect of Goods.*

Orders for the Delivery of Goods—Direction to Person having Possession.]—A forged order for the delivery of goods was not within 7 Geo. 2, c. 22, unless directed to the person who had the goods. *Rex* v. *Clinch*, 1 Leach, C. C. 540 ; 2 East, P. C. 938.

—— **Proof of Disposing Power.**]—In a case of forging an order, the order charged as forged must import that the person making it has a disposing power over the subject of the order, or there ought to be proof that the person in whose name it was made had such power. *Rex* v. *Baher*, 1 M. C. C. 231.

A prisoner convicted on or confessing to an indictment for uttering a forged order, ought not to have judgment passed, if it appears that the person whose name is forged had no authority to order, and the writing merely purports to be a request. *Reg.* v. *Newton*, 2 M. C. C. 59.

A forged order on a tradesman, in the name of a customer, requesting that the goods mentioned in it might be delivered to the bearer, was not within 7 Geo. 2, c. 22, if the customer had no interest in the goods mentioned. *Rex* v. *Williams*, 1 Leach, C. C. 114 ; 2 East, P. C. 937.

Warrants or Orders for Delivery of Goods—What are.]—Forging an order in the name of a silversmith for the re-delivery of plate from Goldsmiths' Hall, viz. "Please to deliver my work to the bearer," was within 7 Geo. 2, c. 22, and 13 Geo. 3, c. 26. *Rex* v. *Jones*, 1 Leach, C. C. 53 ; 2 East, C. C. 941.

An order to taste wine in the London Docks, is an order for the delivery of goods, the forgery of which is a felony. *Reg.* v. *Illidge*, 2 Car. & K. 871 ; T. & M. 127 ; 1 Den. C. C. 404 ; 18 L. J., M. C. 179 ; 13 Jur. 543 ; 3 Cox, C. C. 552.

At the London Docks, a person bringing a tasting-order from a merchant having wine there is not allowed to taste till the order has the signature of a clerk of the company across it. A. uttered a tasting order, with the merchant's name forged to it, by presenting it to the company's clerk for his signature across it. The clerk refused to sign it :—Held, that in this state the order was a forged order for the delivery of goods. *Ib.*

A note, in the name of an overseer of the poor, to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, was not a warrant or an order for the delivery of goods within 7 Geo. 2, c. 22. *Rex* v. *Mitchell*, 2 East, P. C. 936.

A forged paper in the following form :—"Per bearer, two 11-4 superior counterpanes. T. Davis, E. Twell," which was not addressed to any one, is not an order for the delivery of goods within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Rex* v. *Cullen*, 5 Car. & P. 116 ; 1 M. C. C. 300.

A forged instrument in the following form, "I hereby authorise my servant A. B. to procure a watch of you," is not a forged order and request for the delivery of goods. *Reg.* v. *Egan*, 1 Cox, C. C. 29.

Requests for the Delivery of Goods—What are.]—A forged paper in the following form, "Per bearer, two 11-4 superior counterpanes. T. Davis, E. Twell," which was not addressed to any person, is not a request for the delivery of goods within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Rex* v. *Cullen*, 5 Car. & P. 116 ; 1 M. C. C. 300. *See Reg.* v. *Egan*, supra.

But a request for the delivery of goods need not be addressed to any one. *Rex* v. *Carney*, 1 M. C. C. 351.

A paper in the following form is a request for the delivery of goods, though not addressed to any one :—"Aug. 3, 1839—one 16-in. helmet scoop, one 4-qt. kettle—Jas. Hayward." *Reg.* v. *Pulbrook*, 9 Car. & P. 37.

If the course of dealing between A. and B. is, that A. shall write persons' names in a list with a sum against each name, on sight of which B. is to furnish goods on the credit of A. to each person whose name is on the list to the amount set against his name, such list is a request for the delivery of goods, and the fraudulent alteration of one of the sums in it is indictable as a forgery. *Reg.* v. *Walters*, Car. & M. 588.

The prisoner represented that M. C. was dead, and had left him 50*l.* or 60*l.*, and it was in the hands of A. D., and that he wanted mourning. He brought a forged paper, purporting to be signed by A. D., as follows :—"Please to let W. T. have such things as he wants for the purpose. Sir, I have got the amount of 27*l.* for M. C. in my keeping these many years :"—Held, that this was a forged request for the delivery of goods. *Rex* v. *Thomas*, 7 Car. & P. 851 ; 2 M. C. C. 16.

A forged paper addressed to a tradesman, and purporting to be signed by one of his customers, in the following form, "Please to let bearer, William Goff, have spillshovel and grafting tool for me," is a forged request for the delivery of goods. *Reg.* v *James*, 8 Car. & P. 292.

A forged paper in the following form, "Please to let the lad have a hat, and I will answer for the money—E. B.," is a forged request for the delivery of goods, and is not the less so because it may also be a forged undertaking for the payment of money. *Reg.* v. *White*, 9 Car. & P. 282.

A document in the following form, "W. Trim, 2*s.*," is not a request for the delivery of goods within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and cannot be shown to be so by parol evidence. *Reg.* v. *Ellis*, 4 Cox, C. C. 258.

A person obtaining goods on delivering a forged letter, "Please to let the bearer, W. T., have for J. R. four yards of linen," signed J. R., can be convicted of uttering a forged request for the delivery of goods under 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Rex* v. *Evans*, 5 Car. & P. 553.

Receipts for Goods—What are.]—A pawnbroker's duplicate of goods pledged with him is an accountable receipt for goods. *Reg.* v. *Fitchie*, Dears. & B. 175 ; 26 L. J., M. C. 90 ; 3 Jur. (N.S.) 419 ; 7 Cox, C. C. 257.

On an indictment for forging and uttering an accountable receipt for goods, the following document was held to be an accountable receipt : "By order of R. F. Pries, we have this day transferred into the name of Messrs. Collman and Stolterfoht, 759 quarters and 4 bushels of wheat, ex August Ferdinand, Captain Richards, a Neustadt. Entered by R. F. Pries, and now lying at our granaries, Bermondsey-wall. The wheat is insured against risk of fire by us.—Brown and Young, Corn Exchange, Oct. 23, 1852." *Reg.* v. *Pries*, 6 Cox, C. C. 165.

Where the prisoner signed a document which entitled him to receive a delivery note, which, in the course of business of a canal company, would enable him to demand and have the goods described therein delivered to him on payment of the charges for carriage :—Held, a forgery of a receipt for goods. *Reg.* v. *Meigh*, 7 Cox, C. C. 401.

ii. *In respect of Money.*

Warrants or Orders for Payment of Money—Must be valid.]—Any instrument for payment, under which, if genuine, the payer may recover the amount against the party signing it, may be properly considered a warrant for the payment of money ; and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed, or not. *Reg.* v. *Vivian*, 1 Den. C. C. 35 ; 1 Car. & K. 719.

Any document requesting the payment of money, which, if genuine, would give to the person paying the money in pursuance of it, a right of action against the writer, is if forged, a forged warrant for the payment of money. *Reg.* v. *Ferguson*, 1 Cox, C. C. 241.

In order to constitute a forging of a warrant or order for the payment of money, it is necessary that the instrument be such that, if genuine, it would in the ordinary course of business between the parties, be effectual for the payment of money. *Reg.* v. *Rouse*, 4 Cox, C. C. 7. See *Reg.* v. *Tuberville*, 4 Cox, C. C. 13.

—— **Name of Person addressed.**]—A forged order for the payment of money need not disclose on the face of it the name of the party to whom it is addressed, but the direction may be shown by extrinsic evidence. *Reg.* v. *Snelling*, Dears. C. C. 219 ; 2 C. L. R. 114 ; 23 L. J., M. C. 8 ; 17 Jur. 1012 ; 2 W. R. 54 ; 6 Cox, C. C. 230.

It is not necessary that a warrant for the payment of money should be addressed to any particular person. *Reg.* v. *Rogers*, 9 Car. & P. 41.

—— **No Payee.**]—The prisoner drew a bill upon the treasurer of the navy payable to —— or order, and signed it in the name of a navy surgeon :—Held, that to constitute an order for payment of money there must be some payee ; a direction to pay —— or order is not sufficient. *Rex* v. *Richards*, R. & R. 193.

"Please to pay R. Jones or bearer the sum of 5*l.*, payable at Hoare & Co., 272, Fleet-street," is not an order for the payment of money, there being no sufficient orderee on the face of the instrument. *Reg.* v. *Denny*, 1 Cox, C. C. 178.

The prisoner drew a bill, "Please to pay the bearer on demand 15*l.*," and signed it with his own name, but it was not addressed to any one ; there were forged upon this instrument, when uttered, the words and signature, "Payable at Messrs. Masterman & Co., White Hart-court. Wm. M'Inerheney." M'Inerheney kept cash at Masterman & Co.'s :—Held, that this was not an order for payment of money. *Rex* v. *Ravenscroft*, R. & R. 161.

—— **What are.**]—A prisoner was indicted for forging an order for the payment of money, with intent to defraud "H. D., as one of the public officers of the Y. district bank." The instrument was as follows :—"Thornton-le-Moor, July 20, 1844. Mr. J. Sir, Please to pay James Jackson 13*l.*, by order of Christopher Sadler, Thornton-le-Moor, brewer. The district bank. I shall see you on Monday. Yours obliged, Charles Sadler" :—Held, to be an order within 11 Geo. 4 & 1 Will. 4, c. 66, s. 3. *Reg.* v. *Carter*, 1 Den. C. C. 65 ; 1 Car. & K. 741 ; 1 Cox, C. C. 170.

A person who knowingly utters a forged pass of a discharged prisoner, purporting to have been given under 5 Geo. 4, c. 85, may be convicted of uttering a forged warrant and order for the payment of money, although the forged pass be not precisely in the form given by that statute, and although it does not purport to be sealed with the county seal, or any seal provided for the purpose, the only seal to it being two small pieces of paper affixed to it by wafers. *Reg.* v. *M'Connell*, 1 Car. & K. 371; 2 M. C. C. 298.

The words "warrant" or "order," in 7 Geo. 2, c. 22, were synonymous. *Rex* v. *Mitchell*, 2 East, P. C. 936.

A bill of exchange or a banker's draft might have been charged in an indictment on 7 Geo. 2, c. 22, as an order for payment of money. *Rex* v. *Willoughby*, 2 East, P. C. 944. S. P., *Rex* v. *Shepherd*, 2 East, P. C. 944; 1 Leach, C. C. 226.

A note—"Please to send 10*l.* by bearer, as I am so ill I cannot wait on you,"—was not an order for the payment of money within 7 Geo. 2, c. 22. *Rex* v. *Ellor*, 1 Leach, C. C. 323; 2 East, P. C. 937.

Indictment for forging an order for payment of money. The instrument was an order to pay prisoner or order the sum of four pounds five shillings, being a month's advance on an intended voyage to Quebec, in the ship "Mary Ann," as per agreement with G. M., master. The prisoner had in the margin of the order written, "On receiving this cheque I agree to sail, and be on board within sixteen hours from the date of this cheque":—Held, a good order for payment of money within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 3. *Rex* v. *Bamfield*, 1 M. C. C. 416.

A person forging a seaman's advance note cannot be indicted for forging or uttering it as an order for the payment of money. *Reg.* v. *Howie*, 11 Cox, C. C. 320.

A document in the following form, "W. Trim, 2*s.*," is not a warrant for the payment of money, within 11 Geo. 4 & 1 Will. 4, c. 66, ss. 3, 10, and cannot be shown to be so by parol evidence. *Reg.* v. *Ellis*, 4 Cox, C. C. 258.

Before the 24 & 25 Vict. c. 98, s. 24, a forged request to pay a third person money on account of the supposed writer, would not sustain an indictment for forgery, describing it either as an undertaking, warrant or order for the payment of money. *Reg.* v. *Thorn*, 2 M. C. C. 210; Car. & M. 206.

A writing directed to A. & Co. requiring them to pay the bearer on demand a sum of money is not, on an indictment for forgery, an order for the payment of money. *Reg.* v. *Curry*, 2 M. C. C. 218.

Cheques of a society were signed by the chairman and three of the committee and countersigned by the clerk; the bankers did not know the names or signatures of the chairman or committeemen, but relied solely on the clerk's signature:—Held, that a forgery of the chairman's and committeemen's signatures, by means of which the genuine signature of the clerk was obtained, was a forgery of a warrant or order for the payment of money. *Reg.* v. *Lee*, 3 Cox, C. C. 80.

A. kept a deposit account, but not a drawing account, with B., a banker, and was not entitled to draw cheques on B. C. presented a forged cheque of A. on B., which B. paid:—Held, that this was a forged warrant for the payment of money, but not a forged order; as A. had, by the course of dealing between him and B., no right to draw cheques on B. *Reg.* v. *Williams*, 2 Car. & K. 51.

A post-dated cheque is an order for the payment of money. *Reg.* v. *Taylor*, 1 Car. & K. 213.

A sailor's shipping-note for 2*l.* 15*s.*, payable to A. or bearer, five days after the ship shall sail, is not a void instrument under 17 Geo. 3, c. 30, but is an undertaking, warrant, or order for the payment of money within 11 Geo. 4 & 1 Will. 4, c. 66, s. 3. *Reg.* v. *Anderson*, 2 M. & Rob. 469.

But a warrant for wages, signed by a foreman and paid by a cashier, is not a warrant for the payment of money within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Reg.* v. *Pilling*, 1 F. & F. 324.

A certificate in the following form, "I hereby certify that the within-named William Mitchell is gaining his living by hawking," the production of which was necessary, in order that the prisoner might obtain payment of a sum of money to which he was entitled, is not a warrant or order for the payment of money within 11 Geo. 4 & 1 Will. 4, c. 66. *Reg.* v. *Mitchell*, 2 F. & F. 44.

For forging such a certificate the prisoner must be indicted for a forgery at common law. *Ib.*

D. was indicted for having forged and uttered the following instrument:—"Mr. Lowe.—Bought of C. Dawson, English and foreign fruit merchant and potato salesman. Nov. 9th, two bushels of apples, 9*s.* Sir,—I hope you will excuse me sending for such a trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c., F. Dawson:"—Held, that this was properly described both as a warrant and as an order for the payment of money. *Reg.* v. *Dawson*, T. & M. 428; 2 Den. C. C. 75; 20 L. J., M. C. 102; 15 Jur. 159; 5 Cox, C. C. 220.

"Three days after the ship 'Selah' has sailed from the port of Sunderland, please to pay to John Wilson or bearer, the sum of four pounds 0 shillings and 0 pence (provided the said John Wilson has actually sailed in the said ship), being part of his wages in advance, on her intended voyage to Alexandria.—John Robson, Master. To Mr. John Stobart, owner of ship," is an order for payment of money. *Reg.* v. *Lonsdale*, 2 Cox, C. C. 222.

A forged paper was in the following form:—"To M. & Co. Pay to my order, two months after date, to Mr. J. S., 80*l.*, and deduct the same out of my account." It was not signed, but across it was written, "Accepted, Luke Lade;" and at the back the name and address of J. S. M. & Co. were bankers, and Luke Lade kept cash with them:—Held, that this paper was a warrant for the payment of money, as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay the money to J. S. *Reg.* v. *Smith*, 1 Car. & K. 700; 1 Den. C. C. 79.

"Mr. M. will be pleased to send by the bearer 10*l.* on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself," and the paper purported to be signed, "Mr. R., foreman, St. A. Foundry," and Mr. M. was clerk to Messrs. C., bankers, with whom Mr. H. kept an account, and R. was foreman to Mr. H., but had no authority to draw on Mr. H.'s banker, is a warrant for the payment of money. *Reg.* v. *Vivian*, 1 Car. & K. 719; 1 Den. C. C. 35.

A writing, purporting to authorise the bearer to receive money deposited in a bank by a friendly society on accountable receipts, and purporting to be signed by the principal officers of the society, may, in an indictment for forgery, be alleged to be a warrant for the payment of money. *Reg.* v. *Harris*, 2 M. C. C. 267 ; 1 Car. & K. 179.

An order for the payment of prize-money, signed in the name of a seaman, was an order for the payment of money within 7 Geo. 2, c. 22, the forgery of which was felony, although the requisites of 32 Geo. 3, c. 34, s. 2, had not been complied with. *Rex* v. *M'Intosh*, 2 East, P. C. 942, 956 ; 2 Leach, C. C. 883.

A dividend warrant of a railway company, signed by the secretary, and addressed to a banker, required the latter to pay the amount to L. (a shareholder) or order, and to charge the same to the company's revenue account. It further required the shareholder's name to be indorsed, and the banker would not pay the money without such indorsement. The prisoner uttered this dividend warrant, knowing that the indorsement of the shareholder's name was a forgery, and he was convicted upon an indictment which charged him in one count with uttering a warrant for the payment of money, and in another with uttering an order for the payment of money :—Held, that the document was properly described. *Reg.* v. *Autey*, Dears. & B. 294 ; 26 L. J., M. C. 190 ; 3 Jur. (N.S.) 697 ; 5 W. R. 737 ; 7 Cox, C. C. 329.

—— **Post-office Money Orders.**]—A post-office money order purporting to be signed by a local postmaster, and addressed to the Post-office, London, in the following form, "Credit the person named in my letter of advice the sum of 5*l.*, and debit the same to this office," is both a warrant and an order for the payment of money. *Reg.* v. *Gilchrist*, Car. & M. 224 ; 2 M. C. C. 233.

V. was indicted for uttering forged orders for the payment of money, and convicted. He had fraudulently obtained certain forms of post-office orders from the office at A., and also some with the N. stamp affixed. These orders being filled up, and signed "G. J., pro postmaster," there being no one of the name of G. J. at N., were uttered by V. in payment for goods at D. No letters of advice were forwarded to D. :—Held, that V. was rightly convicted. *Reg.* v. *Vanderstein*, 16 Ir. C. L. R. 574 ; 10 Cox, C. C. 177.

A prisoner named T. Story went to the post-office at N., and inquired for a letter directed to "T. Story, post-office, Nottingham, to be left till called for ;" and a letter directed to T. Storer, post-office, was given him, the postmaster supposing that the prisoner was the person to whom it was directed, not noticing the difference of names ; the letter contained a money order, of which the prisoner obtained payment on signing his own name on the back of it :—Held, that this was not forgery. *Rex* v. *Story*, R. & R. 81.

—— **Letters of Credit.**]—A letter of credit, on which the correspondents of the writer of it, having funds of his in their possession, apply them to the use of the party in whose favour it is given, is a warrant for the payment of money. *Reg.* v. *Roake*, 8 Car. & P. 626 ; 2 M. C. C. 66.

An indorsement on a letter of credit is not an order, as not being within the original mandate. *Reg.* v. *Wilton*, 1 F. & F. 391.

—— **Indorsement on Warrant.**]—It was not an offence under 11 Geo. 4 & 1 Will. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money. *Rex* v. *Arscott*, 6 Car. & P. 408. *But see* 24 & 25 Vict. c. 98, s. 24.

—— **By Procuration.**]—A building society was in the practice of taking money on deposit at interest, and upon repaying the deposit required a receipt to be given by the depositor for the amount repaid. A person was convicted of forging one of such receipts, which was in the following form :—"Received of the South Lancashire Building Society, 417*l.* 13*s.* on account of my share, No. 8071, pp. Susey Ambler, William Kay." Susey Ambler was the depositor, and the prisoner a local agent of the society. By the custom of the society such a document was treated as an authority, warrant or request to pay the deposit, but not as an order :—Held, that the document might be described in the indictment as a warrant, authority or request for the payment of money by procuration within the 24 & 25 Vict. c. 98, s. 24. *Reg.* v. *Kay*, 39 L. J., M. C. 118 ; L. R. 1 C. C. 257 ; 22 L. T. 557 ; 18 W. R. 934 ; 11 Cox, C. C. 529.

Undertakings for the Payment of Money—What are.]—A guarantee is the subject of forgery, though no consideration appears, and 19 & 20 Vict. c. 97, s. 3, gives validity to such an undertaking. *Reg.* v. *Coelho*, 9 Cox, C. C. 8.

Indictment under 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, for uttering a forged undertaking for the payment of money ;—Held, that the statute applied as well to a written promise for the payment of money by a third person as to a like promise of payment by the supposed party to the instrument. *Reg.* v. *Stone*, 1 Den. C. C. 181 ; 2 Car. & K. 364.

A forged instrument, by which the supposed maker of it, in consideration of goods to be sold to P., undertakes to guarantee to the vendor the due payment for all such goods so to be sold to P., but so that the supposed maker should not be liable beyond 10*l.*, is a forged undertaking for the payment of money. *Ib.*

Forging a document purporting to guarantee a master to a certain amount in money against the dishonesty of a clerk, is forging an undertaking for the payment of money within 24 & 25 Vict. c. 98, s. 23. *Reg.* v. *Joyce*, L. & C. 576 ; 34 L. J., M. C. 168 ; 11 Jur. (N.S.) 472 ; 12 L. T. 351 ; 13 W. R. 662 ; 10 Cox, C. C. 100.

The forging of a paper, by which the supposed writer promises to pay to B., or order, 100*l.*, or such other sum, not exceeding the same, as he may incur by reason of his becoming one of the sureties to the sheriff of Y., for J. R., a sheriff's officer, is a forgery of an undertaking for the payment of money. *Reg.* v. *Need*, 8 Car. & P. 623 ; 2 Lewin, C. C. 185.

A debtor being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I O U, purporting to be signed by himself and another, the signature of the latter being forged by the debtor :—Held, that the instrument was an undertaking for the payment of money within 24 & 25 Vict. c. 98, s. 23. *Reg.* v. *Chambers*, 41 L. J., M. C. 15 ; L. R. 1 C. C. 341 ; 25 L. T. 507 ; 20 W. R. 103 ; 12 Cox, C. C. 109.

An instrument professing to be a scrip certificate of a railway company was not an undertaking for the payment of money within 11 Geo. 4 & 1 Will. 4, c. 66. *Reg.* v. *West*, 1 Den. C. C. 258; 2 Car. & K. 496; 2 Cox, C. C. 437. S. P., *Clarke* v. *Newsum*, 5 Railw. Cas. 69; 1 Ex. 131; 16 L. J., Ex. 296.

Before 24 & 25 Vict. c. 98, s. 24, a forged request to pay a third person money on account of the supposed writer would not sustain an indictment for forgery, describing it as an undertaking for the payment of money. *Reg.* v. *Thorn*, 2 M. C. C. 210; Car. & M. 206.

A sailor's shipping note for 2*l.* 15*s.* payable to A. or bearer, five days after the ship shall sail, is an undertaking for the payment of money within 11 Geo. 4 & 1 Will. 4, c. 66, s. 3. *Reg.* v. *Anderson*, 2 M. & Rob. 469.

A certificate in the following form:—"I hereby certify that the within-named William Mitchell is gaining his living by hawking," the production of which was necessary, in order that the prisoner might obtain payment of a sum of money to which he was entitled, is not an undertaking for the payment of money within 11 Geo. 4 & 1 Will. 4, c. 66. *Reg.* v. *Mitchell*, 2 F. & F. 44.

Security for the Payment of Money.]—The prisoner having borrowed 35*l.* and being pressed for payment, obtained further time by giving as security an instrument which was set out in the indictment in the words and figures following:—

November 21, 1870.

I O U thirty-five pounds,

35*l.* Arthur Chambers,
George Wickham.

The name "George Wickham" was forged by the prisoner, and he was convicted under 24 & 25 Vict. c. 98, s. 23, of forging the instrument, which was described as a security:—Held, that the instrument was rightly described. *Reg.* v. *Chambers*, 41 L. J., M. C. 15; L. R. 1 C. C. 341; 25 L. T. 507; 20 W. R. 103; 12 Cox, C. C. 109.

Acquittance or Receipt—What is.]—A friendly society had branches in various towns. A member belonging to one branch could not be received into the court of another branch as a clearance member without a document called a "clearance," certifying that he had paid all the dues and demands of the branch to which he belonged, and authorising the other branch to receive him:—Held, that such clearance was not an acquittance or a receipt for money within 24 & 25 Vict. c. 98, s. 23, and that a conviction for forging such a document could not be sustained. *Reg.* v. *French*, 39 L. J., M. C. 58; L. R. 1 C. C. 217; 21 L. T. 726; 18 W. R. 354; 11 Cox, C. C. 472.

A railway ticket is not an acquittance or a receipt within the above statute. *Reg.* v. *Gooden*, 11 Cox, C. C. 672.

A turnpike toll-gate ticket is a receipt for money within 24 & 25 Vict. c. 98, s. 23. *Reg.* v. *Fitch*, L. & C. 159; 8 Jur. (N.S.) 624; 6 L. T. 256; 10 W. R. 489; 9 Cox, C. C. 160.

The prisoner was a collector of rates for a corporation. While in the service he received cash from the prosecutor on account of a rate, for which he gave a receipt. After he had left the service, he called on the prosecutor for the balance, which was paid. The prisoner altered the figures in the receipt, which then appeared as a receipt for the entire rate due:—Held, not to be a forgery. *Reg.* v. *Sargent*, 10 Cox, C. C. 161.

If a party wrote on the back of a bill of exchange payable to R. A., "Received for R. A.," and signed his own name to it, he was not guilty under 11 Geo. 4 & 1 Will. 4, c. 66, of forging a receipt. *Rex* v. *Arscott*, 6 Car. & P. 408. *But see* 24 & 25 Vict. c. 98, s. 24.

It being the duty of a railway station-master to pay B. for delivering and collecting parcels, he falsely told B. that the company had determined to pay him only for collecting, and not for delivering, and accordingly then continued to pay him only for collecting, but he continued to charge the company with payments purporting to be made to B. for delivering. In order to furnish a voucher to the company for these pretended payments, the station-master, after paying B.'s servant the sum entered under the head "collecting," in the printed form supplied by the company, and obtaining his receipt in writing for that amount, without his or B.'s knowledge, put a receipt stamp under the servant's name, and wrote thereon in figures a sum, being the aggregate for collecting and delivering:—Held, that he was properly convicted of forgery. *Reg.* v. *Griffith*, Dears. & B. 548; 27 L. J., M. C. 205; 4 Jur. (N.S.) 442; 6 W. R. 472; 7 Cox, C. C. 501.

A stamped memorandum, importing that A. B. had paid a sum of money to C. D., but not importing any acknowledgment from C. D. of his having received it, was not such a receipt as 2 Geo. 2, c. 25, s. 1, made it capital to forge or utter. *Rex* v. *Harvey*, R. & R. 227.

An entry of the receipt of money or notes made by a cashier of the Bank of England in the bank book of a creditor was an accountable receipt for the payment of money within 7 Geo. 2, c. 22. *Rex* v. *Harrison*, 1 Leach, C. C. 180; 2 East, P. C. 927, 988.

Making a false entry in what purports to be a banker's pass-book, with intent to defraud, is forgery of a receipt. *Reg.* v. *Smith*, L. & C. 168; 31 L. J., M. C. 154; 8 Jur. (N.S.) 572; 6 L. T. 300; 10 W. R. 583; 9 Cox, C. C. 162.

Forging an indenture of apprenticeship and a receipt for the apprenticeship fee, with intent to defraud the stewards of the Feast of the Sons of the Clergy, was forgery. *Rex* v. *Jones*, 1 Leach, C. C. 366; 2 East, P. C. 991.

The name of the holder of a navy bill, signed on a proper receipt stamp, and affixed to the navy bill, did not on the face of it purport to be a receipt for money within 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22; but as the money was paid on such signature, and it always had been considered as a receipt at the Navy Office, it might, by proper averments in the indictment, be brought within the protection of the statutes as a receipt for money. *Rex* v. *Hunter*, 2 Leach, C. C. 624; 2 East, P. C. 928, 977.

If a person, employed by the executors of a public accountant to settle the accounts of the testator with government, procure fabricated vouchers, and deliver them to the Navy Board, in order to exonerate the estate of the testator from an extent, it was a forging and uttering within 2 Geo. 2, c. 25. *Rex* v. *Thomas*, 2 Leach, C. C. 877; 2 East, P. C. 934.

A scrip receipt not filled up with the name of the subscriber is not a receipt for money within the statutes against forgery. *Rex* v. *Lyon*, 2 Leach, C. C. 597; 2 East, P. C. 933.

A servant employed by her mistress to pay tradesmen's bills, received from her a bill of a tradesman named Sadler, together with the money to pay that and other bills. She brought the bill again to her mistress, with the words "paid Sadler" on it, the word Sadler being written with a small *s*, and there being no initial of the christian name of the tradesman. The mistress stated that she believed the words to be a receipt and that no application was made for the money afterwards:—Held, on an indictment for forgery, that the words "paid Sadler," under the circumstances, imported a receipt or an acquittance for the money, and were not merely a memorandum by the servant of her having paid the bill. *Reg.* v. *Houseman*, 8 Car. & P. 180.

The words "Settled, Samuel Hughes," at the foot of a bill of parcels, import a receipt and an acquittance. *Rex* v. *Martin*, 7 Car. & P. 549; 1 M. C. C. 483.

The prisoner, a pay-sergeant of the artillery, obtained from the paymaster a receipt for a sum of money as part of subsistence of a company for the month of May. He afterwards erased May and inserted June, and gave the receipt to a tradesman, who, according to the usual practice, advanced the sum to the prisoner, and sent the receipt to the agent of the regiment, who paid the amount. The indictment for forgery, describing the instrument as a receipt, was good. *Rex* v. *Hope*, 1 M. C. C. 414.

The provisions of the 7 Geo. 4, c. 16, s. 38, extend to the forging and uttering a receipt, or other document, relating to a Chelsea pension, supposed to be payable, and are not confined to cases of forging and uttering receipts and other documents relating to pensions in actual existence. *Reg.* v. *Pringle*, 9 Car. & P. 408; 2 M. C. C. 127.

An instrument purporting to be an agreement, and stamped as such, and reciting that an arrangement had been made between the parties thereto in consideration of a certain sum, the receipt of which was thereby acknowledged, and then proceeding to release the party paying it from all further claim in the matter in respect of which it was paid, is a receipt or an acquittance under 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and may be so described in an indictment for forgery. *Reg.* v. *Hill*, 2 Cox, C. C. 246.

A receipt given by bankers to poor-rate collectors in respect of monies paid in by them to the account of the guardians of the union is an accountable receipt. *Reg.* v. *Johnston*, 5 Cox, C. C. 133.

The signature of a witness indorsed on the back of an order upon the treasurer of county stock for the payment of the costs of a prosecution, with the sum allotted to the witness written in figures opposite to his name, is merely an authority and not a receipt or acquittance. *Reg.* v. *Parker*, 2 Cox, C. C. 274.

Where it was shown to be the custom of bankers to give receipts on the deposit of money in the following form, "Received of A. eighty-five pounds to his credit. This receipt not transferable"; and to repay the money with interest on the return of this receipt, with A.'s name written on it:—Held, that forging the name of A., and receiving the money due on its return, was a forging and uttering an acquittance for 85*l.* *Reg.* v. *Atkinson*, 2 M. C. C. 215; Car. & M. 325.

It was the practice of the treasurer of a county, when an order had been made on him for the payment of expenses of a prosecution, to pay the whole amount to the attorney for the prosecution, or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person:—Held, that such a signature is not a receipt, the forging of which is an offence against 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and that it is merely an authority to the treasurer to pay the amount. *Reg.* v. *Cooper*, 2 Car. & K. 586.

A receipt, signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence for such detachment, might be properly described as a receipt for money, under 2 & 3 Will. 4, c. 123, s. 3, although it appeared that such instruments were frequently cashed, upon indorsement, by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *Rex* v. *Rice*, 6 Car. & P. 634.

A scrip certificate in a railway company is not an accountable receipt, or an acquittance or a receipt within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10; therefore the forgery of such a document is not a felony, but a misdemeanour only. *Clarke* v. *Newsam*, 1 Ex. 131; 5 Railw. Cas. 69; 16 L. J., Ex. 296. S. P., *Reg.* v. *West*, 1 Den. C. C. 258; 2 Car. & K. 496; 2 Cox, C. C. 437.

—— **Alteration or Addition.**]—If a high constable issues his precept for the payment of a county rate amounting to 3*l.* 5*s.* 9*d.*, and, having received the money, writes a receipt at the bottom of the paper, "Received the above rate, J. P.," and after that, the sum of 3*l.* 5*s.* 9*d.* in the receipt is fraudulently altered to 3*l.* 15*s.* 9*d.*: this is a forgery of a receipt within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Reg.* v. *Vaughan*, 8 Car. & P. 276.

After a receipt was signed by the person giving it, the person to whom it was given added words above the signature:—Held, that it was for the jury to say whether the addition of these words altered the effect of the receipt. *Reg.* v. *Milton*, 10 Cox, C. C. 364.

Held, also, that it was doubtful whether such addition amounted to forgery. *Ib.*

A person makes a copy of a receipt, and adds to it other words, as, for example, "in full of all demands," which were not in the original. It is a forgery if the copy is offered in evidence on the supposed loss of the original. *Upfold* v. *Leit*, 5 Esp. 100.

iii. *Indictment and Evidence.*

Upon Receipts.]—"As follows" is a sufficient averment of the tenor of a forged receipt. *Rex* v. *Powell*, 2 W. Bl. 787; 1 Leach, C. C. 77; 2 East, P. C. 976.

An indictment for forging a receipt in the following form, "6th January, 1830, 16*l.* 15*s.* 6*d.* For the high constable, James Hughes," does not require explanatory averments. *Reg.* v. *Boardman*, 2 M. & Rob. 147; 2 Lewin, C. C. 81.

A count charging the uttering a false receipt simply is good. *Rex* v. *Martin*, 1 M. C. C. 483; 7 Car. & P. 549.

An indictment charging that a precept had been issued to Christopher Hindle, high constable of B., to collect 21*l.* 11*s.* 4*d.*, and that

a receipt for 21*l.* 11*s.* 4*d.* had been forged, by falsely cementing to the precept, at the foot, a receipt in the handwriting of Henry Hargreaves, of the tenor following, "1825, received H. H.," which had before then been written by Hargreaves for other money, and that the prisoner uttered it with intent to defraud Hargreaves, is bad, because there is nothing to show what the initials H. H. meant, and nothing to show what connection Hargreaves had with Hindle, or with the receipt. *Rex* v. *Barton*, 1 M. C. C. 141.

An indictment for uttering a forged receipt for money, which sets out the receipt in terms, need not set forth the bill of items to which the receipt refers, as that is matter of evidence *Rex* v. *Testick*, 2 East, P. C. 925. S. P., *Rex* v. *Thompson*, 2 Leach, C. C. 632, n.; 1 East, 181, n.

An indictment on 7 Geo. 4, c. 16, s. 38, charging the prisoner with having forged and uttered "a certain receipt relating to and concerning the payment of a certain pension, to wit, 4*l.* 11*s.* 0½*d.*, supposed to be payable to one N. M., as an out-pensioner of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex," is good. *Reg.* v. *Pringle*, 9 Car. & P. 409; 2 M. C. C. 127.

—— **Intent to Defraud.**]—If a high constable issues his precept for the payment of a county rate amounting to 3*l.* 5*s.* 9*d.*, and having received the money writes a receipt at the bottom of the paper, "Received the above rate, J. P.," and after that the sum of 3*l.* 5*s.* 9*d.* in the receipt is fraudulently altered to 3*l.* 15*s.* 9*d.*; this is a forgery of a receipt within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and may be laid with intent to defraud any rated inhabitant (by name) of the parish on which the rate is imposed (and others). *Reg.* v. *Vaughan*, 8 Car. & P. 276.

Upon Requests, Orders or Warrants for Delivery of Goods.]—A count in an indictment for forging a request for the delivery of goods, which described the forged instrument as "a certain forged request for the delivery of goods to one J. R.," was good under 2 & 3 Will. 4, c. 123, s. 3, and was not too general. *Reg.* v. *Robson*, 9 Car. & P. 423.

A forged request, to be within 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, must import on the face of it to be a request; and if the words have not necessarily that effect, but are so understood in the trade, there must be an innuendo to explain them. *Rex* v. *Cullen*, 1 M. C. C. 300; 5 Car. & P. 116.

A request for the delivery of goods may be so described in an indictment for forgery, without setting it out verbatim. *Reg.* v. *Robson*, 2 M. C. C. 182.

If an indictment for forgery sets out a forged instrument in hæc verba, describing it as a warrant, order and request for the delivery of goods, it is not necessary, in order to sustain the indictment, that the instrument should answer all the terms of that description. *Reg.* v. *Williams*, 2 Den. C. C. 61; T. & M. 382; 20 L. J., M. C. 106; 14 Jur. 1052; 4 Cox, C. C. 358.

A count in an indictment for forgery alleging the forgery generally to be of a certain warrant and order for the delivery of goods, without more particularity, is sufficient. *Reg.* v. *Smith*, 2 Cox, C. C. 358.

—— **Intent to Defraud.**]—Where a forged request for delivery of goods was addressed to a woman in her maiden name, who, prior to the date of it, had married, the utterer may be convicted on an indictment charging the intent to be to defraud the husband. *Rex* v. *Carter*, 7 Car. & P. 134.

Upon Warrants or Orders for Payment of Money.]—A prisoner was indicted on 2 & 3 Will. 4, c. 123, s. 3, for forging a warrant for the payment of money. The forged paper was as follows:—"This is to satisfy that R. R. *as* swept the flues and cleaned the bilges, and repaired four bridges of the 'Princess Victoria,' (signed) J. N., 4*l.* 10*s.* 0*d.*" It was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorised L. & Co. to pay 4*l.* 10*s.* 0*d.*:—Held, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that, as it appeared that this document, if genuine, would have been a voucher for the payment of the money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money. *Reg.* v. *Rogers*, 9 Car. & P. 41.

A forged authority to draw money, which is well described as a warrant, is not an order for the payment of the money, and an indictment describing such a forged authority for the payment of money as a warrant and order, is bad. *Reg.* v. *Dixon*, 3 Cox, C. C. 289.

An indictment which charges a forged cheque to be "a warrant and order for the payment of money, which warrant and order are in the words and figures following," is good. *Rex* v. *Crowther*, 5 Car. & P. 316.

Indictment for forging an order for relief to a discharged prisoner, under 3 Geo. 4, c. 85, being in many instances ungrammatical and at variance from the act:—Held bad. *Rex* v. *Donnelly*, 1 M. C. C. 438.

An indictment for presenting a forged order to W. L., treasurer, &c., pretending it was genuine, and obtaining from him under it 4*l.* 10*s.* 6*d.*, after charging that the prisoner, with intent to cheat the treasurer, presented the order, and that he knowingly, &c., pretended it was a genuine order, proceeded, "and so the jurors, &c., say that the prisoner, on the day and year, &c., did obtain the said sum of 4*l.* 10*s.* 6*d.*"; but the intent to cheat and defraud W. L. was not stated in that part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly:—Held bad. *Rex* v. *Rushworth*, R. & R. 317; 1 Stark. 396.

—— **Intent—Evidence of.**]—An instrument in the following form, "Please to pay T. E. Turberville 3*l.* 12*s.* 6*d.* for sick-pay to Brother Isaac Jones," and signed by the officers of a friendly society, and directed to the treasurer, is, on the face of it, an order within 11 Geo. 4 & 1 Will. 4, c. 64, s. 3; and may be shown by evidence to be a warrant for the payment of money. Where a prisoner was charged with forging the above instrument, and some counts of the indictment laid the intent to be to defraud "J. C. and others," by virtue of 11 Geo. 4 & 1 Will. 4, c. 66, s. 28, and it appeared that the prisoner and J. C. and others were members of this society:—Held, that the word "others" might be held to include or exclude the prisoner, according as it was necessary, for the support of the indictment, that his name should be considered as included or excluded.

Other counts of the indictment laid the intent to be to defraud W. R. :—Held, that this intent was supported by proof that W. R. was the treasurer of the society, and that it was the course of business and his duty to pay money, on having genuine orders or warrants for that purpose in the above form. *Reg.* v. *Turberville*, 4 Cox, C. C. 13.

—— **Evidence.**]—It is no defence on an indictment for forging and uttering an order of a board of guardians of a poor-law union, to show that the person who signed the order as presiding chairman was not, in fact, chairman on the day he signed, the forgery charged being of another name in the order. *Reg.* v. *Pike*, 2 M. C. C. 70; 3 Jur. 27.

An indictment for forging an order for the payment of money is not sustained by a forged letter requesting a person, with whom the supposed writer had dealings, to pay money, the balance being at the time against the writer. *Reg.* v. *Roberts*, 2 M. C. C. 258; Car. & M. 682.

A forged order for the payment of money need not disclose on the face of it the name of the party to whom it is addressed, but the direction may be shown by extrinsic evidence. *Reg.* v. *Snelling*, Dears. C. C. 219; 2 C. L. R. 114; 23 L. J., M. C. 8; 17 Jur. 1012; 2 W. R. 54; 6 Cox, C. C. 230.

If a document in form is not a warrant for the payment of money, the fact that it is really so cannot be shown by parol evidence. *Reg.* v. *Ellis*, 4 Cox, C. C. 258.

k. Wills.

When Offence Committed.]—Before 7 Will. 4 & 1 Vict. c. 26, s. 9, there could be no forgery of a will of lands, attested only by two witnesses. *Rex* v. *Wall*, 2 East, P. C. 953.

To forge a will was a capital offence, although the supposed testator was living. *Rex* v. *Sterling*, 1 Leach, C. C. 99; 2 East. P. C. 950. S. P., *Rex* v. *Coogan*, 1 Leach, C. C. 449; 2 East, P. C. 1001.

The forgery of the will of a non-existing person is an offence within the statute. *Reg.* v. *Avery* 8 Car. & P. 596.

Signing a wrong christian name to the person whose will a false instrument purports to be, is a forgery. *Rex* v. *Fitzgerald*, 1 Leach, C. C. 20; 2 East, P. C. 953.

Indictment.]—An indictment for forging a paper writing purporting to be the will of A. is good. *Rex* v. *Birch*, 2 W. Bl. 790; 1 Leach, C. C. 79; 2 East, P. C. 980.

—— **Joint Indictment—Separate Acts.**]—Three were jointly charged with procuring other persons to utter a forged will. The only evidence for the prosecution was of separate acts, at separate times and places, done by each of the persons charged as accessories. At the end of that evidence one of them pleaded guilty:—Held, that the other two might, notwithstanding, be convicted. *Reg.* v. *Barber*, 1 Car. & K. 442.

Evidence—Identity.]—On an indictment for forging a seaman's will, the muster-book of the Navy Office is good evidence to prove the identity of the supposed testator. *Rex* v. *Rhodes*, 1 Leach, C. C. 24. S. P., *Rex* v. *Fitzgerald*, 1 Leach, C. C. 20; 2 East, P. C. 953.

—— **Validity.**]—On an indictment for forging a will, the probate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. *Rex* v. *Buttery*, R. & R. 342. S. P., *Rex* v. *Gibson*, R. & R. 343, n.

—— **Intent to Defraud.**]—In an indictment for forging a will, an intent to defraud the heir-at-law was charged in one count, and in another an intent to defraud persons to the jurors unknown. The only one found guilty was the son of the testator, whose will was alleged to be forged. No evidence was given that the testator had been previously married, or left any other children, but one of the witnesses stated that he had heard a report that the deceased had left another son by a former wife:—Held, that there was no evidence of an intention to defraud anyone, to justify a conviction. *Reg.* v. *Tylney*, 1 Den. C. C. 319; 18 L. J., M. C. 36; 3 Cox, C. C. 160.

—— **Solicitor—Privilege.**]—A., an attorney, was employed by B., as his solicitor, to put out money upon mortgage. C. applied to A. to procure him the advance of money on mortgage, and to act as his solicitor in procuring it. C. stated to A. that he was the owner of certain freehold lands, and produced a forged will in proof of his title, which he placed in the hands of A. B. advanced the money, A. acting as his solicitor, by preparing the mortgage-deeds:—Held, that, on the trial of C. for uttering the forged will, A. was bound to produce the will, and also to give evidence of what C. said to him as to the advance of the money. *Reg. v. Avery*, 8 Car. & P. 596.

Quære, whether a forged document intrusted by the prisoner to an attorney, as an attorney, can be produced on the trial for forgery. *Reg.* v. *Tylney*, supra.

A forged will had been sent to an attorney with some title-deeds ostensibly for the purpose of asking his advice upon them, but really that he might see the will and act upon it. The will being produced at the trial by the attorney, the prisoner's counsel objected to the reading of it on the ground that it was a privileged communication, and the objection was overruled at the time, and afterwards on a case reserved. *Reg.* v. *Hayward*, 2 Car. & K. 234; 2 Cox, C. C. 23.

The prisoner was indicted for forging a will. The forged instrument had been given to an attorney by the prisoner ostensibly for professional purposes, but, in the opinion of the judge, with some very different object. On objection that it was a privileged communication, and therefore could not be read:—Held, invalid. *Reg.* v. *Jones*, 1 Den. C. C. 166.

Upon the trial of an indictment for forging the will of one W., it was proved that the prisoner's wife, by his desire, took another will purporting to be the will of W., also forged, to a solicitor, and asked him to advance money on mortgage of the property which passed under the will of her father W.; that the will being left with the solicitor and discovered by him to be a forgery, he made an exact copy of it, and then returned it to the prisoner. What the wife stated to the solicitor was afterwards communi-

cated to the prisoner. The solicitor stated that he was not then acting as the prisoner's attorney, that he made no charge for the interview, but that if he had found the security sufficient he should have advanced the money. Notice was given to the prisoner to produce that will, and upon its non-production the copy taken by the solicitor was tendered and received:—Held, that the interview between the solicitor and the prisoner's wife was not privileged as a confidential communication, and that the conversation which then took place, and the copy of the will, were both admissible. *Reg.* v. *Farley*, 2 Car. & K. 313; 1 Den. C. C. 197; 2 Cox, C. C. 82.

1. Other Instruments.

Post-Office Telegram.]—A post-office telegram accepting a wager is an "instrument" within the meaning of s. 38 of the Forgery Act, 1861. *Reg.* v. *Riley*, 65 L. J., M. C. 74; [1896] 1 Q. B. 309; 74 L. T. 254; 44 W. R. 318; 18 Cox, C. C. 285; 60 J. P. 519—C. C. R.

False Entry in Bankers' Books.]—Where a paying teller of a bank falsely and with intent to defraud, enters in the proof book of the bank, kept by him, a certain sum of money, as assets of the bank, whereas the assets do not amount to that sum, he is not guilty of forgery by the law of England. *Windsor, In re*, 6 B. & S. 522; 34 L. J., M. C. 163; 11 Jur. (N.S.) 807; 12 L. T. 307; 13 W. R. 653; 10 Cox, C. C. 118.

Railway Pass.]—The forgery of a railway pass to allow the bearer to pass free on a railway is a forgery at common law. *Reg.* v. *Boult*, 2 Car. & K. 604.

Report of Seaman's Character.]—A master of a ship having made and signed a report of a seaman's character upon his discharge, in the form sanctioned by the Board of Trade, the shipping-master gave the seaman a copy. The seaman went to the prisoner, who, for 2*s.* 6*d.*, made and delivered to him a facsimile of the genuine copy of the report, except that the letter "G," which signified "good," was substituted for the letter "M.," which signified "middling":—Held, that the prisoner was guilty of an offence within 17 & 18 Vict. c. 104, s. 176. *Reg.* v. *Wilson*, Dears. & B. 538; 27 L. J., M. C. 230; 4 Jur. (N.S.) 670; 6 W. R. 503; 8 Cox, C. C. 25.

Testimonials as to Character.]—Forging testimonials as to character, whereby a situation as a police constable is obtained, is a forgery at common law. *Reg.* v. *Moah*, Dears. & B. 550; 27 L. J., M. C. 204; 4 Jur. (N.S.) 464; 6 W. R. 470; 7 Cox, C. C. 503.

Certificate of Service at Sea.]—To forge a certificate of service, sobriety and good conduct at sea, with intent to deceive and defraud, is an offence indictable at common law. *Reg.* v. *Toshack*, T. & M. 207; 1 Den. C. C. 492; 13 Jur. 1011; 4 Cox, C. C. 38.

Indictment.]—A count which, without an inducement, charging that the prisoner "did forge a writing, as a certificate of W. N., with intent to deceive and defraud W. P. and others," is good. *Reg.* v. *Toshack*, supra.

3. Indictment, Evidence and Practice.

a. Parties Indictable, 1290.
b. Form and Contents of Indictment, 1291.
c. Proof of Possession, 1291.
d. Allegation and Proof of Intent to Defraud, 1292.
e. Evidence Generally, 1294.
f. Jurisdiction to Try, 1297.
g. Election of Forgeries, 1297.
h. Power to Seize Forged Instruments, 1297.

a. Parties Indictable.

Who are Principals and Accessories.]—*See* ante, col. 1116, et seq.

Treasurer of Illegal Trades Union.]—A man was indicted for forging a banker's pass book, with intent to defraud. He was treasurer to a trades union, which was an illegal society. It was contended that such a society, having no legal existence, could possess no funds, and, therefore, could not be defrauded:—Held, that the objection of illegality was applicable only to the summary proceedings before magistrates provided by the Friendly Societies Act; but did not extend to deprive the society of its remedy by indictment. *Reg.* v. *Dodd*, 18 L. T. 89. See *Reg.* v. *Stainer*, 39 L. J., M. C. 51; L. R. 1 C. C. 230; 21 L. T. 758; 18 W. R. 439; and 32 & 33 Vict. c. 61.

Secretary of Unenrolled Friendly Society—Part Owner.]—The prisoner was the paid secretary of an unenrolled friendly society, of which his wife was a member. He delivered to the society a book on which was indorsed "Savings Bank, New-street, Huddersfield," and in which was an entry, "1853, Oct. 30, received 40*l.*" It was proved that the entry was a forgery, and that the money had not been paid into the savings bank, The jury having found that the prisoner was guilty of knowingly uttering with intent to deceive the society, and that he had, in fact, defrauded it, it was objected for the prisoner that being the husband of a member he was a part owner, and could not be made criminally liable for defrauding his co-owners:—Held, that the objection was untenable, and that the conviction was right. *Reg.* v. *Moody*, L. & C. 173; 31 L. J., M. C. 156; 8 Jur. (N.S.) 574; 6 L. T. 301; 10 W. R. 585; 9 Cox, C. C. 166.

The prisoner was the treasurer, and also a member of an unenrolled friendly society, and it was his duty to pay moneys received into the society's bankers. The prisoner produced to the society a fictitious book, purporting to be the bank pass-book, containing entries purporting to vouch that he had paid certain moneys into the bank, and that the bank acknowledged the receipt of them, which book did not truly represent the state of account. The prisoner having at various times drawn out moneys which he had appropriated for his own purpose, the jury found the prisoner guilty of presenting a false account with intent to obtain credit for having paid the moneys into the bank, with a view to obtain other moneys from the society which he might fraudulently appropriate to his own use:—Held, that the prisoner, though a member of the society, might properly be convicted of uttering a forged receipt, with intent, &c. *Reg.* v. *Smith*, L. & C. 168; 31 L. J., M. C. 154; 8 Jur. (N.S.) 572; 6 L. T. 300; 10 W. R. 583; 9 Cox, C. C. 162.

b. Form and Contents of Indictment.

Invalidity of Document.]—The invalidity of an instrument must appear upon the face of it, in order to found an objection to an indictment for forgery. *Rex* v. *M'Intosh*, 2 East, P. C. 942; 2 Leach, C. C. 883.

Instrument, how Described.]—An indictment stating that the prisoner forged a certain paper instrument, partly printed and partly written, in the words and figures following, that is to say, &c., was bad in form, as it did not state what the instrument was in respect of which the forgery was committed, nor how the party signing it had authority to sign it. *Rex* v. *Wilcox*, R. & R. 50.

In an indictment for forgery, a description to a common intent of the person intended to be defrauded is sufficient. *Rex* v. *Lovell*, 1 Leach, C. C. 248; 2 East, P. C. 990.

Setting Out.]—In an indictment, the words, "in manner and form following, that is to say," do not bind the party to recite the instrument verbatim, nor render a mere formal omission or mistake fatal. *Rex* v. *May*, 1 Dougl. 193.

Part of Instrument Forged.]—If any part of a true instrument is altered, the indictment may lay it to be a forgery of the whole instrument. For every alteration of a true instrument makes it a forgery of the whole. *Rex* v. *Dawson*, 2 East, P. C. 978; 1 Str. 19.

In Particular Cases.]—*See preceding subheads.*

c. Proof of Possession.

Where, on an indictment on 45 Geo. 3, c. 89, s. 6, for knowingly and wittingly having in his possession forged Bank of England notes, it appeared that the prisoner, being suspected of having such in his possession, was requested by A. to sell him some, which he said he would do, and A. accordingly paid him for them; the prisoner then went out as he said to fetch the notes, but on his return said, "he had put them in an old shoe in a particular place," which he described; A. then went to look for the notes, and the prisoner followed him, but whilst A. was looking for them, the prisoner threw a stone into the place, and said, "there they are"; A., on looking there, found the notes in an old shoe:—Held, that the prisoner had a sufficient possession within the meaning of the statute. *Rex* v. *Rowley*, R. & R. 110.

A. took a bank note in the course of his business, which he paid to B.; the note was afterwards stopped at the bank as a forged note, and was brought by an inspector to A., who immediately paid to B. the amount of the note, and refused to give it up to the inspector, insisting on his right to retain it, in order to recover the amount from the person from whom he had received it. The inspector, in the absence of all circumstances of suspicion, is not justified in charging A. before a magistrate with feloniously having the note in his possession, knowing it to be forged, for the purpose of compelling him to give up the note. By possession under the 45 Geo. 3, c. 89, was meant the original possession of a note acquired in an illegal mode, and not a subsequent possession, like the above, where the original possession was legal. *Brooks* v. *Warwick*, 2 Stark. 389.

d. Allegation and Proof of Intent to Defraud.

Indictment—Some Person.]—Since 14 & 15 Vict. c. 103, s. 8, there must be proof of an intent to defraud some person, in order to support the indictment for forgery, though it need not be alleged that it was done with intent to defraud a particular person. *Reg.* v. *Hodgson*, Dears. & B. 3; 25 L. J., M. C. 78; 2 Jur. (N.S.) 453; 4 W. R. 509; 7 Cox. C. C. 122.

It is sufficient, upon an indictment for forgery and uttering a bond, to lay the intent generally to defraud; and the prisoner may be convicted, although it does not appear that he had any intention ultimately to defraud the party whose signature he had forged, he having defrauded the party to whom he uttered the instrument. *Reg.* v. *Trenfield*, 1 F. & F. 43.

—— **Manner in which Fraud Effected.**]—It is only necessary to aver a general intent to defraud A. B., without setting out the manner in which that fraud was to be effected. *Rex* v. *Powell*, 2 W. Bl. 787; 1 Leach, C. C. 77; 2 East, P. C. 976.

—— **"With Intent."**]—The words "with intent," in an indictment for forgery, apply to the verb to which prisoner's name is the nominative; therefore, a count which states that the prisoner "did forge" a promissory note for 50*l*., "on which note is an indorsement as follows, 'C. J.,' with intent to defraud W. R. S.," sufficiently charges that the forged note, and not the indorsement, was the thing by which the prisoner intended to defraud W. R. S. *Rex* v. *James*, 7 Car. & P. 553.

—— **Particular Persons.**]—Where a forged request for the delivery of goods was addressed in her maiden name to a female, who prior to the date of it had married:—Held, that the party uttering it might properly be convicted, on an indictment charging the intent to be to defraud the husband. *Rex* v. *Carter*, 7 Car. & P. 134.

If a banker authorised to pay a sum of money to three persons in particular, and to them only, pays it to one of them and two strangers, who personate the other two, his liability continues, and the false instrument upon which the money was obtained may be charged to have been made with intent to defraud them. *Reg.* v. *Dixon*, 2 Lewin, C. C. 178.

A., a sharebroker, had bought twenty shares of the E. Railway, in which all the calls had been paid up, from another broker, which shares stood in R.'s name; A. not having received the deed of transfer for these shares from his vendor (being held back because A. owed his vendor money), procured a boy to execute a transfer in R.'s name:—Held, that A. could be convicted on counts laying an intent to defraud R. and the railway company. *Reg.* v. *Houtson*, 2 Car. & K. 777.

Evidence of Intent to Defraud—Inference.]—On the trial of an indictment for uttering a forged bill of exchange, if the jury is satisfied that the prisoner uttered the bill as a true bill, meaning it to be taken as such, and at that time knew it to be forged, they ought to find, as a

necessary consequence of law, that the prisoner intended to defraud, and the jury ought to infer the intent to defraud, if they are satisfied on the two other points. *Reg.* v. *Hill*, 8 Car. & P. 274

If a person, at the time he uttered a bill of exchange with a forged acceptance on it, knew that acceptance to be forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is, that he intended to defraud. *Reg.* v. *Cooke*, 8 Car. & P. 582.

So, it is a consequence, and almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, and also the person whose name is used: as everything which is the natural consequence of the act must be taken to be the intention of the prisoner. *Ib.* S. P., *Reg.* v. *Todd*, 1 Cox, C. C. 57.

A jury ought to infer an intent to defraud the person who would have to pay a forged instrument if it was genuine, although from the manner of executing a forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was generally to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine did not enter into the prisoner's contemplation. *Rex* v. *Mazagora*, R. & R. 291.

—— **To Defraud Particular Person.**]—There must be proof of an intent to defraud some person since 14 & 15 Vict. c. 100, s. 8, in order to support an indictment for forgery, though it need not be alleged that it was done with intent to defraud a particular person. *Reg.* v. *Hodgson*, Dears. & B. 3; 25 L. J., M. C. 78; 2 Jur. (N.S.) 453; 4 W. R. 509; 7 Cox, C. C. 122.

In forgery it is not required, in order to constitute in point of law an intent to defraud, that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud any person; but there must at all events be a possibility of some person being defrauded by the forgery. *Reg.* v. *Marcus*, 2 Car. & K. 356.

—— **Sufficiency.**]—A prisoner asked his employer to give him 4*l.* to buy "settled-ated stinking acid," to be used in the employer's tanning business, which the prisoner superintended; the employer gave him the money, and about four days after the prisoner delivered to his employer a forged receipt for the 4*l.*, which purported to come from a firm of whom the acid had been bought:—Held, that proof of these facts was sufficient evidence of uttering the forged receipt with intent to defraud the employer. *Rex* v. *Martin*, 7 Car. & P. 549; 1 M. C. C. 483.

Where, on the trial of a prisoner for forging a note, it appeared that he had kept the note in his possession, and never uttered or attempted to make any use of it:—Held, whether the note was made innocently, or with intent to defraud, was for the consideration of the jury, and to be collected from the facts proved. *Rex* v. *Crocker*, R. & R. 97; 2 Bos. & P. (N.R.) 87; 2 Leach, C. C. 987.

The intent to defraud a bank constitutes the offence of feloniously disposing of and putting away counterfeit bank notes, and it is not done away by the circumstance that the notes were furnished by the prisoner in consequence of an application made by an agent employed thereto by the bank, and that they were delivered to him as forged notes, for the purpose of being disposed of by that agent. *Rex* v. *Holden*, 2 Taunt. 334; R. & R. 154.

The fact that the prisoner has given guarantees to his bankers, to whom he payed a forged note, to a larger amount than the note, does not so completely negative an attempt to defraud them as to withdraw the case from the consideration of the jury. *Rex* v. *James*, 7 Car. & P. 553.

e. Evidence Generally.

In Particular Cases.]—*See preceding subheads.*

Production of Instrument.]—If, on an indictment for forgery being presented to the grand jury, it appears that the forged instrument cannot be produced, either from its being in the hands of the prisoner, or from any other sufficient cause, the grand jury may receive secondary evidence of its contents. *Rex* v. *Hunter*, 3 Car. & P. 591.

On an indictment for forgery being presented to the grand jury, a witness declined to produce certain deeds before them:—Held, that, if the deeds formed a part of the evidence of the witness's title to his own estate, he was not compellable to produce them, but that, if they did not, the grand jury might compel their production. *Ib.*

—— **Secondary Evidence of.**]—On an indictment for uttering a forged deed, it appeared that the deed alleged to have been forged was produced in evidence by the prisoner's attorney on the trial of an ejectment, in which the prisoner was lessor of the plaintiff; and that after the trial, it was returned to the prisoner's attorney:—Held, that, if the prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling his attorney to prove what he had done with the deed. If, as secondary evidence of the contents of the deed, the draft is given in evidence, and in the draft words are abbreviated, which, in the setting out of the deed in the indictment, are put in words at length, it will be for the jury to say whether they think that the words abbreviated in the draft were inserted at length in the deed itself. *Rex* v. *Hunter*, 4 Car. & P. 128.

—— **Notice to Produce.**]—If a forged deed is in the possession of a prisoner, who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the assizes, given the prisoner notice to produce it; and a notice given to the prisoner during the assizes is too late; but if the prisoner has said that he has destroyed the deed, no notice to produce it will be necessary. *Rex* v. *Haworth*, 4 Car. & P. 254.

A man was indicted for forging a bank note of a banking company. The note was not produced at the trial, but secondary evidence thereof was given, there not having been any notice to produce the original:—Held, that secondary evidence was inadmissible in the absence of notice to produce the original. *Reg.* v. *Fitzsimons*, Ir. R. 4 C. L. 1; 18 W. R. 763.

—— **Evidence of Loss.**]—If the forged instrument is not produced at the trial, the best proof

that can be given of its loss or destruction must be adduced before a copy may be used as secondary evidence *Reg* v *Hull* 12 Cox, C C 159

Production of Documents — Privilege of Solicitor]—Quære whether a forged document intrusted by the prisoner to an attorney, as an attorney, can be produced on the trial for the forgery *Reg* v *Tylney* 1 Den C C 319 18 L J, M C 36 *And see Cases* ante, col 1288, *and see further* EVIDENCE

Document not Stamped]—On an indictment for forging a bill of exchange the bill may be given in evidence, although it is not stamped *Rex* v *Haulswood*, 1 Leach, C C 257 2 East, P C 955 2 Term Rep 606 n S P, *Rex* v *Morton* 2 East P C 955 1 Leach, C C 259, n *See now* 54 & 55 Vict c 39, s 14

Identity or Non existence of Person whose Name Forged]—It is essential to prove the identity or non existence of the person whose name is charged to be forged so far as to show that it is not the handwriting of the person it purports to be *Rex* v *Simonsby* 1 Leach C C 332 2 East P C 996 S P, *Rex* v *Downes*, 2 East, P C 997

—— **By what Witnesses**]—To prove the forging of a bank note it is not necessary that the signing clerk at the bank should be produced, if witnesses acquainted with his handwriting state that the signature to the note is not in his handwriting *Anon*, R & R 378

On an indictment for uttering a forged cheque in the name of J W, on Messrs C G & Co, who were army agents and bankers evidence by a clerk in the former department that he did not know any customer named J W, and that he had been told by the other clerks that there was not any such customer in the banking department is sufficient on the part of the prosecution to call upon the prisoner to show that there was in fact such a person as J W having an account with Messrs C G & Co, and in the absence of such proof is sufficient by itself for the jury *Rex* v *Brennan* 6 Car & P 326

Extraneous Evidence that Document Invalid]—Where the instrument forged is legal on the face of it, the prisoner may be legally convicted although it appears from extraneous evidence that the forged instrument would not have been valid in law *Reg* v *Pike*, 2 M C C 70, 3 Jur 27

Original Entry must be Produced]—Upon an indictment for forging a cheque for 60*l* 10*s*, evidence of the number of the notes in which it was paid was rejected in consequence of the original entry not being forthcoming at the trial *Reg* v *Harvey*, 11 Cox, C C 546

Admissibility of Writing to Compare with Forgery]—Copy books found at the prisoner's house containing writing by the prisoner, and produced by a policeman, cannot be received in order to compare with the forged cheque *Ib*

On an indictment for forgery, it appeared that the prisoner, on the discovery of the forgery, being suspected, was asked to write his name, for the purpose of comparison, and did so — Held, that the signature was not admissible on the part of the prosecution for that purpose. *Reg* v *Aldridge*, 3 F & F 781 Cp, *Reg* v *Taylor*, 6 Cox, C C 58

Expert Evidence]—On a trial for forgery of a bill of exchange an expert cannot be asked whether, on comparing the signatures of the drawer, the acceptor and the indorser of the bill he is of opinion that they are all written by the same hand *Reg* v *Coleman*, 6 Cox, C C 163

On an indictment for uttering a forged will, which, together with writings in support of it, was suggested to have been written over pencil marks which had been rubbed out, the evidence of an engraver, who has examined the paper with a mirror and traced the pencil marks, is admissible on the part of the prosecution *Reg* v *Williams*, 8 Car & P 434

Admissibility to Implicate—Letter Written by Prisoner to Third Person]—In a case of forging and uttering a forged bill a letter written by the prisoner to a third person saying that such person's name is on another bill, and desiring him not to say that that bill is a forgery is receivable in evidence to show guilty knowledge but the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced and the forgery of it proved in the usual way *Rex* v *Forbes*, 7 Car & P 224

—— **Deposition or Examination of Prisoner**]—A was charged with a forgery, and B was examined on oath before the magistrate as a witness against A after this B was himself charged with a different forgery —Held, that the deposition of B was evidence against him on his trial for the forgery notwithstanding it was taken on oath *Rex* v *Haworth*, 4 Car & P 254

The examination of a person taken on oath as a witness before commissioners of bankruptcy, is admissible against him on a charge of forgery, he having been cautioned and allowed to elect what questions he would answer *Reg* v *Wheater*, 2 Lewin C C 157, 2 M C C 45

—— **Letter from Prisoner's Brother after Apprehension**]—On an indictment for forging a bank note a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction at the prisoner's lodgings, after he was apprehended and during his confinement but never actually in his custody, cannot be read in evidence against him on his trial *Rex* v *Huet*, 2 Leach, C C 820

Evidence of Knowledge]—Uttering a forged order for the payment of money under a false representation is evidence of knowing it to be forged *Rex* v *Sheppard*, 1 Leach, C C 226, 2 East, P C 967, R & R 169

—— **Of Forgery**]—Where a prisoner utters an instrument with a forged indorsement or other writing, and a short time previously the instrument is shown to have been in his possession without such indorsement, there is some evidence of forgery, although there is no proof of the indorsement being in the prisoner's handwriting, or if it is even shown that he is unable to write *Reg* v *James*, 4 Cox, C C 90

Statement of Prisoner as to other Documents]—On the trial of an indictment for forgery of

the acceptance of a bill of exchange evidence of what the prisoner said respecting other bills of exchange which are not in evidence is not admissible *Reg* v *Cooke*, 8 Car & P 586 But see *Reg* v *Brown* 2 F & F 559

Evidence of other Offences.]—L was indicted for feloniously having in his possession a lithographic stone on which was engraved a portion of a Dutch coupon A second lithographic stone was found in his lodgings in respect of which another indictment had been preferred against him —Held that it was competent for the prosecution to give evidence on the trial of the first indictment of what was on the second stone *Reg* v *Zeigert*, 10 Cox, C C 535

f Jurisdiction to Try

Evidence]—On an indictment for forgery at common law it is not necessary to prove that the party charged was in custody before the time of the trial in order to give jurisdiction under 11 Geo 4 & 1 Will 4, c 66 s 24 *Reg* v *Smythies* 1 & M 190 1 Den C C 498, 2 Car & K 878 19 L J, M C 31, 13 Jur 1334, 4 Cox, C C 94

A verdict, in such case of guilty of forging, but there is no evidence of its having been done within the jurisdiction of the court, amounts to a conviction *Ib*

Averment as to]—Where a prisoner was tried for forgery in the county where he was in custody, under 11 Geo 4 & 1 Will 4, c 66, s 24, the forgery might be alleged to have been committed in that county, and there need not be any averment that the prisoner was in custody there *Rex* v *James*, 7 Car & P 553

g. Election of Forgeries

Minor Offence, where Facts sufficient to Convict on Greater]—The Bank of England having preferred several indictments for uttering and having in possession, in respect of the same note, and having elected to proceed on the indictment for having in possession —Held that although facts sufficient to support the capital charge were made out in proof an acquittal for the minor offence ought not to be directed, because the whole of the minor offence was proved, and it did not merge in the larger *Anon*, R & R 378

The bank might elect to proceed on an indictment for a lesser offence although an indictment had been found for a capital charge in respect of forging the same note *Ib*

When Prosecutor bound to Elect]—On a count for uttering several forged receipts, the court will not put the prosecutor to his election on which receipt to proceed, if they be all uttered at the same time *Rex* v *Thomas*, 2 East, P C 934

h Power to seize Forged Instruments

Right to detain and impound Instruments, on the Ground of being Forged]—A bill of costs of an attorney having been referred to one of the prothonotaries of the common pleas of Lancaster for taxation, the client produced and handed to the prothonotary two receipts which it was alleged contained false entries and the prothonotary was requested to retain them It appearing that the attorney was not on the roll, he declined to tax the bill or to return the receipts Ten days afterwards the client brought an action of trover against the prothonotary to recover the receipts No proceedings had been taken by any parties with reference to the supposed fraudulent contents —Held, that the prothonotary was justified in withholding the receipts for a limited time and although he could not ultimately detain them from the owner, yet an action brought only ten days after he received them was prematurely brought *Miller* v *Puget*, 23 L T 365

In an action by payee against makers of a cheque in which they pleaded that they did not make the cheque, their signatures were admitted, but it was opened for the defendants, that the defendants, who were directors of a company of which the plaintiff was secretary kept blank cheques, with their signatures to them, in a book, and that this cheque was one of those filled up by the plaintiff without authority The judge intimated that this would be a forgery, even though the whole sum the cheque was drawn for was due to the plaintiff The plaintiff's counsel elected to be nonsuited and the judge ordered the cheque to be impounded in the hands of the associate but would not order the plaintiff to be taken into custody, as no evidence of any forgery had been given and the whole matter rested upon the statement of counsel only *Flower* v *Shaw* 2 Car & K 703 S P, *Wright's Case*, 1 Lewin, C C 135.

B *UTTERING FORGED INSTRUMENTS*

1 *What is an Uttering*, 1298
2. *Evidence and Trial* 1303

1 What is an Uttering

Genuine Indorsement]—The uttering a bill with a genuine indorsement, under pretence of being the indorser, will not subject the party to an indictment as for uttering a forged instrument as it is only a misdemeanour *Rex* v *Hevey* R & R 407, n., 2 East, P C 856, 856, 1 Leach, C C 229

Bill to Prisoner's Order—No Indorsement]—Forging a bill payable to the prisoner's own order, and uttering it without an indorsement as a security for a debt is a complete offence if done with a fraudulent intent the bill having been issued to obtain credit, though as a pledge only *Rex* v *Birkett*, R & R 86

Bill to Drawer's Order—No Indorsement]—Uttering a forged bill of exchange purporting to be payable to the drawer's order with intent to defraud, is a complete offence although there is no indorsement upon it importing to be the drawer's *Rex* v *Wicks*, R & R 149

Statute Passed after Forgery and before Uttering]—On an indictment for forging a scrip receipt, it must appear that the receipt was signed subsequently to the passing of the statute on which the indictment is founded, but though signed before, yet, if it was uttered after the passing of the act, the prisoner may be convicted on the count for uttering it, knowing it to be forged *Rex* v *Reeves*, 2 Leach, C C 808, 814

Mere Showing Instrument.]—Showing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering. *Rex* v. *Shukard*, R. & R. 200.

If A. exhibits a forged receipt to B., a person with whom he is claiming credit for it, this is an uttering, although A. refuses to part with the possession of the paper out of his hand. *Reg.* v. *Radford*, 1 Car. & K. 707 ; 1 Den. C. C. 59 ; 1 Cox, C. C. 168.

Leaving Document Sealed up.]—Nor will the shewing of a forged receipt and leaving it afterwards, sealed up, with the person to whom it was shewn under cover, that he might take charge of it, as being too valuable to be carried about, be an uttering. *Rex* v *Shukard*, R. & R. 200.

Delivery of, to Carrier in Box.]—Delivering a box containing forged stamps to the party's own servant, that he may carry them to an inn, to be forwarded by the carrier to a customer in the country, is an uttering. *Rex* v. *Cullicott*, R. & R. 212 ; 2 Leach, C. C. 1048 ; 4 Taunt. 300.

Application to Purchase Forged Notes.]—The offence of disposing and putting away forged bank notes is complete, although the person to whom they are disposed was an agent for the bank to detect utterers, and applied to the prisoner to purchase forged notes, and had them delivered to him as forged notes, for the purpose of disposing of them. *Rex* v. *Holden*, R. & R. 154 ; 2 Leach, C. C. 1019 ; 2 Taunt. 334 ; 11 R. R. 600.

Presenting to Bank Clerk—Alteration Afterwards.]—If a person presents a bill of exchange for payment, with a forged indorsement upon it of a receipt by the payee, and the clerk to whom he presents it objects to a variance between the spelling of the payee's name in the bill and the indorsement, upon which the person alters the indorsement into a receipt by himself for the payee : semble, that the act of presenting the bill to the clerk previously to his objection is sufficient to constitute the offence of uttering the forged indorsement. *Rex* v. *Arscott*, 6 Car. & P. 408.

Note Given as a Specimen.]—If an engraving of a forged note is given to a party as a pattern or as a specimen of skill, the party giving it not intending that the particular note should be put in circulation, it is not an uttering. *Rex* v. *Harris*, 7 Car. & P. 428.

By Third Person.]—Upon proceedings before justices against a pawnbroker, under 30 & 40 Geo. 3, c. 99, s. 14, he delivering to them, through the hands of his attorney, a false and fabricated duplicate of goods that had been pledged with him, is an uttering by the pawnbroker. *Reg.* v. *Fitchie*, Dears. & B. 175 ; 26 L. J., M. C. 90 ; 3 Jur. (N.S.) 419 ; 4 W. R. 505 ; 7 Cox, C. C. 257.

Bill of Fictitious Person.]—Putting off a bill of exchange of A., an existing person, as the bill of exchange of A., a fictitious person, is a felonious uttering of the bill of a fictitious drawer. *Reg.* v. *Nisbitt*, 6 Cox, C. C. 320.

Giving Document to be Handed to Another.]—If A. gives to B. a forged certificate of a pretended marriage between himself and B., in order that B. may give it to a third party, A. is not guilty of an uttering. *Reg.* v. *Heywood*, 2 Car. & K. 352.

If a person knowingly delivers a forged bank note to another, who knowingly utters it accordingly, the prisoner who delivered such note to be put off might have been convicted of having disposed and put away the same on 15 Geo. 2, c. 13, s. 11. *Rex* v. *Palmer*, R. & R. 72 ; 1 Bos. & P. (N.R.) 96 ; 2 Leach, C. C. 978.

Pass of Discharged Prisoner.]—A woman who applies to a relieving officer for money on a forged pass of a discharged prisoner, purporting to have been given under 5 Geo. 4, c. 85, and produces it to such officer, may be convicted of uttering a forged warrant and order for the payment of money, although the forged pass direct the money mentioned in it to be paid to "William Henry" on his giving a receipt. *Reg.* v. *M'Connell*, 1 Car. & K. 371 ; 2 M. C. C. 298.

Uttering in England—Cheque Circulated Abroad.]—On an indictment for forging and uttering a cheque or an order for the payment of money, it appearing that the cheque was dated as if drawn abroad ; but there being evidence, by comparison of handwriting, that it was drawn abroad, and also evidence that he caused it to be presented to a banker abroad, through whom it was presented in this country without a stamp : —Held, that the prisoner might be convicted of uttering it in this country, if he set it in circulation abroad. *Reg.* v. *Taylor*, 4 F. & F. 511.

Bonds Received Abroad by Post—Dealing with Proceeds in England.]—A company in Brussels received on 4th January a letter from N. & Co., a firm in London, containing a number of foreign bonds for negotiation. They accordingly on the 5th January sent to N. & Co., by post a cheque for 1,500*l.* On 6th January the cheque was paid into a bank in London by T., the only person known at N. & Co.'s offices, to the account of N. & Co. ; and on 7th January cheques drawn by N. & Co. were presented at such bank by T., who received 1,495*l.* in respect thereof. On the 12th January, F., who was an associate of T., endeavoured to telegraph, under an assumed name, a sum of money from London to Stockholm, but was too late to do so. Upon an indictment which charged F. and T. with having forged and uttered the bonds with intent to defraud :—Held, that it was a question for the jury whether there was sufficient evidence of the forged bonds having been posted in this country ; and that, if they were satisfied that there was sufficient evidence, they could find both the prisoners guilty of uttering the forged bonds upon the indictment. *Reg.* v. *Finkelstein*, 16 Cox, C. C. 107.

Uttering Receipts to get Credit therefrom.]—A. applied to B. to lend him money, and gave him the name of the defendant as a surety. B. went to him, and, to satisfy himself of his respectability, asked to see his receipts for rent and taxes. The defendant placed in the hands of B., for his inspection, three documents purporting to be receipts for poor rates, with the intent to induce B. to advance money to A. One

of these receipts was forged. B. inspected the documents, and then returned them to the defendant:—Held, that the defendant might be convicted of uttering a forged receipt, and that, for the purpose of rendering him liable, it was not necessary that the receipt should be used to get credit upon it by its operating as a receipt, but that it was sufficient if he used it fraudulently to obtain money by means of it. *Reg.* v. *Ion*, 2 Den. C. C. 475; 21 L. J., M. C. 166; 16 Jur. 746; 6 Cox, C. C. 1.

Held, also, that it was immaterial whether the money to be obtained by means of it was for himself or for any other person. *Ib.*

The prisoner, servant of A., applied to B. for payment of 17*s.* due from B. to A. B. refused to pay it without A.'s receipt. The prisoner went away and returned with a document as follows:—"Received from Mr. Bendon, due to Mr. Warman, 17*s.* Settled." Whereupon B. paid the debt:—Held, a question for the jury whether the prisoner tendered the receipt as the handwriting of A., which would make him liable on this indictment; or as his own, which would make his act a false pretence. *Reg.* v. *Inder*, 1 Den. C. C. 325; 2 Car. & K. 635.

A. was treasurer of an unenrolled friendly society, and it was his duty to receive contributions from the members, and pay them into a bank in his own name for the benefit of the society. At meetings of the society he produced to the members a fictitious pass-book, purporting to vouch for the payment of moneys by him into the bank. This book did not truly represent the state of the account between himself and the bank. He also at various times drew out moneys which he had paid in, and appropriated them to his own use. He was convicted upon an indictment which charged him with uttering a receipt for money, the jury finding that he presented a false account, with intent thereby to obtain credit for having duly paid into the bank the various sums which he had received, and to be continued in his office of treasurer with a view to obtain other moneys from the society, which he might fraudulently appropriate to his own use:—Held, that the conviction was right. *Reg.* v. *Smith*, L. & C. 168; 31 L. J., M. C. 154; 8 Jur. (N.S.) 572; 6 L. T. 300; 10 W. R. 583; 9 Cox, C. C. 162.

A paid secretary of an unenrolled friendly society, of which his wife was a member, was directed by the society to pay into a savings bank 40*l.*, given him for that purpose. At the next meeting he handed in a book, indorsed "Savings Bank, New-street, Huddersfield," and on which was written. "1855, Oct. 30, received 40*l.*" The indorsement on and entry in the book were forgeries, and the money had not been paid into the bank. He was convicted of uttering this document, knowing it to be forged:—Held, that the conviction was right. *Reg.* v. *Moody*, L. & C. 173; 31 L. J., M. C. 156; 8 Jur. (N.S.) 574; 6 L. T. 301; 10 W. R. 585; 9 Cox, C. C. 166.

Conditional.]—A conditional uttering of a forged instrument is as much a crime as any other uttering. Where a person gave a forged acceptance, knowing it to be so, to the manager of a banking company where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of inquiries respecting the acceptance:—Held, a sufficient uttering. *Reg.* v. *Cooke*, 8 Car. & P. 582.

Intent to Defraud is Necessary.]—Where a person had made alterations in a diploma of the College of Surgeons, to make it appear to be a document issued by the college to him, and had hung it up in his house, and showed it to certain persons, it was found, by the case reserved for the court, that he had no intent, in the uttering and publishing, to commit any particular fraud or specific wrong to any individual:—Held, that he could not be convicted of uttering. *Reg.* v. *Hodgson*, Dears. & B. 3; 25 L. J., M. C. 78; 2 Jur. (N.S.) 453; 4 W. R. 509; 7 Cox, C. C. 122.

On a charge of uttering a receipt with intent to defraud, the uttering being to the employer, and he appearing to have been indebted to the prisoner at the time, negatives an intent to defraud. *Reg.* v. *Bradford*, 2 F. & F. 859.

Uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, is sufficient evidence of an intent to defraud that person; and the oath of the person to whom the receipt was uttered that he believed the prisoner had no such intent will not repel the presumption of an intention to defraud. *Rex* v. *Sheppard*, 1 Leach, C. C. 226; 2 East, P. C. 967; R. & R. 169.

Fraud actually Perpetrated.]—Uttering a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud is actually perpetrated by it; and where in such case the indictment contained some counts for forging the instrument and others for uttering it, and the defendant was acquitted on the counts for the forgery, and convicted on the counts for the uttering, judgment was arrested. *Reg.* v. *Bouit*, 2 Car. & K. 604.

The forgery of a railway pass, to allow the bearer to pass free on a railway, is a forgery at common law; but the uttering of it per se is not a misdemeanour. *Ib.*

A person was indicted for forging a testimonial to his character as a schoolmaster, and the indictment also charged him with having uttered the forged document. The jury acquitted him of the forgery, but found him guilty of the uttering with intent to obtain the emoluments of the place of schoolmaster, and to deceive the prosecutor:—Held, that this finding of the jury amounted to an offence at common law, of which the prisoner was properly convicted. *Reg.* v. *Sharman*, Dears. C. C. 285; 23 L. J., M. C. 51; 18 Jur. 157; 2 W. R. 227; 6 Cox, C. C. 312.

Joint Uttering.]—Where three were jointly indicted for feloniously using plates, containing impressions of forged notes:—Held, that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using, and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. *Rex* v. *Harris*, 7 Car. & P. 416.

V. was indicted for uttering forged post-office money orders. H. and S. were joined in the indictment and convicted. They had gone to the shop where V. uttered the orders, remaining outside in a cab so situated that they could not see or be seen by the people in the shop. They had previously accompanied V. to another shop, where he failed to get change for the orders, and they assisted him in taking away the goods obtained at the second shop:—Held, that though they were not in the cab for the purpose of taking part in aiding or assisting in the actual act of uttering, they were rightly convicted. *Reg.* v. *Vanderstein*, 16 Ir. C. L. R. 574; 10 Cox, C. C. 177.

2. Evidence and Trial.

Guilty Knowledge—Evidence of other Utterings.]—The prisoner, who had been stamp distributor of the Queen's Bench Division, was indicted for uttering three law forms with forged stamps impressed thereon. The forms which were the subject of the indictment were those ordinarily used by the stamp distributor of the Exchequer Division, and bore his particular mark. It sometimes happens that, in the process of stamping, a second sheet of paper is inadvertently placed under the sheet which is brought into contact with the die; this second sheet receives an impression, but of a fainter character, and one which can be distinguished from the impression made on the outer sheet. These second sheets are termed "blinds," and are never supposed to be issued by the stamping department, or regarded as genuine stamps. The principal defence was that when the prisoner sent to purchase genuine stamps at the custom house, his messenger, either deceived by the guilty party or in collusion with him, brought back these "blinds," which were then innocently sold by the prisoner. To meet this defence, counsel for the crown proposed to give in evidence several documents from the files of the Queen's Bench Division, which were on forms headed with the printed device used on the prisoner's forms, and date stamps on which were proved by the evidence of an expert to have been made with the same instrument as the forged stamps on the documents the subject of the indictment; and in the prisoner's office implements were found suitable for the forging of such stamps. These documents were submitted by the learned judge to the jury, notwithstanding that the prisoner's counsel objected to their reception on the ground that there was not sufficient evidence to connect the prisoner with them:—Held (Fitzgerald, B., and Barry, J., dissenting), that there was sufficient evidence to connect the prisoner with these documents, and of their having been uttered by him; and that they were rightly submitted to the jury as evidence of guilty knowledge in uttering the stamped instruments which were the subject-matter of the indictment. *Reg.* v. *Colclough*, 10 L. R. Ir. 241; 15 Cox, C. C. 92.

On a trial for uttering a forged note scienter, the admissibility of evidence of other utterings is not affected by *Reg.* v. *Oddy* (2 Den. C. C. 264). *Reg.* v. *Green*, 3 Car. & K. 209.

Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. *Rex* v. *Wylie*, 1 Bos. & P. (N.R.) 92; 2 Leach, C. C. 983. S. P., *Rex* v. *Tattersall*, 1 Bos. & P. (N.R.) 93, n.

So proof that a prisoner had in his possession other bills or notes of the same kind is admissible. *Rex* v. *Hough*, R. & R. 120.

So proof that he pointed out where such others were hidden. *Rex* v. *Rowley*, Bayl. Bills, 448.

If the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments were forged; proof that the prisoner returned the money on such an instrument, and received the instrument back, is not sufficient without producing the instrument or duly accounting for its non-production. *Rex* v. *Millard*, R. & R. 245.

Upon an indictment for uttering a forged note, evidence is admissible of the prisoner's having, at a prior time, uttered another forged note of the same manufacture; and also that other notes of the same fabrication had been found on the files of the bank, with his handwriting on the back of them, in order to show his knowledge that the note mentioned in the indictment was a forgery. *Rex* v. *Ball*, R. & R. 132; 1 Camp. 324; 2 Leach, C. C. 987, n.; 10 R. R. 695.

If a second uttering is made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *Rex* v. *Smith*, 2 Car. & P. 633.

On an indictment for uttering forged Polish notes, conversations with the prisoners respecting the forgery and circulation of forged Austrian notes are admissible to prove the scienter. *Rex* v. *Harris*, 7 Car. & P. 429.

On an indictment for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering notes of another foreign prince is admissible, in proof of a guilty knowledge. *Rex* v. *Balls*, 1 M. C. C. 470.

In a prosecution for forging and uttering a receipt, knowing it to be forged, it was proposed to give in evidence other acts of forgery by the prisoner, against the same prosecutor, as evidence of guilty knowledge, on the count for uttering. It was objected that they could only be given in evidence if they were forgeries, and there was no evidence of that without first asking the jury to find them so, which was not the issue they had to try:—Held, that the whole evidence must be confined to the document they were proceeding upon, without at all trenching upon the rules as to uttering in other cases. *Reg.* v. *Moore*, 1 F. & F. 73.

Upon an indictment for uttering a forged bill, the previous uttering of other bills forged in other names may be given in evidence in proof of guilty knowledge. *Reg.* v. *Sult*, 3 F. & F. 834.

It is impracticable to lay down any general rule as to the time within which such previous uttering must have taken place, in order to be admissible. *Ib.*

In order to show a guilty knowledge, on an an indictment for uttering forged bank notes, evidence of another uttering, subsequently to the one charged, is not admissible, unless the latter uttering was in some way connected with the principal case, or it can be shown that the notes were of the same manufacture; for only previous or contemporaneous acts can show quo animo a thing is done. *Rex* v. *Taverner*, Car. C. L. 195.

Statements made by the prisoner with refer-

ence to the drawer of a bill of exchange on a previous occasion when he applied to get a bill discounted are admissible in evidence on a charge of uttering a subsequent bill represented by him as being drawn by the same person. *Reg.* v. *Nisbett*, 6 Cox, C. C. 320.

Sufficiency of Evidence to sustain Conviction.]—A bill was addressed to Messrs. Williams & Co., bankers, Birchin-lane, London, and there might, at that time, have been a 3 on the lower left-hand corner of the bill; the prisoner was asked at the time whether the acceptors were Williams, Birch & Co., and his answer imported that they were. Williams, Birch & Co. lived at No. 20, Birchin-lane, and it was not their acceptance. There were no other known bankers in London using the style of Williams & Co.; but at No. 3, Birchin-lane, the name of "Williams & Co." was on the door; and some bills addressed to Messrs. Williams & Co., bankers, Swansea, had been accepted, payable at No. 3, and had been paid there. There was no evidence who lived at No. 3, but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there:—Held, that on these facts he was improperly convicted of uttering a forged acceptance, knowing it to be forged. *Rex* v. *Watts*, R. & R. 436; 3 Br. & B. 197; 6 Moore, 442; 9 Price, 620.

On a charge of uttering an order or a request for the delivery of goods, proof of the receipt of goods by the prisoner is no evidence of the uttering. *Reg.* v. *Johnson*, 6 Cox, C. C. 18.

Upon an indictment for uttering a forged acceptance to a bill of exchange, where the only evidence of uttering is that the bill came enclosed in a letter in the prisoner's handwriting, it is not necessary to prove any act of uttering either by putting the letter into the post himself, or commissioning anyone else to do so, but it is a question of fact for the jury. *Reg.* v. *McQuin*, 1 Cox, C. C. 34.

On an indictment for uttering a forged bill, it was proved that the prisoner had drawn and indorsed the bill in the name of another, and that it had been paid into the prisoner's bankers, and placed to the credit of his account, but by whom or when it had been so paid in did not appear:—Held, no proof of an uttering, disposing, or putting off. *Reg.* v. *Lines*, 1 Cox, C. C. 353; 2 Cox, C. C. 56.

Election by Prosecutor as to what Facts he Relies on.]—On an indictment for uttering a forged bill of exchange, the judge will hear evidence of all the facts which form part of one continued transaction relating to the uttering of the bill, and will not press the prosecutor to elect what particular fact he means to rely upon as the uttering till the case for the prosecution is closed. *Rex* v. *Hart*, 7 Car. & P. 652.

Venue.]—Putting a letter into the Manchester post-office containing a forged instrument is an uttering in the county of Lancaster, and the post-mark is evidence of such an uttering. *Rex* v. *Perkin*, 2 Lewin, C. C. 150.

Jurisdiction.]—Uttering in England a forged note, payable in Ireland only, was within the Forgery Acts prior to 11 Geo. 4 & 1 Will. 4, c. 66. *Rex* v. *Kirkwood*, 1 M. C. C. 311. [*See now* 24 & 25 Vict. c. 98, s. 40.]

C. *EFFECT OF FORGERY.*

Liability of Partnership.]—A., B. and C. were proprietors of stock as trustees, and C., D. and E. were bankers. C. executed a letter of attorney empowering D. and E. to sell the stock, and forged the signatures of A. and B. The stock was sold and transferred in the books of the Bank of England, to the credit of the buyers, and the produce of the stock was paid into the banking-house of C., D. and E.; C. was afterwards tried and convicted of forging a similar instrument, and executed:—Held, upon an issue directed in chancery (it being part of the order that no objection should be taken that he was interested as a trustee, and a partner in the banking-house), that the money received by the banking-house constituted a debt due from them to the trustees. *Stone* v. *Marsh*, 6 B. & C. 551; R. & M. 364; 8 D. & R. 71; 5 L. J., K. B. (O.S.) 201.

F., a partner in a banking-house, transferred bank stock belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by F., who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence would have known of it:—Held, the customer could maintain an action against the partners for money had and received. *Keating* v. *Marsh*, 1 Mont. & Ayr. 582. Affirmed, *Id.* 592.

Money had and Received.]—A party whose stock has been sold under a forged power of attorney may recover the value as money had and received from the purchaser. *Marsh* v. *Keating*, 1 Bing. (N.C.) 198; 1 Scott, 5; 2 Cl. & F. 250; 8 Bligh (N.S.) 851.

Payment of Cheque.]—When a cheque, drawn by a customer upon his bankers for a sum of money described in the body of the cheque in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the cheque, but in such a manner that no person in the ordinary course of business could observe it, and the bankers paid to the holder the larger sum:—Held, that they could not charge the customer for any amount beyond the sum for which the cheque was originally drawn. *Hall* v. *Fuller*, 5 B. & C. 750; 8 D. & R. 464; 4 L. J. (O.S.) K. B. 297; 29 R. R. 383.

Replacing Stock.]—Stock of a railway company was standing in the books of the company in the names of two persons, A. and B. B., by a transfer executed by himself, and to which he forged the signature of A., transferred the stock to a third person whose name was substituted upon the register for the names of B. and A. A. died soon afterwards:—Held, that the personal representative of A. had a legal right to call on the company to replace the stock, though the right of action at law was gone. *Midland Ry.* v. *Taylor*, 8 H. L. Cas. 751; 31 L. J., Ch. 336; 8 Jur. (N.S.) 419; 6 L. T. 73; 10 W. R. 382—H. L.

The owner of railway shares in two companies took certificates from the companies, for which he gave receipts. In so doing he gave his address, in one instance, at the office of a banking company, in the other, at a club. He deposited the certificates with the manager of the bank for

safe custody. The manager fraudulently sold the shares, and forged the name of the owner to transfer deeds of the shares. The companies wrote to him informing him of the transfers: and receiving in one instance no answer, and in the other an answer purporting to come from the owner, but in reality forged by the manager, registered the shares. On a bill against one of the companies and the purchaser, praying that the purchaser might be decreed to deliver up the certificate to the owner, that the company might be decreed to cancel the alleged transfer, and the entry of it in their books, to deliver to the owner a stock certificate, and to pay the dividend then due, and all future dividends:—Held, that he was entitled to the relief prayed, but without prejudice to any question at law or in equity between the co-defendants. *Johnston* v. *Renton*, 39 L. J., Ch. 390; L. R. 9 Eq. 181: 22 L. T. 90; 18 W. R. 284.

Where, from oversight, stock standing in the name of A., not being claimed, had been, with the dividends, transferred to the commissioners of the National Debt, and S. afterwards, under probate of a forged will in the name of H., obtained a transfer:—Held, that the petitioners, the parties truly entitled, were, under 56 Geo. 3, c. 60, s. 7, entitled to have a transfer of the stock and dividends out of the aggregate fund in the commissioners' hands; the costs to be paid out of the funds recovered. *Joliffe, Ex parte*, 8 Beav. 168; 14 L. J., Ch. 134; 10 Jur. 813.

One of two trustees of a sum of stock sold it out under power of attorney, to which he had forged the signature of his co-trustee, and some time afterwards absconded:—He'd, that the Bank of England was compellable in a court of equity to re-invest the stock in the name of the other trustee. *Sloman* v. *Bank of England*, 14 Sim. 475; 14 L. J., Ch. 226; 9 Jur. 243.

One of three trustees being in possession, with the consent of his co-trustees, of railway debentures executed to the three, sold them to a bonâ fide purchaser, and forged the names of his co-trustees to the deed of transfer, which was entered in the books of the company. Upon a bill by the other trustees, praying that the transfer might be declared void with consequential relief:—Held, that possession of the debentures by one trustee gave him no implied authority to deal with them, and the transfer was declared to be void, and the entry in the books of the company was directed to be cancelled and the debentures to be delivered up to the trustees. *Cottam* v. *Eastern Counties Ry.* 30 L. J., Ch. 217; 6 Jur. (N.S.) 1367; 3 L. T. 465; 9 W. R. 94.

Fraudulent Mortgage.]—A son who was heir-at-law to his father, and one of the executors and trustees of his father's will, fraudulently mortgaged some of the testator's property by forging a deed as if he were the absolute owner, his name and his father's name being the same. The co-executors and co-trustees were not cognisant of the transaction:—Held, in an action by them claiming a declaration that the mortgages were void against them, that nothing passed to the mortgagees by the forged mortgage deeds, but that as the son had a beneficial interest under the will, his interest passed to them. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A. See *Keate* v. *Phillips*, 50 L. J., Ch. 664; 18 Ch. D. 560; 44 L. T. 731; 29 W. R. 710. *Fox* v. *Hawks*, 49 L. J., Ch. 579; 13 Ch. D. 822; 42 L. T. 622; 28 W. R. 656.

Estoppel by Conduct.—A person who knows that a bank is relying upon his forged signature to a bill cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse, but mere silence is insufficient if the position of the bank is not altered. *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477—H. L. (Sc.)

S. agreed with E. for the purchase from him of lands sold in the Irish Incumbered Estates Court, but not yet conveyed. Part of the consideration for the purchase was to be a bill of exchange, accepted by a bank. S. forged a conveyance from the Incumbered Estates Court to persons from whom he traced title to himself, and executed a conveyance to W., reciting the forged conveyance, as if genuine. Afterwards, the Incumbered Estates Court executed a conveyance to S., reciting the purchase money to be E.'s:—Held, that under the genuine deed, an interest in the land passed by estoppel to W., and that E. had not a lien for the amount of the bill of exchange. *Eyre* v. *Sadleir*, 15 Ir. Ch. R. 1.

Estoppel by Negligence.]—T., the registered holder of five shares in a company, deposited the share certificates with a stockbroker. A forged transfer of the shares to S. and G. having been left with the secretary for registration, together with the share certificates, he, in accordance with the usual custom of business, registered the transfer and removed the name of T. from and placed the names of S. and G. upon the register as holders of the shares, and share certificates were handed to them. B. and G. having, through their broker, bought on the Stock Exchange five shares in the company, S. and G. transferred the shares comprised in the false transfer to B. and G. respectively, and they were registered as the holders of the shares, and share certificates were handed to them:—Held, first, that the company, by giving the certificates, represented that S. and G. were the lawful holders of the shares mentioned in them, intending that persons purchasing the shares should act thereon, and that B. and G. having bonâ fide acted upon that representation, the company was estopped from denying the truth of it. Held, secondly, that B. and G. were entitled to recover from the company the value of the shares at the time the company refused to recognise them as shareholders, with interest at 4*l.* per cent. *Bahia and San Francisco Ry., In re, Trittin, In re*, 9 B. & S. 844; 37 L. J., Q. B. 176; L. R. 3 Q. B. 584; 18 L. T. 467; 16 W. R. 862.

The plaintiffs, merchants in New York, inclosed in a letter to W. & Co., their correspondents in England, a cheque drawn on Smith & Co., bankers, London, and indorsed by the plaintiffs to W. & Co. The letter was placed with others for the purpose of being posted, but was abstracted, and the cheque was some time after presented to the defendants by C., the cheque at that time bearing a forged indorsement to C. At the request of C., the defendants obtained cash for the cheque from Smith & Co., and allowed C. to draw for the amount:—Held, there being evidence of negligence in the plaintiffs disentitling them to sue, that they were entitled to recover from the defendants the amount of the cheque, for the property in the cheque never having passed out of the plaintiffs, the defen-

dants were guilty of a conversion, and therefore they were entitled to waive the tort, and hold the proceeds of the cheque to be money received to the plaintiffs' use. Evidence was tendered by defendants, which was rejected, of a practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship; with a view to show that the plaintiffs in omitting to do so were estopped by their own negligence from recovery:—Held, that such evidence was rightly rejected, for negligence in order to operate as an estoppel must be in the transaction itself, and there was no duty either towards W. & Co., or the general public, cast on the plaintiffs to comply with such a practice, which could only be collateral to the transaction. *Arnold* v. *Cheque Bank*, 45 L. J., C. P. 562; 1 C. P. D. 578; 34 L. T. 729; 24 W. R. 759.

Trustees of a charity incorporated by act of parliament, and having a common seal, possessed stock in the public funds, which stock was registered in the Bank of Ireland. The secretary of the trustees was allowed to have the seal in his possession. Five several powers of attorney, prepared in different years, sealed with the seal of the trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorised act of the secretary alone, were presented to the bank, and the stock was transferred. The facts were afterwards discovered, and the secretary was indicted and convicted. By a power of attorney duly executed, the trustees then authorised C. to transfer the stock, but the bank refused to make the transfer. An action was brought by the trustees on this refusal; the judge who tried the cause told the jury that if under these circumstances the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the bank. On exceptions for this direction:—Held, that it was wrong. *Bank of Ireland* v. *Evans' Charities Trustees*, 5 H. L. Cas. 389; 3 W. R. 573.

S., wishing to sell certain shares of which he was the owner, was induced by his broker to execute a transfer, leaving a blank for the broker to insert the numbers and description of the shares. The broker fraudulently filled up the blank with the numbers and description of other shares belonging to S., but in a different company, namely, that of the defendants: and passed the transfer as a genuine transfer to a purchaser. By the rules of the defendants' company, it was necessary to produce certificates of the shares before a purchaser's name could be entered on the register as the holder of the shares. The certificates of the shares were kept by S. in a box in the broker's custody. The box was locked, and S. kept the key. The broker, however, managed to get a duplicate key, and stole the certificates, and produced them with the transfer, and the name of the purchaser was registered. In an action by S., claiming damages and a mandamus to have his name restored to the register in respect of the shares:—Held, that S. had been guilty of no false representation or culpable negligence such as estopped him from charging that the transfer deed was a forgery. *Swan* v. *North British Australasian Co.*, 2 H. & C. 175; 32 L. J., Ex. 273; 10 Jur. (N.S.) 102; 11 W. R. 862—Ex. Ch.

C., had been since 1875 the proprietor of certain stock in the defendant company. The confidential clerk of C., feloniously obtained possession of a certificate for 1,000*l.* of the stock, and sold that amount. Subsequently he forged C.'s name to the transfer, and forwarded it, together with the certificate, to the brokers of W., who had purchased the stock on the Stock Exchange. The brokers forwarded the transfer and the certificate to the company for registration. The company thereupon wrote to C. at his usual address, inquiring if the transfer were correct. The letter was intercepted by C.'s clerk, who replied in a way which appeared not quite satisfactory. The company forwarded a second letter, which was also intercepted by C.'s clerk, who gave the company an explanation with which they were satisfied, and they immediately sent a new certificate to W.'s brokers. The fraud was subsequently discovered, and now W. sought to recover from the company on the ground that (inter alia) he was entitled to rely upon the certificate of registration, which the company were estopped from questioning, as he, relying upon it, had so prejudicially altered his position as to bring the case within the authorities upon estoppel. C. sought to have his name replaced in the books of the company as the owner of the stock:—Held, that the company, having issued the certificate without any want of care and bonâ fide, were not estopped from contesting its validity. *Waterhouse* v. *L. & S. W. Ry.*, 41 L. T., 553; 44 J. P. 154.

C. owned stock in a company incorporated under the Companies Act, 1862. His clerk, P., contracted to sell stock in the company to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the company for registration. The company sent a letter to C. inquiring whether the transfer was correct; as they received no answer from him they registered the transfer. B. borrowed money from a bank, and by way of security for the loan the stock was transferred by S. at the request of B. to I. as trustee for the bank, and the company registered I. as owner and issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, and the stock was held by I. as a bare trustee for B. The forgery was discovered, and the company then refused to acknowledge I. as the holder of the stock. In an action brought by B. and I. to compel the company to recognise their title:—Held, that although I., as trustee for the bank, might have acquired a good title by estoppel against the company, yet that title ceased when the loan by the bank was paid off, and that no estoppel existed in favour of B. against the company; for B. in contracting, through S., to buy the stock belonging to C., had acted on the faith of the forged transfer, and had not relied upon any act of the company, and by sending the forged transfer to the company had induced them to recognise his nominee as the holder, and that the action would not lie. *Buhia and San Francisco Ry., In re* (supra); *Hart* v. *Frontino, &c., Gold Mining Co.* (L. R. 5 Ex. 111), and *Knights* v. *Wiffen* (L. R. 5 Q. B. 660), discussed. *Simm* v. *Anglo-American Telegraph Co.*, 49 L. J., Q. B. 392; 5 Q. B. D. 188; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280—C. A.

—— **Ratification.**]—J. indorsed to the plaintiff a promissory note, bearing a signature which he stated to be the defendant's, but which was a

forgery. Shortly before the note became due, the plaintiff, hearing from the defendant that the signature was a forgery, threatened to prosecute J.: whereupon the defendant, to prevent his doing so, said that he would pay the money, and signed a memorandum to the effect that he held himself responsible for the note, describing it as bearing his signature. The plaintiff having sued the defendant upon the note, the judge ruled that the defendant had ratified the forged signature, and directed a verdict for the plaintiff:—Held (per Kelly, C.B., Channell, B., and Pigott, B., dissentiente Martin, B.), that this ruling was wrong, because the defendant's arrangement was not a ratification of a signature, written by an agent claiming to have authority from the defendant in that behalf, but an agreement upon the defendant's part to become liable on the bill in consideration of the plaintiff's forbearing to prosecute J., which agreement was void as against public policy; and also because no act in its inception illegal and void, such as a forgery, can be ratified by matter subsequent; and that the defendant was not estopped from setting up the forgery as a defence to the action. *Brook* v. *Hook*, 40 L. J., Ex. 50; L. R. 6 Ex. 89; 24 L. T. 34; 19 W. R. 508.

Estoppel of Company.]—It was the duty of the secretary of a company to procure the execution of certificates of shares in the company with all requisite and prescribed formalities, and to issue them to the persons entitled to receive the same. By a resolution of the directors of the company it was provided that certificates of shares should be signed by one director, the secretary, and the accountant. The secretary of the company, having executed a deed purporting to transfer certain shares in the company to one G., a purchaser of such shares, issued to G. a certificate stating that he had been registered as the owner of the shares. Such certificate was in the usual and authorised form, and sealed with the company's seal, but the signature of the director appended thereto was a forgery, and the seal of the company was, in fact, affixed thereto without the authority of the directors. G. deposited the certificate with the plaintiff as a security for advances, and subsequently executed a transfer of the shares to the plaintiff. Neither G. nor the plaintiff had any knowledge or reason to suspect that the certificate was otherwise than a genuine document, or that the matters stated therein were untrue. The company refused to register the plaintiff as owner of the shares, stating that there were no such shares standing in G.'s name in their books:—Held, that the company were estopped by the certificate issued by their secretary from disputing the plaintiff's title to the shares. *Shaw* v. *Port Philip Gold Mining Co.*, 53 L. J., Q. B. 369; 13 Q. B. D. 103; 50 L. T. 685; 32 W. R. 771.

Forged Transfer by one Executor—Right of other to sue.]—One of two executors, at various periods, some of which were more than six years before the commencement of the action, forged his co-executor's signature to transfer of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other executor, on discovery of the fraud, informed the railway company that the transfers were invalid, and demanded that the stock should be registered in the names of herself and another who had been appointed trustees of the will. The railway company declined to accede to this request, and the present action was brought that the company might be ordered to register the plaintiffs as owners of the stock:—Held, that one of the co-executors could not transfer stock registered in the names of both; that the transfers were not good as to one moiety of the stock, and that the innocent executor had in equity a sufficient interest in the stock to enable her to sue her fraudulent co-executor and the railway company. *Barton* v. *North Staffordshire Ry.*, 57 L. J., Ch. 800; 38 Ch. D. 458; 58 L. T. 549; 36 W. R. 754.

See *Barton* v. *L. & N. W. Ry.*, 59 L. J., Q. B. 33; 24 Q. B. D. 77; 62 L. T. 164; 38 W. R. 197.

Jurisdiction in Civil Proceedings.]—The court has jurisdiction to declare an instrument forged, and to order it to be delivered up; it may make such a declaration and order, without sending the fact of forgery to be tried by a jury. Where one witness swears to the authenticity of the instrument, the court will not make a decree against it without directing an issue to try the fact of forgery. *Peake* v. *Highfield*, 1 Russ. 559.

Parties resting their defence, in an issue at law, upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence, or to say the forged instruments were immaterial. *Kemp* v. *Mackrell*, 2 Ves. sen. 579.

A forgery is not conclusive against a fact proved by other evidence. *Lloyd* v. *Passingham*, 16 Ves. 59; Coop. 152.

Forged deeds or writing not to be ordered per curiam to be torn or defaced, but kept so that the king may proceed thereon against the criminal. *Frankland* v. *Hampden*, 1 Vern. 66.

Where counsel's name to answer was forged, the court will not order it off file to prejudice of innocent plaintiff. *Bull* v. *Griffin*, 2 Anstr. 563.

Solicitor fined 20*l.* for forging counsel's name to scandalous answer. *Whitlock* v. *Marriot*, Dick. 16.

G. LARCENY AND RECEIVERS.

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A. *LARCENY.*

1. THE OFFENCE.

a. Felonious Intent.

Absence of—Reward for Apprehension.]—If several agree to commit a burglary, but one communicates the intent to an officer, that he may take the other two, and the officer is upon the watch accordingly; the person who has made that communication to the officer will not be particeps criminis in the burglary, although he is present when it is committed, and pretends to assist the other two, but in fact expedites their apprehension. *Rex* v. *Dannelly*, R. & R. 310; 2 Marsh. 571.

Nor will it make any difference, although his object in detecting is to obtain for himself (by previous agreement with the officer) part of a reward that will be payable on conviction. *Ib.*

Intention to deprive Owner of Goods permanently.]—To constitute larceny it is necessary that the party should have had an intention to deprive the owner of his property permanently. *Reg.* v. *Holloway*, 2 Car. & K. 942; 1 Den. C. C. 370; T. & M. 40; 3 New Sess. Cas. 410; 18 L. J., M. C. 60; 13 Jur. 86; 3 Cox, C. C. 241.

The correct definition of larceny is the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, with a felonious intent to convert them to his (the taker's) own use, and make them his own property. The fraudulent taking being explained to be a taking without any colour of right, and the felonious intent, an intent to deprive the owner permanently of his property. *Ib.*

A person who has surreptitiously taken a printed document from a government office, and sent it to a newspaper office to be published, being indicted for larceny:—Held, that the question for the jury was whether he had the object and intention of depriving the government permanently of the property in the paper. *Reg.* v. *Guernsey*, 1 F. & F. 394.

Where the prisoners have entered a stable at night, and taking out horses, rode them thirty-two miles, and then left them at an inn, and were afterwards found pursuing their journey on foot; and the jury found that they took the horses merely with intent to ride and afterwards to leave them, and not to return or make any further use of them:—Held, that this was a trespass and not a larceny. *Rex* v. *Phillips*, 2 East, P. C. 662.

The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem and then restore it, is a defence not to be generally encouraged, though, if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be, that, if it clearly appears that the prisoner only intended to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and a fair expectation of being enabled shortly, by the receipt of money, to take it out and restore it, he might be acquitted; but, otherwise, not. *Reg.* v. *Phetheon*, 9 Car. & P. 553.

On a charge of larceny it was proved that the prisoner had taken property from ready-furnished lodgings that were let to her, and had pawned it:—Held, that the fact that she had frequently pawned and afterwards redeemed portions of the same property, was no answer to the charge. There must not only be the intent, but also the ability to redeem, to render such defence available. *Reg.* v. *Medland*, 5 Cox, C. C. 292.

Upon an indictment for larceny, it was proved that a box of plate having been deposited with

the prisoner for safe custody, he broke it open, and took out a part of the plate, which he offered to a pawnbroker as a security for 50*l*. His offer was declined, but he afterwards pledged the whole box of plate with another person as security for 200*l*. When he was called upon to restore the plate to the owner, he had not the means of redeeming it, and was taken into custody. The jury found him guilty, but recommended him to mercy, believing that he intended ultimately to return the property:—Held, that he was rightly convicted of larceny at common law, because the jury had found a verdict of guilty which was well warranted by the evidence: and though they had recommended him to mercy on the ground that he intended ultimately to restore the property, that expression was not necessarily inconsistent with the verdict, and ought not to be considered equivalent to a finding, that at the time when he took the plate wrongfully he took it for the purpose of merely making a temporary use of it. *Reg.* v. *Trebilcock*, Dears. & B. 453; 27 L. J., M. C. 103; 4 Jur. (N.S.) 123; 6 W. R. 281; 7 Cox, C. C. 408.

A. on B.'s behalf pawned B.'s coat: the next day A. with B.'s consent redeemed the coat, and took it away with him to a place 11 miles distant, where he was found some days after with it:—Held, that if A. at the time he redeemed the coat intended to deprive B. of the use of it and to appropriate it, he was guilty of larceny. *Reg.* v. *Sparrow*, 2 Cox, C. C. 287.

To constitute felony, breach of trust is not sufficient, there must be a felonious taking; but that is satisfied by an act not warranted by the purpose for which the property was delivered, as a tailor taking notes out of a pocket-book left in the pocket of a coat delivered to him to mend, or a hackney-coachman, in whose coach it was left, etc. *Cartwright* v. *Green*, 8 Ves. 409.

Lucri Causâ—Private Advantage.]—A servant of B. applied for at the post-office and received all the letters addressed to B. She delivered them all to B., except one, which she burned. Her motive for destroying it was the hope of suppressing inquiries respecting her character:—Held, a larceny, and that, supposing lucri causâ to be a necessary ingredient therein (which the court did not admit), there was a sufficient lucrum proved. *Reg.* v. *Jones*, 1 Den. C. C. 188; 2 Car. & K. 236; 1 Cox, C. C. 6.

To make a taking felonious it is not necessary that it should be done lucri causâ; taking with an intent to destroy will be sufficient to constitute the offence of larceny, if done to serve the prisoner, or another person, though not in a pecuniary way. *Rex* v. *Cabbage*, R. & R. 292.

But if a person, from idle curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter, this is no larceny, even though a part of his object may be to prevent the letter from reaching its destination. *Reg.* v. *Godfrey*, 8 Car. & P. 563.

A person employed in the post-office committed a mistake in the sorting of two letters containing money, and he threw the letters, unopened, and the money, down a water-closet, in order to avoid a penalty attached to such mistakes:—Held, that this was a larceny of the letters and money. *Reg.* v. *Wynn*, 2 Car. & K. 859; 1 Den. C. C. 365; T. & M. 32; 2 New Sess. Cas. 414; 18 L. J., M. C. 51; 13 Jur. 107; 3 Cox, C. C. 271.

Servants who clandestinely took their masters' oats, with intent to give them to their masters' horses, and without any intent to apply them to their own private benefit, were guilty of larceny, even though they were not answerable at all for the condition of the horses. *Reg* v. *Privett*, 2 Car. & K. 114; 1 Den. C. C. 193; 2 Cox, C. C. 40. S. P., *Reg.* v. *Handley*, Car & M. 547: *Rex* v. *Morfit*, R. & R. 307. *See* 26 & 27 Vict. c. 103, s. 1.

Where the captain of a foreign ship taken as a prize secreted part of the cargo and secretly removed it from the ship, it being doubtful whether he did so for his own benefit or for that of its owners, he was recommended for a free pardon, but the majority of the judges thought that if the goods had been secreted for his own benefit, it would have been larceny. *Rex* v. *Van Mugen*, R. & R. 118.

If property is taken with the intention of holding it until the rightful owner should pay a certain sum, and compelling such payment, this is sufficient to constitute larceny. *Reg.* v. *O'Donnell*, 7 Cox, C. C. 337.

An inspector entered H.'s shop and bought a pound of coffee that was handed to him by H.'s son in a tin and wrapper. The inspector then announced that it was for analysis, and offered to divide it. H. was then called from another part of the premises, and on being told of the matter snatched the package from the inspector, saying it was not sold as pure coffee, and showed the label on the package:—Held, that there was no evidence of felonious intent, and that H. could not be convicted of larceny of the package. *Hewson* v. *Gamble*, 56 J. P. 534.

Fraudulent Removal of Goods to obtain Money from Master.]—A., the servant of B., a tallow-chandler, clandestinely removed a quantity of fat, the property of B., from an upper room in B.'s warehouse, to a lower room in the same place, and placed it in a pair of scales, and afterwards represented to B. that a butcher named D. had sent the fat to be purchased and paid for by B.—Held, that A. was rightly convicted of larceny. *Reg.* v. *Hall*, 2 Car & K. 947; T. & M. 47; 1 Den. C. C. 381; 3 New Sess. Cas. 407; 18 L. J., M. C. 62; 13 Jur. 87; 3 Cox, C. C. 245.

In order to constitute larceny, the taking must be with intention to vest the property in the thief; and therefore, where servants employed by a glove-maker in finishing gloves, removed a quantity of finished gloves from one part of the master's premises to another, with intent fraudulently to obtain payment for them as for so many gloves finished by them:—Held, that they were not guilty of larceny. *Reg.* v. *Poole*, Dears. & B. 345; 27 L. J., M. C. 53; 3 Jur. (N.S.) 1268; 6 W. R. 65; 7 Cox, C. C. 373.

If a servant removes his master's goods from one part of the premises to another, for the purpose of enabling another person to offer them to the master for sale as the goods of that third person, and if this be done in pursuance of a previous arrangement between them, both may be convicted of larceny. *Reg.* v. *Manning*, Dears. C. C. 21; 22 L. J., M. C. 21; 17 Jur. 28; 1 W. R. 40; 6 Cox, C. C. 86.

It is not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them and add it to their own, in order to increase their wages, the ore still remaining in the pos-

session of the owners. *Rex* v. *Webb*, 1 M. C. C. 431. *See now* 24 & 25 Vict. c. 96, s. 39.

A. was supplied with a quantity of pig-iron by B. & Co, his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace and became puddle-bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B. & Co., which was not pig-iron. The value of the axle to B. & Co. was 7*s.*, but the gain to the prisoner by melting it, and thus increasing the quantity of metal which ran from the furnace was 1*d.* :—Held, that, if the prisoner put the axle into the furnace with a felonious intent to convert it to a purpose for his own profit, it was larceny. *Reg.* v. *Richards*, 1 Car. & K. 532.

Taking Goods to induce Girl to fetch them.]—Clandestinely taking away articles to induce the owner (a girl) to fetch them, and thereby to give the prisoner an opportunity to solicit her to commit fornication with him, is not felonious. *Rex* v. *Dickenson*, R. & R. 420.

Bonâ fide Claim of Right.]—Upon an indictment for larceny, it appeared that the prisoner had been intrusted by the wife of the prosecutor to repair an umbrella. After the repairs were finished and it had been returned to the wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it :—Held, that if the jury was of opinion that the taking by the prisoner was an honest assertion of his right, they were to find him not guilty, but if it was only a colourable pretence to obtain possession, then to convict him. *Reg.* v. *Wade*, 11 Cox, C. C. 549.

Where property is taken under a bonâ fide claim of right, in an open manner, such taking is not larceny. *Rex* v. *Jenner*, 7 L. J. (o.s.) M. C. 79.

Goods sold—No Knowledge that Goods hired.]—The prisoner's wife hired a bedstead at 1*s.* per week, and within a fortnight afterwards the prisoner sold it to a broker, his wife being present at the sale. Two days after the sale the wife paid 1*s.* for a week's hire, being all that was paid. There was no evidence that the prisoner knew that the bedstead had only been hired :—Held, that a conviction for larceny could not be sustained. *Reg.* v. *Halford*, 18 L. T. 334 ; 16 W. R. 731 ; 11 Cox, C. C. 88.

To defeat Execution.]—A judgment debtor's goods having been seized under warrants of execution of a county court, and being in the possession of the bailiff, the debtor, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him :—Held, that he was not guilty of larceny. *Reg.* v. *Bailey*, 41 L. J., M. C. 61 ; L. R. 1 C. C. 347 ; 25 L. T. 882 ; 20 W. R. 301 ; 12 Cox, C. C. 129.

Taking Horse in order to convey stolen Property.]—If a person stealing other property takes a horse, not with the intent to steal it, but only to get off more conveniently with the other property which he has stolen, such taking of the horse is not a felony. *Rex* v. *Crump*, 1 Car. & P. 658.

Question must be left to Jury.]—Money was given to the prisoner for the purpose of paying turnpike tolls at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not—that he had gone by the parish road which only crossed the road at the gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but on a case reserved as to whether the facts proved a larceny :—Held, without deciding whether upon such facts a conviction for larceny could be sustained, that as it did not appear that the proper question had been left to the jury the conviction must be quashed. *Reg.* v. *Deering*, 20 L. T. 680 ; 17 W. R. 807 ; 11 Cox, C. C. 298.

b. The Taking.

i. *Generally.*

What Sufficient.]—If a thief goes to an inn, and, intending to steal a horse, directs the ostler to bring out his horse, pointing to that of the prosecutor, and the ostler, at his desire, leads out the horse for the prisoner to mount . this is a sufficient taking by the prisoner to support an indictment for horse-stealing. *Rex* v. *Pitman*, 2 Car. & P. 423.

Taking a rabbit in a wire was sufficient to constitute an offence within 5 Geo. 3, c. 14, s. 6, though the rabbit was not killed, and though the party never took it away. *Rex* v. *Glover*, R. & R. 269.

A Man cannot take his own Goods.]—The prisoner assigned his goods to trustees for the benefit of his creditors ; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his custody as agent of the trustees :—Held, that he was not guilty of larceny. *Reg.* v. *Pratt*, Dears. C. C. 360 ; 2 C. L. R. 774 ; 18 Jur. 539 ; 2 W. R. 497 ; 6 Cox, C. C. 373.

—— **Except from Bailee.**]—If a man steals his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny. *Rex* v. *Wilkinson*, R. & R. 470.

Wife cannot Steal Husband's Goods.]—Stealing, by the wife of a member of a friendly society, money of the society, deposited in a box in the husband's custody, kept locked by the stewards, is not larceny. *Rex* v. *Willis*, 1 M. C. C. 375.

See 45 & 46 Vict. c. 75.

A wife, though she may have committed adultery, cannot steal her husband's goods. *Reg.* v. *Kenny*, 46 L. J., M. C. 156 ; 2 Q. B. D. 307 ; 36 L. T. 36 ; 25 W. R. 679 ; 13 Cox, C. C. 397.

See also cases, post, cols. 1338, 1339.

Married Woman—Bailee of Goods.]—Where a married woman, at the request of A., took charge of his box containing money, and afterwards fraudulently stole the money, the husband having nothing to do with any part of the

matter :—Held, that she was guilty of larceny. *Reg.* v. *Robson*, L. & C. 93 ; 31 L. J., M. C. 22 ; 8 Jur. (N.S.) 64 ; 5 L. T. 402 ; 10 W. R. 61 ; 9 Cox, C. C. 29.

Part-Owner of Property.]—If a part-owner of property steals it from A., in whose sole custody it is, and who is solely responsible for its safety, he is guilty of larceny, and the property is well laid in A. alone, although he is also a part-owner of the property stolen. *Reg.* v. *Webster*, L. & C. 77 ; 31 L. J., M. C. 17 ; 7 Jur. (N.S.) 1208 ; 5 L. T. 327 ; 10 W R. 20 ; 9 Cox, C. C. 13. S. P., *Rex* v. *Bramley*, R. & R. 478.

Where a friendly society had appointed a treasurer and two trustees, one of the trustees was held guilty of larceny in stealing the money of the society. *Reg.* v. *Cain*, 2 M. C. C. 204 ; Car. & M. 309.

Shareholder but not Part-Owner.] — A. was convicted on a count which charged him with stealing a piece of paper, the property of G. and others, his masters. G. and others were directors of an unincorporated insurance company, managed its affairs, appointed, paid, controlled and dismissed the clerks and other servants, and had the charge and custody of all the books and papers of the company. The company had a drawing account with G. & Co., and used to send their pass book in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned, together with the cheques, &c., of the preceding week. A. was a salaried clerk in the office of the company, and also a shareholder ; it was his duty to receive the pass book and vouchers from the messenger, and to preserve the vouchers for the use of the company. G. & Co. delivered the pass book, containing among other things a cashed cheque for 1,400*l.*, to the messenger of the company, who delivered the book and cheque to A. in the usual way, and he thereupon fraudulently destroyed it :—Held, that the cheque was the property of the directors, and that A., though a shareholder in the company, had not a joint property in it, and was properly convicted of larceny. *Reg.* v. *Watts*, 2 Den. C. C. 14 ; T. & M. 342 ; 19 L. J., M. C. 192 ; 14 Jur. 870 ; 4 Cox, C. C. 336.

Thief let into House by Servant.]—A servant let a person into his master's house on a Saturday afternoon, and concealed him there all night, in order that he might rob the house, and on Sunday morning left the premises. In pursuance of the previous arrangement, the man, in the servant's absence, broke into the bedroom of the master, and stole the contents of his cash-box :—Held, that the man who took the property from the cash-box was rightly charged as a thief. *Reg.* v. *Tuckwell*, Car. & M. 215.

Lost Property—Whether Owner known.]—A servant indicted for stealing bank notes, the property of her master, in his dwelling-house, set up, as her defence, that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertised .—Held, she ought to have inquired of her master whether they were his or not ; and that not having done so, but having taken them away from the house, she was guilty of stealing them. *Reg.* v. *Kerr*, 8 Car. & P. 176.

If a bureau is delivered to a carpenter to repair, and he discovers money in a secret drawer of it, which he unnecessarily as to its repairs breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appears that he did it with intention to restore it to its right owner. *Cartwright* v. *Green*, 2 Leach, C. C. 952 ; 8 Ves. 405 ; 7 R. R. 91.

A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever :—Held, that if the buyer had express notice that the bureau alone, and not its contents, if any, were sold to him ; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable property, and it was no larceny. *Merry* v. *Green*, 7 M. & W. 623 ; 10 L. J., M. C. 154.

If a parcel is accidentally left in a hackney-coach, and the coachman, instead of restoring it to the owner, detains it, opens it, destroys part of its contents, and borrows money on the rest, he is guilty of felony. *Rex* v. *Wynne*, 1 Leach, C. C. 413 ; 2 East, P. C. 664, 697. S. P., *Rex* v. *Sears*, 1 Leach, C. C. 415, n.

——Question is whether, at time of taking, Prisoner knew Owner could be Found.]—Where a bank note was lost, and was found by a person who appropriated it to his own use :—Held, that the jury is not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it ; for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny. *Reg.* v. *Preston*, 2 Den. C. C. 353 ; T. & M. 641 ; 21 L. J., M. C. 41 ; 16 Jur. 109 ; 5 Cox, C. C. 390.

In order to make the detention of lost notes by a finder larceny, it is necessary that at the time when he first took the notes he should have had the intention of appropriating them, knowing or having reason to know, who was the owner. *Reg.* v. *Shea*, 7 Cox, C. C. 147.

A. found a watch, and subsequently converted it to his own use ; the jury found him "not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward, from the time he first had the watch." A verdict of guilty was entered at the trial :—Held, wrong, and that on these facts and this finding it was no larceny. *Reg.* v. *York*, 2 Car. & K. 841 ; 1 Den. C. C. 335 ; T. & M. 20 ; 18 L. J., M. C. 38 ; 12 Jur. 1078 ; 3 Cox, C. C. 181.

The finder of a lost sovereign in the high road who, at the time of the finding, had no reasonable means of knowing who the owner was, but who at that time intended to appropriate it even if the owner should afterwards become known, and to whom the next day the owner was made known, when he refused to give it up, is not guilty of larceny. *Reg.* v. *Glyde*, 37 L. J., M. C. 107 ; L. R. 1 C. C. 139 ; 18 L. T. 613 ; 16 W. R. 1174 ; 11 Cox, C. C. 103.

The prisoner's child found six sovereigns in the street, which she brought to the prisoner. The latter counted them, and told some bystanders that the child had found a sovereign, and offered to treat them. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. Two hours afterwards the owner made hue-and-cry in the vicinity. On the same evening the prisoner was told that a woman had lost money; the prisoner told her informant to mind her own business, and gave her half-a-sovereign for herself. The prisoner admitted, on arrest, that she had got the money from the child:—Held, that these facts did not warrant a conviction for larceny, as there was nothing to shew that at the time of the finding the prisoner had reason to think that the owner could be found. *Reg.* v. *Deares*, 11 Cox, C. C. 227; Ir. R. 3 C. L. 306.

If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. *Reg.* v. *Thurborn*, 1 Den. C. C. 387; T. & M. 67; 2 Car. & K. 831; 18 L. J., M. C. 140; 13 Jur. 499; *S. C.*, *Reg.* v. *Wood*, 3 New Sess. Cas. 581; 3 Cox, C. C. 453.

But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. *Ib.*

A. picked up the purse of B. which contained money, on a turnpike road, along which B. had previously travelled by coach. A. converted the purse and its contents to his own use:—Held, no larceny; and that A. was liable civilly, but not criminally. *Reg.* v. *Mole*, 1 Car. & K. 417.

If there had been any mark on the purse by which the owner could have been known it would have been otherwise. *Ib.*

A purse containing money was left by a purchaser on the prisoner's stall. A third person afterwards pointed out the purse to the prisoner, supposing it to be hers. She put it in her pocket and afterwards concealed it, and on the return of the owner denied all knowledge of it. The jury found that the prisoner took up the purse knowing it was not her own, and intending at the time to appropriate it to her own use, but that she did not know who was the owner at the time she took it:—Held, that as the purse was not lost property, the prisoner was properly convicted of larceny. *Reg.* v. *West*, Dears. C. C. 402; 3 C L. R. 86; 24 L. J., M. C. 4; 18 Jur. 1030; 3 W. R. 21; 6 Cox, C. C. 415.

A finder of lost property is not guilty of larceny in appropriating it to his own use, unless he has a felonious intent at the time of the finding. *Reg.* v. *Christopher*, Bell. C. C. 27; 28 L. J., M. C. 35; 5 Jur. (N.S.) 24; 7 W. R. 60; 8 Cox, C. C. 91.

A. was indicted for stealing a bank note. The prosecutor had paid for an article purchased at A.'s shop, out of a purse in which were two bank notes. Next morning he discovered the loss of one of the notes, and applied to A., who told him he knew nothing of the note. He, however, afterwards stated he had given gold for it on the day of the loss. The jury, in answer to questions put to them, found—first, that the note was dropped by the prosecutor in the shop, and that A. found it there; secondly, that he at the time he picked up the note did not know, nor had he reasonable means of knowing, who the owner was; thirdly, that he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use; fourthly, that he intended, when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever that owner might be; and, fifthly, that he believed, at the time he picked up the note, that the owner could be found. A verdict of guilty was thereupon entered:—Held, that he was properly convicted. *Reg.* v. *Moore*, L. & C. 1; 30 L. J., M. C. 77; 7 Jur. (N.S.) 172; 3 L. T. 710; 9 W. R. 276; 8 Cox, C. C. 416. See *Reg.* v. *Matthews*, post, col. 1337.

If a person drops any chattel, and another finds it, and takes it away with the intention of appropriating it to his own use, and only restores it because a reward is offered, he is guilty of larceny. *Reg.* v. *Peters*, 1 Car. & K. 245. S. P., *Reg.* v. *Reed*, Car. & M. 306.

—— **Abandonment by Owner.**]—The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use, is where the owner cannot be found, or where it may be fairly said that the owner has abandoned it. *Ib.*

—— **The Fact that Prisoner might have discovered Owner makes no difference.**]—When it appears that the goods alleged to have been stolen were found by the prisoner, he cannot be convicted of larceny unless there is some evidence that at the time of the finding he believed that the true owner could be ascertained, and it is not enough that the jury is satisfied that he could within a reasonable time have discovered the owner. *Reg.* v. *Knight*, 25 L. T. 508; 20 W. R. 122; 12 Cox, C. C. 102.

If a man finds lost property and keeps it, and at the time of finding it has no means of discovering the owner, he is not guilty of larceny, because he afterwards has means of finding him, and nevertheless retains the property to his own use. *Reg.* v. *Dixon*, Dears. C. C. 580; 25 L. J., M. C. 39; 7 Cox, C. C. 35.

Semble, if a man finds property which has been lost, and appropriates it to himself, he is not guilty of larceny for failing to take steps to discover the owner, unless he saw the article drop from the owner, or unless it has the owner's name upon it, or some circumstances of the sort occurred which afforded the finder an immediate means of knowing who the owner was at the moment when he picked it up and examined it. *Ib.*

—— **Cheque Found—Possession by Another.**]—A prosecutor found a cheque, and, being unable to read, showed it to the prisoner. The prisoner told him that it was only an old cheque of the Royal British Bank, and kept it. He afterwards made excuses for not giving it up to the prosecutor, withholding it from him in the hopes of getting the reward that might be offered for it:—Held, that these facts did not show such a taking as was necessary to constitute larceny. *Reg.* v. *Gardner*, L. & C. 243; 32 L. J., M. C. 35; 8 Jur. (N.S.) 1217; 7 L. T. 471; 11 W. R. 96; 9 Cox, C. C. 253.

—— **Property Found in Railway Carriage.**]—The law with regard to the finder of lost property does not apply to the case of property of a

passenger accidentally left in a railway carriage, and found there by a servant of the company; and such servant is guilty of larceny, if, instead of taking it to the station or superior officer, he appropriates it to his own use. *Reg.* v. *Pierce*, 6 Cox, C. C. 117.

Possession of Property Stolen out of United Kingdom.]—The Larceny Act, 1896, applies to the case of property stolen outside the United Kingdom and received by a person here prior to the act coming into operation. *Reg.* v. *Punse*, 61 J. P. 536.

ii. *Where Delivery by Owner passes Possession and Right of Property.*

Taking away Goods without Paying for Them.]—If a horse is purchased by and delivered to the buyer, it is not felony though he immediately rides away with it without paying the purchase-money. *Rex* v. *Harvey*, 1 Leech, C. C. 467; 2 East, P. C. 669; 3 R. R. 714.

Where the prisoner obtained possession of a hat from the maker, which had been ordered by a third person, by sending a boy for it in the name of such third person:—Held, it did not amount to larceny. *Rex* v. *Adams*, R. & R. 225.

Taking Goods by means of Forgery.]—A. went to B.'s shop, and said that he had come from C. for some hams, and at the same time produced a note in the following terms:—"Have the goodness to give the bearer ten good thick sides of bacon, and four good showy hams, at the lowest price. I shall be in town on Thursday next, and will call and pay you. Yours, &c., C." B. thereupon delivered the hams to A. The note was forged, and A. had no such authority from C.:—Held, that A. was not guilty of larceny. *Reg.* v. *Adams*, 1 Den. C. C. 38.

Where a man writes a letter in the name of another to a third person to borrow money which he obtains by the fraud, this is no larceny. *Rex* v. *Atkinson*, 2 East, P. C. 673.

Possession obtained by a Trick.]—In support of an indictment for the larceny of three shillings and sixpence, it was proved that the prisoner had obtained possession of a shilling and then of a half-crown from the prosecutor by means of what is known as the purse trick. That is to say, he had induced the prosecutor to give him a shilling for a purse, into which he had dropped three coins, by first showing the prosecutor three shillings, and then making it appear as if he had dropped them into the purse. In the same way he had induced the prosecutor to give him a half-crown for a purse into which he had made it appear that he had dropped two half-crowns. Having been convicted of obtaining the money by means of a trick, upon a case reserved for the opinion of this court:—Held, that the prosecutor having parted with the property in his shilling and half-crown in exchange for the purses and their contents, the prisoner had been guilty, if at all, of obtaining the coins by means of a false pretence, and could not be convicted of larceny. *Reg.* v. *Solomons*, 62 L. T. 672; 17 Cox, C. C. 93.

Where, in a case of ring-dropping, the prisoners prevailed on the prosecutor to buy the share of the other party, and the prosecutor was prevailed on to part with his money, intending to part with it for ever, and not with the possession of it only:—Held, that this was not a larceny. *Reg.* v. *Willson*, 8 Car. & P. 111.

A. was treating B. at a beer-house, and A. wishing to pay, put down a sovereign, desiring the landlady to give him change: she could not do so: and B. said that he would go out and get change. A. said, "You won't come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change:—Held, no larceny, as A., having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it. *Reg.* v. *Thomas*, 9 Car. & P. 741.

W. sold and delivered a horse to G., and by way of payment took two pigs of G. of about the same value, no money passing. W. then borrowed the horse from G. to run against C., who won the race, and claimed and took away the horse that W. rode:—Held, no evidence of any larceny of the horse by C. or W. *Reg.* v. *Carter*, 47 J. P. 759.

If a person is induced to play at hiding under the hat, and stakes down his money voluntarily on the event, meaning to receive the stake if he wins, and to pay if he loses, the taking up the stake so deposited by him on the table is not a felonious taking, although the taker was made to appear to win the money by fraudulent conspiracy, and collusion. *Rex* v. *Nicholson*, 2 Leach, C. C. 610; 2 East, P. C. 669.

Prisoner went to a shop, and purchasing a small article put down half-a-crown in payment. The shopman gave him two shillings, and was counting the rest of the change when the prisoner pretended to throw the two shillings into the till, though he really threw back only one, and asked for four sixpences instead, he was given one shilling and two sixpences:—Held, no larceny of the shilling. *Reg.* v. *Williams*, 7 Cox, C. C. 355.

Where a prisoner obtained from the prosecutor in the name of one of his neighbours, half-a-guinea's worth of silver, and said she would return shortly with the half-guinea:—Held, no larceny. *Rex* v. *Coleman*, 1 Leach, C. C. 303, n.; 2 East, P. C. 672.

Where a prisoner took a packet of diamonds to a pawnbroker, with whom he had previously pledged a brooch; and having agreed with the shopman for the amount of the loan on the diamonds, sealed them up and received the amount, deducting the amount for which the brooch was pledged; but, instead of giving the packet of diamonds to the shopman, gave him a packet of similar appearance, containing only glass:—Held, that it was not larceny, but only a fraud. *Rex* v. *Meilheim*, Car. C. L. 281.

—— **Relation of Master and Servant.**]—Where a servant by a false pretence induces his master to give him a cheque as agent of a creditor of his master with the view of its being handed over to that creditor, and the servant appropriates the cheque to his own use, he cannot be indicted for stealing it. *Reg.* v. *Essex*, Dears. & B. 371: 27 L. J., M. C. 20; 4 Jur. (N.S.) 16; 6 W. R. 82; 7 Cox, C. C. 384.

A. was employed to make purchases on account of his masters, and B., a fellow servant, had instructions from them to pay out of their money all such demands as A. should make upon him in respect of such purchases. A. having

falsely represented to B. that he had bought goods for the masters and paid for them, and having thereby obtained from B. a sum of money the property of the masters:—Held, a case of false pretences, and not larceny. *Reg.* v. *Barnes*, 2 Den. C. C. 59; T. & M. 387; 20 L. J., M. C. 34; 14 Jur. 1123; 5 Cox, C. C. 112.

G. was indicted for larceny. The evidence showed that he was the prosecutor's servant; that it was his duty to receive and pay moneys for the prosecutor, and make entries of such receipts and payments in a book which was examined by the prosecutor from time to time; that the prisoner on one occasion showed a balance in his favour of 2*l*., by taking credit for payments falsely entered in the book as having been made by him, when in fact they had not been made by him, and that the prisoner received from his master the sum of 2*l*. as a balance due to him. He was convicted:—Held, that the conviction was wrong. *Reg.* v. *Green*, Dears. C. C. 323; 2 C. L. R. 603; 18 Jur. 158; 2 W. R. 264; 6 Cox, C. C. 296.

It was the duty of a clerk to the prosecutors to ascertain daily the amount of dock and town dues payable by the prosecutors on the exportation of their goods, and, having received the money from the prosecutors' cash-keeper, to pay it over to those who were entitled to it; the clerk falsely represented that a sum of 3*l*. 10*s*. 4*d*. was due on a certain day, whereas, in truth, a sum of 1*l*. 3*s*. only was due, and, having obtained the larger sum from the cash-keeper, converted the difference to his own use:—Held, that he was not guilty of larceny, but might have been convicted of obtaining money by false pretences. *Reg.* v. *Thompson*, L. & C. 233; 32 L. J., M. C. 57; 8 Jur. (N.S.) 1162; 7 L. T. 393; 11 W. R. 41; 9 Cox, C. C. 222.

The prisoner was employed by the prosecutor to make up canvas bags at his (the prisoner's) own house. The canvas was cut out at the shop of the prosecutor and taken away by the prisoner. A portion of it was duly worked up and returned, the remainder was converted by him to his own use:—Held, that he could not be convicted of larceny. *Reg.* v. *Saward*, 5 Cox, C. C. 295

Cp. cases, supra, sub tit. FALSE PRETENCES.

Receiving Money from Master—Debiting Master with Amount Expended.]—The prisoner, who was clerk to the prosecutor, was indicted for embezzling certain moneys belonging to his master. The evidence showed that the prisoner had received at different times several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins. The prisoner obtained the skins on credit, and applied the money to his own use, but debited prosecutor in his day-book with several sums of money as having been paid for the skins. The jury found the prisoner not guilty of embezzlement, but guilty of larceny:—Held, that the conviction was wrong. *Reg.* v. *Goodenough*, Dears. C. C. 210; 6 Cox, C. C. 206.

Cp. cases, supra, sub tit. EMBEZZLEMENT.

Possession obtained by Delivery Orders.]—B., a broker, having large dealings with the prosecutors, Russian merchants, in October entered into a contract for the purchase of 343 casks of tallow which were expected to arrive by the "Hesper," in the ordinary course of trade. The tallow arrived accordingly on the 5th of December, and in due course the transaction should have been completed within fourteen days, and notice was given to B. of the arrival of the tallow, and he was called upon to complete the bargain. He requested that the tallow might be allowed to remain in the docks for a short time. This was granted. On January 28th the manager for the prosecutors called on him, and insisted on the completion of the contract, and B. said he would pay for the tallow on the following day. On the next day B. sent his clerk to the prosecutors' counting-house, and obtained delivery orders for the tallow, and tendered to the prosecutors a crossed cheque on a bank in London for the price of the tallow. Immediately on obtaining possession of the delivery orders he sent them to the docks, and transferred the property into fresh warrants, and when the cheque was presented there were no assets:—Held, not to be a larceny of the delivery orders by a trick, but a lawful possession of them obtained by reason of the prosecutors giving to B. credit in respect of the crossed cheque. *Reg.* v. *North*, 8 Cox, C. C. 433.

Possession obtained by Delivery of Bills.]—If a tradesman sells a stranger goods, enters them to his debit, and makes out a bill of parcels for them as goods sold, and the goods are delivered to the purchaser by the servant of the seller, who receives bills for them, it is not felony, although the tradesman sold them for ready money, never intending to give the stranger credit, and it appears that he had taken the apartments to which he ordered them to be sent for the purpose of obtaining them fraudulently. *Rex* v. *Parkes*, 2 Leach, C. C. 614; 2 East, P. C. 671.

Authority of Servant to act in course of Business.]—If a pawnbroker's servant, who has a general authority from his master to act in his business, delivers up a pledge to the pawner, on receiving a parcel from the pawner, which he supposes contains valuables he has just seen in the pawner's possession in a similar parcel, the receipt of the pledges by the pawner is not a larceny. *Rex* v. *Jackson*, 1 M. C. C. 119.

To constitute larceny, there must be a taking of the property against the will of the owner. But the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness. *Reg.* v. *Prince*, 38 L. J., M. C. 8; L. R. 1 C. C. 150; 19 L. T. 364; 17 W. R. 179; 11 Cox, C. C. 193.

Therefore, a cashier, who, deceived by a forged order purporting to be drawn by a customer, pays money to the payee, who presents it knowing it to be forged, thereby parts with the property in the money of the bank to the payee so as to bind his employer, and the payee is therefore not guilty of larceny, but of obtaining money by false pretences. *Ib.*

A depositor in a post office savings bank obtained a warrant for the withdrawal of 10*s*., and presented it with his depositor's book to a clerk at the post office, who instead of referring to the proper letter of advice for 10*s*., referred by mistake to another letter of advice for 8*l*. 16*s*. 10*d*., and placed that sum upon the counter. The clerk entered 8*l*. 16*s*. 10*d*. in the depositor's book as paid, and stamped it. The

depositor took that sum and went away. The jury found that he had the animus furandi at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up, and found him guilty of larceny :—Held, by a majority of judges, that he was properly convicted of larceny. *Reg.* v. *Middleton*, 42 L. J., M. C. 73 ; L. R. 2 C. C. 38 ; 28 L. T. 777 ; 12 Cox, C. C. 260, 417.

By Cockburn, C.J., Blackburn. J., Mellor, J., Lush, J., Grove, J., Denman, J., and Archibald, J., on the ground that, even assuming the clerk to have the same authority to part with the possession of and property in the money which the Postmaster-General would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property ; and the possession being obtained animo furandi. there was both a taking and a stealing within the definition of larceny. *Ib.*

By Bovill, C.J., Kelly, C.B., and Keating, J., that the clerk, having only a limited authority under the letter of advice, had no power to part with the property in the money to the prisoner, and that therefore the conviction was right. *Ib.*

By Pigott, B., that, before possession of the money was parted with, and whilst it was on the counter, the prisoner had the animus furandi, and took it up, and was therefore guilty of larceny. *Ib.*

But by Martin, B., Bramwell, B., Brett, J., and Cleasby, B., that the money was not taken invito domino, and therefore, that there was no larceny. *Ib.*

Per Bramwell, B., and Brett, J., that the authority of the clerk authorised the parting with the possession and property in the entire sum laid down on the counter. *Ib.*

iii. *Where Possession obtained animo furandi.*

Felonious Intention at time Goods obtained.]—To constitute larceny, the felonious intention must exist in the mind at the time the property is obtained ; for if it is obtained by fair contract and afterwards fraudulently converted it is no felony. *Rex* v. *Charlewood*, 1 Leach, C. C. 409 ; 2 East, P. C. 689 ; 3 R. R. 706.

Intention of Buying and Paying for Goods.]—A surveyor of highways, having authority to order gravel for roads, ordering gravel as usual and applying it to his own use is not guilty of larceny, unless it appears that he did not mean to pay for it. *Reg.* v. *Richardson*, 1 F. & F. 488.

The prisoner went into a shop in London, and purchased jewellery, and said that he would pay in cash, and the seller agreed to deliver the goods at a coach-office belonging to an inn, where the prisoner stated that he lodged. The seller made out an invoice and took the goods there, when the prisoner said he had been disappointed in receiving some money he expected by letter. Just afterwards a twopenny post letter was put into his hands, which he opened in the presence of the seller, and said he had to meet a friend at Tom's Coffee-house at seven, who would supply the money. The goods were left at the coach-office, and the seller went home. The prisoner had taken a place in the mail, but he countermanded that, and absconded with the goods. The seller swore that he considered the goods sold if he got his cash, but not before. It was left to the jury to say whether the prisoner had any intention of buying and paying for the goods, or whether he gave the order merely to get possession of them to convert them to his own use. The jury found the latter, and the prisoner was convicted, and the conviction was held right by the judges. *Rex* v. *Campbell*, Car. C. L. 280 ; 1 M. C. C. 179.

Where a person went into a shop for the purpose of purchasing a ruby pin, and after selecting one, which was put into a box, while the young man who was serving him was absent for about a minute, took it out of the box, and put it into his stock, and afterwards went into the shawl department of the shop to purchase other articles, saying that he would return and pay for both together, but was allowed to go away without inquiry being made as to whether he had paid in the shawl department, and a bill, including the price of the pin, was sent the next day to the house where he was residing :—Held, on the trial of the prisoner for stealing the pin, that, under these circumstances, it was for the jury to say whether there was any intention to steal the pin, and whether there was or was not credit given for it. *Reg.* v. *Box*, 9 Car. & P. 126.

The prisoner was indicted for larceny. The jury returned a verdict that in their opinion the goods were parted with conditionally that the money was to be paid at the time, and that the prisoner took them with a felonious intent :—Held, to amount to a verdict of guilty. *Reg.* v. *Cohen*, 2 Den. C. C. 249 ; T. & M. 576.

Getting goods delivered into a hired cart, on the express condition that the price will be paid for them before they are taken from the cart, and then getting them from the cart without paying the price, will be larceny, if the prisoner never had any intention of paying, but had, ab initio, the intention to defraud. *Rex* v. *Pratt*, 1 M. C. C. 250.

Taking goods, though the prisoner has bargained to buy, is felonious, if by the usage the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner when he bargained for them did not intend to pay for them, but meant to get them into his possession, and dispose of them for his own benefit without paying for them. *Rex* v. *Gilbert*, 1 M. C. C. 185.

The prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which they got from him, and then refused to restore the onions or pay the price. The jury convicted them of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning :—Held, that the conviction was right. *Reg.* v. *Slowly*, 12 Cox, C. C. 269 ; 27 L. T. 803.

Selling hired Goods.]—Obtaining a horse under the pretext of hiring it for a day, and immediately selling it, is felony, if the jury finds the hiring was animo furandi. *Rex* v. *Pear*, 1 Leach, C. C. 212 ; 3 R. R. 703 ; 2 East, P. C. 685, 697. *And see Rex* v. *Tunnard*, 2 East, P. C. 687 ; 1 Leach, C. C. 214, n.

A. hiring a horse and riding it away from a livery-stable, and afterwards selling it, cannot be

convicted of larceny unless he had the intention of stealing the horse when he originally hired it, and that is a question for the jury. *Reg.* v. *Cole*, 2 Cox, C. C. 340.

Obtaining a post-chaise by hiring, with a felonious intent to convert it to the use of the hirer, is felony, although the contract of hiring was not for any definite time. *Rex* v. *Semple*, 1 Leach, C. C. 420; 2 East, P. C. 691; 3 R. R. 709.

If goods are delivered to a person on hire, and he takes them away, animo furandi, he is guilty of larceny, although no actual conversion of them by sale or otherwise is proved. *Reg.* v. *Janson*, 4 Cox, C. C. 82.

A. hired a horse and gig with the felonious intention of converting them to his own use, and afterwards offered them for sale, but no sale took place:—Held, nevertheless, that he was guilty of larceny. *Ib.*

To constitute a larceny by a party to whom goods have been delivered on hire, there must not only be an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods is not such a conversion, if the party who makes the offer does not intend to purchase unless his suspicions, as to the honesty and right of the vendor to sell, are removed. *Reg.* v. *Brooks*, 8 Car. & P. 295.

Intention to keep Goods Obtained.]—A gipsy, obtaining money and goods under pretence of practising witchcraft, without an intention to return them, is properly indicted for larceny. *Reg.* v. *Bunce*, 1 F. & F. 523.

—— **Question for Jury.**]—A., carrying on business on his own account, entered into an engagement with B. to sell goods for him, and for certain purposes to be his servant. B. entrusted A. with certain goods to dispose of in a particular way. A. converted them to his own use:—Held, that it was a question for the jury to say whether, when A. received the goods, he had the intention of misappropriating them. *Reg.* v. *Waller*, 10 Cox, C. C. 360. S. P., *Reg.* v. *Cole*, 2 Cox, C. C. 340.

To obtain property by fraud, and under a preconcerted plan to rob, is felony, but the animus furandi must be found by the jury. *Rex* v. *Horner*, 1 Leach, C. C. 270. S. P., *Reg.* v. *Box*, 9 Car. & P. 126.

—— **Evidence of Tortious Conversion.**]—Non-delivery upon request is evidence of a tortious conversion. *Rex* v. *Semple*, 1 Leach, C. C. 424; 2 East, P. C. 691; 3 R. R. 709.

—— **No Proof of Want of Authority.**]—A. went to the shop of B., and asked for shawls for Mrs. D. to look at; B. gave her five; she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness:—Held, that A. could not be convicted of a larceny in stealing the goods of B. *Rex* v. *Savage*, 5 Car. & P. 143.

Larceny by a Trick—Possession obtained under Contract induced by Fraud.]—Where the owner of money or goods parts with the possession of them under a contract induced by fraud, but does not intend to part with the property in them until the other party to the contract has fulfilled his part of the bargain, the person so fraudulently obtaining possession of the money or goods may be convicted of larceny.—The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once and the remainder upon delivery of the horse. The prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it:—Held, that the prisoner was rightly convicted of larceny by a trick. *Reg.* v. *Russett*, [1892] 2 Q. B. 312; 67 L. T. 124; 40 W. R. 592; 17 Cox, C. C. 534; 56 J. P. 743—C. C. R.

A. and B., pretending that one of them was a sea captain and a Frenchman unable to speak English, offered to the prosecutrix a dress for sale at 25*s.*, saying that if she would give that price for it, she would have another dress, which was produced, worth 12*s.*, into the bargain. She agreed to this, and took a sovereign and a shilling from her pocket. While she was holding the money, A. or B. opened her hand and took it out, though not forcibly. He then declined to take the other 4*s.*, but laid down the dress first produced, and refused to let her have the other. The dress proved to be of little value:—Held, that they were properly convicted of larceny. *Reg.* v. *Morgan*, Dears. C. C. 395; 18 Jur. 1085; 6 Cox, C. C. 408.

—— **Of Documents.**]—A landlord went to his tenant (who had removed all his goods) to demand rent amounting to 12*l.* 10*s.*, taking with him a receipt ready written and signed; the tenant gave 2*l.*, and asked to look at the receipt. It was given to him, and he refused to return it or to pay the remainder of the rent. It was proved by the landlord, that, at the time he gave to the tenant the receipt, he thought the tenant was going to pay him the rent; and that he should not have parted with the receipt unless he had been paid all the rent; but that when he put the receipt into the tenant's hand he never expected to have the receipt again; and that he did not want the receipt again, but wanted his rent to be paid:—Held, a larceny; and that the fact of the tenant giving the 2*l.* made no difference. *Reg.* v. *Rodway*, 9 Car. & P. 784.

Where a prisoner having offered to accommodate the prosecutor with gold for notes, the latter put down a number of bank notes for the purpose of their being exchanged, which the prisoner took up and ran away with:—Held, a larceny, if the jury believed that he intended to run away with them at the time, and not to return the gold. *Rex* v. *Oliver*, 2 Russ. C. & M. 182; 4 Taunt. 274.

To obtain a bill of exchange from an indorsee, under a pretence of getting it discounted, is felony, if the jury finds that the indorsee did not intend to leave the bill in the prisoner's possession without the money, and that he undertook to discount it with a preconcerted design to convert its produce to his own use. *Rex* v. *Aickles*, 1 Leach, C. C. 294; 2 East, P. C. 675.

—— **Automatic Box—Dropping-in Disc instead of Penny.**]—Against the wall of a public

passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the centre of one of its sides was a projecting button or knob. The box was so constructed that, upon a penny piece being dropped into the slit and the knob being pushed in, a cigarette would be ejected from the box on to a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies"; "To obtain an Egyptian Beauties cigarette place a penny in the box and push the knob as far as it will go." The prisoners went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other prisoners: —Held, that the prisoners were guilty of larceny. *Reg.* v. *Hands*, 56 L. T. 370; 16 Cox, C. C. 188; 52 J. P. 24.

—— **Of Money and Goods.**]—A., in the hearing of B., told his servant to go to H. and pay him some money, upon which B. offered to take the money for A., falsely stating that he lived only six doors from H. Induced by the offer of B., A. delivered the money to him to carry to H. B. appropriated the money to his own use. He was indicted for larceny of the money, and found guilty, the jury stating that their verdict was grounded on their belief that he had obtained the money by a trick, intending at the time to appropriate it to his own use:—Held, that the conviction was right. *Reg.* v. *Brown*. Dears. C. C. 616; 2 Jur. (N.S.) 192; 4 W. R. 250.

J., owner of a watch, placed it with the seller to be regulated. The seller had no authority to deliver it to any one but J., or some one commissioned by him to receive it. By the fraud of the prisoner the seller was induced to believe that J. had desired the watch to be sent by post, inclosed in a letter to J., to the care of the postmaster at B. The postmaster, through the fraud of the prisoner, was induced to deliver the letter containing the watch to him, believing him to be J. or his agent:—Held, that the prisoner, having appropriated the watch to his own use, was guilty of larceny of it from the owner. *Reg.* v. *Kay*, Dears. & B. 231; 26 L. J., M. C. 119; 3 Jur. (N.S.) 546; 5 W. R. 511; 7 Cox, C. C. 289.

At a colliery, where coal was sold by retail, it was the practice for the carts, when loaded, to be taken to a weighing machine in the colliery yard, where they were weighed, and the price of the coal paid. B. went to the yard and asked for a load of soft coal: his cart was accordingly loaded by a servant of the prosecutor with that description of coal, and he was then left to take it to be weighed, and pay for it. He, however, covered over the top of the coal in the cart with slack (an inferior description of coal), and then went to the weighing machine, and told the clerk he had got slack; the clerk accordingly weighed the cart, and charged for its contents as slack. B. paid for the coal as slack, and went away with it:—Held, that he was guilty of larceny of the soft coal. *Reg.* v. *Bramley*, L. & C. 21; 7 Jur. (N.S.) 478; 4 L. T. 309; 9 W. R. 555; 8 Cox, C. C. 468.

Where a prisoner had obtained letters from the post-office by falsely representing that he was sent for them by the person to whom they were addressed:—Held, that if he then meant to steal them he might be convicted of larceny. *Reg.* v. *Gillings*. 1 F. & F. 36.

—— **Ringing the Changes.**] — The two prisoners by a series of tricks fraudulently induced a barmaid to pay over money of her master to them, without having received from them in return the proper change: the barmaid had no authority to pay over money without receiving the proper change, and had no intention of or knowledge that she was so doing:—Held, that the prisoners were properly convicted of larceny. *Reg.* v. *Hollis*, 53 L. J., M. C. 38; 12 Q. B. D. 25; 49 L. T. 572; 32 W. R. 372; 15 Cox, C. C. 345; 48 J. P. 120—C. C. R.

J. and W., acting in concert, and intending to defraud S., entered his shop, and by means of an artifice induced him to draw a cheque on his bankers for 42*l*., payable in the name of J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to S. of forty-two sovereigns, and that W. was to remain at the shop till J. and S. went and returned from the bank. At the bank, by the desire of S., the banker handed four ten-pound notes and two sovereigns to J. in the presence of S. S. and J. left the bank together, and while on their way back to S.'s shop, J. went into an inn yard, and, promising to return immediately, absconded with the four ten-pound notes and the two sovereigns, which he and W. (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use:—Held, that the misappropriation of the notes and two sovereigns was larceny, S. never having parted with the property and possession in them, and J. having no more than the bare custody of the money which he had carried off. *Reg.* v. *Johnson*, 2 Den. C. C. 310; T. & M. 612; 21 L. J., M. C. 32; 15 Jur. 1113; 5 Cox, C. C. 372.

A. went to a shop, and asked a boy there to give him change for a half-crown; the boy gave him two shillings and sixpennyworth of copper. The prisoner held out a half-crown, which the boy touched, but never got hold of it, and the prisoner ran away with the two shillings and the copper:—Held, a larceny of the two shillings and the copper. *Rex* v. *Williams*, 6 Car. & P. 390.

The prisoner with another man went into the shop of the prosecutrix and asked for a pennyworth of sweetmeats, for which he put down a florin. The prosecutrix put it into a money-drawer, and put down a shilling and sixpence in silver and fivepence in copper in change, which the prisoner took up. The other man said, "you need not have changed," and threw down a penny, which the prisoner took up; and the latter then put down a sixpence in silver and sixpence in copper on the counter, saying, "here, mistress, give me a shilling for this." The prosecutrix took a shilling out of the money-drawer and put it on the counter, when the prisoner said to her, "you may as well give me the two-shilling-piece and take it all." The prosecutrix took from the money-drawer the florin she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took up the florin; and the prosecutrix took up the silver sixpence and the sixpence in copper put down by the prisoner, and also the shilling put down by herself, and was putting

them into the money-drawer, when she saw she had only got one shilling's-worth of the prisoner's money; but at that moment the prisoner's companion drew away her attention, and before she could speak, the prisoner pushed his companion by the shoulder, and both went out of the shop:—Held, that the property in the florin had not passed to the prisoner, and that he was rightly convicted of larceny. *Reg.* v. *McKale*, 37 L. J., M. C. 97; L. R. 1 C. C. 125; 18 L. T. 335; 16 W. R. 800; 11 Cox, C. C. 32.

—— **Under Colour of Betting.**]—The prisoner was at a race-meeting offering to lay odds against different horses. He made a bet with the prosecutor laying odds against a particular horse, and the money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won, but the prisoner went away with the money, and afterwards when the prosecutor met him he denied that he had made the bet. The prisoner was convicted of larceny, and a case was reserved, the question being whether there was any evidence to be left to the jury:—Held, that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass, and therefore there was evidence of larceny by a trick. *Reg.* v. *Buckmaster*, 57 L. J., M. C. 25; 20 Q. B. D. 182; 57 L. T. 720; 36 W. R. 701; 16 Cox, C. C. 339; 52 J. P. 358—C. C. R.

If there is a plan to cheat a man of his property, under colour of a bet, and he parts with the possession only to deposit it as a stake with one of the confederates; the taking by such confederate is felonious. *Rex* v. *Robson*, R. & R. 413.

—— **Ring-dropping.**] — To obtain property from another by the practice of ring-dropping is felony, if the jury finds it was obtained under a preconceived design to steal it. *Rex* v. *Patch*, 1 Leach, C. C. 238; 2 East, P. C. 678. S. P., *Rex* v. *Marsh*, 1 Leach, C. C. 345.

A person who induces another to deliver bank notes to him by the practice of ring-dropping, on the condition that if he does not restore them in such a time the entire value of the ring will belong to the person delivering the notes, is guilty of felony; for, although the possession of the notes is parted with, the property still remains in the owner. *Rex* v. *Watson*, 2 Leach, C. C. 640; 2 East, P. C. 680.

To aid and assist a person to the jurors unknown, to obtain money by the practice of ring-dropping, is felony, if the jury finds that the prisoner was confederating with the person unknown to obtain the money by means of this practice. *Rex* v. *Moore*, 1 Leach, C. C. 314; 2 East, P. C. 679.

Possession obtained from Servant without Authority.]—Wheat, not the property of the prosecutor, but which had been consigned to him, was placed in one of his storehouses, under the care of a servant, E., who was to deliver it only to the orders of the prosecutor, or his managing clerk. A., who was in the employ of the prosecutor, obtained the key of the storehouse from E., and was allowed to remove a quantity of the wheat, upon his representation to E. that he had been sent by the clerk, and was to take the wheat to a railway station. This representation was false, and he subsequently disposed of the wheat:—Held, that he was guilty of a larceny of the wheat. *Reg.* v. *Robins*, Dears. C. C. 418; 18 Jur. 1058; 6 Cox, C. C. 420.

To obtain goods by false pretences from the servant of the owner, to whom they were delivered for the purpose of being carried to a customer, who had purchased them, is a taking from the possession of the master; and if so taken, with a preconcerted design to steal them, amounts to felony. *Rex* v. *Wilkins*, 1 Leach, C. C. 520; 2 East, P. C. 673.

Where a man pretended to be the servant of a person who had bought a chest of tea deposited at the company's warehouse, got a request paper and permit for the chest, and took it away with the assent of a person in the East India Company's service, who had the charge of it:—Held, to be felony. *Rex* v. *Hench*, R. & R. 163.

S., bailee of P.'s mare, took her to certain livery-stables, and paid P. a balance due to him, after deducting money due for the keep of the mare, and told P. that she was at the livery-stables. P. sent word to the stable-keeper not to let S. have the mare again, and twice refused S. permission to ride the mare. S., after P. had left the town, obtained the mare from the ostler at the livery-stables by a false statement, and never returned her:—Held, that S. was rightly convicted of larceny. *Reg.* v. *Steer*, 2 Car. & K. 988; 1 Den. C. C. 349; T. & M. 11; 18 L. J., M. C. 30; 13 Jur. 41; 3 Cox, C. C. 187.

A., who intended to sell his mare, sent his servant to M. fair, his servant having no authority either to sell the mare or deal with her in any way. The prisoner asked the servant the price and desired him to trot her out; he then talked to two other men, and these two men then came up and persuaded the servant to exchange the mare for a horse they had, and they would give 24*l.* for the chop. They changed saddles, and without giving any money, rode away with the mare, leaving the servant with a horse of little value:—Held, that as the servant had the mere charge of the mare, and had no right to deal with the property in her, the prisoner could be convicted of stealing the mare. *Reg.* v. *Sheppard*, 9 Car. & P. 121.

A carman having orders to deliver goods to a certain person, in mistake delivered them to another person, who appropriated them to his own use:—Held, that he did not part with the property in the goods by delivering them to a wrong party; and that the latter appropriating them to his own use, was guilty of larceny. *Reg.* v. *Little*, 10 Cox, C. C. 559.

Getting a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it is taken animo furandi, is a larceny; for the servant has no authority to part with it but to the right person. *Rex* v. *Longstreeth*, 1 M. C. C. 137.

On the trial of an indictment for larceny it appeared that the prisoner having given the prosecutor an order for certain goods, they were sent by a servant with directions not to part with them without the money. On the way the servant was met by the prisoner, who said the goods were for him and took them, giving two counterfeit half-crowns in payment:—Held, that

he was properly indicted for larceny. *Reg.* v. *Webb*, 5 Cox, C. C. 154.

Where a defendant induced a tradesman to send some goods by a servant to a particular place with change for a crown piece and met the servant on the way and by giving him a bad crown piece induced him to part with the goods and change, which he had no authority to do without receiving payment:—Held, to be larceny. *Rex* v. *Small*, 8 Car. & P. 46. S. P., *Reg* v. *Stewart*, 1 Cox, C. C. 174.

Possession of Goods in Tradesman.]—If a person, having ordered a tradesman to bring goods to his house, looks out a certain quantity, asks the price of them, separates them from the rest, and then, by sending the tradesman home on pretence of wanting other articles, takes the opportunity of running away with the goods so looked out with intent to steal them, it is larceny; for, as the sale was not completed, the possession of the property still remained in the tradesman. *Rex* v. *Sharpless*, 1 Leach, C. C. 92; 2 East, P. C. 675.

Money or Goods obtained by Threat and against Owner's will.]—A. acted as auctioneer at a mock auction. He knocked down some cloth for 26*s.* to B., who had not bid for it, as A. knew. B. refused to take the cloth or to pay for it; A. refused to allow her to leave the room unless she paid. Ultimately she paid the 26*s.* to A., and took the cloth. She paid the 26*s.* because she was afraid. A. was indicted for, and convicted of, feloniously stealing these 26*s.*:—Held, that the conviction was right, because, if the force used to B. made the taking a robbery, larceny was included in that crime; if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as B. paid the money to A. against her will, and because she was afraid. *Reg.* v. *McGrath*, 39 L. J., M. C. 7; L. R. 1 C. C. 205; 21 L. T. 543, 18 W. R. 119; 11 Cox, C. C. 347.

Held, also, that, under the circumstances, it was not necessary that the jury should be asked whether B. paid the money against her will, as from the evidence it was clear that there could have been no doubt in the minds of the jury that the money was so paid. *Ib.*

The prosecutor met a man and walked with him. During the walk the man picked up a purse which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner, who opened it, and there appeared to be about 40*l.* in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public-house and had some drink. The prisoner then showed some money, and said if the man would let him have 10*l.*, and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be 10*l.* in money, and the prisoner and prosecutor then went out together. They then returned, and the prisoner appeared to give the 10*l.* back and 5*l.* more. The prisoner then said he would do the same for the prosecutor, and by that means obtained 3*l.* in gold and the prosecutor's watch and chain from him. The prisoner and the man then left the public-house, and made off with the 3*l.* and the watch and chain. At the trial the prosecutor said he handed the 3*l.* and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him 5*l.*:—Held, that he was properly convicted of larceny upon this evidence. *Reg.* v. *Hazell*, 23 L. T. 562; 11 Cox, C. C. 597.

The prosecutrix engaged the prisoner to grind scissors, and paid him when they were ground. She then handed him six knives to grind. He ground them and demanded 5*s.* 6*d.* for them, the ordinary charge being 1*s.* 3*d.* She refused to pay 5*s.* 6*d.* The prisoner then threatened her, and said he would make her pay, and ultimately, in consequence of her fears, she gave the prisoner 5*s.* 6*d.* The prisoner was indicted for larceny of the 5*s.* 6*d.*, and the chairman on the trial directed the jury that, if the money was obtained by frightening the owner, the prisoner was guilty of larceny. The jury having convicted, the court upheld the conviction. *Reg.* v. *Lovell*, 50 L. J., M. C. 91; 8 Q. B. D. 185; 44 L. T. 319; 30 W. R. 416; 45 J. P. 407.

See also cases, post, col. 1380, et seq.

iv. *Where Possession originally obtained bonâ fide—Subsequent Felonious Intent.*

Whether Possession or Custody of thing obtained.]—If a person is allowed to have possession of a chattel and he converts it to his own use, it is not larceny, unless he had an intention of stealing it when he obtained possession of it; but if he has merely the custody of a chattel, he is guilty of larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody. *Reg.* v. *Jones*, Car. & M. 611. S. P., *Reg.* v. *Evans*, Car. & M. 633.

To constitute larceny, the felonious intention must exist in the mind at the time the property is obtained; for if it is obtained by fair contract, and afterwards fraudulently converted, it is no felony. *Rex* v. *Charlewood*, 1 Leach. C. C. 409; 2 East, P. C. 689.

A watchmaker, to whom a watch was given by the owner for the purpose of having it regulated, disposed of the watch, and applied the proceeds to his own purposes:—Held, that this was no larceny, as the watchmaker had in the first instance obtained the possession of the watch rightfully, and so, unless there was a taking in the first instance animo furandi, no subsequent dishonest dealing with the chattel could amount to larceny. *Reg.* v. *Thristle*, 3 New Sess. Cas. 702; 2 Car. & K. 842; T. & M. 204; 1 Den. C. C. 502; 19 L. J., M. C. 66; 13 Jur. 1035; 3 Cox, C. C. 573. S. P., *Rex* v. *Levy*, 4 Car. & P. 241.

The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on S.'s marshes and had strayed, and a few days afterwards that they belonged to H. The prisoner left them on his marshes for a day or two and then sent them to a long distance as his own property. He then told S. that he had lost them, and denied all knowledge of them. The jury found, 1. That at the time the prisoner found the heifers he had a reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. 2. That at the time of finding them he did not intend to steal them, but that the intention to steal came on him afterwards. 3. That the prisoner when he sent them away did so for the purpose and with the intention of depriving the owner of them and

appropriating them to his own use :—Held, that a conviction of larceny could not be sustained. *Reg.* v. *Matthews*, 28 L. T. 645 ; 12 Cox, C. C. 489.

If the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return them, and afterwards disposes of them ; if he had not a felonious intention when he originally took them, his subsequent withholding and disposing of them will not constitute a new felonious taking, or make him guilty of felony. *Rex* v. *Banks*, R. & R. 441.

A drover employed to drive pigs, and paid the expenses of driving them, being paid wages by the day, but having the liberty to drive the cattle of any other person, at the end of his journey sold the pigs, and converted the proceeds to his own use :—Held, not to be larceny, as at the time he received the pigs into his custody he had no intention of appropriating them to his own use ; and that he was merely a bailee, and not a servant. *Reg.* v. *Hey*, T. & M. 209 ; 1 Den. C. C. 602 ; 2 Car. & K. 983 ; 14 Jur. 154 ; 3 Cox, C. C. 582.

A prisoner received the prosecutor's horse to be agisted, and after a short time sold it :—Held, not larceny. *Rex* v. *Smith*, 1 M. C. C. 413.

Where the jury found that one who assisted in taking another's goods from a fire in his presence, but without his desire, and who afterwards concealed and denied having them, yet took them honestly at first, and that the evil intention to convert them came on the taker afterwards, held no larceny. *Rex* v. *Leigh*, 2 East, P. C. 694 ; 1 Leach, C. C. 411, n.

If a fraudulent conversion takes place after the privity of contract is determined, it is felony. *Rex* v. *Charlewood*, 1 Leach, C. C. 409 ; 2 East, P. C. 689.

Where a man drove away a flock of lambs from a field, and in doing so inadvertently drove away along with them a lamb, the property of another person, and as soon as he discovered that he had done so sold the lamb for his own use, and then denied all knowledge of it :—Held, that as the act of driving the lamb from the field in the first instance was a trespass, as soon as he resolved to appropriate the lamb to his own use the trespass became a felony. *Reg.* v. *Riley*, Dears. C. C. 149 ; 22 L. J., M. C. 48 ; 17 Jur. 189 ; 6 Cox, C. C. 88.

Question for Jury.]—Where a party removed a valuable article, part of a wreck, from a wharf on which it had been placed, and had taken it into his own house, and had afterwards denied the possession of it :—Held, that the question for the jury on an indictment for larceny was, whether, at the time he originally took it, he meant to steal it. *Reg.* v. *Hore*, 3 F. & F. 315.

A., carrying on business on his own account, entered into an engagement with B. to sell goods for him, and for certain purposes to be his servant. B. entrusted A. with certain goods to dispose of in a particular way. A. converted them to his own use :—Held, that it was a question for the jury to say whether, when A. received the goods, he had the intention of misappropriating them. *Reg.* v. *Waller*, 10 Cox, C. C. 360.

Taking invito domino—Delivery of Chattel under common Mistake.]—The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign :—Held, that the prisoner had not been guilty of larceny as a bailee ; but the court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood. *Reg.* v. *Ashwell*, 55 L. J., M. C. 65 ; 16 Q. B. D. 190 ; 53 L. T. 773 ; 34 W. R. 297 ; 16 Cox, C. C. 1 ; 50 J. P. 181—C. C. R.

Where a chattel has been delivered to, and been received by, a person, under a mistake as to its true character, the subsequent fraudulent misappropriation of the chattel by such person does not amount to larceny. *Reg.* v. *Ashwell* (16 Q. B. D. 190) considered. *Reg.* v. *Hehir*, [1895] 2 Ir. R. 709 ; 18 Cox, C. C. 267—C. C. R.

The old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg.* v. *Ashwell* (16 Q. B. D. 190). That case distinguished and discussed. *Reg.* v. *Flowers*, 55 L. J., M. C. 179 ; 16 Q. B. D. 643 ; 54 L. T. 547 ; 34 W. R. 367 ; 16 Cox, C. C. 33 ; 50 J. P. 648—C. C. R.

Obtaining Possession from Wife of Owner.]—A prisoner cannot be found guilty of stealing goods, if it appears that he could not otherwise get them than by the delivery of the prosecutor's wife, in which case it may be presumed that he received them from her. *Rex* v. *Harrison*, 1 Leach, C. C. 47 ; 2 East. P. C. 559. *See* 45 & 46 Vict. c. 75, s. 16.

—— **Where Man is an Adulterer.**]—There is such a unity of interest between husband and wife, that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery of the wife ; and if the wife delivers the goods of the husband to an indifferent person, for that person to convert them to his own use, this is no larceny ; but if the person to whom the goods are delivered by the wife is an adulterer, it is otherwise, and an adulterer can be properly convicted of stealing the husband's goods, though they are delivered to him by the wife. *Reg.* v. *Tollett*, Car. & M. 112.

If no adultery has actually been committed by the parties, but the goods of the husband are removed from the house by the wife and the intended adulterer, with an intent that the wife should elope with him, and live in adultery with him, this taking of the goods is, in point of law, larceny. *Ib.*

If a man and the owner's wife jointly take away the husband's goods, it may be larceny in the man, though he was acting jointly with the wife. *Rex* v. *Tolfree*, 1 M. C. C. 243.

The prisoner, who was previously on familiar terms with the prosecutor's wife, hired a cart, and told the owner to send it to the prosecutor's house to convey furniture for the woman whom he would find there to another address which he gave to the carter, and where the wife had previously engaged rooms without her husband's knowledge. The cart was sent as directed and the furniture loaded, the wife being present but the husband and the prisoner absent during the loading. The wife accompanied the cart to the

lodgings. The prisoner did not appear at the lodgings till the next night; he then lived with her there for some days, using the furniture. The jury convicted the prisoner of stealing the furniture, and the court affirmed the conviction. *Reg.* v. *Flatman*, 14 Cox, C. C. 396; 42 L. T. 159; 44 J. P. 314.

The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart, and harness, in the presence of the wife, who did not object to the sale and received the proceeds, which she retained, after paying the prisoner a sovereign, which he had expended in obtaining lodgings while they were living in a state of adultery:—Held, that the presence of the woman did not alter the offence; that the fact that he negotiated the sale and received part of the proceeds was sufficient: that from the circumstances, the prisoner must have known that the pony, cart, and harness, were not the property of the woman; and that, if the jury were of opinion that he had that knowledge, they were bound to convict him. *Reg.* v. *Harrison*, 12 Cox, C. C. 19.

When a wife absconds from the house of her husband with her avowterer, the latter cannot be convicted of stealing the husband's money missed on their departure, unless the avowterer is proved to have taken some active part either in carrying away or in spending the money stolen. *Reg.* v. *Taylor*, 12 Cox, C. C. 627.

Where a man assists a wife in carrying off what he knows to be her husband's property, and goes away with her with the intention of committing adultery, he is guilty of larceny; and the facts that he was in the husband's service, and acted under the wife's directions in removing the property, afford no answer to the charge. *Reg.* v. *Mutters*, L. & C. 511; 34 L. J., M. C. 54; 11 Jur. (N.S.) 144; 11 L. T. 642; 13 W. R. 326; 10 Cox, C. C. 50.

—— **Evidence.**]—An adulterer cannot be convicted of stealing the goods of the husband brought by the wife alone to his lodgings, and placed by her in the room in which the adultery was afterwards committed, merely upon evidence of their being found there; but it would be otherwise if the goods could be traced in any way to his personal possession. *Reg.* v. *Rosenberg*, 1 Car. & K. 233; 1 Cox, C. C. 21.

The prisoner had been a lodger in the prosecutor's house, and left under circumstances not disclosed. On the following day the prosecutor's wife also left the house, taking with her a small bundle. Two days after the prisoner was found in company with the prosecutor's wife (who was passing by the prisoner's name) on board a ship bound for Quebec. Property belonging to the prosecutor, of a bulk greater than could have been comprised in the bundle taken by the wife, was found in the prisoner's cabin and upon his person:—Held, that there was some evidence to support a conviction for receiving the property, knowing it to have been stolen. *Reg.* v. *Deer*, L. & C. 240; 32 L. J., M. C. 33; 8 Jur. (N.S.) 1216; 7 L. T. 366; 11 W. R. 43; 9 Cox, C. C. 225.

A. assisting the wife of B. to take B.'s goods, which are afterwards used by them in common, without the consent of B., is evidence to warrant a conviction against A. of larceny. *Reg.* v. *Thompson*, 1 Den. C. C. 549; T. & M. 294; 14 Jur. 488; 4 Cox, C. C. 191.

Delivery by the wife of her husband's goods to her adulterer, he having knowledge that she had taken them without her husband's authority, is sufficient to support an indictment for larceny against the adulterer. *Reg.* v. *Featherstone*, Dears. C. C. 369; 2 C. L. R. 774; 23 L. J., M. C. 127; 18 Jur. 538; 2 W. R. 496; 6 Cox, C. C. 376.

If a person merely assists a married woman, who has not committed, or intended to commit, adultery, in carrying away the goods of her husband without the knowledge and consent of the latter, though with intent to deprive the latter of his property, he cannot be convicted of stealing the goods. *Reg.* v. *Avery*, Bell, C. C. 150; 28 L. J., M. C. 185; 5 Jur. (N.S.) 577; 7 W. R. 431; 8 Cox, C. C. 184.

B., watching his opportunity when the prosecutor was absent, took away the prosecutor's wife, and with her several boxes filled with the prosecutor's property. B. and the wife were found living together in adultery. The property was all in their lodgings:—Held, that he was indictable for stealing the property of the prosecutor, as he took the property under such circumstances that the assent of the husband to the taking could not be presumed. *Reg.* v. *Berry*, Bell, C. C. 95; 28 L. J., M. C. 70; 5 Jur. (N.S.) 228; 7 W. R. 240; 8 Cox, C. C. 117.

—— **Wife's Personal Clothes.**]—An adulterer who takes possession of none of the husband's property except the wearing apparel of the wife cannot be convicted of larceny. *Reg.* v. *Fitch*, Dears. & B. 87; 26 L. J., M. C. 169; 3 Jur. (N.S.) 524; 5 W. R. 527; 7 Cox, C. C. 269.

If a wife elopes with an adulterer who takes her clothes with them, the taking is a larceny; and it is as much a larceny to steal her clothes, which are her husband's property, as it would be to steal anything else that is his property. *Reg.* v. *Tollett*, Car. & M. 112. *But see preceding case.*

v. *Where Delivery does not Alter the Possession in Law.*

Possession of Agent that of Principal.]—If a person is allowed to have possession of a chattel, and he converts it to his own use, it is not larceny, unless he had an intention of stealing when he obtained possession of it, but if he has merely the custody of a chattel, he is guilty of a larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody. *Reg.* v. *Jones*, Car. & M. 611. S. P., *Reg.* v. *Evans*, Car. & M. 633.

A lady wishing to get a railway ticket (the price of which was 10*s.*), finding a crowd at the pay-place at the station, asked the prisoner, who was nearer in to the pay-place, to get a ticket for her, and handed him a sovereign to pay for it. He took the sovereign intending to steal it, and instead of getting the ticket ran away:—Held, that he was guilty of larceny at common law. *Reg.* v. *Thompson*, L. & C. 225; 32 L. J., M. C. 53; 8 Jur. (N.S.) 1184; 7 L. T. 432; 11 W. R. 40; 9 Cox, C. C. 244.

On an indictment for larceny, it appeared that the prisoner lived in the prosecutor's house and acted as nurse to his sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages. While the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a

coal bill, which money the prisoner kept and brought back a forged receipt for the coal bill:—Held, that this was a larceny of the money. *Reg.* v. *Smith*, 1 Car. & K. 428.

Where a stockbroker, who receives from a customer a cheque for a particular purpose, cashes it and converts the money to his own use, this is not larceny of the money. *Rex* v. *Walsh*, 2 Leach, C. C. 1054; R. & R. 215; 4 Taunt. 258.

Where money is delivered to a person not a servant of the prosecutor for the purpose of obtaining change for it, and he converts it, this is no larceny. *Reg.* v. *Reynolds*, 2 Cox, C. C. 170.

Possession of Servant that of Master.]—A servant, whose duty it was to pay his master's workmen, and for this purpose to obtain the necessary money from the cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was in fact necessary to pay the workmen. He did this intending at the time to appropriate the balance to his own use. Out of the sum so received he paid the workmen the wages really due to them, and appropriated the balance to his own use:—Held, that, whether the obtaining the money in the first instance was larceny, or obtaining money by false pretences, the money while it remained in his custody was the property and in the possession of the master, and therefore the misappropriation of it by the servant was larceny. *Reg.* v. *Cooke*, 40 L. J., M. C. 68; L. R. 1 C. C. 295; 24 L. T. 108; 19 W. R. 389; 12 Cox, C. C. 10.

A servant intrusted with the care of his master's property, and who subsequently appropriates it to his own use, is guilty of larceny at the time he so disposes of it, and not at any previous time he may have intended to steal it, the principle of animus furandi not applying to the relation of master and servant. *Reg.* v. *Roberts*, 3 Cox, C. C. 74.

A. employed B. to take his barge from S. to E., and paid him his wages in advance, and gave him a separate sum of three sovereigns to pay the tonnage dues. B. took the barge sixteen miles, and paid tonnage dues to an amount rather under 2*l.*, and appropriated the remaining sovereign to his own use:—Held, a larceny. *Reg.* v. *Goode*, Car. & M. 582. S. P., *Reg.* v. *Beaman*, Car. & M. 595.

If a banker's clerk tells a customer of the house that he has paid in money on his account, and thereby induces the customer to give him a cheque for the amount, which he receives the money for, and afterwards makes fictitious entries in the books, to prevent a discovery of the transaction, it is a felonious taking of the money from the banker, without his consent, and not an obtaining of it under false pretences. *Rex* v. *Hammon*, 2 Leach, C. C. 1083; 4 Taunt. 304; R. & R. 221; 13 R. R. 596.

It is felony for the confidential clerk of a merchant to take a bill of exchange, unindorsed, from the bill box, and convert it to his own use, although he was in the habit of transacting the cash concerns of the house from week to week; for, as it had not been delivered to him for such purpose by his employer, it is a tortious taking from the possession of the master. *Rex* v. *Chipchase*, 2 Leach, C. C. 699; 2 East, P. C. 567.

If a servant, to whom goods have been delivered by his master to carry to a customer, sells them and converts the money to his own use, he is guilty of felony; for the possession is not out of the master by such delivery. *Rex* v. *Bass*, 1 Leach, C. C. 258; 2 East, P. C. 566, 698.

Where the defendant, a book-keeper to the prosecutor but not living in his house, took a bill of exchange which the prosecutor had given him to send away by post to a certain address, this is larceny, as the possession remains in the master. *Rex* v. *Puradice*, 2 East, P. C. 565.

If a corn factor purchases a ship laden with corn, and sends his lighter to fetch it from the ship to his wharf, a delivery of the corn on board the lighter puts it into the possession of the corn factor, although the lighterman never delivers it at the factor's wharf. *Rex* v. *Spears*, 2 Leach, C. C. 825; 2 East, P. C. 568.

If a corn factor purchases the cargo of a vessel laden with corn, and sends his servant with a lighter to fetch it from the ship in loose bulk, and the servant contrives to have a certain portion of it put into sacks by the meters on board the ship, and takes the corn so sacked feloniously away in the lighter immediately from the ship, he may be indicted for stealing the property of the corn factor, although it was never put into his lighter, or otherwise reduced into the corn factor's possession. *Rex* v. *Abrahat*, 2 Leach, C. C. 824; 2 East, P. C. 569.

Where property, which the prosecutor had bought, was weighed out in the presence of his clerk, and delivered to his carman's servant to cart, who let other persons take away the cart and dispose of the property for his benefit jointly with that of the others, the carman's servant as well as the others are guilty of larceny at common law. *Rex* v. *Harding*, R. & R. 125.

A servant who receives gold from her master to change into silver, and instead of doing so runs away with the gold is guilty of larceny. *Rex* v. *Atkinson*, 1 Leach, C. C. 302, n.

Where goods are delivered to a servant for his master's use, and are never in the master's possession, the taking of them by the servant was not larceny at common law. *Rex* v. *Bazeley*, 2 Leach, C. C. 835; 2 East, P. C. 571; *Rex* v. *Waite*, 1 Leach, C. C. 28; 2 East, P. C. 570; *Rex* v. *Sullens*, 1 M. C. C. 129.

A servant's duty was to give out materials to be wrought up, and pay the workmen when the work was finished, and for this purpose he received cash from his masters, and at the end of each week he accounted with them for sums so received and paid. The cash was kept by him, but he was not authorised to apply the money in any other way. He paid C. 13*s.* and fraudulently charged his employers as having paid 14*s.* 8*d.*, and appropriated the 1*s.* 8*d.* to his own use:—Held, to amount to larceny. *Reg.* v. *Low*, 13 L. T. 642; 14 W. R. 286; 10 Cox, C. C. 168.

A man was indicted for larceny as a servant. He was groom in the service of the prosecutor, and was supplied by his master with money to pay for the keep of the stallion of which he had the charge. In the course of his employment he stated that he had paid three sums of 7*s.* 2*d.*, 7*s.* 4*d.*, and 7*s.* 6*d.*, to one Thomas Payne, which was untrue, and appropriated these sums to his own use:—Held, that it was not larceny. *Reg.* v. *Dartnell*, 20 L. T. 1020.

Where a servant received money from his master in order to pay the wages of work people

therewith, and in the book in which the account of the moneys so paid was kept by the master entries were found charging the master with more money than the servant had actually disbursed; but there was no proof that he had ever delivered this account to his master:—Held, that this did not amount to larceny in the servant. *Reg.* v. *Butler*, 2 Car. & K. 340.

A shopman was authorised to sell his master's goods at the price marked upon them, but at nothing less. He sold a pair of trousers at a lower price than that marked, and embezzled the money:—Held, not to be a larceny of the trousers. *Reg.* v. *Brockett*, 4 Cox, C. C. 274.

A miller's foreman, employed to sell goods and receive the money, sold some to a customer, who paid him for them. He did not enter the sale in his books, or account for the price according to the usual course of business, but concealed the whole transaction, and appropriated the money:—Held, that there being an actual binding sale as between the buyer and the employer, he could not be convicted of stealing the goods, although he was guilty of embezzling the price. *Reg.* v. *Betts*, Bell, C. C. 90; 28 L. J., M. C. 69; 5 Jur. (N.S.) 274; 7 W. R. 239; 8 Cox, C. C. 140.

If a servant receives from his master goods to sell, and appropriates them to his own use, he is not guilty of embezzlement but larceny. *Reg.* v. *Hawkins*, 4 Cox, C. C. 224.

If a servant takes his master's property, and hands it over to another as a gift, it is as much a felony as if he takes it to a pawnbroker and pledges it. *Reg.* v. *White*, 9 Car. & P. 344.

A. received goods from B. (who was the servant of C.) under colour of a pretended sale:—Held, that the fact of his having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B. *Reg.* v. *Hornby*, 1 Car. & K. 305.

The prisoner was occasionally employed as a clerk to the prosecutors, and having received from them a cheque on their bankers, payable to a creditor, for the purpose of giving it to the creditor, appropriated it to his own use:—Held, a larceny of the cheque. *Reg.* v. *Metcalf*, 1 M. C. C. 433.

It is larceny in the servant of the drawer of a cheque to whom it is given to deliver to a third person, to appropriate the value to his own use. *Reg.* v. *Heath*, 2 M. C. C. 33.

Provision by Drover or Agister, &c.]—A drover of cattle was employed by a grazier in the country to drive eight oxen to London; his instructions were, that, if he could sell them on the road, he might; and those he did not sell on the road he was to take to a particular salesman in Smithfield market, who was to sell them for the grazier. The drover sold two on the road, and instead of taking the remaining six to the salesman, drove them himself to Smithfield market, and sold them there, and received the money, which he applied to his own use:—Held, that he could not be convicted either of larceny or of embezzlement. *Reg.* v. *Goodbody*, 8 Car. & P. 665.

On an indictment against a farmer for stealing sheep entrusted to him for agistment, and which he had sold, concealing for upwards of a month the fact of sale, there being some evidence that he had, or might have supposed that he had, some implied authority to sell, or that the prosecutor would not object to it if he realised a good price, the jury was directed that the question was, whether at the time of the sale the prisoner had any reason to suppose that he might sell. *Reg.* v. *Leppard*, 4 F. & F. 51.

If a man who is hired to drive cattle sells them, it is larceny; for he has the custody only, and not the right to the possession; his possession is the owner's possession, although he is a general drover, at least if he is paid by the day. *Rex* v. *M'Namie*, 1 M. C. C. 368. See *Reg.* v. *Hey*, ante, col. 1337.

A person hired to drive cattle to a particular place, who sells the same and absconds with the money, is guilty of stealing, though the intention to sell is not conceived till after taking possession of the cattle. *Reg.* v. *Jackson*, 2 M. C. C. 32. S. P., *Reg.* v. *Stanbury*, 2 Cox, C. C. 272.

The prisoner, who was not otherwise in the prosecutor's service, was employed by the prosecutor to drive six pigs from C. to U. On the way he left one at Mr. M.'s, stating that it was tired, and he told the prosecutor that he had done so. The prosecutor told the prisoner to go and ask Mr. M. to keep the pig for him. The prisoner went to Mr. M.'s and sold the pig to Mr. M.:—Held, no larceny. *Reg.* v. *Jones*, Car. & M. 611.

Possession of Person Hired for Special Purpose.]—It is larceny for a person hired for the special purpose of driving sheep to a fair to convert them to his own use, he having the intention so to do at the time of receiving them from the owner. *Rex* v. *Stock*, 1 M. C. C. 87.

If the owner of goods employs a person, not in his service, to take them to a particular place, show them to a customer, and bring them back, without authorising him to sell them to or leave them with the customer, and he, instead of taking the goods to the specific place, sells them for his own advantage, he will be guilty of larceny, inasmuch as the felonious intent came upon him at a time when he had the custody only, and not the possession, of the goods. *Reg.* v. *Harvey*, 9 Car. & P. 353.

If a person, not being the servant of the party who intrusts him, receives a parcel containing notes to take to a coach-office, and abstracts the notes on his way there, and applies them to his own use, he is guilty of larceny. *Reg.* v. *Jenkins*, 9 Car. & P. 28.

vi. *Against Will of the Owner.*

Assent of Owner—Effect of.]—The assent of a prosecutor to give facility to the commission of a larceny, for the purpose of detecting the offenders, does not do away with the felony, although the property was not taken against his will. *Rex* v. *Egginton*, 2 Leach, C. C. 913; 2 East, P. C. 494, 666; 2 Bos. & P. 508; 5 R. R. 689.

Overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and some weeks afterwards, the servant, by the direction of his master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master having previously marked some money, it was, by his direction, placed upon the counter by the servant, in order that it might be taken up by the party who had come for the purpose. It was so taken up by him:—Held,

larceny in such party. *Reg.* v. *Williams*, 1 Car. & K. 195.

A., being somewhat tipsy, lay on the ground partly asleep, and while in that state saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing that the prisoner, with whom he had been acquainted for some time, was acting solely from friendly motives :—Held, that this evidence would not support a charge of larceny at common law, but disclosed a bailment. *Reg.* v. *Reeves*, 5 Jur. (N.S.) 716.

vii. *Carrying away—Asportation.*

Larceny from Person — What sufficient Removal or Severance.]—To constitute a stealing from the person, the thing must be completely removed from the person ; removal from the place where it was, if it remains throughout with the person, is not sufficient. *Rex* v. *Thompson*, 1 M. C. C. 78.

But such removal would be sufficient to constitute a simple larceny. *Ib.*

A watch was carried in a waistcoat pocket, with a chain attached passing through a button-hole of the waistcoat, being there secured by a watch-key. The prisoner took the watch out of the pocket and by force drew the chain out of the button-hole, but the watch-key having been caught by a button of the waistcoat, the watch and chain remained suspended :—Held, a sufficient severance to maintain a conviction for stealing from the person. *Reg.* v. *Simpson*, Dears. C. C. 421 ; 3 C. L. R. 80 ; 24 L. J., M. C. 7 ; 18 Jur. 1030 ; 3 W. R. 19 ; 6 Cox, C. C. 422.

Taking an earring from the ear of a lady is a sufficient carrying away, though the earring be found afterwards in the lady's hair. *Rex* v. *Lapier*, 1 Leach, C. C. 320.

What sufficient Severance.]—Where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them away towards the door as far as the string would permit :—Held, there being no severance, there was no asportation, and consequently that it was not a felony. *Anon.*, 2 East, P. C. 556 ; 1 Leach, C. C. 321, n.

—— **Gas Stolen.**] — The prisoner had contracted with a gas company for a supply of gas. The quantity consumed was to be measured by a meter. The gas was conveyed from the company's main through an entrance pipe (the property of the prisoner) to the meter, and from thence by another pipe called the exit pipe to the burners. The prisoner by inserting a connecting pipe into the entrance and exit pipes, diverted the gas from the meter and thereby avoided paying for the full quantity used :—Held, that there was a sufficient severance of the gas, at the point of junction of the connecting pipe with the entrance pipe, to constitute an asportation. *Reg.* v. *White*, 3 Car. & K. 363 ; Dears. C. C. 203 ; 22 L. J., M. C. 123 ; 17 Jur. 536 ; 1 W. R. 418 ; 6 Cox, C. C. 213.

What a sufficient Asportation.]—The transfer of a letter by a letter carrier from his pouch to his pocket is sufficient asportation. *Reg.* v. *Poynton*, L. & C. 247 ; 32 L. J., M. C. 29 ; 8 Jur. (N.S.) 1218 ; 7 L. T. 434 ; 11 W. R. 73 ; 9 Cox, C. C. 249.

In an indictment for stealing five pints of porter, it appeared that the prisoner was discovered standing by a barrel of porter, out of a hole in which the porter was running into a can on the ground, and that about five pints had run into the can :—Held, that there was a sufficient asportation proved of the porter in the can. *Reg.* v. *Wallis*, 3 Cox, C. C. 67.

Two prisoners were charged with stealing four sacks of barley and three sack bags from their master. The prisoners and B. were employed by the prosecutor to winnow barley, which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and B. filled with barley. The two prisoners then sent B. home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the prisoners concealed under straw in the loft, and then, in a dust-bin in a stable beneath, he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty :—Held, that the evidence was sufficient to support the conviction. *Reg.* v. *Samways*, Dears. C. C. 371 ; 2 W. R. 498.

A waggoner took some hay from his master's stable and put it on a waggon, and then set off on a journey ; the hay was not allowed by the master to be used on the journey :—Held, larceny as soon as it was removed from the stable animo furandi. *Reg.* v. *Gruncell*, 9 Car. & P. 365.

Goods in Waggon or Coach.] — Where a prisoner set up a long bale upon end in a waggon, and cut the wrapper all the way down with intent to remove the contents, but was apprehended before he had taken anything out of it :—Held, that there was not a sufficient asportation to constitute a larceny. *Rex* v. *Cherry*, 1 Leach, C. C. 236, n. ; 2 East, P. C. 556.

To remove a package from the head to the tail of a waggon, with a felonious intent to take it away, is a sufficient asportation to constitute a larceny ; but merely to alter the position of a package on the spot where it lies is not. *Rex* v. *Coslet*, 1 Leach, C. C. 236 ; 2 East, P. C. 556.

A prisoner, having lifted up a bag from the boot of a coach, was detected before he had got it out ; and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising of it from the bottom had completely removed each part of it from the space that specific part occupied :—Held, that it was a complete asportation. *Rex* v. *Walsh*, 1 M. C. C. 14.

Apprehension before Taking.] — Where a prisoner stopped the prosecutor, who was carrying a bed on his shoulders, and told him to lay it down, or he would shoot him ; and he laid it down on the ground, but before the prisoner could take it up he was apprehended :—Held, that the offence was not completed. *Rex* v. *Farrell*, 1 Leach, C. C. 322, n.

Abstracting Money from Letter.]—If A. asks B., who is not his servant, to put a letter in the post, telling him it contains money, and B.

breaks the seal, and abstracts the money before he puts the letter in the post, he is guilty of larceny. *Rex* v. *Jones*, 7 Car. & P. 151.

Bailees—Special Property in Goods determined by Unlawful Acts.]—The prisoner was employed by a tailor to sell clothes for him about a particular county; the price of each article was fixed, and the clothes were entrusted to the prisoner on the arrangement that he was to sell them at the price fixed, he receiving 3*s.* in the pound on the amount received for them, and being bound to bring back the remainder of the clothes which were unsold. The prisoner received from the prosecutor a parcel of clothes on these terms, but, instead of selling them, he fraudulently pawned a portion of them for his own benefit, and afterwards fraudulently misappropriated the residue to his own use:—Held, that the original bailment of the goods to the prosecutor was determined by the unlawful act of pawning part of them, and that the subsequent fraudulent misappropriation of the remainder amounted to larceny. *Reg.* v. *Poyser*, 2 Den. C. C. 233; T. & M. 559; 20 L. J., M. C. 191; 15 Jur. 386; 5 Cox, C. C. 241.

A. was convicted of larceny under the following circumstances: he was a common carrier, and employed by the prosecutor to carry a cargo of coals from a ship to a coal-yard belonging to the prosecutor. He carted the coals to the first-mentioned coal-yard, and was engaged for several days in carting them thence to the prosecutor's other yard. He left the first-mentioned coal-yard on one of those days with two carts and a waggon, all laden with coals; before he arrived at the other yard, he delivered the two cart-loads to a third person on his own account, but he duly delivered the waggon-load at the prosecutor's yard:—Held, that the conviction was wrong, the coals having been delivered to A. as a carrier, and there having been no breaking of bulk or other determination of the bailment. *Reg.* v. *Cornish*, Dears. C. C. 425; 6 Cox, C. C. 432.

If the master or owner of a ship steals some of the goods delivered to him to carry, it is not larceny in him, unless he takes the goods out of their packages. *Rex* v. *Madox*, R. & R. 92.

If one employed to carry goods for hire appropriates them to his own use, but does not break bulk, this is no larceny, although the person so employed was not a common carrier, but was only employed in this particular instance. *Rex* v. *Fletcher*, 4 Car. & P. 544.

A. the owner of a boat, was employed by B., the captain of a ship, to carry a number of wooden staves ashore in his boat; B.'s men were put into the boat, but were under the control of A., who did not deliver all the staves, but took one of them away to the house of his mother:—Held, that this was a bailment of the staves to A., and not a charge only; and that a mere non-delivery of the staves would not have been a larceny in A.; but that if A. separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and therefore would be sufficient to constitute a larceny. *Rex* v. *Howell*, 7 Car. & P. 325.

If a warehouseman has several bags of wheat delivered to him for safe custody, and he takes the whole of the wheat out of one bag, it is no less a larceny than if he had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the bag. *Rex* v. *Brazier*, R. & R. 337.

A. consigned three trusses of hay to B., and sent them by the prisoner's cart; the prisoner took away one of the trusses, which was found in his stable, but not broken up:—Held, no larceny, as the prisoner did not break up the truss. *Rex* v. *Pratley*, 5 Car. & P. 533. *But see now* 24 & 25 Vict. c. 96, s. 3.

Attempt to Steal—Empty Pocket.]—If a person tries to pick a pocket, he is guilty of an attempt to steal, without proof that there was anything in the pocket. *Reg.* v. *Collins* (L. & C. 471), overruled. *Reg.* v. *Brown*, 59 L. J., M. C. 47; 24 Q. B. D. 357; 61 L. T. 594: 38 W. R. 95; 16 Cox, C. C. 715; 54 J. P. 408. S. P., *Reg.* v. *Ring*, 61 L. J., M. C. 116; 66 L. T. 300; 17 Cox, C. C. 491; 56 J. P. 552—C. C. R.

If a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. *Reg.* v. *Collins*, L. & C. 471: 33 L. J., M. C. 177; 10 Jur. (N.S.) 686; 10 L. T. 581; 12 W. R. 886; 9 Cox, C. C. 497.

—— **Nothing remaining to be done except to carry away.**]—C. was in the employ of a contractor for the supply of meat to a camp, and the course of business was for the meat to be sent down to the camp, there weighed out to the different messes, and the surplus, if any, returned to the contractor. C., whilst employed upon this duty by the contractor, during the weighing out, substituted a false weight for the true one, his intention being to carry away and steal the difference between the just surplus, for which he would have to account to his master, and the apparent surplus actually remaining after the first weighing. Nothing remained upon his part to complete his scheme except to carry away and dispose of the meat, which he would have done had the fraud not been detected:—Held, properly convicted of attempting to steal the meat. *Reg.* v. *Cheeseman*, L. & C. 140; 31 L. J., M. C. 89; 8 Jur. (N.S.) 143; 5 L. T. 717; 10 W. R. 255; 9 Cox, C. C. 100.

viii. *Possession of Owner, what Sufficient.*

Possession obtained by Fraud.]—A. owed 4*l.* 11*s.* 1½*d.* to the prosecutor; and the latter having demanded payment, the prisoner said he would settle with him on behalf of A. He took out of his pocket a piece of blank paper, stamped with a sixpenny stamp, and put it upon the table, and then took out some silver in his hand. The prosecutor wrote a receipt for the sum mentioned on the stamped paper, and the prisoner took it up and went out of the room. On being asked for the money, he said, "It is all right," but never paid it:—Held, that this was not a case of larceny, the prosecutor never having had such a possession of the stamped paper as would enable him to maintain trespass. *Reg.* v. *Smith*, 2 Den. C. C. 449; 21 L. J., M. C. 111; 16 Jur. 414; 5 Cox, C. C. 533. S. P., *Reg.* v. *Frompton*, 2 Car. & K. 47.

Where in consequence of an advertisement, A. applied to B. to raise money for him, and B. promised to procure 5,000*l.*, and produced ten blank 6*s.* stamps, across which A. wrote an acceptance,

and B. took them up without saying anything, and afterwards filled up the stamps as bills for 500*l.* each and put them in circulation :—Held, that as the prosecutor never had any possession of the papers so as to maintain trespass for them, there was no taking of them sufficient to constitute larceny. *Rex* v. *Hart*, 6 Car. & P. 106.

What sufficient Reduction into Possession.]—The prisoner was employed to trap wild rabbits, and it was his duty to take them when trapped to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land, and placed them in a bag, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them, and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits with the intention of appropriating them to his own use :—Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them. *Reg.* v. *Petch*, 14 Cox, C. C. 116 ; 38 L. T. 788.

Possession of Master by means of Servant.]—The prosecutor's horse had been impounded. The prisoner, pretending that he had been sent by the prosecutor, paid the pound-keeper's demand, received the horse, and made off with it. He was indicted for larceny. The indictment had two counts, one laying the property in the prosecutor, and the other in the pound-keeper :—Held, that the pound-keeper was a servant of the owner, and, therefore, that the offence was larceny. *Reg.* v. *Simpson*, 2 Cox, C. C. 235.

Where a person gave his servant a 5*l.* note to get changed, and he got the note changed, and made off with the change :—Held, to be no larceny, but an embezzlement. *Rex.* v. *Sullens*, Car. C. L. 319 : 1 M. C. C. 129.

The prisoner was sent with his master's cart for some coals. The coals were delivered to the prisoner and deposited in the cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals :—Held, that this was larceny of the coals and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master. *Reg.* v. *Reed*, Dears. C. C. 257 ; 2 C. L. R. 607 ; 23 L. J., M. C. 25 ; 18 Jur. 67 ; 6 Cox, C. C. 284 ; 2 W. R. 190.

A. had agreed to buy straw of B., and sent his servant C. to fetch it ; C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in a court-yard of A., and then went to A. and asked him to send someone with the key of the hay-loft, which was over the stable, which A. did, and C. put part of the straw into the hay-loft, and carried the rest away to a public-house, and sold it :—Held, that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable-door. *Reg.* v. *Hayward*. 1 Car. & K. 518.

The prisoner was employed to conduct an office in connection with a branch bank. His salary included his services, and the providing an office, which was in his own house, where he carried on another business. The office was fitted up at the expense of the bank, and in it there was an iron safe, the property of the bank, into which it was his duty, when the night came, to put any money received during the day, which had not been required. The manager of the branch bank kept a duplicate key of the safe. It was the prisoner's duty to receive money from customers, to be put to their accounts with the branch bank, and to pay cheques. The prisoner was indicted for larceny as a clerk, and the jury found him guilty of having stolen some money received from customers, which before such stealing had been placed in the safe :—Held, that there was evidence to go to the jury of larceny. *Reg.* v. *Wright*, Dears. & B. 431 ; 27 L. J., M. C. 65 ; 4 Jur. (N.S.) 313 ; 6 W. R. 255 ; 7 Cox, C. C. 413.

See also cases ante, col. 1334.

2. What are the Subject of Larceny.

a. Generally.

Property Stolen out of United Kingdom.]—The Larceny Act, 1896, applies to the case of property stolen outside the United Kingdom and received by a person here prior to the act coming into operation. *Reg.* v. *Panse*, 61 J. P. 536.

Things savouring of the Realty.]—Before 7 & 8 Geo. 4, c. 29, stealing rolls of parchment was a larceny, though such rolls were the records of a court of justice unless they concerned the realty. *Rex* v. *Walker*, 1 M. C. C. 155.

But it was not so if they concerned the realty. *Rex* v. *Westbeer*, 2 Str. 1133.

A commission to settle the boundaries of a manor is an instrument concerning the realty, and not the subject of larceny at common law. *Rex* v. *Westbeer*, 1 Leach, C. C. 13.

—— **Pigs Buried.**]—Three pigs bitten by a mad dog were shot and buried on the owner's land three feet below the surface of the soil. There was no intention of digging them up again or of making any use of them, but the same evening the prisoners dug them up, carried them away, and afterwards sold them for 9*l.* 3*s.* 9*d.* The jury found that there was no abandonment of the property of the pigs by the owner, and convicted the prisoners of larceny :—Held, that larceny would be notwithstanding the dead pigs were buried in the ground three feet below the surface. *Reg.* v. *Edwards*, 36 L. T. 30 ; 13 Cox, C. C. 384.

Seaweed.]—Drifted and ungathered seaweed, cast on the shore, between high and low water mark, of him who has the exclusive ownership of the shore, is not the subject of larceny. *Reg.* v. *Clinton*, Ir. R. 4 C. L. 6.

Animals feræ naturæ—Rabbits.]—Poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the crown. They placed the rabbits in a ditch upon the land, some of the rabbits in bags and some strapped together. They had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but put them in the ditch as a place of deposit till they could conveniently remove them. About three hours afterwards the prisoner came back, and began to remove the rabbits :—Held, that

the taking of the rabbits and the removal of them was one continuous act, and that the removal was therefore not larceny. *Reg.* v. *Townley*, 40 L. J., M. C. 144; L. R., 1 C. C. 315; 24 L. T. 517; 19 W. R. 725; 12 Cox, C. C. 59. Cp., *Blades* v. *Higgs*, 11 H. L. Cas. 621; 34 L. J., C. P. 286; 11 Jur. (N.S.) 701; 12 L. T. 615; 13 W. R. 927, and *Lonsdale (Earl)* v. *Rigg*, 1 H. & N. 924; 26 L. J., Ex. 196; 3 Jur. (N.S.) 390; 5 W. R. 355.

—— **Live Partridges.**]—A prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive but in a dying state:—Held, that the indictment was not proved. *Reg.* v *Roe*, 11 Cox, C. C. 554; 22 L. T. 414.

—— **But if Confined, it is Otherwise.**]—Partridges about three weeks old and able to fly a little, which had been hatched and reared by a common hen placed under a hen coop, and after the removal of the coop remained about the place with the hen as her brood, sleeping under her wings at night, may be the subject of larceny. *Reg.* v. *Shickle*, 38 L. J., M. C. 21; L. R. 1 C. C. 158; 19 L. T. 327; 17 W. R. 144; 11 Cox, C. C. 189.

Pheasants that have been reared under hens, and have never become wild, may be the subject of larceny. *Reg.* v. *Head*, 1 F. & F. 350.

So young pheasants hatched by a hen, and under the care of a hen in a coop, in a field at a distance from a dwelling-house, are the subject of larceny. *Reg.* v. *Cory*, 10 Cox, C. C. 23. S. P., *Reg.* v. *Garnham*, 8 Cox, C. C. 451; 2 F. & F. 347.

Tame pigeons kept in an ordinary dovecote, having liberty of ingress and egress at all times, may be the subject of larceny. *Reg.* v. *Cheafor*, 2 Den. C. C. 361; T. & M. 621; 21 L. J., M. C. 43: 15 Jur. 1065; 5 Cox, C. C. 367.

If pigeons are so far tame that they come home every night to roost in wooden boxes; hung on the outside of the house of their owner, and a party comes in the night and steals them out of these boxes, this is a larceny. *Rex* v. *Brooks*, 4 Car. & P. 131.

Products of Domestic Animals.]—Pulling wool from the bodies of live sheep and lambs, animo furandi, is larceny. *Rex* v. *Martin*, 1 Leach, C. C. 171; 2 East, P. C. 618.

So it is larceny to take the milk from a cow. *Ib.*

Domestic Animals not used for Food.]—Dogs are not the subject-matter of larceny at common law. *Reg.* v. *Robinson*, Bell, C. C. 34; 28 L. J., M. C. 58; 5 Jur. (N.S.) 203; 7 W. R. 203; 8 Cox, C. C. 115.

Ferrets, though tame and saleable, cannot be the subject of larceny. *Rex* v. *Searing*, R. & R. 351.

Corpse.]—There can be no property in a corpse, and therefore stealing one is not larceny. *Rex* v. *Haynes*, 2 East, P. C. 652.

Choses in action or Goods and Chattels.]—Mortgage deeds, being substituted securities for the payment of money, are choses in action, and not goods and chattels. Where, therefore, a prisoner was indicted for a burglary, in breaking into a house at night, with intent to steal the goods and chattels therein, and the jury found that he broke into the house with intent to steal mortgage deeds only, the conviction was quashed. *Reg.* v. *Powell*, 2 Den. C. C. 430; 21 L. J., M. C. 78; 16 Jur. 177; 5 Cox, C. C. 396.

An agreement, although unstamped, is a chose in action, and therefore was not the subject of larceny at common law. *Reg.* v. *Watts*, Dears. C. C. 326; 2 C. L. R. 604; 23 L. J., M. C. 56; 18 Jur. 192; 2 W. R. 233; 6 Cox, C. C. 304.

Pawnbroker's Duplicate.]—Stealing a pawnbroker's duplicate is larceny. *Reg.* v. *Morrison*, Bell, C. C. 158; 28 L. J., M. C., 210; 5 Jur. (N.S.) 604; 7 W. R. 554; 8 Cox, C. C. 194.

Railway Ticket.]—The fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the railway company, is larceny, although the ticket would, if used, be returned to the company at the end of the journey. *Reg.* v. *Beecham*, 5 Cox, C. C. 181.

Growing Grass—Continuity of Act of Trespass.]—A trespasser cut down growing grass not his property, and after leaving the same where cut returned three days afterwards and took it away. Upon an indictment for larceny at common law for such acts he was convicted:—Held, that such conviction was right. *Reg.* v. *Foley*, 26 L. R. Ir. 299; 17 Cox, C. C. 142—C. C. R.

Gas.]—The prisoner had contracted with a gas company for a supply of gas. The quantity consumed was to be measured by a meter rented by the prisoner of the company, and was to be paid for according to such measurement. The gas was conveyed from the company's main through an entrance pipe (the property of the prisoner) to the meter, and from thence, by another pipe, called the exit pipe, to the burners. The prisoner, by inserting a connecting pipe into the entrance and exit pipes, diverted the gas from the meter, and thereby avoided paying for the full quantity of gas consumed:—Held, that this was larceny of the gas; that the property and possession of the gas were in the company; and that it was immaterial whether the service pipe was the property of the prisoner or the company. *Reg.* v. *White*, 3 Car. & K. 363; Dears. C. C. 203; 1 C. L. R. 489; 22 L. J., M. C. 123; 17 Jur. 536; 1 W. R. 418; 6 Cox, C. C. 213.

Water stored in Pipes]—Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law. *Ferens* v. *O'Brien*, 52 L. J., M. C. 70; 11 Q. B. D. 21; 31 W. R. 643; 15 Cox, C. C. 332; 47 J. P. 472.

b. In particular Cases.

i. *Documents, Bills, Securities, &c.*

Valuable Security—Mortgage Deeds.]—A mortgage deed, and title deeds accompanying it, constituted a security for money within 7 & 8 Geo. 4, c. 29, s. 5. *Reg.* v. *Williams*, 6 Cox, C. C. 49.

—— **Indictment.**]—An indictment charging in one count the larceny of "three deeds being a security for money, to wit, for 20*l.*, of and belong-

ing to H. W." : and in another count, the larceny of "three deeds, being a security for the payment of money, to wit, for 20*l*., of and belonging to H. W.," is supported by proof of the larceny of deeds of lease and release from A. to B of real estate, and of a mortgage by demise of the same property from B. to C., and held by the prosecutor as executor of C. *Ib.*

An indictment under 24 & 25 Vict. c. 96, s. 27, for stealing a valuable security, must particularise the kind of valuable security stolen ; and any material variance between the description in the indictment and the evidence, if not amended, will be fatal. *Reg* v. *Lowrie*, 36 L. J., M. C. 24 ; L. R. 1 C. C. 61 ; 15 L. T. 632 ; 15 W. R. 360 ; 10 Cox, C. C. 388.

—— **Bills, Notes, and Other Securities.**]—Stealing re-issuable notes after they have been paid, and before they have been re-issued, did not subject the party to an indictment on 2 Geo. 2, c. 25, for stealing notes ; but he might be indicted for stealing paper with valuable stamps upon it. *Rex* v. *Clark*, R. & R. 181 ; 2 Leach, C. C. 1036.

Defendant was indicted in the county of Leicester for stealing a bill of exchange with two indorsers' names ; the bill was stolen from the prosecutor at Manchester, then indorsed by two indorsers ; when negotiated at Leicester by the defendant a third indorser's name was on it :—Held, that the addition of the third name made no difference. *Rex* v. *Austin*, 2 East, P. C. 602.

A document which is a complete bill of exchange in all respects except that of the signature of the drawer is, when in the hands of the intended drawer, a valuable security : and is also by virtue of s. 18 of the Bills of Exchange Act, 1882, a bill of exchange. Such a document is therefore a security for the payment of money within s. 75 of 24 & 25 Vict. c. 96. *Reg.* v. *Bowerman*, 60 L. J., M. C. 13 ; [1891] 1 Q. B. 112 ; 63 L. T. 532 ; 39 W. R. 207 ; 17 Cox, C. C 151 ; 55 J. P. 373—C. C. R.

Under 7 & 8 Geo. 4, c. 29, s. 5, scrip certificates of a foreign railway company were the subject of larceny. *Reg.* v. *Smith*, Dears. C. C. 561 ; 25 L. J., M. C. 31 ; 1 Jur. (N.S.) 1212 ; 4 W. R. 196 ; 7 Cox, C. C. 93.

Country bankers' notes, which had been paid by the bankers in London at whose house they were made payable, and by them sent down to the country bankers to be re-issued, on the way there were stolen, and the prisoner was indicted for receiving them. The indictment in some counts charged the notes to be valuable securities, and in others as pieces of paper of the goods and chattels of the country bankers. The prisoner was convicted and the conviction held right. Some of the judges doubted whether these notes were to be considered as valuable securities, but, if not, they all thought they were goods and chattels. *Rex* v. *Vyse*, 1 M. C. C. 218.

Secreting a letter containing country bank notes paid in London and not re-issued was holden felony within s. 1 of 7 Geo. 3, c. 50. *Rex* v. *Ranson*, R. & R. 232 ; 2 Leach, C. C. 1090. See also *Rex* v. *Pooley*, R. & R. 12 ; 2 Leach, C. C. 887.

Exchequer bills, although signed by a person not authorised to do so, were securities and effects within 15 Geo. 2, c. 13, s. 12. *Rex* v. *Aslett*, 1 Bos. & P. (N.R.) 1 ; 2 Leach, C. C. 958 ; R. & R. 67.

The halves of country bank notes, sent in a letter, are goods and chattels, and a person who steals them is indictable for larceny. *Rex* v. *Mead*, 4 Car. & P. 535.

A., in consequence of seeing an advertisement, applied to B. to raise money for him. B. said he would procure him 5,000*l*., and produced from his pocket-book ten blank 6*s*. bill stamps, across each of which A. wrote, "Accepted, payable at Messrs. P. & Co., 189, F. Street, London," and signed his name. B., who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards bills of exchange for 500*l*. each were drawn on these stamps, and B. put them into circulation :—Held, that these stamps, with the acceptances thus written upon them, were neither bills of exchange, orders for the payment of money, nor securities for money. *Rex* v. *Hart*, 6 Car. & P. 106.

Cheque.]—A cheque is the subject of larceny if obtained animo furandi. *Commonwealth* v. *Yerkes*, 12 Cox, C. C. 208.

In the absence of fraud by the prisoner, if the prosecutor hand to him a cheque for a particular purpose and he cashes it and absconds with the money, this is not larceny, even though the prisoner intended to misapply the cheque when he took it. *Rex* v. *Walsh*, 2 Leach, C. C. 1054 ; R & R. 215 ; 4 Taunt. 258.

Prisoner, who was occasionally employed as a clerk to the prosecutors, having received from them a cheque to pay over to one of their creditors and appropriated it, is guilty of larceny of the cheque. *Rex* v. *Metcalf*, 1 M. C. C. 433. S. P., *Reg.* v. *Heath*, 2 M. C. C. 33.

—— **Even if Void.**]—A. charged in one count with stealing a cheque for 13*l*. 9*s*. 7*d*., and in another count with stealing a piece of paper value 1*d*. :—Held, that, supposing the cheque to have been a void cheque (as being contrary to 55 Geo. 3, c. 184), it would still sustain the charge laid in the second count. *Reg.* v. *Perry*, 1 Den. C. C. 69 ; 1 Car. & K. 725 ; 1 Cox, C. C. 222.

Concealment of Will—Fraudulent Purpose.]—If a defendant concealed a will, and the money which ought, by the will, to have gone to A. and B. and with that money paid the debts of the husband of the next of kin, to whom he was a creditor, this was a fraudulent purpose, within 7 & 8 Geo. 4 c. 29, s. 23. *Reg.* v. *Morris*, 9 Car. & P. 89.

Deeds relating to Real Estate—What Taking is sufficient.]—On an indictment on 7 & 8 Geo. 4, c. 29, s. 23, for stealing writings relating to real estate, the jury must be satisfied that the defendant took them under such circumstances as would have amounted to larceny, if the writings had been the subject of larceny. *Rex* v. *John*, 7 Car. & P. 324.

Taking Record of Court for Fraudulent Purpose.]—A judgment debtor's goods having been seized under warrants of execution of a county court, and being in the possession of the bailiff, the debtor, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him : —Held, that he was not guilty of larceny, but that he was guilty of taking the warrants for a fraudulent purpose within 24 & 25 Vict. c. 96 s.

30. *Reg.* v. *Bailey*, 41 L. J., M. C. 61; L. R. 1 C. C. 347; 25 L. T. 882; 20 W. R. 301; 12 Cox, C. C. 129.

ii. *Horses, Cattle and Sheep.*

Horse, Mare, or Gelding.]—In an indictment for horse-stealing, the animal, whether a horse, mare, gelding, colt, or filly, may be described as a horse. *Reg.* v. *Aldridge*, 4 Cox, C. C. 143.

Foals and fillies were within 2 & 3 Edw. 6, c. 33, and were included in the words horse, gelding, or mare, and evidence of stealing a mare filly supported an indictment for stealing a mare. *Rex* v. *Welland*, R. & R. 494.

Cow or Heifer.]—An indictment for stealing a cow cannot be supported by evidence of stealing a heifer. *Rex* v. *Cook*, 1 Leach, C. C. 105; 2 East. P. C. 616.

The beast, however old, is a heifer until she has had a calf. *Ib.*

Bullock-stealing.]—The phrase bullock-stealing, in 7 Geo. 4, c. 64, s. 28, relating to the allowance of rewards in certain cases for the discovery of offenders, includes all cases of cattle-stealing of that particular description, e.g. ox, cow, heifer, &c. *Rex* v. *Gillbrass*, 7 Car. & P. 445.

Sheep, Ewe, or Lamb.]—An indictment for stealing a sheep is supported by proof of stealing a ewe or a ram, though the statute specifies "ram, ewe, sheep, or lamb." *Reg.* v. *M'Culley*, 2 M. C. C. 34; 2 Lewin, C. C. 272.

A sheep was called in the indictment a ewe, and, by the witnesses, the proper name was said to be a ewe teg:—Held, that the description was bad. *Reg.* v. *Jewett*, 2 Cox, C. C. 227.

On the trial of an indictment under 7 & 8 Geo. 4, c. 29, s. 25, for stealing one "sheep," some of the witnesses stated the animal to be a sheep, others a lamb. It was between nine and twelve months old; and the jury who convicted the prisoner found, that, in common parlance, according to the usual mode of describing such animals, it would be called a lamb. Conviction held right, the word "sheep" being general. *Reg.* v. *Spicer*, 1 Car. & K. 699; 1 Den. C. C. 82.

On an indictment for sheep-stealing, a rig sheep is properly described as one "sheep." *Rex* v. *Stroud*, 6 Car. & P. 535.

On an indictment for stealing sheep, a prisoner could not have been convicted of stealing lambs. *Rex* v. *Loom*, 1 M. C. C. 160.

Nor of stealing a ewe. *Rex* v. *Puddifoot*, 1 M. C. C. 247. S. P., *Rex* v. *Birket*, 4 Car. & P. 216.

An indictment for stealing lambs is sustained by proof that the carcases were found in the owner's ground, and only the skins taken away. *Rex* v. *Rawlins*, 2 East, P. C. 617.

Carcases of.]—*See* post, col. 1358.

iii. *Deer or Rabbits.*

What are Deer.]—The term deer in s. 25 of 7 & 8 Geo. 4, c. 29, includes all kinds of deer, all ages and both sexes, and therefore includes a fawn. *Reg.* v. *Strange*, 1 Cox, C. C. 58.

In Inclosed Part of Forest.]—An inclosure in the Forest of Dean, made under a statute, for the protection of timber, and surrounded by a ditch and a bank, which were sufficient to prevent cattle from getting into it, but over which the deer could pass in or out at their free will, was an inclosed part of a forest within 7 & 8 Geo. 4, c. 29, s. 26. *Reg.* v. *Money*, 2 Russ. C. & M. 308.

The words "wherein deer shall be usually kept" refer to inclosed land only. *Ib.*

Killing—Previous Convictions.]—On an indictment under 7 & 8 Geo. 4, c. 29, s. 26, for killing a deer after a previous summary conviction, a conviction by *two* justices of the previous offence was put in:—Held, that such a conviction was good. *Rex* v. *Weale*, 5 Car. & P. 135.

Upon an indictment for a second offence against 42 Geo. 3, c. 107, by killing deer, objections might have been taken to the conviction for the first offence, that it was not in the proper county, and that it was not correctly stated in the indictment for the second offence. *Rex* v. *Allen*, R. & R. 513.

A commitment under 7 & 8 Geo. 4, c. 29, s. 26, reciting a conviction that the defendant "did unlawfully kill and carry away one fallow deer, the property of Her Majesty Queen Victoria, against the form of the statute," was bad for omitting to state that the deer was in the uninclosed part of some forest, chase or purlieu. *Reg.* v. *King*, 1 D. & L. 721; 13 L. J., M. C. 43; 8 Jur. 271.

Offences against Deer Keepers.] — The 16 Geo. 3, c. 30, s. 9, authorised the seizing the guns of persons carrying them into grounds where deer are usually kept, with intent to destroy them, and made the beating or wounding the keepers, in the due execution of their offices, felony:—Held, that an assistant-keeper had no right to seize the person of one so armed in order to get his gun, without having first demanded his gun; and, consequently, if such person beat the keeper it was not within the statute, the keeper not being in the due execution of his office. *Rex* v. *Amey*, R. & R. 500.

Pulling a deer-keeper to the ground and holding him there while another person escapes, is not a *beating* of the deer-keeper within 7 & 8 Geo. 4, c. 29, s. 29. *Reg.* v. *Hale*, 2 Car. & K. 326.

A mere *battery* is not sufficient to come within this enactment. *Ib.*

There must be a *beating* in the popular sense of the word. *Ib.*

Rabbits.]—Destroying rabbits in the night-time, in a rick-yard in which they were kept, was not within 7 & 8 Geo. 4, c. 29, s. 30. *Rex* v. *Garratt*, 6 Car. & P. 369.

—— **Taking—What is.**]—Taking a rabbit in a wire was sufficient to constitute an offence within 5 Geo. 3, c. 14, s. 6, though the rabbit was not killed, and though the party never took it away. *Rex* v. *Glover*, R. & R. 269.

Poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the crown. They placed the rabbits in a ditch upon the land, some of the rabbits in bags, and some strapped together. They had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but put them in a ditch as a place of deposit till they could conveniently remove them. About three hours afterwards the prisoner came back, and began to remove the rabbits:—Held, that the taking of the rabbits and the removal

of them was one continuous act, and that the removal was therefore not larceny. *Reg.* v. *Townley*, 40 L. J., M. C. 144; L. R. 1 C. C. 315; 24 L. T. 517; 19 W. R. 725; 12 Cox, C. C. 59.

—— **Reduction into Possession.**] — The prisoner was employed to trap wild rabbits, and it was his duty to take them when trapped to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land, and placed them in a bag, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them, and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits with the intention of appropriating them to his own use:—Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them. *Reg.* v. *Petch*, 38 L. T. 788; 14 Cox, C. C. 17.

iv. *Birds.*

Exercise of Legal Right.]—Section 23 of 24 & 25 Vict. c. 96, does not apply where the killing of pigeons, though unlawful, is done by the party for the protection of his own property, and under the bonâ fide belief that he is acting in the exercise of a legal right. *Taylor* v. *Newman*, 4 B. & S. 69; 32 L. J., M. C. 186; 8 L. T. 424; 11 W. R. 752; 9 Cox, C. C. 314.

Rooks.]—Rooks at their natural liberty are not the subject of larceny. *Hannam* v. *Mockett*, 2 B. & C. 934; 4 D. & R. 518; 2 L. J. (O.S.) K. B. 183; 26 R. R. 591.

Partridges.]—*See* ante, col. 1351.

v. *Fish.*

Indictment.]—Semble, an indictment on 5 Geo. 3, c. 14, s. 1, for stealing fish out of a river running through an enclosed park, need not have stated the ways, means, or devices by which the fish were taken. *Rex* v. *Carradice*, R. & R. 205.

Place where Fish are Bred, Kept, and Preserved.]—On an indictment on 5 Geo. 3, c. 14, s. 1, for entering an enclosed park, and taking fish bred, kept, and preserved there, in the river Kent, running through the park, it appeared that the park was walled round, except where the river entered and passed out, and that there were fences to keep in the deer, that there was nothing to keep in the fish, that they were not known to breed there, that nothing was done to stock the river, but that persons were never suffered to angle in the park without leave:—Held, that this was not a place where fish were to be considered as "bred, kept, or preserved" within the meaning of the act. *Ib.*

Stream in Enclosed Ground.]—A stream of water running by the side of a piece of ground, which is enclosed on every side except that on which it is bounded by the water, was not a stream in inclosed ground, within 5 Geo. 3, c. 14, s. 3, so as to subject a person fishing therein to the penalty inflicted by that act. *Leslie* v. *Brown*, 1 Marsh. 127; 5 Taunt. 440.

Proof of Offence.]—A defendant formed an oyster-bed in a part of the Menai Straits where persons had been accustomed to dredge for oysters. The plaintiff bought of a dredger a quantity of oysters, when the defendant, having been informed that the oysters were taken from his bed, gave the plaintiff into custody on a charge of having in his possession stolen oysters. The plaintiff having been discharged, brought an action for false imprisonment, when the defendant relied on 7 & 8 Geo. 4, c. 29, s. 36; and, in order to show that he acted bonâ fide and under the belief that the oysters were stolen, he tendered in evidence the record of the conviction of a person who had shortly before been tried for taking oysters from the same bed of the defendant:—Held, that the record, merely as such, was inadmissible. *Thomas* v. *Russell*, 9 Ex. 764; 2 C. L. R. 542; 23 L. J., Ex. 233; 2 W. R. 418.

To try a Right.]—A person who fished in a fishery belonging to another, but to which he had a claim, for the purpose of giving occasion to an action in order to try the right, was not liable to a penalty under 5 Geo. 3, c. 14. *Kinnersley* v. *Orpe*, 2 Dougl. 517.

Conviction—Form of.]—A conviction under 5 Geo. 3, c. 14, for killing fish in a private river, without the consent of the owner, should state the offence to have been committed in an inclosed ground. *Wickes* v. *Clutterbuck*, 10 Moore, 63; 2 Bing. 483; 3 L. J. (O.S.) C. P. 67. S. P., *Rex* v. *Sadler*, 2 Chit. 519.

And that it was without the consent of such owner. *Rex* v. *Daman*, 2 B. & Ald. 378; 1 Chit. 147. S. P., *Rex* v. *Corden*, 2 Burr. 2279.

So, a conviction on the same statute, for fishing without consent of the owner, "in part of a certain stream which runs between B. in the parish of A., in the county of W., and C., in the same parish and county," quashed, because it did not appear that the intermediate course of the stream between the two termini in which the offence was alleged to be committed was in the county of W., and within the jurisdiction of the convicting magistrate. *Rex* v. *Edwards*, 1 East, 278.

Objection to a conviction for unlawfully taking and killing fish, in that it did not allege that the defendant had not the licence or consent of the owner: but that it merely alleged that he took and killed the fish unlawfully and against the form of the statute, is insufficient, and therefore it was quashed. *Rex* v. *Mallinson*, 2 Burr. 679; 2 Ld. Ken. 384.

vi. *Dogs.*

Dogs, not being the subject of larceny at common law, were not chattels within 7 & 8 Geo. 4, c. 29, s. 53. *Reg.* v. *Robinson*, Bell, C. C, 34; 28 L. J., M. C. 58; 5 Jur. (N.S.) 203; 7 W. R. 203. *See* 24 & 25 Vict. c. 96, s. 18.

vii. *Carcases or Skins.*

Killing with Intent to Steal.]—Where a man was indicted under 14 Geo. 2, c. 6, for killing sheep with intent to steal the whole carcase, proof of killing with intent to steal part of the carcase was sufficient to support the charge. *Rex* v. *Williams*, 1 M. C. C. 107.

Cutting off part of a sheep whilst it is alive

with intent to steal such part, will support an indictment for killing with intent to steal part of the carcase, if the cutting off must occasion its death. *Rex* v. *Clay*, R. & R. 387.

On the trial of an indictment for killing a ewe with intent to steal the carcase, it appeared that the prisoner wounded the ewe by cutting her throat, and was then interrupted by the prosecutor, and the ewe died of the wound two days afterwards. It was found by the jury who convicted the prisoner, that he intended to steal the carcase of the ewe; and the judges held the conviction right. *Reg.* v. *Sutton*, 8 Car. & P. 291; 2 Lewin, C. C. 272; 2 M. C. C. 34.

Indictment.]—An indictment charged in the first count, that A. and B. killed a sheep, with intent to steal one of its hind legs; and, in the second count, that C. received nine pounds weight of mutton so stolen as aforesaid; and in the third count, that C. received the mutton "of a certain evil-disposed person," scienter, &c.:—Held, that, on this form of indictment, all the three prisoners might be properly convicted. *Rex* v. *Wheeler*, 7 Car. & P. 170.

viii. *Fixtures.*

What is a "Building."]—The prisoners were convicted upon an indictment which charged them with stealing lead fixed to a certain wharf. It was proved that the lead stolen formed the gutters of two brick, timber and tile built sheds erected upon the prosecutor's wharf:—Held, that the conviction was good, the lead being fixed to a building within 7 & 8 Geo. 4, c. 29, s. 44. *Reg.* v. *Rice*, Bell, C. C. 87: 28 L. J., M. C. 64; 5 Jur. (N.S.) 273; 7 W. R. 232; 8 Cox, C. C. 119.

An unfinished building, intended as a cart-shed, which is boarded up on all its sides, and has a door with a lock to it, and the frame of a roof with loose gorse thrown upon it, because it is not yet thatched, is a building within 7 & 8 Geo. 4, c. 29, s. 44. *Rex* v. *Worrall*, 7 Car. & P. 516.

A church was a building within 4 Geo. 2, c. 32. *Rex* v. *Hickman*, 1 Leach, C. C. 318; 2 East, P. C. 593. S. P., *Rex* v. *Parker*, 2 East, P. C. 592; 1 Leach, C. C. 320, n.

Metal, &c., affixed to Land.]—The prisoners were convicted upon an indictment framed under 7 & 8 Geo. 4, c. 29, s. 44, of stealing metal fixed in land. It was proved that they had stolen a copper sun-dial fixed upon a wooden post in a churchyard:—Held, that the conviction was right. *Reg.* v. *Jones*, Dears. & B. 655; 27 L. J., M. C. 171; 4 Jur. (N.S.) 394; 6 W. R. 470; 7 Cox, C. C. 498.

Stealing iron rails from a tomb in a churchyard, not connected by any building with the church, was not within 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68. *Rex* v. *Davis*, 2 East, P. C. 593; 1 Leach, C. C. 496, n.

Semble, that the stealing of brass fixed to tombstones in a churchyard was a felony under 7 & 8 Geo. 4, c. 29, s. 44. *Rex* v. *Blick*, 4 Car. & P. 377.

Leaden images, on pedestals, fixed in the ground near a summer-house, the summer-house being in an inclosed field (but not within the same inclosure as the house), were not within 4 Geo. 2, c. 32. *Rex* v. *Richards*, R. & R. 28.

A larceny may be committed of window sashes which are neither hung nor beaded into the frames, but merely fastened by laths nailed across the frames to prevent their shaking out; as they are not fixed to the freehold. *Rex* v. *Hedges*, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

—— By whom Committed — Tenant.]—A person who procured possession of a house under a written agreement between him and the landlord, for a lease of twenty-one years, with a fraudulent intention to steal the fixtures thereto belonging, was, by stealing the lead affixed to the house, guilty of larceny on 4 Geo. 2, c. 32. *Rex* v. *Munday*, 2 Leach, C. C. 850; 2 East, P. C. 594.

Indictment.]—An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms of which A. and B. are separate tenants in the same house. *Rex* v. *Finch*, 1 M. C. C. 418.

Evidence.]—A. was indicted at common law in Middlesex for larceny of lead taken from the roof of a church in Buckingham:—Held, not indictable in Middlesex as the original taking not being larceny, but only a statutable felony, the subsequent possession could not be considered larceny. *Rex* v. *Millar*, 7 Car. & P. 665.

In support of an indictment for stealing lead fixed to a dwelling-house, proof that the prosecutor received the rent is sufficient primâ facie evidence of his ownership. *Reg.* v. *Brummitt*, L. & C. 9; 3 L. T. 679; 9 W. R. 257; 8 Cox, C. C. 413.

A person, on a count (in the usual form) for stealing lead affixed to a building, cannot be convicted of larceny; and in order to warrant a conviction on such count, the jury must be satisfied that he unfixed the lead from the building or was present aiding and assisting. *Reg.* v. *Gooch*, 8 Car. & P. 293.

ix. *Trees and Plants.*

Trees—Adjoining any Dwelling-house.]—In 7 & 8 Geo. 4, c. 29, s. 38, the words "adjoining any dwelling-house" imported actual contact, and therefore ground separated from a house by a narrow walk and paling with a gate in it, was not within their meaning. *Rex* v. *Hodges*, M. & M. 341.

—— Garden—Question for Jury.]—Whether ground is properly described as a garden within that section, is a question for the jury. *Ib.*

—— Amount of Injury—How Ascertained.]—The 24 & 25 Vict. c. 96, s. 32, enacts, that whosoever shall steal or cut, destroy or damage with intent to steal the whole or any part of any tree, &c., shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 5*l.*) be guilty of felony. In estimating the injury, the amount of the injury done to two or three trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction. *Reg.* v. *Shepherd*, 37 L. J., M. C. 45; L. R. 1 C. C. 118; 17 L. T. 482; 16 W. R. 373; 11 Cox, C. C. 119.

—— Conviction—Validity of.]—A conviction under the 7 & 8 Geo. 4, c. 29, s. 39, for

stealing an ash tree, the property of M., ordered the offender "to forfeit and pay, over and above the value of the tree stolen, 5*s*., and for the value of the tree 1*s*.; and also to pay 1*l*. 4*s*. 6*d*. for costs, to be paid on or before March 19th, and, in default of payment of the sums, to be imprisoned for one month, unless the sums should be sooner paid." It was then ordered that the 5*s*. should be paid to the overseer, and the 1*s*. to the person aggrieved, and the 1*l*. 4*s*. 6*d*. should be immediately paid to R., the complainant. The information had been laid by R. before one magistrate, who had granted a summons, and the case heard, and the conviction made by another. On an action for false imprisonment being brought against the convicting magistrate:—Held, that the conviction was not invalidated, first, by reason of its not having taken place upon the information of the person aggrieved. Secondly, nor from its having taken place before a magistrate who did not receive the original information. Thirdly, nor by the mode of adjudicating as to the costs. *Tarry* v. *Newman*, 2 New Sess. Cas. 449; 15 M. & W. 645; 15 L. J., M. C. 160.

"Plant"—"Vegetable Production"—Young Fruit Trees.]—The words "plant" and "vegetable production" in s. 42 of 7 & 8 Geo. 4, c. 29, did not apply to young fruit trees. *Rex* v. *Hodges*, M. & M. 341.

Cultivated Root or Plant—Clover.]—Clover was a cultivated root or plant used for the food of beasts within s. 43 of 7 & 8 Geo. 4, c. 29, and therefore the subject of larceny. *Reg.* v. *Brumby*, 3 Car. & K. 315; 5 Cox, C. C. 315.

3. Persons who may Commit Offence.

a. Clerks or Servants.

Who are Clerks or Servants.]—On the trial of an indictment for larceny as servant, it appeared that the prisoner lived in the house of the prosecutor, and acted as nurse to his sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages. While the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a coal bill, which money the prisoner kept, and brought back a forged receipt to the coal bill:—Held, that the prisoner was not the servant of the prosecutor, but that this was a larceny of the money. *Reg.* v. *Smith*, 1 Car. & K. 428.

A person employed as a distraining broker, if engaged in the service of the prosecutor only, and paid a salary by him, is a servant within 24 & 25 Vict. c. 96, s. 67. *Reg.* v. *Flanagan*, 10 Cox, C. C. 561.

A member of two unenrolled benefit clubs, paid as secretary, and intrusted with the funds to deposit in the bank in the joint names of himself and the treasurer, dishonestly appropriating to himself the sums intrusted to him, cannot be found guilty of larceny as a servant. *Reg.* v. *Marsh*, 3 F. & F. 523.

The driver of a glass-coach hired for the day is not the servant of the party hiring it, so as to bring him within 7 & 8 Geo. 4, c. 29, s. 46. *Rex* v. *Haydon*, 7 Car. & P. 445.

—— Question for Jury.]—The prisoner lived with the prosecutor as his wife, and was authorised by him to draw and sign cheques and bills in his name, he being blind and unable to do this himself. He entrusted her with a large sum of money to pay into the bank, which she did not do, but appropriated it to her own use:—Held, that the question, whether she was a servant to the prosecutor, was one for the jury. *Reg.* v. *Warren*, 10 Cox, C. C. 359.

b. Tenants or Lodgers.

Of what Goods—Chattel Changed.]—The prisoners were tenants and occupiers of a house in which were certain gas-fittings belonging to a public company. It became necessary that a gas-meter should be changed, and the old one was taken down and left in the custody of the prisoners till called for by the company's servant. In the meantime they converted it to their use:—Held, that they could not be convicted of larceny. *Reg.* v. *Mattheson*, 3 Cox, C. C. 276.

A tenant stealing goods from a ready-furnished house was not guilty of felony, within 3 Will. & M. c. 9, s. 5. *Rex* v. *Palmer*, 2 Leach, C. C. 680; 2 East, P. C. 586.

c. Persons in the Public Service.

Amount taken.]—An indictment, framed upon 2 & 3 Will. 4, c. 4. s. 1, alleged that A., being employed in the public service, and intrusted, by virtue of such employment, with the receipt of money, the property of the Queen, fraudulently applied to his own use 5,000*l*. so received, and feloniously stole the same. It was proved that he was an officer of inland revenue, and received certain taxes; that it was his duty to make returns to inspectors, and that these returns, when rendered, showed a much larger balance in his hands than he was allowed to retain. At last his accounts were examined, and a statement extracted from them was produced to him, showing a balance in his hands of 5,214*l*. and a fraction, which he admitted to be correct. He was then asked if he was prepared to hand over that balance, or any part of it, and he said he was not. He was then reminded that there was a balance of 300*l*. against him from the previous Monday, which was a receipt day at T. A. then took out a sum of money less than the 300*l*., and, on being asked what he had done with the rest, said he had spent it in an unfortunate speculation:—Held, that the evidence in respect of the 300*l*. was sufficient to sustain a conviction. *Reg.* v. *Moah*, Dears. C. C. 626; 25 L. J., M. C. 66; 2 Jur. (N.S.) 213; 7 Cox, C. C. 60; 4 W. R. 255.

d. Post-Office Servants and Others.

What amounts to a Stealing.]—Fraudulently obtaining the mail bags by delivery from one in the post-office to the prisoner, is a stealing out of the post-office. *Rex* v. *Pearce*, 2 East, P. C. 603.

The horse mail bags, being left by the mail rider after he had taken possession of them for a temporary purpose for two minutes, were stolen during his absence:—Held, within the 52 Geo. 3, c. 143, s. 3. *Rex* v. *Robinson*, 2 Stark. 485.

A letter carrier, whose duty it was, in case he was unable to deliver any letter, to bring it to the post-office on his return from delivery, not having delivered a letter containing money, gave no account of it, and being asked why he had not delivered it, produced it unopened, and the coin safe within, from his trousers pocket,

stating, untruly, that the house where it ought to have been delivered was closed. Upon an indictment for stealing the letter, the jury found him guilty, and that he detained it with the intention of stealing it:—Held, that so dealing with the letter amounted to larceny. *Reg.* v. *Poynton*, L. & C. 247; 32 L. J., M. C. 29; 8 Jur. (N.S.) 1218; 7 L. T. 434; 11 W. R. 73; 9 Cox, C. C. 249.

A person employed in the post-office committed a mistake in the sorting of two letters containing money, and he threw the letters unopened, and the money, down a water-closet, in order to avoid a penalty attached to such mistakes:—Held, that there was a larceny of the letters and money, and also a secreting of the letters. *Reg.* v. *Wynn*, 2 Car. & K. 859; 1 Den. C. C. 365; T. & M. 32; 3 New Sess. Cas. 414; 18 L. J., M. C. 51; 13 Jur. 107; 3 Cox, C. C. 271.

To constitute the offence of stealing a letter from a place for the receipt of letters, under 52 Geo. 3, c. 143, s. 2, it was essential that the letter should be carried out of the shop which was the place for the receipt of letters; and, therefore, if a person took a letter and stole its contents, without taking the letter out of the shop, that was not an offence within that statute. *Rex* v. *Pearson*, 4 Car. & P. 571.

Causing Postman to intercept Letter—Principal or Accessory.]—A person who induces a servant of the Post Office to intercept and hand over a letter which is in course of transmission by the post is either guilty of larceny as a principal felon, or is accessory before the fact to the larceny committed by the servant of the post-office, and in either view can be convicted on an indictment charging him with larceny of the letter. *Reg.* v. *James*, 59 L. J., M. C. 96; 24 Q. B. D. 439; 62 L. T. 578; 17 Cox, C. C. 24; 54 J. P. 615.

Servants, who are.]—S. delivered two 5*l.* notes to D., the wife of the postmaster of C., at which post-office money orders were not granted, and asked her to send them by G., the letter-carrier, from C. to W., in order that he might get two 5*l.* money orders for them at the W. post-office. D. gave these instructions to G., and put the notes, by his desire, into his bag. G. afterwards took the notes out of the bag, and pretended, when he got to the W. post-office, that he had lost them. It was found by the jury that G. had no intention to steal the notes when they were given to him by D.:—Held, that this taking of the notes by G. was not a larceny, the notes not being in his possession in the course of his duty as a post-office servant. *Reg.* v. *Glass*, 2 2 Car. & K. 395; 1 Den. C. C. 215; 2 Cox, C. C. 236.

S., post-mistress of G., received from A. a letter unsealed, but addressed to B., and with it 1*l.* for a post-office order, 3*d.* for the poundage on the order, 1*d.* for the postage, and 1*d.* for the person who got the order. S. gave the letter, unsealed, and the money, to the prisoner, who was the letter-carrier from G. to L., telling him to get the order at L. and inclose it in the letter, and post the letter at L. The prisoner destroyed the letter, never procured the order, and kept the money:—Held, that he was indictable for stealing, embezzling and destroying a post letter, he being at the time in the employ of the post-office. *Reg.* v. *Bickerstaff*, 2 Car. & K. 761.

If a person, while engaged in gratuitously assisting a post-master, at his request, in sorting the letters, steals one of them, he is liable to the severer penalties imposed by 7 Will. 4 & 1 Vict. c. 36, s. 26, as a person employed under the post-office. *Reg.* v. *Reason*, Dears. C. C. 226; 2 C. L. R. 120; 23 L. J., M. C. 11; 17 Jur. 1014; 2 W. R. 54; 6 Cox, C. C. 227.

A person employed at a receiving-house of the general post-office to clean boots, and to assist in tying up the letter bag, was not a servant of the post-office within 52 Geo. 3, c. 143, s. 2. *Rex* v. *Pearson*, 4 Car. & P. 572.

S. was employed by a post-mistress to carry letters from Dursley to Berkeley, at a weekly salary paid him by the post-mistress, but which was repaid to her by the post-office:—Held, that S. was a person employed by the post-office within 52 Geo. 3, c. 143, s. 2. *Rex* v. *Salisbury*, 5 Car. & P. 155.

Receiving-Houses.]—A receiving-house was not a post-office within 52 Geo. 3, c. 143, s. 2, but it was a place for the receipt of letters, and the whole shop was to be considered as the place for the receipt of letters, and not the mere letter-box; and, therefore, if a person took a letter and put it on the shop-counter of the receiving-house or gave it to one of the persons belonging to the shop there, that was a putting the letter into the post. *Rex* v. *Pearson*, 4 Car. & P. 572.

Post Letters, what are.]—The president of a department in the post-office put a half-sovereign into a letter, on which he wrote a fictitious address, and dropped the letter, with the money in it, into the letter-box of a post-office receiving-house, where the prisoner was employed in the service of the post-office. The prisoner stole the letter and money:—Held, that this was a stealing of a post letter, containing money, and that this was not the less a post letter within 7 Will. 4, & 1 Vict. c. 36, s. 26, because it had a fictitious address. *Reg.* v. *Young*, 2 Car. & K. 446; 1 Den. C. C. 194; 2 Cox, C. C. 142.

R., an officer in the post-office in London, intending to try the honesty of G., the post-mistress of Enstone, went to Oxford, and having put marked money into a letter, directed "Thomas Hicks, Radford-lane, Exeter," placed this letter in a bundle of letters in the Oxford post-office, which was to go to the Enstone post-office. This letter going in the bundle of letters to the Enstone post-office, G. took out the marked money, and denied any knowledge of the letter. R. neither knew any person named Thomas Hicks, nor that there was any such place as Radford-lane in Exeter:—Held, that this was not a stealing of a post letter, but that the taking of the money by G. was a larceny. *Reg.* v. *Gardener*, 1 Car. & K. 628. Overruled by preceding case.

A post-office being at an inn, a person was sent to put a letter, containing promissory notes, into the post. He took it to the inn, with money to pre-pay the postage; he did not put it into the letter-box, but laid the letter, and the money upon it, upon a table in the passage of the inn, in which passage the letter-box was, and he pointed out the letter to the prisoner, who was a female servant at the inn, who said she would "give it to them." The prisoner, who was not authorised by the innkeeper, her master, to receive letters for him, stole the letter and its contents:—Held, that this was not a post letter within 7 Will. 4 &

1 Vict. c. 36, ss. 27, 28; and that the stealing of the letter and its contents by the prisoner was not an offence within either of those sections. *Reg.* v. *Harley*, 1 Car. & K. 89.

An inspector secretly put a letter, prepared for the purpose, containing a sovereign, amongst some letters, which a letter-carrier, suspected of dishonesty, was about to sort. The letter-carrier stole the letter and the sovereign:—Held, not rightly convicted of stealing a post letter, such letter not having been put in the post in the ordinary way; but rightly convicted of larceny of the sovereign, laid as the property of the Postmaster-General. *Reg.* v. *Rathbone*, 2 M. C. C. 242; Car. & M. 220.

A. brought a letter, enclosing a 10*l.* note, to a district receiving-house, and desired that it might be registered. The post mistress took the money for the registration, and, being busy at the time, requested A. to call again. In the meantime she put the letter under a glass case, to which the prisoner had access. When the letter was taken up, for the purpose of being despatched, it was found that the note had been extracted:—Held, that the letter was a post letter. *Reg.* v. *Rogers*, 5 Cox, C. C. 293.

A. was indicted for stealing a post letter containing money, he being a sub-sorter at the general post-office. An inspector of the post-office had put some marked money into a letter, which was then sealed, and stamped with the usual postage stamp. It was addressed to Mr. H., and delivered in at the window of the post-office to another inspector, who handed it to a third. This last locked it up for the night, and on the following morning gave it to a sorter, who, according to his instructions, secretly placed it among other letters which A. in due course would have to sort. He opened and secreted the letter, abstracting the money, which was found upon him. It was no part of the ordinary duty of the inspector to receive letters at the window, but the whole scheme was arranged for the detection of A.:—Held, that he could not be convicted of stealing a post letter. *Reg.* v. *Shepherd*. Dears. C. C. 606; 25 L. J., M. C. 52; 2 Jur (N.S.) 96; 4 W. R. 237.

A servant, being sent with a letter, and a penny to pre-pay the postage of it at a receiving-house, found the door shut, and in consequence put the penny inside the letter, and fastened it in by means of a pin, and then put the letter into an unpaid letter-box. A messenger in the general post-office stole this letter, with the penny in it:—Held, that he might be convicted of stealing a post letter containing money, although the money was not put into the letter for the purpose of being conveyed, by means of it, to the person to whom it was addressed. *Reg.* v. *Mence*, Car. & M. 234.

Indictment.]—A post-office order, for the payment of 5*l.* in the ordinary form, is a warrant and order for the payment of money, and may be so described in an indictment for larceny. *Reg.* v. *Gilchrist*, 2 M. C. C. 233; Car. & M. 224.

In an indictment on 7 Will. 4 & 1 Vict. c. 36, s. 26, for secreting a post letter, it is not necessary to state the purpose for which the letter was secreted. *Reg.* v. *Wynn*, 2 Car. & K. 859; 1 Den. C. C. 365; T. & M. 32; 18 L. J., M. C. 51.

Evidence.]—Possession by a letter carrier of a bank note some months after it had been sent by post and lost, is not sufficient evidence of a felonious stealing by him, although not accounted for otherwise than by his mere assertion that he had found it. *Reg.* v. *Smith*, 3 F. & F. 123.

At the trial of a person on 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under the post-office, it was sufficient to prove that such person acted in the service of the post-office, and it was not necessary to go into proof of his appointment. *Rex* v. *Rees*, 6 Car. & P. 606.

On an indictment under s. 1 of 7 Geo. 3, c. 50, stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either is sufficient. *Rex* v. *Ellins*, R. R. 188.

Where a tradesman, being a district postmaster, gave his servant, the prisoner, a paper, and told him to go before the magistrate to take the oath usually taken by persons in the employ of the post-office, and to get the paper properly filled up, evidence that the prisoner then went out and shortly after returned showing the paper, and stating that he had taken the oath, is sufficient to show that he was in the employ of the post-office. *Reg.* v. *Simpson*, 4 Cox, C. C. 275.

Retaining Post Letters.]—A letter containing a post-office order, directed to John Davies, was misdelivered to John Davis, one of the prisoners. Not being able to read, he took it to W. D., the other prisoner, who read it to him. He then said the letter and order were not for him, but was advised by W. D. to keep them and get the money. Both prisoners then went to the post-office, obtained the money, and appropriated it to their own use:—Held, that a conviction for larceny of the order could not be supported. *Reg.* v. *Davis*, Dears. C. C. 640; 25 L. J., M. C. 91; 2 Jur. (N.S.) 478; 4 W. R. 492; 7 Cox, C. C. 104. *See* 7 Will. 4 & 1 Vict. c. 36, s. 31.

Where a letter enclosing a cheque was directed to James Mucklow, St. Martin's-lane, Birmingham, and no person of that name lived there, but the prisoner lived about ten yards from St. Martin's-lane, and another James Mucklow lived in New Hall-street; and the prisoner, in consequence of a message left by the postman, got the letter from the post-office, and appropriated the cheque to his own use:—Held, that it was not a felonious taking. *Rex* v. *Mucklow*, Car. C. L. 280; 1 M. C. C. 160.

e. Fraudulent Bailees.

Who is a Bailee—Keeper of Shire-hall.]—A hall-keeper appointed by the justices is not bailee of any of the contents of the shire-hall, but is the servant of the inhabitants, and, if he converts to his own use any of the property committed to his care, he may be indicted for larceny. *Reg.* v. *Winbow*, 5 Cox, C. C. 346.

—— **Infant over Fourteen.**]—An infant over fourteen years of age fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same:—Held, that he was rightly convicted of larceny as a bailee of the goods under 24 & 25 Vict. c. 96, s. 3. *Reg.* v. *McDonald*, 15 Q. B. D. 323; 52 L. T. 583; 33 W. R. 735; 15 Cox, C. C. 757; 49 J. P. 695—C. C. R.

—— **Receiving Money on behalf of Another.**]—A person who receives money on behalf of

another, does not thereby become a bailee of the money. *Reg.* v. *Hoare*, 1 F. & F. 647.

A prisoner was convicted of larceny under the following circumstances:—The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday. On the next Wednesday the prosecutor did not go himself to sell his mare, but sent his wife, who went to where the prisoner was and saw him riding the mare about a horse fair, and sell her to a third party, and receive on such sale some money. The prosecutor's wife after such sale asked the prisoner to give her the money, saying she would pay his expenses. This the prisoner declined to do, and eventually he absconded with the money and without accounting:—Held (Stephen, J., dissenting), that there was evidence that the prisoner was a bailee of the money thus paid to him, and that the conviction could be supported. *Reg.* v. *Banks*, 53 L. J., M. C. 132; 13 Q. B. D. 29; 50 L. T. 427; 32 W. R. 722; 15 Cox, C. C. 450; 48 J. P. 470—C. C. R.

—— **Receiving Money to buy Goods.**]—The prosecutor gave the prisoner money to buy half a ton of coals for him. He bought the coals, and took a receipt in his own name, and used his own horse and cart to fetch them, but on the way home he appropriated a portion of the coals to his own use, and afterwards pretended to the prosecutor that he had delivered to him the full quantity:—Held, that even if it was necessary to show a specific appropriation of the coals to the prosecutor, there was sufficient evidence of such appropriation, and that the prisoner was rightly convicted of larceny as a bailee. *Reg.* v. *Bunkall*, L. & C. 371; 33 L. J., M. C. 75; 10 Jur. (N.S.) 216; 9 L. T. 778; 12 W. R. 414; 9 Cox, C. C. 419.

A carrier who, receiving money to procure goods, obtained and duly delivered the goods, but fraudulently retained the money, may be convicted of larceny as a bailee. *Reg.* v. *Wells*, 1 F. & F. 109.

The prisoner was employed by the prosecutor to fetch coals from C. Before each journey the prosecutor made up to the prisoner 24*l*., out of which he was to pay for the coals, keep 23*s*. for himself, and if the price of the coal, with the 23*s*., did not amount to 24*l*., to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal as he obtained it with the money received from the prosecutor; and the prosecutor did not know but that he did so; but provided he was supplied with the coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th March, the prisoner had a balance of 3*l*. in hand, and the prosecutor gave him 21*l*. to make up 24*l*. for the next journey. The prisoner did not buy any coal, but fraudulently appropriated it:—Held, that a conviction for larceny of the 21*l*. as a bailee was right. *Reg.* v. *Aden*, 29 L. T. 467; 12 Cox, C. C. 512.

—— **Carrier selling part of Goods.**]—A carrier employed by the prosecutor to deliver in his (the prisoner's) cart a boat's cargo of coals to persons named in a list, to whom only he was authorised to deliver them, and having fraudulently sold some of the coals, and appropriated the proceeds, is properly convicted of larceny as a bailee. *Reg.* v. *Davies*, 14 L. T. 491; 14 W. R. 679; 10 Cox, C. C. 239.

—— **Delivery of Goods for Sale.**]—A person delivered two brooches to the prisoner to sell for him at 200*l*. for one and 115*l*. for the other, and he was to have them for a week for that purpose; but two or three days' grace might be allowed. After ten days had elapsed, he sold them, with other jewellery, for 250*l*., but arranged with the vendee that he might redeem the brooches for 110*l*. before September:—Held, that this amounted to a fraudulent conversion of the brooches to his own use by a bailee within 24 & 25 Vict. c. 96, s. 3. *Reg.* v. *Henderson*, 11 Cox, C. C. 593; 23 L. T. 628.

A traveller was entrusted with pieces of silk (about 95 yds. each) to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any might have been sold, and the numbers, quantities, and prices of the silk sold. All goods not so accounted for remained in his hands and were considered by his employers as stock. At the end of each half-year it was his duty to send in an account for the entire six months, and to return the unsold silk. Within six months after four pieces of silk had been delivered to him, the traveller rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use:—Held, that he could be properly convicted of larceny as a bailee. *Reg.* v. *Richmond*, 29 L. T. 408; 12 Cox, C. C. 495.

—— **Delivery of Animals to Sell.**]—A drover employed to drive pigs and paid the expenses of driving them, being paid wages by the day, but having the liberty of driving the cattle of any other person, is a bailee. *Reg.* v. *Hey*, T. & M. 209; 1 Den. C. C. 602; 2 Car. & K. 983; 3 Cox, C. C. 582; 14 Jur. 154. *And see cases* ante, cols. 1340, et seq.

—— **Delivery of Security.**]—Where a person has been entrusted by another with a valuable security, with authority and instructions to raise thereon a loan for that other person, and having effected the loan and received the proceeds in cash misappropriates the latter to his own use, proof of these facts constitutes evidence on which he may be convicted of larceny as a bailee of the money received. *Reg.* v. *Holloway* (*Governor*), 66 L. J., Q. B. 830; 77 L. T. 247.

—— **Delivery of Bills of Exchange to get Discounted.**]—The prosecutor asked prisoner if he could get bills of exchange discounted, and prisoner replied that if prosecutor was a person of credit he could get his discounted. Three bills were then drawn by prisoner payable to his order, which prosecutor accepted, and delivered to the prisoner to get discounted. The proceeds of the discounting were to be handed to the prosecutor, less the prisoner's commission, or the bills to be returned. The prisoner being pressed by a creditor for a debt, less than the amount of the bill indorsed to him, gave one of the bills in payment, representing it as his own bill, and asking the creditor to discount the balance of the bill. The bill was not indorsed upon the condi-

tion of the creditor's discounting the balance; and the jury found that it was the prisoner's intention, when he indorsed the bill, to pass the property in it absolutely to the creditor:—Held, that he might properly be convicted of larceny as a bailee of a bill of exchange under 24 & 25 Vict. c. 96, s. 3. *Reg.* v. *Oxenham*, 46 L. J., M. C. 125; 35 L. T. 490; 13 Cox, C. C. 349.

—— **Delivery of Bills of Exchange for Particular Purpose.**]—Whilst in treaty with Messrs. G. & P. for the sale and transfer of a public-house licence, the prisoner was required by them to give security for the purchase money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which the latter was to deposit with G. & P. by way of security, and not negotiate or use for any other purpose, and if the transfer was not effected, was to return to the prosecutor. The prisoner, instead of depositing them with G. & P., converted two of them to his own use:—Held, that he was not a bailee within s. 3 of 24 & 25 Vict. c. 96, and could not be convicted under that section. *Reg.* v. *Cosser*, 13 Cox, C. C. 187.

—— **Trustee of Friendly Society.**]—A., who was a trustee of a friendly society, was appointed by a resolution of the society to receive money from the treasurer, and carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank, he applied it to his own purposes. He was indicted for stealing, as bailee of the money of the treasurer, and also for a common law larceny, the money being laid as that of the treasurer. The 18 & 19 Vict. c. 63, s. 18, vests the property of friendly societies in the trustees, and directs that in all indictments the property shall be laid in their names:—Held, that A. could not be convicted of larceny as a bailee. *Reg.* v. *Loose*, Bell, C. C. 259; 29 L. J., M. C. 132; 6 Jur. (N.S.) 513; 2 L. T. 254; 8 W. R. 422; 8 Cox, C. C. 302.

A member of two unenrolled benefit clubs, paid as secretary, and intrusted with the funds to deposit in the bank in the joint names of himself and the treasurer, dishonestly appropriating to himself the sums intrusted to him, cannot be found guilty of larceny as a bailee. *Reg.* v. *Marsh*, 3 F. & F. 523.

—— **Where Summary Proceedings.**]—Boot and shoe manufacturers gave out to their workmen leather and materials to be worked up, which were entered in the men's books and charged to their debit. The men might either take them to their own homes to work up, or work them up upon the prosecutors' premises; but in the latter case they paid for the seats provided for them. When the work was done, they received a receipt for the delivery of the leather and materials and payment of the work. If the leather and materials were not re-delivered, they were required to be paid for. The prisoner Daynes was in the prosecutors' employ, and received materials for twelve pairs of boots; he did some work upon them, but instead of returning them, sold them to the prisoner Warner. These materials were entered in the prosecutors' books to Daynes' debit, but omitted by mistake to be entered in Daynes' book:—Held, that Daynes could not be convicted of larceny as a bailee, under 24 & 25 Vict. c. 96, s. 3, as the offence of which he had been guilty was punishable summarily under 13 Geo. 2, c. 8. *Reg.* v. *Daynes*, 29 L. T. 468; 12 Cox, C. C. 514.

—— **Whether Wife can be a Bailee.**]—B. was charged with larceny as a bailee. B. was a married woman, living with her husband, and at the request of a lodger in her husband's house took charge of his box, containing money. She afterwards fraudulently stole the money, and converted it to her own use. The husband knew nothing whatever of the transaction:—Held, that she was guilty of larceny as a bailee. *Reg.* v. *Robson*, L. & C. 93; 31 L. J., M. C. 22; 8 Jur. (N.S.) 64; 5 L. T. 402; 10 W. R. 61; 9 Cox, C. C. 29.

Where husband and wife were jointly indicted for larceny, as bailees, and it was proved that they took charge of the property, but the wife alone disposed of it afterwards:—Held, that neither could be convicted; the wife, because she could not be a bailee; the husband, because he was not proved to have taken part in the conversion. *Reg.* v. *Denmour*, 8 Cox, C. C. 440. *But see preceding case.*

—— **Deed Entrusted to a Professional Person for the purpose of Transfer of Mortgage.**]—The prosecutor advanced money to the prisoner, a solicitor's clerk, upon the deposit of a deed conveying the equity of redemption to the prisoner in a house of his own, and subsequently he obtained a legal mortgage from him as security for the sums so advanced. The prisoner then obtained from the prosecutor the deed conveying the equity of redemption on the representation that he had found a person who would take a transfer of the mortgage. The prisoner then obtained 140*l.* from another person on the deposit of the deed with him without notice of the prosecutor's mortgage, and appropriated the money to his own use. The judge at the trial directed the jury that the prisoner was a bailee of the deed, and the jury found that he had fraudulently converted it to his own use:—Held, that the direction was right, and that the prisoner was properly convicted of larceny as a bailee. *Reg.* v. *Tonkinson*, 44 L. T. 821; 14 Cox, C. C. 603; 45 J. P. 814.

Possession obtained by Bailee bona fide—Subsequent Felonious Intent.]—*See* ante, col. 1336.

Special Property in Goods determined by Unlawful Acts.]—*See* ante, col. 1347.

Bailment—Return of Specific Things.]—A bailment under s. 4 of the Fraudulent Trustee Act, 1857, has reference to something deposited with another to be returned in specie, and does not apply to the case of a treasurer of a money club, who is under no obligation to return to the members the specific coins intrusted to him. *Reg.* v. *Hassall*, L. & C. 58; 30 L. J., M. C. 175; 7 Jur. (N.S.) 1064; 4 L. T. 561; 9 W. R. 708; 8 Cox, C. C. 491. S. P., *Reg.* v. *Garrett*, 2 F. & F. 14; 8 Cox, C. C. 368; and *Reg.* v. *Wheeler*, 14 W. R. 848—Ir. C. C. R.

—— **Assent of Bailor.**]—A., being somewhat tipsy, lay on the ground, partly asleep, and while in that state saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing that the prisoner, with whom he had

been acquainted for some time, was acting solely from friendly motives :—Held, that this evidence disclosed a sufficient bailment to bring the case within s. 4 of the Fraudulent Trustee Act, 1857. *Reg.* v. *Reeves*, 5 Jur. (N.S.) 716.

—— **Money obtained by Fraud.**]—An indictment charged the prisoner with obtaining 26*l.* 5*s.*, the moneys of H., by false pretences. According to the prosecutor's evidence, he was induced to part with the money on the prisoner's statement that he was to pay 135*l.* for a pair of carriage horses. No such averment was contained in the indictment. It was urged that the prisoner might be convicted of larceny as a bailee ; but the money having been obtained by fraud, and the prosecutor having parted with all control as well over it as with the possession :—Held, that there was no bailment, and that he could not be convicted. *Reg.* v. *Hunt*, 8 Cox, C. C. 495.

—— **By Licence.**]—A bailment under the 21 & 22 Vict. c. 54, s. 4, does not necessarily mean a bailment by contract, but a bailment by licence is sufficient—per Martin, B. *Reg.* v. *Robson*, L. & C. 93 ; 31 L. J., M. C. 22 ; 8 Jur. (N.S.) 64 ; 5 L. T. 402 ; 10 W. R. 61 ; 9 Cox, C. C. 29.

—— **No Contract concluded or made.**]—The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on S.'s marshes and had strayed, and a few days after that they belonged to H. The prisoner left them on his marshes for a day or two, and then sent them to a long distance as his own property. He then told S. that he had lost them, and denied all knowledge of them. The jury found, 1. That at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. 2. That at the time of finding them he did not intend to steal them, but that the intention to steal them came on him subsequently. 3. That the prisoner when he sent them away did so for the purpose and with the intention of depriving the owner of them, and appropriating them to his own use :—Held, that a conviction of larceny, or of larceny as bailee, could not be sustained under the above circumstances. *Reg.* v. *Matthews*, 28 L. T. 645 ; 12 Cox, C. C. 489.

The owner of a wreck contracted with A. to salve the property. A. entered into a sub-contract with B. to do the work, B. allowing his son, the prisoner, to have charge of the wreck in his absence. The prisoner corresponded with A. as to the sale of salvage, and was addressed by A. as a responsible party under the contract, though A. stated that he considered B. as the party liable on the contract :—Held, that the prisoner was a bailee within s. 3 of the Larceny Act. *Reg.* v. *Clegg*, 11 Cox, C. C. 212 ; Ir. R. 3 C. L. 166.

Indictment—Form.]—A bailee charged with fraudulently converting bailed property under 20 & 21 Vict. c. 54, s. 4, was indicted in the ordinary form as for larceny, with a conclusion contra formam :—Held, good. *Reg.* v. *Haigh*, 7 Cox, C. C. 403.

Evidence.]—To sustain a charge of larceny by a bailee it is necessary to prove some act of conversion inconsistent with the purposes of the bailment. *Reg.* v. *Jackson*, 9 Cox, C. C. 505. See *Reg.* v. *Weekes*, 10 Cox, C. C. 224.

—— **Intent — Fraudulent Conversion.**] — Prisoner, a travelling watchmaker, on two separate occasions received from different persons watches which he was to repair. One of the watches was pledged by the prisoner in November, 1886, and the other before Christmas in that year. Upon pledging the first watch the prisoner stated that he only wanted the money for which he pledged it temporarily. And upon pledging the second watch he requested the person with whom he pledged it not to part with it, as it was not his property. Upon an indictment under 24 & 25 Vict. c. 96, s. 3, for the fraudulent conversion of the watches by the prisoner while a bailee thereof :—Held, that there was some evidence of a fraudulent conversion, i.e. an intention on the part of the prisoner to deprive the prosecutors permanently of their property, there being no evidence that any effort had been made by the prisoner to redeem the watches ; and he never having shown any intention, beyond the statements referred to, of doing so. *Reg.* v. *Wynn*, 56 L. T. 749 ; 16 Cox, C. C. 231 ; 52 J. P. 55—C. C. R.

f. Wife Taking Husband's Goods.

See cases ante, cols. 1318, 1338, 1339.

4. Taking in Particular Places or Methods.

a. From the Person.

i. *Without Violence.*

What a sufficient Asportation.]—*See cases* ante, col. 1345.

What is.]—A. asked B. what time it was, and B. took out his watch to tell him, holding his watch loosely in both hands. A. caught hold of the ribbon and key attached to the watch and snatched it from B., and made off with it :—Held, no robbery, but a stealing from the person. *Reg.* v. *Walls*, 2 Car. & K. 214.

On a trial for robbery and stealing from the person, it was proved that the prosecutor, who was paralysed, received, whilst sitting on a sofa in his room, a violent blow on the head from one of the prisoners, whilst the other went to a cupboard in the same room and stole therefrom a cash-box :—Held, that it was a question for the jury whether the cash-box was at the time under the protection of the prosecutor. If so, the charge of stealing from the person would be sustained. *Reg.* v. *Selway*, 8 Cox, C. C. 235.

A man went to bed with a prostitute, having put his watch in his hat on the table ; the woman stole the watch while he was asleep :—Held, that the offence was not a stealing from the person. *Reg.* v. *Hamilton*, 8 Car. & P. 49.

Indictment.]—An indictment for larceny from the person need not negative the force or fear necessary to constitute robbery. On such an indictment the prisoner will not be entitled to an acquittal if it appears that the offence was really robbery. *Rex* v. *Pearce*, R. & R. 174 ; 2 Leach, C. C. 1946. S. P., *Rex* v. *Robinson*, R. & R. 321.

Evidence that Property in Prosecutor's Possession.]—In a case of robbery from the

person, where the property alleged to have been stolen has not been seen or known to be safe immediately before the robbery, if there is any evidence on the subject, it is for the jury to say whether the property really was in a position to be stolen as alleged. *Reg.* v. *Wilkins*, 10 Cox, C. C. 363.

ii. *With Violence—Robbery.*

a. The Offence.

Taking—What is.]—If a robber takes a purse of money from a person and restores it to him immediately, saying, "If you value your purse take it back and give me the contents," but is apprehended before the money is delivered to him, yet the crime is completed. *Rex* v. *Peat*, 1 Leach, C. C. 228; 2 East, P. C. 557.

Carrying away—What is.]—To remove an ear-ring from the curls of a lady's hair, where it had accidentally been fixed, is a sufficient carrying away. *Rex* v. *Lapier*, 1 Leach, C. C. 320; 2 East, P. C. 557, 708.

Bodily Fear—No Threats.]—Taking money from a woman at the time of an attempt to commit a rape amounts to robbery, although there was no demand of money made by the prisoner, and it was clearly his original intent only to commit a rape. *Rex* v. *Blackham*, 2 East, P. C. 711.

Where money was given to one of the mob during the riots in London, in 1780, upon knocking at the prosecutor's door in a menacing manner:—Held, that it was robbery. *Rex* v. *Taplin*, 2 East, P. C. 712.

—— **In Case of Threats.**]—Where the prisoners threatened to bring a mob from Birmingham (then in a state of riot and disturbance), and burn the prosecutor's house if he did not give them money, and he did so under fear of that threat:—Held, a robbery. *Rex* v. *Astley*, 2 East, P. C. 729; *Rex* v. *Brown*, 2 East, P. C. 731.

So it was held in the case of a threat to tear down corn, and level the house. *Rex* v. *Simons*, 2 East, P. C. 731.

If a person by force or threats compels another to give him goods, and by way of colour obliges him to take, or if he offers, less than the value, it is robbery. *Rex* v. *Simons*, 2 East, P. C. 712. S. P., *Rex* v. *Spencer*, 2 East, P. C. 712.

—— **Threat of Legal Imprisonment.**]—Where persons under pretence of an auction got a woman into a house, and compelled her, by threats of carrying her before a magistrate and to prison for not paying for a lot pretended to have been bid for by her, to pay them one shilling through fear of prison, and for the purpose of obtaining her liberation, but without any fear of any other personal violence:—Held, not robbery, but only duress. *Rex* v. *Wood*, 2 East, P. C. 732. *See now* 24 & 25 Vict. c. 96, s. 45.

To obtain money by a threat to send for a constable, and take the party before a magistrate, and thence to prison, is not robbery; for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. *Rex* v. *Knewland*, 2 Leach, C. C. 721; 2 East, P. C. 732.

Force—What is sufficient to constitute Robbery.]—Suddenly snatching a bundle from the hands of a boy as the prisoner ran past him, is only larceny, as there was not a sufficient degree of force and terror to constitute robbery. *Rex* v. *Macaulay*, 1 Leach, C. C. 287. S. P., *Rex* v. *Robins*, 1 Leach, C. C. 290, n.; *Rex* v. *Steward*, 2 East, P. C. 702.

But snatching an article from a man will constitute robbery, if it is so attached to his person or clothes as to afford resistance. *Rex* v. *Mason*, R. & R. 419.

If prisoner takes hold of goods attached to the person of the prosecutor, and there is a struggle to obtain possession of them, this is robbery. *Rex* v. *Davies*, 2 East, P. C. 709.

To force an ear-ring from the ear of a lady, with a felonious intent to steal it, is a sufficient degree of violence to constitute robbery. *Rex* v. *Lapier*, 1 Leach, C. C. 320; 2 East, P. C. 557, 708.

To snatch a diamond pin from the head-dress of a lady, with such force as to remove it with part of the hair from the place in which it was fixed, is a sufficient violence to constitute robbery. *Rex* v. *Moore*, 1 Leach, C. C. 335.

Snatching property from the hand of another is not sufficient force to constitute highway robbery. *Rex* v. *Baker*, 1 Leach, C. C. 290; 2 East, P. C. 702.

To constitute the crime of highway robbery, the force used must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property of the party attacked, it is not highway robbery. *Rex* v. *Gnosil*, 1 Car. & P. 504.

A. asked B. what o'clock it was, and B. took out his watch to tell him, holding his watch loosely in both his hands. A. caught hold of the ribbon and key attached to the watch and snatched it from B., and made off with it:—Held, no robbery, but a stealing from the person. *Reg.* v. *Walls*, 2 Car. & K. 214.

Excessive Force by Officers.]—If a bailiff handcuffs a prisoner, under pretence of carrying him to prison with greater safety, and by means of this violence extorts money, he is guilty of robbery. *Rex* v. *Gascoigne*, 1 Leach, C. C. 280; 2 East, P. C. 709.

Threat to Charge with Unnatural Crime.]—If the property is not taken in violence, nor parted with through fear, it is no robbery; though there was sufficient legal and reasonable ground for fear, as upon a threat to charge one with an unnatural crime. *Rex* v. *Reane*, 2 East, P. C. 734; 2 Leach, C. C. 616.

The crime of robbery may be committed by obtaining money from a man, by threatening to charge him with having been guilty of sodomitical practices. *Rex* v. *Jones*, 1 Leach, C. C. 139.

To obtain money from a person against his will, by threatening to carry him before a magistrate, and to accuse him of unnatural practices, amounts to robbery, though no actual or personal violence is used. *Rex* v. *Donnally*, 1 Leach, C. C. 193; 2 East, P. C. 713, 783.

It is equally a robbery to extort money from a person, by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. *Rex* v. *Gardner*, 1 Car. & P. 479.

If a man obtains property from another by accusing him of having been guilty of an un-

natural crime, it will amount to robbery, although the party was under no apprehension of personal danger, and felt no other fear than that of losing his character. *Rex* v. *Hickman*, 1 Leach, C. C. 278 ; 2 East, P. C. 728.

Semble, it is still robbery to extort money by threatening a charge of sodomy. *Reg.* v. *Stranger*, 2 M. C. C. 261.

Obtaining money by threatening to charge a man with an unnatural crime, and carry him before a magistrate, is robbery, if there is any constraint upon his person. *Rex* v. *Cannon*, R. & R. 146.

See also post, col. 1380 et seq.

—— **Threat must be immediately before Thing taken.**]—To constitute robbery by taking money from another upon a threat of charging him with an unnatural crime, the money must be taken immediately upon the threat made, and not after the parties have separated, and there has been time for the prosecutor to deliberate and procure assistance. *Rex* v. *Jackson*, 1 East, P. C. Ad. xxi. ; 1 Leach, C. C. 193, n. ; 2 Leach, C. C. 618, n.

Threat to accuse Husband of Indecent Assault.]—Obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery. *Rex* v. *Edwards*, 5 Car. & P. 518; 1 M. & Rob. 257.

Fear of losing Character or Place.]—Where money was obtained by calling a man a sodomite and threatening him, but the money was parted with by the prosecutor, not so much from fear of losing his character as from fear of losing his place :—Held, that it was sufficient to constitute a robbery. *Rex* v. *Elmstead*, 2 Russ. C. & M. 106.

The parting with money or goods, through fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, although the party has no fear of being taken into custody, nor any dread of punishment. *Rex* v. *Egerton*, R. & R. 375.

—— **Property parted with so as to Prosecute.**]—Parting with property upon the charge of an unnatural crime will not make the taking a robbery, if it is parted with, not from the fear of loss of character, but for the purpose of prosecuting. *Rex* v. *Fuller*, R. & R. 408.

Demand of Property bona fide Made.]—A. had set wires in which game was caught ; B., a gamekeeper, found them and took them, with the game caught in them, for the use of the lord of the manor ; A. demanded them with menaces, and B. gave them up. The jury found that A. acted under a bonâ fide impression that the wires and game were his property :—Held, that it was no robbery. *Rex* v. *Hall*, 3 Car. & P. 409.

Taking out of Prosecutor's Possession.]—A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. ; B. threw down the bundle, and ran to the assistance of A., when C. took it up and made off with it. C. and D. were indicted for robbery, A. being the prosecutor :—Held, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of A. *Rex* v. *Fallows*, 5 Car. & P. 508. Sed quære. See *Reg.* v. *Thompson*, L. & C. 225 ; 32 L. J., M. C. 53 ; 7 L. T. 432 ; 11 W. R. 40 ; 9 Cox, C. C. 244..

Taking in Prosecutor's Presence.]—To constitute robbery, it is sufficient that property be taken in the owner's presence ; it need not be taken from his person ; provided there be violence to his person or putting him in fear. *Rex* v. *Francis*, 2 Stra. 1015 ; 2 East, P. C. 708. S. P., *Rex* v. *Grey*, 2 East, P. C. 708.

What Property the Subject of Robbery.]—A. was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him :—Held, robbery. *Rex* v. *Bingley*, 5 Car. & P. 602.

Parties — Common Intent.]—If a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them returns and steals his money :—Held, that one only can be convicted of the robbery, as it was not in pursuance of any common intent. *Rex* v. *Hawkins*, 3 C. & P. 392.

Force must be Used with Intent to Rob.]—In order to constitute the offence of robbery, not only force must be employed by the party charged therewith, but it is necessary to show that that force was used with the intent to accomplish the robbery. *Reg.* v. *Edwards*, 1 Cox, C. C. 32.

When it appeared that a wound had been accidentally inflicted on the hand of the prosecutrix:—Held, that an indictment for robbery was not sustainable. *Ib.*

A creditor having violently assaulted his debtor, and so forced him to give him a cheque in part payment, and having then again assaulted him, in order to force him to give him money in payment of the debt :—Held, that as there was no felonious intent, he could not properly be convicted of robbery. *Reg.* v. *Hemmings*, 4 F. & F. 50.

b. Indictment.

Offensive Weapon.]—An indictment for a highway robbery must state that the assault was feloniously made with an offensive weapon. *Rex* v. *Pelfryman*, 2 Leach, C. C. 563 ; 2 East, P. C. 783.

Violently.]—An indictment for robbery need not have the word "violently" ; but it must appear upon the whole statement that violence was used. *Rex* v. *Smith*, 2 East, P. C. 784.

Who may be Convicted.]—A. and B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party, with A., to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in, or privy to the taking of, the property from the prosecutor by violence :—Held, that, in order to convict B., the indictment should have been framed on 7 Will. 4, & 1 Vict. c. 87, s. 4 ; and that he could not, since the

passing of the statute, under the circumstances of the case, be convicted on an indictment charging the offence of robbery. *Reg.* v. *Taunton*, 9 Car. & P. 309 ; 2 M. C. C. 118.

Where several are indicted for robbery, it is not necessary to aver that they were together, but where one only of the party is indicted, it ought to be averred that he committed the offence "together with others." *Rex* v. *Raffety*, 2 Lewin, C. C. 271. See *Reg.* v. *Ramsden*, 1 Cox, C. C. 37.

Robbery from Two Persons at Same Time—Election.]—An indictment for robbery, which charges the prisoners with having assaulted G. P. and H. P., and stolen 2*s.* from G. P. and 1*s.* from H. P., is correct, if the robbing of G. P. and H. P. was all one act; and, if it were so, the counsel for the prosecution will not be put to elect. *Reg.* v. *Giddins*, Car. & M. 634.

c. Evidence.

What Admissible.]—On an indictment for robbery, the declaration in articulo mortis of the party robbed is not admissible in evidence. *Rex* v. *Lloyd*, 4 Car. & P. 233.

—— **Other Cases.**]—A. and B., when riding in a gig together, were robbed at the same time, A. of his money, B. of his watch, and violence used towards both. There was an indictment for the robbing of A., and another indictment for the robbing of B. :—Held, that, on the trial of the first indictment, evidence might be given of the fact of the loss of the watch by B., and that it was found on one of the prisoners, but that no evidence ought to be given of any violence offered to B. by the robbers. *Rex* v. *Rooney*, 7 Car. & P. 517.

If persons who had formed part of a mob obtained money from a party by advising him to give money to the mob, and are indicted for this as a robbery, the prosecutor, to show that this was not bonâ fide advice, may give evidence of demands of money made by the same mob at other places, before or afterwards in the course of the same day, if any of the prisoners were present on those occasions. *Rex* v. *Winkworth*, 4 Car. & P. 444.

Sufficiency—Footmarks.]—Evidence of footmarks is, per se, insufficient evidence on which to convict of a robbery. *Reg.* v. *Britton*, 1 F. & F. 354.

d. Trial.

Verdict—Common Assault.]—Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged :—Held, that they could not be convicted on this indictment and finding of a common assault. *Reg.* v. *Woodhall*, 12 Cox, C. C. 240.

—— **Independent Assault unconnected with Robbery.**]—A., B. and C. were indicted for having robbed and beaten D. A. knocked D. down, and it was imputed that B. and C. stole the property from his pockets :—Held, that if B. and C. stole the property, and A. did not participate in the robbery, A. could not be convicted of an assault, as the assault committed by him was an independent assault unconnected with the robbery ; but that, if the jury thought that D. was not robbed by any of the prisoners, but had been assaulted by all of them, they might find all guilty of the assault. *Reg.* v. *Barnett*, 2 Car. & K. 594 ; 3 Cox, C. C. 432.

—— **When Sustainable.**]—An indictment for robbery charged that A. and B. together assaulted C., and robbed him of his watch. At the trial C. did not appear, and there was no evidence of the felony, but a witness saw C. on the ground on the night in question, and several persons round him abusing him, and this witness saw A. strike C. The jury convicted A. of an assault, but said that they were not satisfied that A. had any intent to rob C. :—Held, that the conviction was right. *Reg.* v. *Birch*, 2 Car. & K. 193 ; 1 Den. C. C. 185 ; 2 Cox, C. C. 22.

The prisoners were indicted for robbery ; the jury acquitted them of the robbery, but found that the prisoners were guilty of assaulting and beating the prosecutor with intent to rob him : —Held, that the jury were not justified in finding this verdict, and that the judgment must be arrested, as the assaults contemplated by 7 Will. 4 & 1 Vict. c. 85, s. 11, were misdemeanours, and as the jury had found the prisoners guilty of a felony, which was not in the indictment. *Reg.* v. *Reid*, T. & M. 431 ; 2 Den. C. C. 88 ; 20 L. J., M. C. 67 ; 15 Jur. 181 ; 5 Cox, C. C. 104.

Burglariously breaking and entering a dwelling-house with intent to commit a rape, was not a crime which included an assault ; and therefore, in an indictment for such a burglary, the prisoner could not be convicted of an assault. *Reg.* v. *Watkins*, Car. & M. 264 ; 2 M. C. C. 217. S. P., *Reg.* v. *Crumpton*, Car. & M. 597.

If on an indictment for a robbery with violence the robbery was not proved, the prisoner could not be found guilty of the assault only, under 7 Will. 4 & 1 Vict. c. 85, s. 11, unless it appeared that such assault was committed in the progress of something, which, when completed, would be, and with intent to commit, a felony. *Reg.* v. *Greenwood*, 2 Car. & K. 339.

e. Assault with Intent to Rob.

What may be Stolen.]—A. was decoyed into a house and chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds. The paper on which he wrote remained in his hand half-an-hour, but he was chained all the time :—Held, that this was not an assault with intent to rob within 7 & 8 Geo. 4, c. 29, s. 6. *Rex* v. *Edwards*, 6 Car. & P. 521.

Assault on Person intended to be Robbed.]—It must be proved that the assault was made on the person intended to be robbed. *Rex* v. *Thomas*, 1 Leach, C. C. 330 ; 1 East, P. C. 417. And see *Rex* v. *Trusty*, 1 East, P. C. 418.

Therefore an assault on a post boy, with intent to rob the traveller, is not sufficient. *Ib.*

Demand and Assault.]—There must be a demand of money or other property, as well as an assault, to constitute the offence. *Rex* v. *Parfait*, 1 Leach, C. C. 19 ; 1 East, P. C. 416.

What kind of Threats.]—A. and B., on a concerted plan to obtain money from C., threatened to accuse him of an indecent exposure of his person, and A. (B. being present) seized C. by the collar, and A. and C. went to a station-

house, and there A made the threatened charge:—Held, that, on these facts, A. and B. might be convicted of an assault with intent to rob C., although the threats used did not come within the terms of 7 & 8 Geo. 4, c. 29, ss. 7, 9, or of 7 Will. 4 & 1 Vict. c 87, s. 4. *Reg.* v. *Stringer*, 1 Car. & K. 188; 2 M. C. C. 261.

Bonâ fide Claim of Right.]—A., at C. fair, came up to B., the prosecutor's father (being a stranger to him), and gave him eleven sovereigns to buy him a horse, and B. put them into his pocket. B. refused to give the eleven sovereigns back, and A. and the prisoner, who was in his company, assaulted him, but could not get the money from him. On the next day the prisoner asked B. for the eleven sovereigns: and, at L. fair on a subsequent day, the prisoner, having seen the prosecutor receive seven sovereigns, demanded the eleven sovereigns of him, and then knocked him down, and tried to get the seven sovereigns out of his pocket:—Held, that there was such a semblance of a claim of right, that this was not an assault with an intent to rob. *Reg* v. *Boden*, 1 Car. & K. 395.

Indictment.]—An indictment for an assault with intent to rob, which charges that the prisoner in and upon R. B. feloniously did make an assault, "with intent the moneys, goods and chattels of R. B., from the person and against the will of R. B., then and there feloniously and violently to rob, steal, take and carry away, against the form of the statute," is good. *Reg.* v. *Huxley*, Car. & M. 596.

—— **Joinder of Counts.**]—A. was indicted in one count for feloniously assaulting the prosecutor with intent to steal his moneys and goods, and in another count for the misdemeanour of attempting to steal the same moneys and goods. He was found guilty on the first count; whereupon his counsel moved in arrest of judgment, on the ground that the indictment was bad, by reason of a misjoinder of counts:—Held, that the objection was unfounded, and that A. was properly convicted *Reg.* v. *Ferguson*, Dears. C C. 427: 24 L. J., M C. 61; 1 Jur. (N.S.) 73; 3 W. R. 178; 6 Cox, C. C. 454.

Verdict—Powers of Jury.]—An indictment charged that A. B. in and upon C. D. feloniously did make an assault, and him the said C. D. in bodily fear and danger of his life did put, and two pieces of current silver coin, from the person and against the will of the said C. D. feloniously and violently did rob, steal, take and carry away; and that A. B. immediately before, at the time of and immediately after such robbery as aforesaid, did feloniously beat and strike and use other personal violence to said C. D. contra forman statuti. The jury found A. B. guilty of beating and assaulting C. D., with intent to rob him:—Held, that, as the offence of assaulting with intent to rob was not expressly stated in the indictment, the prisoner, at common law, could not be convicted; and, secondly, as an assault with intent to rob was made felony by statute, the jury was not at liberty, under 7 Will. 4 & 1 Vict. c. 85. s. 11, to find the prisoner guilty of that felonious assault. *Reg.* v. *Reid*, 2 Den. C. C. 89; T. & M. 431; 20 L. J., M. C. 67; 15 Jur. 181; 5 Cox, C. C. 104.

On an indictment for an assault with intent to rob, the prisoner cannot be convicted of a common assault, for an assault committed subsequently to that in which the felonious intent is charged. *Reg.* v. *Sandys*, 1 Cox, C. C. 8.

But where an indictment charged an assault and a stealing from the person and the jury find the prisoner guilty of the assault, this is only a common assault, and not an assault with intent to steal. *Reg.* v. *Trigg*, 1 Cox, C. C. 8.

Where prisoners were indicted for robbery under aggravated circumstances, it was competent for the jury, under 14 & 15 Vict. c. 100, s. 11, to find the prisoners guilty of an aggravated assault with intent to rob, the assault following the nature of the robbery charged; and prisoners found guilty of such aggravated assaults were liable to transportation, under 7 Will. 4 & 1 Vict c. 87, ss 3, 10. *Reg.* v. *Mitchell*, 3 Car. & K. 181; 2 Den. C. C. 468; 21 L. J., M. C. 135; 16 Jur. 506; 5 Cox, C. C. 541. *See also cases* ante, col. 1378.

b. Obtaining by means of Threats and Menaces.

1. *Generally.*

Against the Will of the Owner.]—See *Reg.* v. *McGrath*, ante, col. 1335.

Letter demanding Money—Threats.]—A letter written to the prosecutor stating that a conspiracy has been entered into by certain persons to ruin him—that it will shortly be carried into effect, but that it is in the writer's power to prevent it, and that he will prevent it if a certain sum of money is deposited for him in a particular place by a specified time—is a letter demanding money, with menaces, within 7 & 8 Geo. 4, c. 29, s. 8, although the writer did not hold out any threat that he himself would do any mischief. *Reg.* v. *Smith*, T. & M. 214; 1 Den. C. C. 510; 2 Car. & K. 882; 19 L. J., M. C. 80; 14 Jur. 92; 4 Cox, C. C. 42.

The doctrine that the threat held out must be such as would be likely to intimidate a firm man, and not merely a person of a timid disposition, must be taken to refer to the nature of the threat, and not to the nerves of the party to whom it is addressed. *Ib.*

In a threatening letter, the threat must be direct and plain. *Rex* v. *Girdwood*, 1 Leach, C. C. 442; 2 East, P. C. 1120.

An anonymous letter stated, that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent; and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt:—Held, that this was not a threatening letter within 7 & 8 Geo. 4, c. 29, s. 8, although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns. *Rex* v. *Pickford*, 4 Car. & P. 227.

Upon an indictment for sending a letter demanding money, with menaces, and without reasonable or probable cause, it appeared that the prisoner, who had been in the prosecutor's employ as traveller, had afterwards set up in business for himself, married, and become the father of children. There was no evidence of the prosecutor having indulged in the slightest familiarity with the prisoner's wife or of the prisoner having at any time any ground to sus-

pect that such had been the case, and the prosecutor denied it; but the prisoner sent to him letters imputing to the prosecutor adultery with his wife, that he was the father of one of his children, stating that many a man would have sent a bullet through him, and that he was to refund 44*l*. The judge left to the jury whether the meaning of the letters was to demand a sum of money, and to menace him with adultery, or to send the child to the prosecutor's house; and whether there was any reasonable or probable cause for the demand of the money, or for any of the charges, on all of which questions they found against the prisoner, and found him guilty:—Held, that the letters implied a threat either of bodily violence, or to charge the prosecutor with adultery, or to send the child to his house, and that the conviction was right. *Reg.* v. *Chalmers*, 16 L. T. 363; 15 W. R. 773; 10 Cox, C. C. 450.

A threatening letter referring, in the terms of it, to such circumstances as were plainly intended to denote who the writer was, and making a demand of a sum of money in controversy between him and the prosecutor, which the latter had received, and which the former had before insisted should be accounted for to him, was not a threatening letter within 9 Geo. 1, c. 22, or 27 Geo. 2, c. 15, although the writer did not subscribe his name. *Rex* v. *Hemming*, 2 East, P. C. 1116; 1 Leach, C. C. 445, n.

—— **Question for Jury and not for Court.**]—It is for the jury and not for the court to determine whether or not the letter is a threatening one within the statute, and the judge will not withdraw it from their consideration, unless by no possible construction can it be held to involve a threat. *Reg.* v. *Carruthers*, 1 Cox, C. C. 138.

—— **Writer might be Discovered.**]—It is no answer to a charge of sending threatening letters, that the contents would lead the party to suspect who wrote the letter, unless it is shown that the prisoner did not mean to conceal himself. *Rex* v. *Wagstaff*, R. & R. 398.

Letter—What is.]—A letter signed by two initials, as R. R., was a letter without a name subscribed thereto within 9 Geo. 1, c. 22. *Reg.* v. *Robinson*, 2 Leach, C. C. 749; 2 East, P. C. 1110.

Sending Letter—What Sufficient.]—To bring the offence of sending a threatening letter within 27 Geo. 2, c. 15, the letter must have been sent to the person threatened, and it must have been so stated in the indictment. *Rex* v. *Paddle*, R. & R. 484.

But it seems, that sending the letter to A., in order that he may deliver it to B., is a sending to B., if the letter was delivered by A. to B. *Ib.*

If a letter threatening to burn the premises of A., but directed to B., is left at a gate on a public highway, with the intention that it should reach as well A. as B., that was a sending to A. within 4 Geo. 4, c. 54, s. 3. *Reg.* v. *Grimwade*, 1 Den. C. C. 33; 1 Car. & K. 592; 1 Cox, C. C. 85.

On an indictment on 27 Geo. 2, c. 15, for sending a threatening letter, the dropping a letter in a man's way, in order that he might pick it up, was a sending of it. *Rex* v. *Wagstaff*, R. & R. 398.

The sending was within this statute, although the party saw the prisoner drop the letter, if the prisoner did not suppose the party knew him, and intended he should not. *Ib.*

Demanding Money with Threats or Menaces.]—The word "menaces" in s. 44 of the Larceny Act, 1851, is not restricted to threats of violence to person or property, nor to threats of accusing a person of crime; it includes a threat to accuse of immoral conduct. *Reg.* v. *Tomlinson*, 64 L. J., M. C. 97; [1895] 1 Q. B. 706; 15 R. 207; 72 L. T. 155; 43 W. R. 544; 18 Cox, C. C. 75—C. C. R.

Threatening to expose a clergyman who had had criminal intercourse with a woman in a house of ill fame, in his own church and village, to his own bishop, to all the other bishops, and to the Archbishop of Canterbury, and also to publish his shame in the newspapers, is such a threat as a man of ordinary firmness cannot be expected to resist, and therefore falls within the word menaces used in the statute. *Reg.* v. *Muard*, 1 Cox, C. C. 22.

Where a person demanded a shilling from the prosecutor, and, on being refused, became very abusive, and threatened to burn up the prosecutor, and then proceeded to make an attempt to set fire to a stack of his:—Held, that he was liable to be indicted for demanding money by menaces, under 7 Will. 4 & 1 Vict. 87, c 87, s. 7. *Reg.* v. *Taylor*, 1 F. & F. 511.

To constitute the offence of demanding money with menaces, under 24 & 25 Vict. c. 96, s. 45, the menace or threat must be of a character to produce in a reasonable man some degree of alarm or bodily fear, and such alarm must be of a nature and extent to unsettle the mind upon which it operates, and take away that free voluntary action which constitutes consent. *Reg.* v. *Walton*, L. & C. 288; 32 L. J., M. C. 79; 9 Jur. (N.S.) 259; 7 L. T. 754; 11 W. R. 348; 9 Cox, C. C. 268.

A threat to imprison a man upon a fictitious charge is a menace within 24 & 25 Vict. c. 96, s. 45. *Reg.* v. *Robertson*, L. & C. 483; 34 L. J., M. C. 35; 11 Jur. (N.S.) 96; 11 L. T. 386; 13 W. R. 101; 10 Cox, C. C. 9.

A conviction under that section is good, although the money has been actually obtained. —*Ib.*

A prisoner was convicted for demanding money with menaces, with intent to steal the same. The prosecutor, having spoken to a female in the street, at night, the prisoner, a policeman, came up, and told him he had been talking to a prostitute, and that he must go with him to Bridewell, and that he, the prosecutor, was under a penalty of 1*l*. and costs, for talking to a prostitute in the streets; but if he would give him 5*s*. he might go about his business. The prosecutor thereupon gave him 4*s*. 6*d*.:—Held, that the conviction was right. *Ib.*

Previous Statutes—Possession obtained by Threats.]—To obtain from a person his note of hand by threatening with a knife held to his throat to take away his life, was not a felonious stealing of the note within 2 Geo. 2, c. 25, s. 3, for it never was of value to, or in the peaceable possession of, such person. *Rex* v. *Phipoe*, 2 Leach, C. C. 673; 2 East, P. C. 599. *See now* 24 & 25 Vict. c. 96, s. 48.

If a person with menaces demanded a sum of money of another, and that other did not give it to him because he had it not with him, this was a felony within 7 & 8 Geo. 4, c. 29, s. 6; but if

the person demanding the money knew that the money was not then in the possession of the party, and only intended to obtain an order for the payment of it, it was otherwise. *Rex* v. *Edwards*, 6 Car. & P. 515. *See now* 24 & 25 Vict. c. 96, s. 45.

Threatening to Sue for Penalties.]—Threatening by letter, or otherwise, to put in motion a prosecution by a public officer, to recover penalties for selling Fryer's Balsam without a stamp (which by 42 Geo. 3, c. 36, was prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law, although it is alleged that the money was obtained; no reference being made to any statute which prohibits such attempt. *Rex* v. *Southerton*, 6 East, 126; 2 Smith, 305; 8 R. R. 428.

But it seems that such an offence is indictable upon 18 Eliz. c. 5, s. 4, for regulating common informers, which prohibits the taking of money, without consent of court, under colour of process, or without process, from any person upon pretence of any offence against the penal law. *Ib.*

But no indictment for any attempt to commit such a statutable misdemeanour can be sustained as a misdemeanour at common law, without at least bringing the offence intended within, and laying it to be against, the statute. *Ib.*

Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute, which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for example's sake, might also, upon general principles, have been deemed a sufficient ground to sustain the indictment at common law. *Ib.*

Threatening to Publish Libellous Matter.]—On an indictment for threatening to publish certain matter with intent to extort money, it is not necessary that the matter should be libellous. *Reg.* v. *Coghlan*, 4 F. & F. 316.

—— **Evidence.**]—Counts under s. 3 of 6 & 7 Vict. c. 96, charging the defendants with unlawfully offering to prevent the publishing, and with threatening to publish certain matters touching the prosecutor, with intent to extort money, are not supported by evidence, that they attempted to obtain the money by leading the prosecutor to believe that an information would be laid against him by one G., for an offence relating to the post-horse duties, and that they had the means of preventing the proceedings and would prevent it on being paid a sum of money. *Reg.* v. *Yates*, 6 Cox, C. C. 441.

—— **Intent may be Implied or Inferred.**]—An intent to extort money may be implied from the circumstances, and does not require an express demand of money. *Reg.* v. *Coghlan*, 4 F. & F. 316.

But, if it appears that the object is to compel the delivery of accounts of moneys honestly believed to be due and owing, there is no evidence of the intent. *Ib.*

Actual Demand not necessary.]—To support an indictment for demanding money with menaces and by force with intent to steal, it is not necessary to prove an actual demand which may be implied from the circumstances. *Rex* v. *Jackson*, 1 Leach, C. C. 267.

Without Reasonable or Probable Cause.]—The words, "without any reasonable or probable cause," in 7 & 8 Geo. 4, c. 29, s. 8, concerning sending threatening letters, apply to the money demanded, and not to the accusation threatened to be made. *Reg.* v. *Hamilton*, 1 Car. & K. 212.

The words "without any reasonable or probable cause," in 7 & 8 Geo. 4, c. 29, s. 8, must be taken to apply to the state of the prisoner's mind at the time of making the demand; and the jury must look at all the circumstances for the purpose of deciding whether at that time the prisoner bonâ fide believed that she or he had reasonable cause. *Reg.* v. *Miard*, 1 Cox, C. C. 22.

Valuable Security—What is.]—Husband and wife were indicted under 24 & 25 Vict. c. 96, s. 48, for having by threats of violence and restraint induced the prosecutor to write and affix his name to the following document:—"London, July 19th, 1875. I hereby agree to pay you 100*l.* on the 27th inst., to prevent any action against me':—Held, that this document was not a promissory note, but was an agreement to pay money upon a valid consideration which could be sued upon, and was therefore a valuable security. *Reg.* v. *John*, 13 Cox, C. C. 100.

To constitute a valuable security within the statute an instrument need not be negotiable. *Ib.*

ii. *Threatening to Accuse of Crime.*

Guilt or Innocence Immaterial.]—On the trial of an indictment for threatening to accuse of an infamous crime in order to extort money, the guilt or innocence of the party threatening is quite immaterial. *Reg.* v. *Cracknell*, 10 Cox, C. C. 408.

Whether the crime of which the prisoner was accused by the prosecutor was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money. *Reg.* v. *Richards*, 11 Cox, C. C. 43.

But it is material in considering the question whether, under the circumstances of the case, the intention of the prisoner was to extort money, or merely to compound a felony. *Ib.*

Intent may be Implied or Inferred.]—A prisoner was indicted under 7 & 8 Geo. 4, c. 29, s. 8, in a first count, for feloniously accusing A. of a certain infamous crime, that is to say, of having made to the prisoner a certain solicitation, whereby to move and induce the prisoner to commit with him, the crime of sodomy, with a view to extort and gain money from him; second count, charging the same offence somewhat differently:—Held, that the evidence was not sufficient to prove the intent laid. *Reg.* v. *Middleditch*, 1 Den. C. C. 92; 2 Cox, C. C. 313.

Where a prisoner is indicted for feloniously sending a letter, threatening to accuse of an infamous crime, with intent to extort money, both the threat and the intent may be inferred,

even against the declaration of the prisoner at the time, and in the absence of express proof, from the letter itself, from his previous and contemporaneous, and even from his subsequent conduct and expressions to third parties. *Reg.* v. *Menage*, 3 F. & F. 310.

Threat to Accuse.]—The threatening to accuse, under 7 & 8 Geo. 4, c. 29, s. 8, need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is enough. *Rex* v. *Robinson*, 2 M. & Rob. 14; 2 Lewin, C. C. 273.

Sending a letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, did not threaten to charge such an infamous crime as to be within 4 Geo. 4, c. 54, s. 3. *Rex* v. *Hickman*, 1 M. C. C. 34.

When it was proved that a prisoner, to obtain moneys, said to the prosecutor, "If you do not assist me, I will say you took indecent liberties with me some time ago":—Held, not sufficient to sustain a count which charged that he threatened to accuse the prosecutor of having attempted and endeavoured to commit with him the abominable crime. *Reg.* v. *Norton*, 8 Car. & P. 671.

A person threatening A.'s father that he would accuse A. of having committed an abominable offence upon a mare for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price, is guilty of threatening to accuse with intent to extort money, within 24 & 25 Vict. c. 96, s. 47. *Reg.* v. *Redman*, 35 L. J., M. C. 89; L. R. 1 C. C. 12; 11 Jur. (N.S.) 960; 13 L. T. 303; 14 W. R. 56; 10 Cox, C. C. 159.

Question for Jury.]—The prisoner was proved to have made the accusation in these words, "I charge this man with indecently assaulting me":—Held, that it was a question for the jury—taking into consideration the prisoner's conduct throughout the transaction—whether by those words he did not mean to allege that the prosecutor had solicited him to the commission of an unnatural offence. *Reg.* v. *Cooper*, 3 Cox, C. C. 547.

Where the charge made by the prisoners was one specifically of an indecent assault:—Held, that it was for the jury to take into their consideration not only the charge itself, but the conduct of the prisoners generally, for the purpose of deciding what was the nature of the accusation they intended to prefer. *Reg.* v. *Braynell*, 4 Cox, C. C. 404.

iii. *Indictment.*

Persons Indictable.]—Where a wife wrote a threatening letter, and the husband carried it to the party threatened:—Held, that the husband, though privy to the writing, was not within 9 Geo. 1. c. 22, and 27 Geo. 2, c. 15, nor could the wife alone be convicted unless she wrote and sent it without the husband who delivered it being privy to the contents. *Rex* v. *Hammond*, 2 East, P. C. 1119; 1 Leach, C. C. 444.

Form of.]—An indictment charging that a prisoner "did feloniously and maliciously, with intent to extort money, charge and accuse A. with having committed the horrible and detestable crime, and feloniously, &c., menace and threaten to prosecute the said A.," was not good under 4 Geo. 4, c. 24, s. 3. *Rex* v. *Abgood*, 2 Car. & P. 436.

—— **To obtain Bill not Money.**]—An indictment on 30 Geo. 2, c. 24, for sending a threatening letter, intended to extort and gain money, could not be supported by showing a letter threatening to accuse the prosecutor of an unnatural crime, if he did not give up a certain bill drawn by the prisoner, of which the prosecutor was the holder. *Rex* v. *Major*, 2 East, P. C. 1118; 2 Leach, C. C. 772.

By whom Offence Committed.]—An indictment on 4 Geo. 4, c. 54, s. 5, for demanding money, must have distinctly shown by whom it was demanded. *Rex* v. *Dunkley*, 1 M. C. C. 90.

Who Threatened.]—And an indictment on the same statute by threatening to accuse, &c., must have positively shown who was threatened. *Ib.*

To whom Security Belonged.]—On an indictment for threatening to accuse of an infamous crime, with intent to extort a certain security for money, it is not necessary to aver to whom the security belonged. *Reg.* v. *Tiddeman*, 4 Cox, C. C. 389.

Letter to be Set Out.]—An indictment for sending a threatening letter must set out the letter. *Rex* v. *Lloyd*, 2 East, P. C. 1122. S. P., *Reg.* v. *Hunter*, 2 Leach, C. C. 631.

iv. *Trial and Evidence.*

Practice—Venue.]—The offence of sending a threatening letter may be laid in the county where it is delivered by the post to the prosecutor. *Rex* v. *Esser*, 2 East, P. C. 1125. S. P., *Rex* v. *Girdwood*, 2 East, P. C. 1120; 1 Leach, C. C. 142.

—— **Inspection of Letter.**]—If a party is indicted for sending a threatening letter, the court will, on the motion of the prisoner's counsel, as soon as the bill is found, order that the letter be deposited with the officer of the court, that the prisoner's witnesses may inspect it. *Rex* v. *Harrie*, 6 Car. & P. 105.

Evidence—To show Guilt of Prosecutor.]—The prosecutor may be cross-examined with a view to show that he is really guilty of the offence imputed to him, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor is really guilty. *Reg.* v. *Crackneli*, 10 Cox, C. C. 408.

—— **Knowledge of Contents of Letter.**]—The bare delivery of a letter containing threats, though sealed, is evidence of a knowledge of its contents. *Rex* v. *Girdwood*, 1 Leach, C. C. 142; 2 East, P. C. 1120.

—— **Proof of several Letters.**]—Indictment, with three counts for three separate letters. It was proposed to prove the sending of all three:—Held, that evidence of one only was admissible. *Reg.* v. *Ward*, 10 Cox, C. C. 42.

—— **Of sending Letter.**]—Affixing a threaten-

ing letter on a gate in a public highway, is some evidence to go to the jury of a sending thereof *Reg* v *Williams*, 1 Cox, C C 16

A prisoner was indicted for sending a threatening letter The only evidence against him was his own statement, that he should never have written it but for W G —Held, not sufficient *Rex* v *Howe* 7 Car & P 268

—— **Letter improperly addressed**]—When there is no person in existence of the precise name which the letter bears as its address it is a question for the jury whether the party into whose hands it falls was really the one for whom it was intended *Reg* v *Carruthers* 1 Cox C C 138

—— **Other Cases to show Intent**]—On the trial of an indictment for threatening to accuse the prosecutor of an infamous crime with intent to extort money it was proved that the prisoner had gone up to the prosecutor and said to him 'If you do not give me a sovereign I will charge you with an indecent assault —Held that inasmuch as if the jury believed that such language had been used by the prisoner the intent was manifest evidence for the prosecution tending to show that the prisoner had made a similar charge two years before ought not to be admitted *Reg* v *M Donnell* 5 Cox C C 153

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money—the prisoner being a soldier and the accusation having been made while he was on duty as sentry—evidence of declarations made by him on a former occasion on coming off guard that he had obtained money from a gentleman by threatening to take him to the guard house and accuse him of an unnatural crime is admissible *Reg* v *Cooper*, 3 Cox C C 547

What Admissible to show Meaning of Letter]—If the terms of a threatening letter are doubtful as to the exact accusations the prisoner meant to threaten his declarations subsequently made on being asked what he meant to impute are evidence to explain the meaning of the letter *Rex* v *Lucker* Car C L 288, 1 M C C 134

On the trial of an indictment for threatening to accuse a person of an abominable crime with intent to extort money and by intimidating the party by the threat in fact obtaining the money the jury need not confine themselves to the consideration of the expressions used before the money was given, but may if those expressions are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody *Reg* v *Kain*, 8 Car & P 187

The prisoner sent to the prosecutor a letter the language of which was ambiguous —Held, that the prosecutor might be asked what appeared to him to be the meaning of the letter *Reg* v *Hendy*, 4 Cox C C 243

Evidence is admissible to show that under the particular circumstances, the words in such a letter have not their ordinary meaning but the meaning imputed to them upon the record, and therefore the witness may be asked whether he understood the meaning to be that which the record imputed *Ib*

What Admissible in Case of Accessories.]—Where an accessory after the fact to a charge of sending threatening letters, is tried in the absence of the principal, the letters so written and sent by the principal are evidence on the trial *Reg* v *Hansill*, 3 Cox C C 597

Depositions of Prisoners, when Admissible against them]—On a charge of threatening to accuse of an infamous crime it appeared that the prisoner had made a charge before a magistrate against the prosecutor of endeavouring to excite one of them to the commission of an unnatural offence —Held, that the depositions of the prisoners upon that occasion were admissible against them *Reg* v *Braynell* 3 Cox, C C 402

When before the magistrate the prisoners were separately cross examined as to their being together on the day when the offence was alleged to have been committed how they had been occupied &c and their answers were so contradictory in themselves and so inconsistent with each other that the magistrate dismissed the charge against the then defendant, and bound him over to prosecute the prisoner for endeavouring to extort money by threats —Held that the answers elicited on such cross examination were not admissible *Ib*

c In a Dwelling-house

How Value Ascertained]—If a prisoner, who was in the service of the prosecutor stole a quantity of lace in several pieces the pieces together being above 5*l* in value and brought them all out of his master's house at the same time this was a capital offence although it was shown that the prisoner had the opportunity of stealing the lace by a piece at a time and that no one of the pieces was worth 5*l* *Rex* v *Jones* 4 Car & P 217

Dwelling-house—What is]—Stealing in a bedroom over a stable in a yard not under the same roof nor having any direct communication with the house in which the prosecutor resides can not be properly charged as a stealing in his dwelling house *Rex* v *Turner* 6 Car & P 407

If one on going to bed puts his clothes and money by the bed side they are under the protection of the dwelling house and not of the person and therefore a party stealing them may be convicted of stealing in a dwelling house *Rex* v *Thomas* Car C L 295

A man went to bed with a prostitute having put his watch in his hat on the table the woman stole his watch whilst he was asleep —Held that the offence was that of stealing in a dwelling house *Reg* v *Hamilton* 8 Car & P 49

Things under Protection of House]—Under 12 Anne st 1 c 7 the larceny must have been of things under the protection of the house and not of any person within it therefore not of money in the pocket *Rex* v *Owen*, 2 East, P C 645 2 Leach, C C 572

Property left by mistake at a house and delivered to the occupier, under the supposition that it was for one of the persons in the house, is entitled to the protection of the house *Rex* v *Carroll*, 1 M C C 89

If goods are under the protection of the person of the prosecutor at the time they are stolen, the

offence is not larceny in a dwelling house *Rex* v *Campbell*, 2 Leach C C 564

Guest's Goods Stolen by Lodger]—The goods of a lodger's guest are under the protection of the dwelling house therefore a lodger who invites a man to his room and then steals his goods to the value of 40*s* (now 5*l*) when not about his person is liable to be found guilty of stealing in a dwelling house *Rex* v *Taylor* R & R 418

Stolen by Owner of House]—Stealing in a dwelling house to the value of 5*l* or more by the owner of the house was within 7 & 8 Geo 4 c 29 s 12 *Reg* v *Bowden* 2 M C C 285 1 Car & K 147 Contra *Rex* v *Thompson*, 1 Leach, C C 338 2 East P C 644 *Rex* v *Gould* 1 Leach C C 217 2 East P C 644

Indictment—Two Counts]—A and B were found guilty on an indictment containing two counts—one for stealing in a dwelling house above the value of 5*l* and the other for simple larceny and the judgment was that they should be transported for ten years for the felony afore said —Held that the judgment was bad as either the indictment alleged no felony in two counts in which case the judgment was bad for uncertainty the court not having the power to apply it to the particular count in the indictment which would support it or it alleged a separate felony on each count in which case the jury having found but one offence the judgment is bad because the word felony cannot be treated as nomen collectionis *Campbell* v *Reg* 2 New Sess Cas 297 11 Q B 799 17 L J M C 89 12 Jur 117 2 Cox C C 463—Ex Ch

—— **Particular Goods need not be Specified**]—In an indictment for attempting to steal goods in a dwelling house it is not necessary to specify any particular article or articles A general allegation of an attempt to steal goods and chattels of A is sufficient *Reg* v *Johnson* L & C 489 34 L J M C 24 10 Jur (N S) 1160 11 L T 389 13 W R 101, 10 Cox C C 13

With Menaces or Threats — Indictment]—An indictment for stealing in the dwelling house persons being therein and put in fear must state that the persons were put in fear by the prisoners *Rex* v *Etherington* 2 Leach C C 671 2 East P C 639

—— **Who are Principals**]—In order to constitute the offence of stealing in a dwelling house and by menaces and threats putting persons being therein in bodily fear it is not necessary that all the persons engaged in the crime should be actually in the house and if one remains outside he may be equally guilty of using menaces and threats if there was a common purpose to inspire terror *Reg* v *Murphy* 6 Cox C C 340

—— **Evidence**]—A threat to a person outside the house is not within the words of the statute but it is a circumstance from which the jury may infer the line of conduct inside the house *Ib*

The act of placing persons with their faces against a wall, and desiring them not to look round without the use of any actual violence is evidence of an intention to obtain money by threats and the bodily fear may be inferred, although the persons so treated may deny that such acts created alarm or fear *Ib.*

d In Manufactories

Goods—Process of Manufacture]—Where on an indictment on 18 Geo 2 c 27 for stealing yarn out of a bleaching ground it appeared that the yarn had been spread on the ground, but at the time of the theft was in heaps in order to be carried into the house —Held that as there was no occasion to leave it in that state it was not within the statute which uses the words laid, placed or exposed during any stage process or progress of manufacture in any building, field, or other place *Rex* v *Hugill* 2 Russ C & M. 403

Goods remain in a stage process or progress of manufacture within s 3 of 7 & 8 Geo 4 c 30 though the texture is complete provided they are not yet brought into a condition fit for sale *Rex* v *Woodhead* 1 M & Rob 549

Building used for Manufacturing]—On an indictment on 18 Geo 2 c 27 for stealing calico placed to be printed &c in a building made use of by a calico printer for printing dying, &c —Held that in order to support the capital charge it was necessary to have proved that the building from which the calico was stolen, was made use of either for printing or dying calico *Rex* v *Dixon* R & R 53 1 East P C 212

Place—What is]—By 17 Geo 3 c 56, s 10, it shall be lawful for any two justices upon complaint made to them upon oath that there is cause to suspect that pilfered or embezzled materials used in certain manufactures are concealed in any dwelling house outhouse yard, garden or other place or places to issue a search warrant for the search in the daytime of every such dwelling house &c and if any such materials suspected to be pilfered or embezzled, be found therein to cause the same and the person in whose house outhouse yard, garden, or other place they are found to be brought before two justices and if the person shall not give an account to their satisfaction of how he came by the same he shall be adjudged guilty of a misdemeanour —Held that a warehouse occupied for business purposes only, and not within the curtilage of or connected with any dwelling house was a place within the section *Reg* v *Edmunds* 2 El & El 77 28 L J M C 213 5 Jur (N S) 1351 7 W R 565, 8 Cox C C 212

e From Mines

Removal with Intent to Defraud]—Before 2 & 3 Vict c 58 s 10 it was not larceny for miners employed to bring ore to the surface and paid by the owners according to the quantity produced to remove from the heaps of other miners ore produced by them and add it to their own, in order to increase their wages the ore still remaining in the possession of the owners *Rex* v *Webb*, 1 M C C 431

Indictment]—An indictment alleging, that

A. B., C. D., and persons employed in a mine, in the parish of, &c., in the county of Cornwall, did steal ore, the property of the adventurers in the said mine, then and there being found, does not sufficiently show the ore to have been in the mine when stolen. *Reg.* v. *Trevenner*, 2 M. & Rob. 476.

Trial—Election of Counts.]—Where a prisoner was indicted in one count for stealing from the mine of H. J. G. coal, the property of H. J. G., and in the same count for stealing from the mines of thirty other proprietors coal, the property of each of such other proprietors, and it appeared that all the coal so alleged to have been stolen, had been raised at one shaft:—Held, first, that the prosecutor could not be called upon to elect on which charge he would go to the jury. *Reg.* v. *Bleasdale*, 2 Car. & K. 765.

—— **Evidence of other Cases.**] — Held, secondly, that although, for the sake of convenience, in trying the prisoner the judge might direct the jury to confine their attention to one particular charge, yet that the prosecutor was entitled to give evidence in support of all the charges in the indictment. *Ib.*

Held, thirdly, that proof of such charges might be relied on, in order to show a felonious intent. *Ib.*

f. From Ships in Ports or on Navigable Rivers.

Luggage.]—The luggage of a passenger going by a steamboat, was within the words "goods or merchandise" in 7 & 8 Geo. 4, c. 29, s. 17. *Rex* v. *Wright*, 7 Car. & P. 159.

Stealing on a Creek.]—An indictment for stealing goods on a navigable river was not satisfied by evidence of a stealing on one of its creeks. *Rex* v. *Pike*, 1 Leach, C. C. 317; 2 East, P. C. 647.

g. Abroad or on the High Seas.

Jurisdiction on High Seas.]—If a person is apprehended in a borough for a larceny committed on the high seas, he may be tried for that larceny before the court of quarter sessions of the borough. *Reg.* v. *Peel*, L. & C. 331; 32 L. J., M. C. 65; 8 Jur. (N.S.) 1185; 7 L. T. 336; 11 W. R. 40; 9 Cox, C. C. 220.

Piratically stealing a ship's anchor and cable was a capital offence by the marine laws, and triable under 28 Hen. 8, c. 15; 39 Geo. 3, c. 37, not extending to this case. *Rex* v. *Curling*, R. & R. 123. *And see* post, col. 1717 et seq.

—— **Offence Committed Abroad.**]—A person had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial:—Held, that Guernsey not being a part of the United Kingdom, he could not be convicted of larceny, for having them in his possession here, nor of receiving in England the goods so stolen in Guernsey. *Reg.* v. *Debruiel*, 11 Cox, C. C. 207.

If a larceny is committed out of the kingdom, though within the king's dominions (e.g. in Jersey), bringing the things stolen into this kingdom will not make it larceny here. *Rex* v. *Prowes*, 1 M. C. C. 349. S. P., *Reg.* v. *Madge*, 9 Car. & P. 29.

Some securities were transmitted on 2nd June by the prosecutor to a customer in Paris; they were traced safely as far as Calais, and were stolen from the train after leaving that place; on the 4th September the prisoner was found dealing with them, and was tried in England for larceny and feloniously receiving:—Held, that the court had no jurisdiction, and that the prisoner must be acquitted. *Reg.* v. *Carr*, 15 Cox, C. C. 131, n.

5. Indictment.

a. Generally.

Things Stolen at same Time—Two Indictments.]—Where a person stole two pigs belonging to the same person at the same time, and after being convicted and punished for stealing one of the pigs, was indicted at a subsequent assize for stealing the other:—Held, that this might legally be done; but, semble, that in such a case, the second prosecution ought not to be proceeded with. *Reg.* v. *Brettell*, Car. & M. 609.

Statement of Value.]—The original distinction of grand and petty larceny made it necessary, in indictments for larceny, to allege the value of the chattel stolen, in order to allot the punishment. *Reg.* v. *Gamble*, 16 M. & W. 384; 16 L. J., M. C. 149.

Though, to make a thing the subject of an indictment for a larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. *Reg.* v. *Morris*, 9 Car. & P. 349.

Attempt to Steal—False Pretence.]—A count charging the prisoners that they, by false pretences, did attempt to steal is good. *Reg.* v. *Bullock*, Dears. C. C. 653; 25 L. J., M. C. 92.

Servant.]—An indictment charged that A. on, &c., being the servant to K., on the same day, &c., one gold ring, &c., then and there being his goods and chattels, feloniously did steal:—Held, that the fair import of the charge was, that A. was the servant of K. at the time when the theft was committed. *Rex* v. *Somerton*, 7 B. & C. 463; 6 L. J. (O.S.) M. C. 22.

An indictment charged that the prisoner, whilst a servant of A., stole the money of A. The prisoner was not the servant of A., but the servant of B., and the money which he stole was the money of B., but in the possession of A. as the agent of B.:—Held, that the allegation as to the prisoner being servant might be rejected as surplusage, and the prisoner convicted of simple larceny, the money being properly alleged to belong to A., who had a special property therein. *Reg.* v. *Jennings*, Dears. & B. 447; 4 Jur. (N.S.) 146; 6 W. R. 231; 7 Cox, C. C. 397.

Esquire.]—If goods are laid in an indictment as "the property of A. W. G., Esq.," the addition is not material, and if he is not an esquire, it is no ground for an acquittal. *Rex* v. *Ogilvie*, 2 Car. & P. 230. S. P., *Reg.* v. *Keys*, 2 Cox, C. C. 225.

Feloniously taken from Company.]—In an indictment against a servant of the West India Dock Company, for stealing a quantity of canvas and hessen belonging to the company from their warehouses, it was sufficient to state the

property to be "the goods and chattels of the West India Dock Company." and not necessary, notwithstanding the words of the 1 & 2 Will. 4, c. 52, s. 133, to allege, in addition, that it was feloniously taken from the company. *Reg.* v. *Stoke*, 8 Car. & P. 151.

Feloniously—Partnership Property Stolen]—An indictment under 31 & 32 Vict. c. 116, s. 1, alleging that B. was a member of a co-partnership consisting of B. and L., and that B. being a member, eleven bags of cotton waste, the property of the co-partnership, feloniously did steal, take and carry away, contrary to the statute, is not bad for introducing the word "feloniously." *Reg.* v. *Butterworth*, 25 L. T. 850 ; 12 Cox, C. C. 132.

b. Description of Thing Stolen.

Of the Goods and Chattels of A.—Surplusage.] —In an indictment for larceny, two shillings stolen were described as "two pieces of the current silver coin of the realm, called shillings, of the value of two shillings, of the goods and chattels of S. F." : the words "goods and chattels" may be rejected as surplusage, and the indictment is good. *Reg.* v. *Radley*, 3 New Sess. Cas. 651 ; T. & M. 144 ; 1 Den. C. C. 450 ; 2 Car. & K. 974: 18 L. J., M. C. 184; 13 Jur. 544; 3 Cox, C. C. 460.

Where an indictment alleges stealing in a certain pond fish "of the goods and chattels" of the prosecutor :—Held, that these words might be treated as surplusage. *Rex* v. *Hundson*, 2 East, P. C. 611.

Amendment, when Allowed]—A man was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign —Held, that by 14 & 15 Vict. c. 100, s. 1, the court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen shillings and sixpence," and that by s. 18 the indictment so amended was proved. *Reg.* v. *Gumble*, 42 L. J., M. C. 7 ; L. R. 2 C. C. 1 ; 27 L. T. 692 ; 21 W. R. 299 ; 12 Cox, C. C. 248.

Valuable Security not relating to Land.]—A prisoner was convicted on an indictment under 24 & 25 Vict. c. 96, s. 27, for stealing a valuable security, to wit, an agreement between L. and C., whereby C. was entitled to receive payment of certain sums of money, and which sums were then due and unsatisfied to C. The sums were not due till some time after the stealing :—Held, that since this section limits the term valuable security to securities other than a document of title to lands, it is material in an indictment under this section to describe the valuable security, so as to show that it is within the section, that the description given ought to have been proved, and that, since it had not been proved, the conviction could not be supported. *Reg.* v. *Lowrie*, 36 L. J., M. C. 24 ; L. R. 1 C. C. 61 ; 15 L. T. 632 ; 15 W. R. 360 ; 10 Cox, C. C. 388.

Post-office Order.]—A post-office order is a warrant or order for the payment of money, and may be so described in an indictment for larceny. *Reg.* v. *Gilchrist*, 2 M. C. C. 233 ; Car. & M. 224.

Parcel.]—The word "parcel" is not a sufficient description of goods alleged to have been stolen. *Reg.* v. *Bonner*, 9 Cox, C. C. 13.

Notes not in Circulation.]—Banknotes are properly described in an indictment for larceny within section 18 of 14 & 15 Vict. c. 100, as money, although at the time when they were stolen they were not in circulation, but were in the hands of the bankers themselves. *Reg.* v. *West*, Dears. & B. 109 ; 26 L. J., M. C. 6 ; 2 Jur. (N.S.) 1123 ; 5 W. R. 50 ; 7 Cox, C. C. 183.

Specific Coins]—An indictment, charging a stealing of one or more specific thing or things, is not supported, except by proof of some one or more of the specific things so charged. *Reg.* v. *Bond*, 1 Den. C. C. 517; T. & M. 242; 3 Car. & K. 337 ; 4 New Sess. Cas. 143 ; 19 L. J., M. C. 138 ; 14 Jur. 390 ; 4 Cox, C. C. 231.

Therefore, an indictment charging a stealing of 70 pieces of the current coin of the realm, called sovereigns, of the value of 70*l.*, 140 pieces, called half-sovereigns, 500 pieces, &c, called crowns, &c, is not supported by proof of a stealing of a sum of money consisting of some or other of the coins mentioned in the indictment, without proof of some or one or more of the specific coins here charged to have been stolen. *Ib.*

Coin and Banknotes before 14 & 15 Vict. c. 100, s 18.]—An indictment for stealing 10*l.* in moneys numbered was not sufficient ; some of the pieces of which that money consisted should be specified. *Rex* v. *Fry*, R. & R. 482.

If the thing stolen was described as a bank-post bill, and was not set out, the court could not take judicial notice that it was a promissory note, or that it was such an instrument as under 2 Geo 2, c. 25, might be the subject of larceny, although it was described as made for the payment of money. *Rex* v. *Chard*, R & R. 488

Where an indictment described a banknote as signed by A. H. for the Governor and Company of the Bank of England, and a prisoner was convicted ; such conviction was bad, there being no evidence of A. H.'s signature. *Rex* v. *Craven*, R. & R. 14 : 2 East, P. C. 601.

Dollars or Portugal money not current by proclamation were not goods within 24 Geo. 2, c. 45. *Rex* v. *Leigh*, 1 Leach, C. C. 52. S. P., *Rex* v. *Grimes*, 2 East, P. C. 646.

Amount of Money Stolen.]—The prosecutor bought a horse, and was entitled to the return of 10*s.*, chap money, out of the purchase-money. The prosecutor, afterwards, on the same day, met the seller, the prisoner, and others, and asked the seller for the 10*s.*, but he said he had no change, and offered the prosecutor a sovereign, who could not change it. The prosecutor asked whether anyone present could give change The prisoner said he could, but would not give it to the seller of the horse, but would give it to the prosecutor, and produced two half-sovereigns. The prosecutor then offered a sovereign with one hand to the prisoner, and held out the other for the change. The prisoner took the sovereign and put one half-sovereign only in the prosecutor's hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor, and ran off with it.—Held that the indictment rightly charged the prisoner with stealing a sovereign. *Reg.* v. *Twist*, 29 L. T. 546 ; 12 Cox, C. C. 509.

The prisoner was the daughter of the proprietor of a "merry-go-round," and was in charge

thereof, and the price of a ride thereon was one penny for each person. The prosecutrix got into the machine and handed to the prisoner a sovereign in payment of the ride, asking for the change. The prisoner gave the prosecutrix elevenpence, and the merry-go-round being about to start, said she would give her the rest of the change when the ride was over. The prosecutrix assented to this, and about ten minutes after, when the ride was over, found the prisoner attending to a shooting gallery, and asked her for her change, when the prisoner replied that she had only received a shilling from her, and declined to give any more:—Held, that the prisoner could not be convicted on an indictment charging her with stealing nineteen shillings in money of the moneys of the prosecutrix. *Reg.* v. *Bird*, 42 L. J., M. C. 44; 27 L. T. 800; 21 W. R. 448; 12 Cox, C. C. 257.

Cheques.]—The servant of the drawer of a cheque on bankers, to whom it is given to deliver to a third person, appropriating the value to his own use, may be charged in an indictment for stealing a valuable security, to wit, a cheque of the value specified, without stating the drawees to be bankers. *Reg.* v. *Heath*, 2 M. C. C. 33.

Handkerchiefs in a Piece.]—A set of new handkerchiefs in a piece may be described as so many handkerchiefs, though they are not separated one from another, if the pattern designates each, and they are described in the trade as so many handkerchiefs. *Rex* v. *Nibbs*, 1 M. C. C. 25.

Tin or Iron.]—In an indictment for receiving stolen tin, ingots of tin are properly described as so many pounds weight of tin. *Reg* v. *Mansfield*, Car. & M. 140; 5 Jur. 661.

So it would be proper to describe a bar of iron as so many pounds of iron. *Ib.*

Eggs—Description of Kind.]—An indictment for stealing "three eggs of the value of twopence, of the goods and chattels of S. H.," is bad, for not stating the species of eggs, because it does not show that the eggs stolen might not be such as are not the subject of larceny. *Reg.* v. *Cox*, 1 Car. & K. 487.

Ham.]—An indictment describing the property stolen as "one ham, of the value of 10s., of the goods and chattels of T. H.," is sufficient, as the word "ham" has acquired a meaning which is universally understood; and it is no objection, that it may be taken to mean the ham of an animal feræ naturæ or of a base nature, inasmuch as the flesh of a dead animal feræ naturæ is the subject of larceny, and the expenditure of labour on the flesh or the skin of animals of a base nature, at common law, imparts to it value, and makes it also the subject of larceny. *Reg.* v. *Gallears*, 3 New Sess. Cas. 704; 1 Den. C. C. 501; 2 Car. & K. 981; T. & M. 196; 19 L. J., M. C. 13; 13 Jur. 1010; 3 Cox, C. C. 572.

Animals feræ naturæ.]—In cases of larceny of animals feræ naturæ, the indictment must show that they were either dead, tame, or confined, otherwise they must be presumed to be in their original state. *Rex* v. *Rough*, 2 East, P. C. 607. And see *Rex* v. *Hudson*, 2 East, P. C. 611.

And it is not sufficient to add "of the goods and chattels" of such a one. *Rex* v. *Rough*, 2 East, P. C. 607.

Dead Animal.]—An indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive. *Rex* v. *Edwards*, R. & R. 497.

Upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead one. *Ib.*

But where A. was indicted for receiving a lamb, and it appeared that when he received the lamb it was dead, it was held that the indictment was sufficient, it being immaterial, as to the prisoner's offence, whether the lamb was alive or dead, his offence, and the punishment for it, being in both cases the same. *Rex* v. *Puckering*, 1 M. C. C. 242.

Live Animals.]—An indictment for stealing four live tame turkeys was laid in the county of H.; it appeared that the prisoner stole them alive in the county of C., and killed them there, and then brought them into the county of H.:—Held, that as the prisoner had not the turkeys in a live state in the county of H., the charge as laid was not proved, and that the word "live" in the description could not be rejected as surplusage, and therefore that the indictment was bad. *Rex* v. *Halloway*, 1 Car. & P. 128.

Tame Animals.]—An indictment charged the prisoner with having feloniously stolen four tame pigeons:—Held, that the word "tame" sufficiently showed that they were reclaimed, and that such tame and reclaimed pigeons are the subjects of larceny, notwithstanding that they have the means of ingress and egress at pleasure. *Reg.* v. *Cheafor*, 2 Den. C. C. 361; T. & M. 621; 21 L. J., M. C. 43; 15 Jur. 1065; 5 Cox, C. C. 367.

c. Allegation and Proof of Ownership of Property.

Person to whom Goods belong must be stated.]—An indictment for larceny, and receiving goods knowing them to have been stolen, is bad, if it does not state to whom the goods belonged. *Reg.* v. *Ward*, 7 Cox, C. C. 421.

Person must have Actual or Constructive Possession.]—Property cannot be laid in a person who has never had either actual or constructive possession. *Rex* v. *Adams*, R. & R. 225.

The goods in a dissenting chapel, vested in trustees, cannot be described in an indictment as the goods of a servant who has merely the custody of the chapel and things in it, to clean and keep in order, although he has the key of the chapel, and no other person but the minister has another key. *Rex* v. *Hutchinson*, R. & R. 412.

Never in Real Owner's Possession.]—The property stolen may be described as the real owner's, although it never was actually in his possession, but in the possession of his agent only. *Rex* v. *Remnant*, R. & R. 136.

A servant was sent out by his master to receive money from his master's customers, and having received the money, he was robbed of it on his way home. Semble, that an indictment for this robbery, in which the money was laid to be the property of his master, could not be supported, as the money had never been in the possession of the master. *Reg.* v. *Rudick*, 8 Car. & P. 237.

Guest or Innkeeper.]—Goods belonging to a

guest, stolen at an inn, may be laid to be the property either of the innkeeper or of the guest. *Rex* v. *Todd*, 1 Leach, C. C. 357, n.

Washerwoman.]—So goods stolen from a washerwoman may be laid to be her property. *Rex* v. *Parker*, 1 Leach, C. C. 357, n.

Agister.]—So in the case of an agister, who takes in sheep to agist for another, they may be laid to be his property. *Rex* v. *Woodward*, 1 Leach, C. C. 357, n.; 2 East, P. C. 653.

Coachmaster or Owner.]—The coach-glass of a gentleman's coach, standing in a coachmaster's yard, may be laid to be the property of the coachmaster. *Rex* v. *Taylor*, 1 Leach, C. C. 356; 2 East, P. C. 653.

Goods in Boot of Coach.]—The property in goods stolen, is properly alleged to be in the driver of a coach, from the boot of which they were taken. *Rex* v. *Deakin*, 2 East, P. C. 653; 2 Leach, C. C. 862.

Goods Salved from Wreck.]—The property in goods salved from a wreck may be laid in the owner of the wreck. *Reg.* v. *Clegg*, Ir. R. 3 C. L. 166; 11 Cox, C. C. 212.

Furnished Lodgings.]—The goods of a furnished lodging must be described as the lodger's goods, not as the goods of the original owner. *Rex* v. *Belstead*, R. & R. 411; *Rex* v. *Brunswick*, 1 M. C. C. 26.

Possession of Owner by Agent or Servant.]—The prisoner was sent by his fellow workmen to their common employer, to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper, with the names of the workmen and the sum due to each written inside:—Held, that he received the money as the agent of his fellow workmen, and not as the servant of the employer, and that, in an indictment against him for stealing it, the money was wrongly described as the property of the employer. *Reg.* v. *Barnes*, 35 L. J., M. C. 204; L. R. 1 C. C. 45; 12 Jur. (N.S.) 549; 14 L. T. 601; 14 W. R. 805; 10 Cox, C. C. 255.

Wife's Possession that of Husband.]—The wife of A. was employed by her father to sell sheep, and receive the amount at K. She did so; but before she left K. a 5*l.* note, which she received in payment for the sheep, was stolen from her:—Held, that the note was properly described as the property of the husband. *Rex* v. *Roberts*, 7 Car. & P. 485.

A married woman found a purse lying on the road and took it, but before she reached home the prisoners met her and robbed her of it:—Held, that the purse was rightly described as the property of her husband. *Reg.* v. *Sallows*, 2 Cox, C. C. 63.

Prosecutrix Married before Indictment Found.]—An indictment for a robbery on an unmarried woman in her maiden name is good, although she marries before the indictment is found. *Rex* v. *Turner*, 1 Leach, C. C. 536.

Bailee.]—The London Dock Company by mistake delivered two hogsheads of sugar to a carrier, who produced two delivery notes authorising them to deliver two other hogsheads of sugar, the property of B. The carrier broke bulk, and was indicted for larceny:—Held, that the property was well described as the property of the London Dock Company, they having still a special property in the chattels, notwithstanding that they had parted with the possession by mistake. *Reg.* v. *Vincent*, 3 Car. & K. 246; 2 Den. C. C. 464; 21 L. J., M. C. 109; 16 Jur. 457; 5 Cox, C. C. 537.

Where K. had taken a house in which his brother-in-law M. carried on business for the benefit of K. and his family, M. receiving neither profits nor salary, but having authority to buy and sell stock, and take money from the till:—Held, that the goods might be laid as the property of M., he being a bailee thereof. *Reg.* v. *Bird*, 9 Car. & P. 44.

A. was indicted for stealing iron which he had taken from a canal while the canal was being cleaned. Property found on such occasions in the canal, if identified, was returned by the company to the owner; otherwise it was kept by the company. A. was not in the employ of the company:—Held, that the property in the iron was rightly laid in the company. *Reg.* v. *Rowe*, Bell, C. C. 93; 28 L. J., M. C. 128; 5 Jur. (N.S.) 274; 7 W. R. 236; 8 Cox, C. C. 139.

Churchwardens and Overseers.]—Money was stolen from an ancient poor's box fixed up in a church:—Held, that, in an indictment for stealing it, the property would be properly laid in the vicar and churchwardens; and that an indictment in which the property was stated to be that of "J. N. and others," J. N. being the vicar, was correct, without alleging J. N. to be the vicar, or the "others" to be the churchwardens. *Reg.* v. *Wortley*, 2 Car. & K. 283; 1 Den. C. C. 162; 2 Cox, C. C. 32.

An indictment for stealing goods may, under 55 Geo. 3, c. 137, state them to be the goods of the overseers of the poor, for the time being, of the parish of A.; for this will import that they belonged, at the time of the theft, to the persons who were the then overseers. *Rex* v. *Went*, R. & R. 359.

Where the lead of a coffin deposited in a private vault in a public church has been stolen, the property is well laid in the churchwardens and overseers of the parish to which such church belongs, though locally situate in another parish, and long disused for divine service. *Reg.* v. *Garlick*, 1 Cox, C. C. 52.

Vicar—Lead from Roof of Church.]—In an indictment under s. 44 of 7 & 8 Geo. 4, c. 29, for stealing lead from the roof of a parish church, when the benefice is a vicarage, the lead is properly laid as the property of the vicar. *Reg.* v. *Miles*, 1 Cox, C. C. 351.

Inhabitants of a County.]—A room attached to a shire-hall, and built and used for the purpose of a ball and concert-room, is within 7 Geo. 4, c. 64, s. 5, which provides, that in any indictment for any felony or misdemeanour, committed in, upon, or with respect to any court, or other building erected or maintained at the expense of any county, in, on, or with respect to any goods or chattels provided for or at the expense of the county, to be used in or with any such court, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county. *Reg.* v. *Winbow*, 5 Cox, C. C. 346.

A chandelier which had been used as a fixture in the ball-room, and subsequently removed to another part of the building, but not used for any purpose, is also within the same statute, and is properly described as the property of the inhabitants of the county. *Ib.*

Bank not Registered—Public Officer.]—In an indictment for larceny, the property was laid to be in G., manager of the Dudley and West Bromwich Bank. The property belonged to the banking company, a company consisting of more than twenty partners, but no registration of it, or appointment of any manager or public officer, was proved. The indictment was amended by laying the property in W. and others, W. being one of the partners:—Held, that the ownership, as amended, was rightly laid under 7 Geo 4, c. 64, s. 14, and that it need not have been laid in the public officer (presuming there was one), under 7 Geo 4, c. 46, s. 9. *Reg.* v. *Pritchard*, L. & C. 34; 30 L. J., M. C. 169; 7 Jur. (N.S.) 557; 4 L. T. 340; 9 W. R. 579; 8 Cox, C. C. 461.

The 1 & 2 Vict. c. 85, was continued by 3 & 4 Vict. c. 111; and a shareholder in a joint stock banking company may be indicted for embezzling or stealing the money of the company, it being laid as the property of a public officer of the company correctly appointed and registered. *Reg.* v. *Atkinson*, 2 M. C. C. 278; Car. & M. 525.

Savings Bank—Trustee.]—The property of a savings bank may be laid as the property of A. (a trustee of the bank) and others, under s. 14 of 7 & 8 Geo. 4, c. 64. *Reg.* v. *Bull*, 1 Cox, C. C. 137.

Property of Company.] — An indictment charged the prisoners with stealing brass, the property of H. The evidence was that the brass was the property of a trading company, and that it was seen on the company's premises about twelve days before it was missed on the 24th March, 1877; that the company was being wound up; and that H. was the official liquidator. A copy of the "London Gazette," dated 19th May, 1877, was produced, which stated that at a special meeting of the company duly convened, and at a subsequent special general meeting (April 25th), a resolution was passed for winding-up the company voluntarily, and that H. and S. were appointed liquidators at the special general meeting:—Held, that this evidence did not prove that the brass was the property of H. as laid in the indictment. *Reg.* v. *Bell*, 36 L. T. 670; 13 Cox, C. C. 623.

In order to satisfy the allegation in an indictment laying the property in a company limited, it is not necessary to prove the incorporation of the company by the certificate of incorporation, but it is sufficient to show that the company acted and carried on business in fact as such company. *Reg.* v. *Langton*, 46 L. J., M. C. 136; 2 Q. B. D. 296; 35 L. T. 527; 13 Cox, C. C. 345.

Father or Son.]—An indictment for stealing the wearing apparel of a son, who is an apprentice to his father, and furnished with his clothes in pursuance of his indentures, should lay them to be the property of the son, and not of the father. *Rex* v. *Forsgate*, 1 Leach, C. C. 463.

If a father buys and pays for cloth which is made into trowsers for his son, who is seventeen years of age, these trowsers may, on an indictment for larceny, be laid as the property of the father. *Reg.* v. *Hughes*, Car. & M. 593.

In such cases the property may be laid either in the father or in the son, but the better course is to lay it in the latter. *Ib.*

A. was a boy of fourteen years of age, living with and assisting B., who was his father. The prisoner was indicted for stealing a pair of boots the property of A. The boots were the property of B., but at the time they were stolen by the prisoner, A. had temporarily, in his father's absence, the charge of the stall from which they were stolen:—Held, that A. was not a bailee, and that the ownership of the boots could not properly be laid in him. *Reg.* v. *Green*, Dears. & B. 113; 26 L. J., M. C. 17; 2 Jur. (N.S.) 1146; 5 W. R. 52; 7 Cox, C. C. 186.

Goods under Execution.]—If goods seized under a fi. fa. are stolen, they may be described as the goods of the party against whom the writ issued; for though they are in custodiâ legis, the original owner continues to have a property in them until they are sold. *Rex* v. *Eastall*, 2 Russ. C. & M. 264, 320.

Peers and Peeresses.]—In an indictment for larceny of goods, the property of a peer who is a baron, the goods may be laid as the goods and chattels of "G., T. R., Lord D.," without styling him Baron D., although the more proper way to describe the peer is by his christian name, and his degree in the peerage, as duke, earl, baron, or the like. *Reg.* v. *Pitts*, 8 Car. & P. 771. S. P., *Reg.* v. *Culey*, 5 Jur. 709.

An indictment for larceny, laying the goods stolen to be the property of Victory Baroness Turkheim, is good, although her name is Selinda Victoire. *Rex* v. *Sulls*, 2 Leach, C. C. 861.

Property of Industrial Co-operative Society.]—B. was charged with stealing money, alleged to be the money of A. A. had received the money as the servant of an industrial co-operative society, for goods sold to members of the society, and he was accountable to the treasurer for the moneys he had received. B. was a member of the society, and had abstracted some money from a till under A.'s charge:—Held, that there was a sufficient possession of the money in A. to sustain a conviction for larceny against B. *Reg.* v. *Burgess*, L. & C. 299; 32 L. J., M. C. 185; 9 Jur. (N.S.) 582; 8 L. T. 255; 11 W. R. 602; 9 Cox, C. C. 302.

Trustees not Incorporated.]—An indictment for the larceny of property belonging to trustees who are not incorporated, must lay the property to be in them by name as individuals, subjoining a description of the character, in which they are authorised to act. *R* x v. *Sherrington*, 1 Leach, C. C. 513.

Property of Friendly Society.]—When a friendly society had appointed a treasurer and two trustees, one of the trustees was held guilty of larceny in stealing the money of the society, the money being alleged in the indictment to be the property of the treasurer, and having been taken from his hands with the intention of stealing. *Reg.* v. *Cain*, 2 M. C. C. 204; Car. & M. 309.

A. was indicted for stealing money, the property of "F. and others." "F. and others"

were trustees of a friendly society; and A. and H. were members of the society. H. was in possession of a shop where goods were sold for the society, and had the sole management, and was answerable for property and money coming into his possession. A, while assisting in the shop, without salary, took the money from the till. The prosecution failing to prove the society was duly enrolled, the indictment was amended by inserting H.'s name instead of "F. and others." It was then proved, on behalf of A, that the society was enrolled:—Held, that a conviction upon the amended indictment might be sustained. *Reg.* v. *Webster*, L. & C. 77; 31 L. J., M. C. 17; 7 Jur. (N.S.) 1208; 5 L. T. 327; 10 W. R. 20; 9 Cox, C. C. 13. S. P., *Rex* v. *Bramley*, R. & R. 478.

A., who was a trustee of a friendly society, was appointed by resolution of the society to receive money from the treasurer, and to carry it to the bank. He received the money from the treasurer's clerk, but instead of taking into the bank, he applied it to his own purposes. He was indicted for stealing, the money being laid as that of the treasurer. The 18 & 19 Vict. c. 63, s. 18, vests the property of friendly societies in the trustees, and directs that in all indictments the property shall be laid in their names:—Held, that A. could not be convicted. *Reg.* v. *Loose*, Bell, C. C. 259; 29 L. J., M. C. 132; 6 Jur. (N.S.) 513; 2 L. T. 254; 8 W. R. 222; 8 Cox, C. C. 302.

Landlord or Benefit Society.]—A box belonging to a benefit society was stolen from a room in a public-house. Two of the stewards had keys of this box; and, by the rules of the society, the landlord ought to have had a key, but in fact he had not:—Held, that the prisoner might be convicted on a count laying the property in the landlord alone. *Rex* v. *Wymer*, 4 Car. & P. 391.

Chapel Trustees.]—A bible had been given to a society of Wesleyans; and it had been bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust-deed was produced:—Held, that, in an indictment for stealing the bible, the property was rightly laid in B. and others. *Rex* v. *Boulton*, 5 Car. & P. 537.

On Death of Parties—Laid in the Ordinary.]—In an indictment for stealing property which has belonged to a deceased person, who appointed executors, who would not prove the will, the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, has taken out letters of administration with the will annexed; because the rights of an administrator only commence from the date of the letters, as distinguished from those of an executor, which commence, not from the granting of the probate, but from the death of the testator. *Rex* v. *Smith*, 7 Car. & P. 147. See *Tharpe* v. *Stallwood*, 5 Man. & G. 760; 12 L. J., C. P. 241.

A knife was stolen from the pocket of A., as his dead body lay in a road at S., in the diocese of W. The last place of abode of A. was at T., in the diocese of G.; but A.'s father stated that he believed his son had left T. to come to live with him, but did not know whether his son had given up his lodgings at T.:—Held, that this was sufficient proof to support a count for larceny, laying the property in the lord bishop of W. *Reg.* v. *Tippin*, Car. & M. 545.

A. was convicted upon an indictment charging her with stealing numerous articles, laid as the property of the ordinary. The evidence was, that the articles, which belonged to a deceased person, were after her death found in A.'s possession; that search had been made for a will, and none found; and that a small portion only of the articles had been seen in the house of the deceased after her death:—Held, that the property was rightly laid in the ordinary, and that the sessions had done right in leaving the case, as to the whole of the articles, to the jury, and in refusing to put the prosecutor to an election to proceed only in respect of the taking any particular articles. *Reg.* v. *Johnson*, Dears. & B. 340; 27 L. J., M. C. 52; 4 Jur. (N.S.) 55; 6 W. R. 64; 7 Cox, C. C. 379.

—— **Joint Owners or Partners.**]—Where two had jointly stock upon a farm, and one died, leaving several children —Held, that the property in sheep stolen was properly alleged to be in the survivor and the children; the former swearing that he considered himself to hold one moiety for the benefit of the latter. *Rex* v. *Scott*, 2 East, P. C. 655; R. & R. 13.

D. and C. were partners; C. died intestate, leaving a widow and children; from the time of his death the widow acted as partner with D., and attended the business of the shop; three weeks after C.'s death part of the goods were stolen; they were described in the indictment as the goods of D. and the widow:—Held, that the description was right *Rex* v. *Gaby*, R. & R. 178.

—— **Sufficient Evidence of Possession.**]—On an indictment for stealing sheep, which had been stolen after the death of the late owner, there being no formal proof of a will or an administration, but it appearing that the sheep were in charge of the shepherd, under the orders of a steward, who was under the order of the prosecutors, and took directions from and rendered accounts to them:—Held, that there was sufficient evidence of a possession in them, which would sustain the indictment. *Reg.* v. *King*, 4 F. & F. 493.

On Conviction of Felons.]—Goods of an adjudged felon, stolen from his house, in the possession and occupation of his wife, may be described in an indictment for larceny as the goods of the Queen. But the house cannot be so described without office found. *Reg.* v. *Whitehead*, 2 M. C. C. 181. S. P., *Coombes* v. *Queen's Proctor*, 16 Jur. 820.

Amendment of.]—Where stolen property has been laid in the wrong person, the indictment may be amended. *Reg.* v. *Fullarton*, 6 Cox, C. C. 194. S. P., *Reg.* v. *Pritchard*, L. & C. 34; 30 L. J., M. C. 169; 7 Jur. (N.S.) 557; 4 L. T. 340; 9 W. R. 579; 8 Cox, C. C. 461.

If in an indictment for larceny the property of the goods is laid in A. and the property is proved to be in the London Dock Co., this is amendable under 14 & 15 Vict. c. 100, s. 1. *Reg.* v. *Vincent*, 3 Car. & K. 246; 2 Den. C. C. 464; 21 L. J., M. C. 109; 16 Jur. 457; 5 Cox, C. C. 537.

If an indictment for larceny does not state to whom the goods belong, it cannot be amended,

nor is the defect cured by 14 & 15 Vict. c. 100, s. 8. *Reg.* v. *Ward*, 7 Cox, C. C. 421.

Proof of Ownership.]—In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, e.g. that the prosecutor and his father for forty-five years since 1815, had exercised the exclusive right of oyster-fishing in the locus in quo, and that in 1846 an action had been brought to try the right, and the verdict given in favour of the prosecutor. *Reg.* v. *Downing*, 23 L. T. 398 ; 11 Cox, C. C. 580.

Prisoner was charged with stealing a mare, the property of E. The evidence was that the prosecutor, in presence of the prisoner, agreed to buy of W. a mare for 5*l*., and that W. assented to take a cheque for the 5*l*. The prosecutor afterwards sent the prisoner to W. with the cheque, and directions to take the mare to Bramshot Farm. On the next day the prisoner sold a mare to S., which he said he had bought for 5*l*. Before the magistrate he said he sold the mare to S., with the intention of giving the money to E., but that he got drunk :—Held, that that was sufficient evidence on which a jury might find that the mare sold to S. was the property of E. *Reg.* v. *King*, 25 L. T. 851 ; 12 Cox, C. C. 134.

W. let a horse on hire for a week to C., who fetched the horse every morning from W.'s stable, and returned it after the day's work was done. The prisoner went to C. one day, just as the day's work was done, and fraudulently obtained it from him by saying falsely, "I have come for W.'s horse ; he has got a job on, and wants it as quickly as possible." The same evening the prisoner was found three miles off with the horse by a constable, to whom he stated that it was his father's horse, and that he was sent to sell it :—Held, that he was rightly convicted of larceny on an indictment alleging the property of the horse to be in W. *Reg.* v. *Kendall*, 30 L. T. 345 ; 12 Cox, C. C. 598.

—— **Possession of Agent—Charge of Stealing from Agent as Principal.**]—The prisoner was tried upon an indictment which charged, that whilst the servant of A. he stole money belonging to A. The evidence was, that the prisoner was the servant of B., and that the money belonged to B., but was in the possession of A. as the agent of B. He was accordingly convicted of simple larceny :—Held, that the conviction was right. *Reg.* v. *Jennings*, Dears. & B. 447 ; 4 Jur. (N.S.) 146 ; 6 W. R. 231 ; 7 Cox, C. C. 397.

6. Trial.

a. Jurisdiction to Try.

Parish Partly in Two Counties.]—If a parish is partly situate in the county of W., and partly in the county of S., it is sufficient, in an indictment for larceny, to state the offence to have been committed at the parish of H. in the county of W. *Rex* v. *Perkins*, 4 Car. & P. 363.

Goods carried into another County.]—Larceny must be tried in the county where committed ; but the offence is considered as committed in every county into which the thief carries the goods. *Rex* v. *Thomson*, 2 Russ. C. & M. 283.

If a man steals goods in one county, and carries them into another, it will be larceny in the latter, though the goods are not carried into the latter county until long after the original theft. *Rex* v. *Parkin*, 1 M. C. C. 45.

A wife took her husband's goods from Nottinghill, and she was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession. There was no evidence that they were under his control at any place within the jurisdiction of the Central Criminal Court :—Held, that that court had no jurisdiction to try the prisoner for the offence. *Reg.* v. *Prince*, 11 Cox, C. C. 145.

Indictment for stealing two horses in Kent ; the only evidence of stealing in Kent was that the constable having taken the prisoner in Surrey, and the prisoner having offered on some pretence to go to a place in Kent, the constable and the prisoner rode the horses there, and the prisoner escaped, leaving the horses with the constable : —Held, not sufficient. *Rex* v. *Simmons*, 1 M. C. C. 408.

The prisoner stole a watch at Liverpool, and sent it by railway to a confederate in London :—Held, that the constructive possession still remained in the prisoner, and that he was triable at the Middlesex sessions. *Reg.* v. *Rogers*, 37 L. J., M. C. 83 ; L. R. 1 C. C. 136 ; 18 L. T. 414 ; 16 W. R. 733 ; 11 Cox, C. C. 38.

If a man kills a sheep in county A., and carries the carcase into county B., he may be convicted upon an indictment for stealing, taking and driving away sheep into county B. If a man kills a sheep in county A., and carries the carcase into county B., he cannot be convicted of killing the sheep with intent to steal the carcase in county B. *Reg.* v. *Newland*, 2 Cox, C. C. 283.

Goods Stolen Abroad and brought to England.]—A person had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial :—Held, that, Guernsey not being a part of the United Kingdom, he could not be convicted of larceny, for having them in his possession here, nor of receiving in England the goods stolen in Guernsey. *Reg.* v. *Debruiel*, 11 Cox, C. C. 207.

If a larceny is committed out of the kingdom, though within the king's dominions (e.g. in Jersey), bringing the things stolen into this kingdom, will not make it larceny here. *Rex* v. *Prowes*, 1 M. C. C. 349. S. P., *Reg.* v. *Madge*, 9 Car. & P. 29.

Within Admiralty Jurisdiction.]—The court of quarter sessions has jurisdiction to try cases of larceny committed on the high seas where the offender is apprehended within the jurisdiction of such court. *Reg.* v. *Peel*, L. & C. 231 ; 32 L. J., M. C. 65 ; 8 Jur. (N.S.) 1185 ; 7 L. T. 336 ; 11 W. R. 40 ; 9 Cox, C. C. 220.

See further infra, col. 1717 et seq.

b. Practice.

Election of Larcenies Charged.] — A. was charged and convicted of stealing various articles. The evidence was that the articles had belonged to a deceased person and after her death were found in A.'s possession :—Held, that the sessions had done right in leaving the case as to the whole of the articles to the jury, and in refusing to put the prosecutor to an election to proceed only in respect of the taking any particular articles. *Reg.* v. *Johnson*, Dears. & B.

340; 27 L. J., M. C. 52; 4 Jur. (N.S.) 55; 7 Cox, C. C. 379.

On an indictment for stealing fowls, in a first count laid on the 15th February, for stealing ten fowls, and in the third count laid on the 13th February in the same year, for stealing three fowls, the prosecutor was put to elect between the two occasions. *Reg.* v. *Lonsdale*, 4 F. & F. 56.

A. was tried upon an indictment which contained two counts, the first for embezzlement, and the second for larceny as a bailee. At the close of the case for the prosecution, it was objected that the indictment was bad for misjoinder of counts, and that the counsel for the prosecution could not be allowed to elect upon which count he would proceed. The objection was overruled. The counsel for the prosecution elected to proceed upon the second count, and A. was convicted:—Held, the conviction was right. *Reg.* v. *Holman*, L. & C. 177; 8 Jur. (N.S.) 1082; 6 L. T. 474; 10 W. R. 718; 9 Cox, C. C. 201.

An indictment charged an assistant to a photographer with stealing divers articles belonging to his employer. It did not appear when the articles were taken, whether at one time or more times, but only that one particular article could not have been taken before a given month:—Held, that this was not a case in which the prosecutor should be put to elect upon which articles to proceed under 24 & 25 Vict. c. 96, s. 6. *Reg.* v. *Henwood*, 22 L. T. 486; 11 Cox, C. C. 526.

A person stole gas for the use of a manufactory by means of a pipe, which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day, and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas:—Held, that as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings, and therefore the prosecution was not bound to elect. *Reg.* v. *Firth*, 38 L. J., M. C. 54; L. R. 1 C. C. 172; 19 L. T. 746; 17 W. R. 327; 11 Cox, C. C. 234.

Held, also, that, even if the pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction. *Ib.*

—— **Before 24 & 25 Vict. c. 96, s. 6.**]—Two persons indicted for horse-stealing in county A., were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county B.:—Held, that as each taking in county B. was a separate felony, the prosecutor's counsel must elect on which to proceed. *Rex* v. *Smith*, R. & M. 295.

Whether Jury must find Specific Amount Stolen on Particular Day.]—The prisoner was employed to conduct an office in connection with a branch bank. His salary included his services and the providing an office, which was in his own house, where he carried on another business. The office was fitted up at the expense of the bank, and in it there was an iron safe, the property of the bank, into which it was his duty when night came to put any money received during the day which had not been required. The manager of the branch bank kept a duplicate key of this safe. It was the prisoner's duty to receive money from customers, to be put to their accounts with the branch bank, and to pay cheques. He furnished accounts to the manager, and it was his duty to pay over weekly to the manager the excess not required at the office. He also received moneys from the branch as required, which were entered in his weekly accounts. In September, 1855, his accounts were audited, and his cash found correct: and from that time up to September, 1857, he continued to furnish weekly accounts which were correct in their statements of receipts and payments, but no examination of the balances appearing from those accounts to be in his hands took place. At the latter date, however, he was about 3,000*l.* short in his accounts, and admitted that he had taken that amount. The jury found the prisoner guilty of larceny as a clerk, in having stolen some money received from customers, which before such stealing had been placed in the safe, and made the subject of a weekly account:—Held, that it was not necessary that the jury should find any specific amount to have been stolen on any particular day. *Reg.* v. *Wright*, Dears. & B. 431; 27 L. J., M. C. 65; 4 Jur. (N.S.) 313; 6 W. R. 255; 7 Cox, C. C. 413.

Prisoner may be found Guilty of Embezzlement though Indicted for Larceny.]—*See* ante, EMBEZZLEMENT.

c. Evidence.

Competent Witness—Wife of Prisoner previously Convicted.]—A. being tried for sheep stealing, it was proposed to call the wife of B. to prove that A. and B. had jointly stolen the sheep, B. having been convicted of it at the previous quarter sessions:—Held, that she was a competent witness. *Reg.* v. *Williams*, 8 Car. & P. 284.

Statement of Prisoner.]—A statement made by a prisoner before suspicion attaches to him, and before search made, in order to account for his possession of property, which he is afterwards charged with having stolen, is admissible as evidence for him. *Reg.* v. *Abraham*, 2 Car. & K. 550.

—— **Duty of Prosecution to Rebut.**]—As a matter of law it is not incumbent upon the prosecution on a trial for larceny to call as witnesses the persons whom the prisoner has named as able to account for his possession of the stolen property, though the persons so named are known and might be called. *Reg.* v. *Wilson*, Dears. & B. 157; 26 L. J., M. C. 45; 3 Jur. (N.S.) 167; 5 W. R. 251; 7 Cox, C. C. 310.

Where a prisoner charged with larceny has given two different accounts of the way in which he became possessed of the stolen property, it is not incumbent on the prosecutor to call as witnesses persons whom, in one of the statements, he says could prove his innocence, with a view of disproving that statement, but it may be prudent in the prosecutor to have these persons in attendance at the trial, though he does not call them, to avoid the effect of the observations by the prisoner or his counsel that these persons could prove the prisoner's innocence, but that he has not the means of procuring their attendance. *Reg.* v. *Dibley*, 2 Car. & K. 818.

Where a person on whom stolen property is found gives to those who find him in possession of it a reasonable account of how he came by it,

it is incumbent on the prosecutor, on the trial, to show that that account is untrue. *Reg.* v. *Crowhurst*, 1 Car. & K. 370. S. P., *Reg.* v. *Smith*, 2 Car. & K. 207; *Reg.* v. *Hughes*, 1 Cox, C. C. 176.

Aliter, if that account is unreasonable or improbable on the face of it. *Ib.*

On a charge of burglary, possession by the prisoner of part of the stolen property very soon after the burglary, with an account given of it not reasonable or credible, is sufficient primâ facie evidence, without express evidence to falsify it. It is so however only if, upon all the circumstances in the case, the account given is not reasonably credible. *Reg.* v. *Exall*, 4 F. & F. 922.

Where stolen property is traced to the possession of a prisoner, and he at the time gives an account of how he became possessed of it, it is not the duty of the prosecution to disprove that account where circumstances exist in the case which render that account unreasonable, or its truth improbable. In such a case the burden of calling the parties vouched is cast on the prisoner. *Reg.* v. *Harmer*, 2 Cox, C. C. 487. See *Reg.* v. *Ritson*, 50 L. T. 727; 15 Cox, C. C. 478; 48 J. P. 630.

Of other Cases.]—Neither upon an indictment for stealing nor receiving can evidence be given that the prisoner had at the time, or previously, other stolen goods in his possession. *Reg.* v. *Oddy*, T. & M. 593; 2 Den. C. C. 264; 20 L. J., M. C. 198; 15 Jur. 517; 5 Cox, C. C. 210.

A prisoner was indicted for stealing three articles. Having taken the first article, he returned in about two minutes and took the second, and then returned in half an hour and took the third:—Held, that, the last taking was a distinct felony, and could not be given in evidence with the other two; but, that the interval of time between the first and second taking was so short, that they must be considered as parts of the same transaction. *Rex* v. *Birdseye*, 4 Car. & P. 386.

See also cases, post, col. 1874 et seq.

Mere Possession of another's Property.]—Mere possession of property belonging to another is not sufficient to sustain a charge of larceny unless there be evidence that the property was stolen. *Reg.* v. *Hall*, 1 Cox, C. C. 231.

Sufficiency to support Conviction.]—W. was indicted for larceny for stealing six pounds of brass from a foundry. The only suggested evidence offered at the trial was, that the prisoner, who was employed upon the premises, had been sent to come into the place where the brass was kept:—Held, that there was not a scintilla of evidence to go to the jury. *Reg.* v. *Walker*, Dears. C. C. 280; 6 Cox, C. C. 310.

A. had agisted his horse with B., and in consequence of hearing of the loss of it, A. went to the field of B., where it was not:—Held, to be not sufficient proof of loss to support an indictment for horse-stealing. *Rex* v. *Yend*, 6 Car. & P. 176.

A servant a day or two before her mistress's death got cashed a cheque drawn to her mistress's order, and which had come to her mistress's house in a letter, and when cashed purported to bear her mistress's indorsement; and after cashing it she applied the greater part of it to a purpose which probably was directed by her mistress, but had retained a small surplus, and when taxed with it, just after her mistress's death, she denied the receipt of the cheque, the indorsement of which was believed not to be that of her mistress. The jury was directed that there was no evidence on which they could properly convict her for stealing the cheque, even if there was any on which they could have convicted for embezzling the surplus. *Reg.* v. *Slingsby*, 4 F. & F. 61.

A banker's clerk was employed at A. to manage a branch for them at the town of B. He provided an office for the bank in his own house. The office was furnished by the bankers, and an iron safe was provided there by them. There were duplicate keys, the bankers kept one and the clerk the other key. It was his duty to receive money from customers of the bank, to place it at night in the safe, to pay away from time to time such portions of it as were required for the business of the bank, to pay cheques, to pay over weekly any balance not required for the business at B., and to send in weekly accounts to the bankers at A. He carried on the business, receiving and paying money and sending in weekly accounts. In auditing his accounts a deficiency of 3,000*l.* was discovered. He admitted that he had taken that amount of the money. There was no other evidence, except that in the day-time money was sometimes kept in a drawer in the office. The jury found him guilty of larceny as a clerk in having stolen some money received from customers which, before such stealing, had been placed in the safe, and made the subject of a weekly account:—Held, that there was evidence to go to the jury of larceny. *Reg.* v. *Wright*, Dears. & B. 431; 27 L. J., M. C. 65; 4 Jur. (N.S.) 313; 6 W. R. 255; 7 Cox, C. C. 413.

The prisoner was the bailor, and the prosecutor the bailee of a horse. The prisoner had intrusted the horse to the prosecutor as security for a bill drawn by the former and accepted by the latter, to accommodate him. The prisoner took the horse out of the prosecutor's possession. The bill had been paid by the prosecutor, who had never been repaid by the prisoner, but was not produced at the trial:—Held, that in the absence of the bill there was no evidence to show that the prisoner had ever parted with his property in the horse, so as to constitute his taking of it a larceny. *Reg.* v. *Wadsworth*, 10 Cox, C. C. 557.

When Prosecutor cannot say that any Goods Lost.]—A man was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl-house where a number of fowls were kept, and on the floor of which were some feathers corresponding to the feathers of one of the fowls found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed over night, was found open in the morning. The spot where he was found was 1,200 yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any:—Held, that there was evidence to support a conviction for larceny. *Reg.* v. *Mockford*, 17 L. T. 582; 16 W. R. 375; 11 Cox, C. C. 16.

The prisoner was found coming out of a warehouse, where a large quantity of pepper was kept, with pepper of a similar quality in his possession. He had no right to be in the warehouse, and on being discovered he said, "I hope

you will not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk :—Held, that there was sufficient evidence to go to the jury of the corpus delicti. *Reg.* v. *Burton*, Dears. C. C. 282 ; 23 L. J., M. C. 52 ; 18 Jur. 157 ; 2 W. R. 230 ; 6 Cox, C. C. 293.

Though no portion of the prosecutor's goods has been missed, it is a question for the jury, under all the circumstances of the case, whether the goods, which are the subject of the indictment, are his property. *Reg.* v. *Hooper*, 1 F. & F. 85. Contra, *Reg.* v. *Dredge*, 1 Cox, C. C. 235.

Proof of Writing—No Notice to Produce.]—On an indictment against A. and B., for burglary, one of the articles stolen (the only one directly proved to have been in the possession of either of them) being a ring, which was described particularly by the prosecutor, and proved to have had an inscription upon it, and to have been just like one he produced ; and one of the prisoners being proved to have shown, soon after the burglary, a ring which was proved to have been just like that produced, and to have had an inscription upon it, but no notice to produce which had been given :—Held, that the contents of the inscription on the prosecutor's ring could not be proved, and that, as there had been no notice given to the prisoner to produce the ring shown by him to the witness, the contents of the inscription upon it could not be proved. *Reg.* v. *Farr*, 4. F. & F. 396.

—— **After proof of Subpœna.**]—On an indictment for the larceny of a bill of exchange obtained from the prosecutor, under a pretence of discounting it, parol evidence of the bill may be given after proof of a subpœna duces tecum given to the person in whose possession it was shown to be previously to the trial, but who did not attend. *Rex* v. *Ackles*, 1 Leach, C. C. 294 ; 2 East, P. C. 675.

d. Recent Possession of Stolen Property.

What Considerations Affect.]—The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. Therefore, where two ends of woollen cloth in an unfinished state, consisting of about 20 yards each, are lost, and were in the possession of the prisoner two months after their being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call on the prisoner to show how he came by the property. *Rex* v. *Partridge*, 7 Car. & P. 551.

Where a stolen horse was found in the possession of the prisoner six months after it was stolen, and there was no other evidence against him, the judge would not call on him for his defence, as the possession was not sufficiently recent. *Reg.* v. *Cooper*, 3 Car. & K. 318 ; 16 Jur. 750. S. P., *Rex* v. *Adams*, 3 Car. & P. 600 ; *Reg.* v. *Cruttenden*, 6 Jur. 267.

Possession by a letter-carrier of a bank-note some months after it had been sent by post and lost, is not sufficient evidence of a felonious stealing by him, though not accounted for otherwise than by his mere assertion that he had found it. *Reg.* v. *Smith*, 3 F. & F. 123.

A prisoner was tried on the 29th of June, 1863, upon an indictment which charged him in the first count with having on the 20th September, 1862, stolen certain property of A., and in the second count with having on the 16th of January, 1863, stolen five shovels, also the property of A. The prisoner had been in A.'s employ several years, and the property charged in the indictment was found in his possession on the 21st of January, 1863, but there was no evidence to show when they were stolen :—Held, that he was not entitled to be acquitted on the ground that the stolen property was not proved to have been in his possession recently after it was stolen. *Reg.* v. *Knight*, L. & C. 378 ; 9 L. T. 808 ; 9 Cox, C. C. 437.

Where property of insignificant value is traced to the possession of the prisoner fifteen months after the loss, and he gives an account of his possession of it which is not inconsistent with the right of the prosecutor to it, he ought not to be called on to account for that possession in a court of justice. Where, however, the prisoner, when lost property is found in his possession, and identified by the prosecutor after so long an interval, claims it as his own property by right of purchase made before the alleged theft, and a continuous possession up to the time of discovery, he may be called on to account for that possession, notwithstanding the interval which has elapsed between the loss and discovery, for then he disputes the identity of the thing found with that lost. *Reg.* v. *Evans*, 2 Cox, C. C. 270.

A prisoner was indicted for sheep stealing. The prosecutor lost a sheep in September ; it was found in the prosecutor's possession in the March following. There was no other evidence of larceny than the possession :—Held, that the period between the loss and the finding was too long to permit the case to go to the jury. *Reg.* v. *Harris*, 8 Cox, C. C. 333.

Evidence of Receiving Property, knowing it to have been Stolen.]—Recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to have been stolen, according to the other circumstances of the case. *Reg.* v. *Langmead*, L. & C. 427 ; 10 L. T. 350 ; 9 Cox, C. C. 464.

What sufficient Evidence of Recent Possession.]—A bag was left by the owner on a Saturday night near to a place where the prisoner and two other persons were at the time. The prisoner passed by the place on his way home, and shortly afterwards one of the other persons followed in the same direction. That person and the prosecutor then met the prisoner coming back to his home from the opposite direction, and being questioned he denied all knowledge of the bag, and said that he had been into the neighbouring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it, were then searched without success. On the Monday morning the bag was found in a hay-loft in one of the disused farm buildings near to the highway. There was no door to it, and passers-by had easy access to it. The prisoner was then taken into custody for stealing the bag, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this," and made use of some other words of no more definite meaning. The chairman left all the facts to the jury as evidence from which they might infer

that the prisoner had had possession of the bag, and directed them if they found so, to treat the case as one of recent possession :—Held, that the chairman's ruling was wrong, and that he ought to have directed an acquittal. *Reg.* v. *Hughes*, 39 L. T. 292 ; 14 Cox, C. C. 223.

On the night following the commission of a burglary, two boys were found concealed in a corn-chest in an open gig-house with which they were not in any way connected, and half a mile from the house of the prosecutor. Outside the corn-chest was found some of the stolen property, and in the loft over the gig-house was found another portion of the stolen property :—Held, that there was no evidence to go to the jury of possession by the boys of any of the stolen articles. *Reg.* v. *Coots*, 2 Cox, C. C. 188.

7. Restitution and Recovery of Stolen Property.

Power to Order—Property must have been Stolen.]—On a conviction for stealing, the court has no jurisdiction to make an order directing the disposal of property found in the possession of the felon when he was apprehended, which was not part of that stolen. *Reg.* v. *London Corporation*, E. B. & E. 509 ; 27 L. J., M. C. 231 ; 4 Jur. (N.S.) 1078. S. C., sub nom. *Reg.* v. *Pierce*, Bell, C. C. 235 ; 8 Cox, C. C. 344.

To what Cases Applicable.]—The 21 Hen. 8, c. 11, which restored goods to a prosecutor on conviction of the person who took them away, extended only to a felonious and not to a fraudulent taking. *Rex* v. *De Veaux*, 2 Leach, C. C. 585 ; 2 East, P. C. 789, 839.

The 24 & 25 Vict. c. 96, s. 100, applies to cases of false pretences as well as felony, and the fact that the prisoner parted with the goods to a bonâ fide pawnee will not disentitle the original owner to the restitution of the goods. *Reg.* v. *Stancliffe*, 11 Cox, C. C. 318.

The court is bound by the statute to order restitution of property obtained by false pretences, and the subject of the prosecution, in whose hands soever it is found. *Reg.* v. *Goldsmith*, 12 Cox, C. C. 594.

So, likewise, of property received by a person knowing it to have been stolen or obtained by false pretences. *Ib.*

But the order is strictly limited to property identified at the trial as being the subject of the charge. *Ib.*

It does not, therefore, extend to property in the possession of innocent third persons, which was not produced and identified at the trial as being the subject of the indictment. *Ib.*

An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified, and in the possession of the court. *Reg.* v. *Smith*, 12 Cox, C. C. 597.

Sect. 100 of the Larceny Act, 1861, enacts that any property dishonestly acquired shall be restored to the owner upon conviction of the offender, and in every case the court before which the conviction takes place shall have power to order restitution in a summary manner, provided that in case of a bonâ fide transfer of a negotiable instrument for value, and without notice or reasonable cause to suspect, the court shall not award or order the restitution of such security. The defendants had bonâ fide and without cause to suspect acquired the possession for value of a New Zealand bond for 1,000*l.*, which had been stolen from the plaintiff's possession, after the conviction of a person for feloniously receiving the same :—Held, that the proviso in the above section applies to the right to recover as well as to the summary restitution of a negotiable instrument, and that, under the circumstances, the owner of the bond could not recover it from the transferees. *Chichester* v. *Hill*, 52 L. J., Q. B. 160 ; 48 L. T. 364 ; 31 W. R. 245 ; 15 Cox, C. C. 258 ; 47 J. P. 324.

See also next sub-head.

Stolen Horses.]—The provisions of 31 Eliz. c. 12, extend to the sale as well of horses which are not stolen as of those which are stolen ; and the sale of a horse in market overt without complying with the requirements of this statute has merely the effect of a sale out of market overt. *Moran* v. *Pitt*, 42 L. J., Q. B. 47 ; 28 L. T. 554 ; 21 W. R. 525.

A magistrate has no power under 31 Eliz. c. 12, to cause a stolen horse to be re-delivered to the owner, unless proof of the actual theft is first given. *Josephs* v. *Adkins*, 2 Stark. 76 ; 19 R. R. 677.

A complaint having been made to a magistrate by the owner, that his horse had been stolen by B. ; an officer, although armed with a warrant against B., is not justified, under the above statute, in taking the horse out of the possession of a bonâ fide purchaser from B. *Ib.*

Restitution to Owner.] — The postmaster-general is not entitled to have restored to him moneys found on the prisoner, part of the proceeds of the theft, the prisoner having pleaded guilty to an indictment for stealing a letter containing two banknotes, the property of the postmaster-general. *Reg.* v. *Jones*, 14 Cox, C. C. 528.

The court cannot, under the 7 & 8 Geo. 4, c. 29, s. 57. order a Bank of England note which has been paid and cancelled, to be delivered up to the prosecutor of an indictment against the party who stole it. *Rex* v. *Stanton*, 7 Car. & P. 431.

Counsel heard on behalf of Persons in Possession of Goods.]—Where a prisoner pleaded guilty to several indictments charging him with larceny, and an application was made on the part of the prosecutor for an order for restitution, the court consented to hear counsel on behalf of those who were in possession of the goods, and against whom the order, if made, would operate. *Reg.* v. *Macklin*, 5 Cox, C. C. 216.

Common Order, when made.]—Where, under such circumstances, the depositions taken before the magistrate disclosed a clear case of felony, the court declined to order a writ of restitution to issue on the suggestion of the holders of the goods that the prisoner was an agent, and therefore that the fraudulent dealing with the goods on his part did not constitute a felony, but the court made the common order for restitution. *Ib.*

Order refused by Quarter Sessions — Metropolitan Police Magistrate — Jurisdiction.]—On the conviction of a person for larceny the court of quarter sessions declined to make any order for restitution of the stolen property, part of which had been pawned. Subsequently, an ap-

plication was made by the owner of some of the property to a metropolitan police magistrate, under section 40 of the Metropolitan Police Courts Act, 1839, for an order for restitution, and the magistrate made such an order :—Held, that he had jurisdiction to do so, as section 40 merely substitutes in small cases a cheap and summary alternative for the remedy by an ordinary civil action. *Davison, Ex parte*, 60 J. P. 808.

Jurisdiction to award Writ of Restitution.]—The jurisdiction of the Court of Queen's Bench to issue a writ of restitution of stolen property was incidental to the judgment on appeals of felony, which were abolished by 59 Geo. 3, c. 46, and it was abolished with them. *Reg.* v. *London Corporation*, 10 B. & S. 341 ; 4 L. R. Q. B. 371 : 17 W. R. 722. *S. C.*, nom. *Walker* v. *London Corporation*, 38 L. J., M. C. 107 ; 20 L. T. 604 ; 11 Cox, C. C. 280.

That jurisdiction was not given by 21 Hen. 8, c. 11, nor is it given by 24 & 25 Vict. c. 96, s. 100. *Ib.*

A man was convicted of stealing cattle, which were sold by him on the following day in market overt, and were resold upon the same day, also in market overt, the purchases being bonâ fide :—Held, that the judge at the trial had jurisdiction to order the restitution of the cattle to the person from whose land the cattle had been stolen. *Reg.* v. *Horan*, Ir. R. 6, C. L. 293.

The court before whom a person charged with larceny is tried has jurisdiction, under 24 & 25 Vict. c. 96, s. 100, on his conviction to order restitution to the original owner of the proceeds of the stolen property in the hands of the convict or his agent. *Reg.* v. *Central Criminal Court JJ.*, 56 L. J., M. C. 25 ; 18 Q. B. D. 314 ; 56 L. T. 352 ; 35 W. R. 243 ; 16 Cox, C. C. 196 ; 51 J. P. 229—C. A.

Mandamus to compel Court to make Order.]—Mandamus will not lie to the judges and justices of the Central Criminal Court. The recorder of London, upon the trial and conviction of a prisoner charged with larceny, having refused to order (under 24 & 25 Vict. c. 96, s. 100), the person with whom stolen property was pledged to restore it to the prosecutor, the Queen's Bench Division refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the recorder to make such order. *Reg.* v. *Central Criminal Court JJ.*, 52 L. J., M. C. 121 ; 11 Q. B. D. 479.

Attachment for Disobedience.]—The order for restitution not being obeyed, a rule was obtained calling upon D. to show cause why he should not be attached for contempt, and a cross rule was obtained calling upon the prosecutor to show cause why the order of restitution should not be rescinded ; the court made the rule absolute for an attachment. *Reg.* v. *Wollez, Hart, In re*, 8 Cox, C. C. 337.

Award of Compensation to Prosecutor out of Forfeited Property.]—The Forfeiture for Felony Act, 1870 (33 & 34 Vict. c. 23), s. 4, which empowers the court to award any sum of money not exceeding 100*l.*, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by reason of felony, such sum to be "deemed a judgment debt to the person entitled to receive the same from the person so convicted," requires to be exercised with considerable caution, as being liable to abuse by arrangements in the nature of condonation of a felony. *Reg.* v. *Lovett*, 11 Cox, C. C. 602.

On an indictment of a servant for stealing money from his master, it had been arranged between the counsel for the prisoner and the prosecutor, that the prisoner should repay the money which he had stolen, and that the prosecutor should recommend that he be discharged without punishment, on his own recognizances to come up for judgment when called upon, and that the court should order that sum to be paid as compensation to the prosecutor. The prisoner having pleaded guilty to the charge, an application was made by counsel, stating the arrangement. But the court refused its assent to any compromise, as not being within the intention of the act, which contemplated compensation to the party wronged, as an addition to, and not as a substitute for the punishment due to the crime. *Ib.*

Taking or Advertising Rewards for return of Stolen Property.]—It was an offence within 4 Geo. 1, c. 11, s. 4, to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had not power to restore them. *Rex* v. *Ledbitter*, 1 M. C. C. 76.

On an indictment against A. for corruptly and feloniously receiving from B. money under pretence of helping B. to recover goods before then stolen from B., and for not causing the thieves to be apprehended, three questions were left to the jury : First, did A. mean to screen the guilty parties, or to share the money with them? Second, did A. know the thieves, and intend to assist them in getting rid of the property, by promising B. to buy it? Third, did A. know the thieves, and assist B., as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the first question in the negative, and the third in the affirmative :—Held, that the receipt of the money, under the circumstances, was a corrupt receiving of the money by A. within 7 & 8 Geo. 4, c. 29, s. 58. *Reg* v. *Pascoe*, 4 New Sess. Cas. 66 ; 2 Car. & K. 927 ; 1 Den. C. C. 456 ; T. & M. 141 ; 18 L. J., M. C. 186 ; 13 Jur. 544 ; 3 Cox, C. C. 462.

8. Effect of Larceny on Ownership of Property.

Theft of Bond Payable to Bearer—Bonâ fide Holder of Value—Banker's Charge.]—A bank advanced moneys to a customer upon promissory notes, on the back of each of which he placed an indorsement by which he charged all his property, shares, or securities, which then were or which might be, at any time prior to the payment of the note, "in the possession or power of the holder thereof for the time being," with the payment of the promissory note, and interest. After several such transactions had taken place, the customer obtained an advance upon a French bond, payable to bearer and transferable by

delivery, and he subsequently handed the bank another French bond, and requested that both might be sold on his account. On the latter occasion he obtained no advance of money. On the bonds being sent to the bank's brokers for sale it was discovered for the first time that both had been stolen:—Held, that as to the first bond, the bank had a charge upon it, since an advance had been obtained upon it, but that as to the second bond, there was no such charge, since no advance having been made upon it, there could be no charge otherwise than by virtue of the charge endorsed upon the promissory note, which did not apply to the case, because it could only apply to property of the drawer of the note placed in the possession or power of the holder for a purpose not inconsistent with an assertion of such a charge, and the bond in question was not so situated. *Symons* v. *Mulkern*, 46 L. T. 763; 30 W. R. 875.

Property Revesting in Owner on Conviction.]—By 7 & 8 Geo. 4, c. 29, s. 57, the property in a stolen chattel revests in the owner on the conviction of the thief, and the owner may maintain trover for it, though there has been no order for restitution. *Scattergood* v. *Sylvester*, 15 Q. B. 506; 19 L. J., Q. B. 417; 14 Jur. 977.

The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce* v. *Newington* (4 Q. B. D. 32) overruled. *Bentley* v. *Vilmont*, 57 L. J., Q. B. 18; 12 App. Cas. 471; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68—H. L. (E) *See* Sale of Goods Act, 1893, s. 24.

Where a hirer in possession of goods under a hire-and-purchase agreement sells them to a bonâ fide purchaser without notice before all instalments agreed upon are paid, and is prosecuted to conviction for larceny as a bailee, the owner can maintain an action for conversion against the purchaser. *Payne* v. *Wilson*, 65 L. J., Q. B. 150; [1895] 2 Q. B. 537; 15 R. 239, n.; 73 L. T. 12; 43 W. R. 657—C. A.

See PRINCIPAL AND AGENT.

A. and B. were convicted of stealing the goods of C.; D., before they were convicted, acquired a title to the goods by making an advance of money, bonâ fide, to A., who was the servant and agent of C., and established his title to the goods in trover brought against him for their recovery by C.:—Held, that, notwithstanding the title had been acquired under 5 & 6 Vict. c. 39, by D., the goods on the conviction of A. and B. revested in C., and the court ordered them to be restored. *Reg.* v. *Wollez, Hart, In re*, 8 Cox, C. C. 337.

A bonâ fide purchaser of a horse from a person who has bought it, as the second purchaser knew, at a fair, without any evidence that he knew it was obtained dishonestly, although it has been purchased on credit, and not paid for, is entitled to maintain trover against the original owner for retaking it. *North* v. *Jackson*, 2 F. & F. 198.

By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any chattel, money, or other property by false pretences "shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner." W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. *Moyce* v. *Newington*, 48 L. J., Q. B. 125; 4 Q. B. D. 32; 39 L. T. 535; 27 W. R. 319.

Goods Purchased with Stolen Money.]—The plaintiff had stolen money of the defendant and was prosecuted by him for so doing, but was acquitted on a technical ground. The plaintiff had, previously to the prosecution, converted the money into goods. These were in the house of the prosecutor, and detained by him as being the proceeds of the money stolen by him. The plaintiff brought an action in the county court for return of some of the goods and for damages for the conversion of others of them:—Held, that the county court judge was right in giving judgment for the defendant. *Cattley* v. *Lowndes*, 34 W. R. 139.

Sale of Stolen Goods in Market Overt—Liability of Salesmaster.]—The defendants were public salesmasters, and transacted their business in a legally established cattle market, where a market overt for the sale of cattle and sheep was held once a week. A number of sheep, which had been stolen from the plaintiff, were brought on a market day to the stand of the defendants by the thief, who employed the defendants to sell the sheep for him. The defendants, in ignorance of the theft, placed the sheep in their stand, and sold and delivered them to a purchaser, by whom they were removed:—Held, that the defendants were liable to the plaintiff in an action of trover for the value of the sheep. *Delaney* v. *Wallis*, 13 L. R. Ir. 31; 15 Cox, C. C. 525—C. A. S. P., *Ganly* v. *Ledwidge*, Ir. R. 10 C. L. 33.

—— **Claim by Purchaser against Owner for Cost of Keeping Animals.**]—The bonâ fide purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counter-claim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner. *Walker* v. *Matthews*, 51 L. J., Q. B. 243; 8 Q. B. D. 109; 46 L. T. 915; 30 W. R. 338.

Return of Value of Goods.]—*See* TROVER.

B. *RECEIVERS OF STOLEN PROPERTY.*

1. What is a Receiving.

Receiver or Principal.]—J. had employed M. to load sacks of oats, the property of J., from a vessel into the trams of K., who was to carry them on the trams to the warehouse of K. By previous concert between M. and K., oats were taken by M. from two of the sacks and put into a nose-bag in the absence of K. and hidden under a tram. K. returned in a few minutes and took the nose-bag and its contents from under the tram, and took them away, M. being then within three or four yards of him:—Held, that K. was not a receiver but a principal in the larceny. *Reg.* v. *McCarthy*, 2 Car. & K. 379.

Purpose for which received.]—If a receiver of stolen goods receives them for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased them. *Rex* v. *Richardson*, 6 Car. & P. 335.

It makes no difference whether a receiver receives for the purpose of profit or advantage or whether he does it to assist the thief. *Rex* v. *Davis*, 6 Car. & P. 177.

Taking into Possession.]—Without proof of an actual taking into possession, an indictment for receiving goods knowing them to have been stolen cannot be sustained. *Reg.* v. *Hill*, 3 New Sess. Cas. 348; 1 Den. C. C. 453; T. & M. 150; 2 Car. & K. 978; 18 L. J., M. C. 199; 13 Jur. 545; 3 Cox, C. C. 533.

A prisoner admits having bought an article which is subsequently found in his house; that is sufficient evidence for a jury to convict of receiving without proof of an actual receipt, or that he had ever been at the house from before the purchase to the time of the charge. *Reg.* v. *Matthews*, T. & M. 337; 1 Den. C. C. 596; 14 Jur. 513; 4 Cox, C. C. 214.

In Harmony with or Opposition to Thief.]—W. stole a watch from A.; and while W. and L. were in custody together, W. told L. that he had "planted" the watch under a flag in the soot-cellar of L.'s house. After this L. was discharged, and went to the flag and took up the watch, and sent his wife to pawn it:—Held, that, if L. thus took the watch in consequence of W.'s information, W. telling L. in order that he might use the information by taking the watch, L. was indictable for this as a receiver of stolen goods; but that if this was an act done by L. in opposition to W., or against his will, it might be a question whether it would be a receiving. *Reg.* v. *Wade*, 1 Car. & K. 739.

Control of Goods is Sufficient.]—Two men having stolen some fowls, put them into a sack and carried them into the house of the prisoner's father at about half-past four o'clock in the morning. After remaining in the house about ten minutes, the two men were seen to come out at a back door, one of them carrying the sack, and the prisoner going before them with a light. The stable-door was closed by one of the party, and when the policeman entered he found the two thieves and the prisoner standing round the sack, which lay on the floor untied, as if bargaining for the fowls:—Held, that this was not a receiving within the statute, the prisoner never having had the goods under his control, and the whole transaction being only inchoate. *Reg.* v. *Wiley*, 2 Den. C. C. 37; T. & M. 367; 20 L. J., M. C. 4; 15 Jur. 134; 4 Cox, C. C. 414.

It is not necessary to prove an actual manual possession of stolen goods, in order to sustain an indictment for receiving the goods, but it is sufficient if the goods are shown to have been under the control of the person charged with receiving. *Reg.* v. *Smith*, Dears. C. C. 494; 24 L. J., M. C. 135; 1 Jur. (N.S.) 575; 3 W. R. 484; 6 Cox, C. C. 554.

A. was indicted for feloniously receiving a watch and a hat. It was proved that a policeman, in consequence of information received from B. (the thief), went to a room in a lodging-house where A. slept, and in a box in that room found the hat. A. admitted that the hat had been brought there by B., but denied all knowledge of the watch. On the following day A. was taken into custody, and he then told the policeman that he knew where the watch was, but did not like to say anything about it before the people of the house. A. then took the policeman to a place where he said the watch was, but it was not found there, but he afterwards sent a boy for the watch, and on the boy bringing the watch to A., he gave it to the policeman:—Held, that there was sufficient evidence to go to the jury. *Reg.* v. *Hobson*, Dears. C. C. 400; 6 Cox, C. C. 410.

It is not necessary, to constitute a receiving of stolen goods, that the person indicted should have had manual possession of the goods; but directing a servant to dispose of them, as by pawning or otherwise, will be sufficient to support the charge. Stolen property was brought by the thief into A.'s shop; A., with guilty knowledge, called a servant and directed her to take the stolen goods to a pawn office, and "pawn them for the girl" (the thief). A.'s servant did so accordingly, and brought back the money, which she handed to the thief in her mistress's presence. A. never had manual possession of either the goods or the money:—Held, that this amounted to a receiving by A. of the stolen property. *Reg.* v. *Miller*, 6 Cox, C. C. 353.

Receipt by Wife of Prisoner.]—Stolen goods were delivered by a thief to the wife of the prisoner in his absence; she paid 6*d.* on account, but the amount to be paid was not then fixed. The prisoner and the principal felon afterwards met, when the prisoner, with the knowledge that the goods had been stolen, agreed upon the price and paid the balance:—Held, that he was properly convicted of receiving the goods, knowing them to be stolen. *Reg.* v. *Woodward*, L. & C. 122; 31 L. J., M. C. 91; 8 Jur. (N.S.) 104; 5 L. T. 686; 10 W. R. 298; 9 Cox, C. C. 95.

Husband and wife were jointly indicted for receiving goods, knowing them to have been stolen. The jury found both guilty, and that the wife received the goods without the control or knowledge of, and apart from, her husband, and that he afterwards adopted his wife's receipt:—Held, that the conviction against the husband could not be sustained. *Reg.* v. *Dring*, Dears. & B. 329; 3 Jur. (N.S.) 1132; 6 W. R. 41; 7 Cox, C. C. 382.

But a husband may be convicted of feloniously receiving property which his wife has stolen voluntarily and without any constraint on his part, if he receives it knowing that she has stolen it. *Reg.* v. *M'Athey*, L. & C. 250; 32 L. J., M. C. 35; 8 Jur. (N.S.) 1218; 7 L. T. 433; 11 W. R. 73; 9 Cox, C. C. 251.

2. What is Stolen Property.

Goods of Partnership.]—The effect of the 31 & 32 Vict. c. 116, s. 1, by which a partner or a joint owner in goods is rendered liable to be convicted of stealing goods in respect of which he is so jointly interested, is not to render the receiver of such goods, knowing the same to have been stolen by such partner, liable to be convicted as such receiver, under 24 & 25 Vict. c. 96, s. 91. *Reg.* v. *Smith*, 39 L. J., M. C. 112; L. R. 1 C. C. 266; 22 L. T. 554; 18 W. R. 932; 11 Cox, C. C. 511.

A. and B. were in partnership, and B., in fraud of the partnership, disposed of the goods of the firm to the prisoner, who knowingly received the same. The prisoner was indicted and convicted under the 24 & 25 Vict. c. 96, s. 91:—Held, that the conviction could not be supported. *Ib.*

Wife taking Goods of Husband.]—A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer receiving from her the goods which she has taken from her husband cannot be guilty of receiving stolen goods. *Reg.* v. *Kenny*, 46 L. J., M. C. 156; 2 Q. B. D 307; 36 L. T. 36; 25 W. R. 679; 13 Cox, C. C. 397.

Resumption of Possession by Prosecutor after Discovery of Theft—Subsequent Receiving.]—Goods were intrusted to carriers for delivery to a consignee; it was discovered by the carriers that one of their servants had stolen them in transitu, and had re-addressed them to the prisoners. The carriers ordered another servant of theirs, in company with two detectives, to deliver the goods to the prisoners in the place to which the thief had addressed them, and caused them to be placed in a van for the purpose of such delivery. The goods were accordingly delivered to the prisoners, who received them knowing that they had been stolen. In the indictment the property in the goods was laid in the carriers:—Held, that the carriers had resumed possession of the goods, and that, therefore, when the prisoners received them they were not stolen property, and the prisoners could not be convicted of feloniously receiving them. *Reg.* v. *Dolan* (Dears. C. C. 436) followed. *Reg.* v. *Villensky*, 61 L. J., M. C. 218; [1892] 2 Q. B. 597; 5 R. 16; 41 W. R. 160; 56 J. P. 824—C. C. R.

A lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar from him in the master's presence. In consequence of the lad's statement, the cigar was returned to him with five others, which the lad took to the prisoner and gave to him:—Held, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with the six cigars, and instructing him what to do with them. *Reg.* v. *Hancock*, 38 L. T. 787; 14 Cox, C. C. 119.

A prisoner was convicted of feloniously receiving stolen goods under the following circumstances:—The goods were stolen, and sent by the thief in a parcel by railway, addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station at the place of its destination and stopped it. It was called for by one of the thieves on the day of its arrival and refused to him. A porter of the company the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and it was there received by the prisoner:—Held, that the conviction was wrong, as the goods had ceased to be stolen goods, within the statute, at the time of the receipt by the prisoner. *Reg.* v. *Schmidt*, 35 L. J., M. C. 94; L. R. 1 C. C. 15; 12 Jur. (N.S.) 149; 13 L. T. 679; 14 W. R. 286; 10 Cox, C. C. 172.

Stolen goods were found by the owner in the pockets of the thief; a policeman was sent for who took the goods and subsequently returned them to the thief, and the owner then sent the latter to sell them where he had sold others; he accordingly sold them at the shop of D. D. was tried and convicted of receiving the goods knowing them to have been stolen:—Held, that the conviction was wrong, as the facts did not constitute a receiving of stolen goods within 7 & 8 Geo. 4, c. 29, s. 54. *Reg.* v. *Dolan*, Dears. C. C. 436; 3 C. L. R. 295; 24 L. J., M. C. 59; 1 Jur. (N.S.) 72; 3 W. R. 177; 6 Cox, C. C. 449.

3. Joint Receivers.

Proof of.]—Two or more persons may be indicted jointly for receiving stolen property, knowing it to have been stolen, though each successively received the whole of the same at different times, and it makes no difference whether the receipt was direct from the felon or from an intermediate person. *Reg.* v. *Reardon*, 35 L. J., M. C. 171; L. R. 1 C. C. 31; 12 Jur. (N.S.) 476; 14 L. T. 449; 14 W. R. 663; 10 Cox, C. C. 241.

If two are charged jointly with receiving stolen goods, a joint act of receiving must be proved. Proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. *Rex* v. *Messingham*, 1 M. C. C. 257.

Two were convicted under a count charging them with receiving goods knowing them to have been stolen, upon proof that they were present aiding and abetting a third receiver, who was found in actual possession of the box containing the goods, but the two former never had actual possession of the box:—Held, that the conviction was right. *Reg.* v. *Rogers*, 37 L. J., M. C. 83; L. R. 1 C. C. 136; 18 L. T. 414; 16 W. R. 733; 11 Cox, C. C. 38.

Upon an indictment charging A. and B. with jointly receiving stolen goods, a joint receipt must be proved in order to convict both; but if a separate receipt by each is proved, that one may be convicted who is proved to have been guilty of the first separate act of receiving. *Reg.* v. *Dovey*, 2 Den. C. C. 86; T. & M. 411; 20 L. J., M. C. 105; 15 Jur. 230; 4 Cox, C. C. 430.

Where A. knowing that goods have been stolen, directs B., his servant, to receive them into his premises, and B., in pursuance of that direction, afterwards receives them in A.'s absence, B. knowing that they have been stolen, they may be jointly indicted for receiving them. *Reg.* v. *Parr*, 2 M. & Rob. 346.

4. Indictment.

Property same in each Count.]—Where a count for feloniously receiving property knowing it to be stolen is joined with a count for feloniously stealing, it must appear with sufficient

certainty that the property is the same in each count. *Reg.* v. *Sarsfield*, 6 Cox, C. C. 12.

Property, how Described.]—A receiver, in the case of a sheep feloniously stolen alive and killed, should be stated to have received mutton. *Rex* v. *Cowell*, 2 East, P. C. 617.

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and mixed them and sold them to the prisoner:—Held that the latter could not be convicted on such indictment. *Reg.* v. *Robinson*, 4 F. & F. 43.

Thief Unknown.]—A receiver may be indicted for receiving goods stolen by persons unknown. *Rex* v. *Thomas*, 2 East, P. C. 781. S. P., *Rex* v. *Baxter*, 2 East, P. C. 781; 2 Leach. C. C. 578; 5 Term Rep. 33.

A count for a substantive felony in receiving stolen goods, which charged that the goods were stolen by "a certain evil-disposed person," is good. *Rex* v. *Jervis*, 6 Car. & P. 156.

Goods, how Obtained.]—To bring a case of receiving within 7 & 8 Geo. 4, c. 29, s. 55, the indictment must allege the goods to have been obtained by false pretences and known to have been so. It is not enough to allege them to have been "unlawfully obtained, taken and carried away." *Reg.* v. *Wilson*, 2 M. C. C. 52.

Averment of Guilty Knowledge.]—An indictment against a receiver of stolen goods must aver the guilty knowledge, which is the gist of the offence, correctly. *Rex* v. *Kernon*, 2 Russ. C. & M. 436.

An indictment for receiving stolen goods alleged that the prisoner received the goods of A., "he, the said A., then knowing them to have been stolen." After a verdict of guilty, the counsel moved in arrest of judgment, on the ground that the scienter was omitted; but the quarter sessions amended the indictment by striking out "A.," and substituting the name of the prisoner:—Held, first, that it was bad as it was originally framed. *Reg.* v. *Larkin*, Dears. C. C. 365; 2 C. L. R. 775; 23 L. J., M. C. 125; 18 Jur. 539; 2 W. R. 496; 6 Cox, C. C. 377.

Held, secondly, that the objection was taken at the proper time. *Ib.*

Held, thirdly, that the indictment was not amendable after verdict. *Ib.*

Joinder of Counts.]—A count for stealing articles may not be joined with a count for receiving those and other articles, knowing them to have been stolen. *Reg.* v. *Ward*, 2 F. & F. 18.

Stolen Notes changed before Receiving takes place.]—A. and B. were indicted, A. for stealing six banknotes of 100*l.* each, and B. for receiving "the said notes," knowing them to have been stolen. A. stole the six 100*l.* notes and got them changed into 20*l.* notes, some of which B. received:—Held, that on this indictment B. could not be convicted. *Rex* v. *Walkley*, 4 Car. & P. 132.

Goods "so as aforesaid Stolen."]—A first count charged the prisoner with stealing certain goods and chattels, and a second count charged him with receiving "the goods and chattels aforesaid, of the value aforesaid, so as aforesaid stolen." After objection that he could not be found to have feloniously received goods stolen by himself, the case went to the jury, and he was acquitted upon the first count and convicted upon the second:—Held, that the conviction was good. *Reg.* v. *Huntley*, Bell, C. C. 238; 29 L. J., M. C. 70; 6 Jur. (N.S.) 80; 1 L. T. 384; 8 W. R. 183; 8 Cox, C. C. 260.

Where a prisoner was indicted for stealing goods, and in a subsequent count for receiving the goods, "so as aforesaid feloniously stolen," and the jury acquitted of the stealing and convicted of the receiving, the conviction was affirmed upon a case reserved upon a motion in arrest of judgment. *Reg.* v. *Craddock*, T. & M. 361; 2 Den. C. C. 31; 20 L. J., M. C. 31; 14 Jur. 1031; 4 Cox, C. C. 411.

Where the receiving is so laid, the judge should direct the jury to acquit upon the count for receiving, if they should not find the prisoner guilty of stealing. *Ib.*

5. Trial.

a. Jurisdiction.

Venue.]—The half of a banknote, which had been stolen during its transit through the post-office from S. in Wiltshire to Bristol, was afterwards inclosed by the prisoner in a letter addressed to the bankers at S., requesting payment of it. This letter was posted by the prisoner at Bath, and arrived with its contents in due course at S. There was no evidence of any receipt or possession by the prisoner in Wiltshire:—Held, upon an indictment for receiving the stolen half note, that he was rightly tried in Wiltshire, as the possession of the post-office servants, or of the bankers in Wiltshire, was his possession, and the case therefore was within 7 & 8 Geo. 4, c. 29, s. 56. *Reg.* v. *Cryer*, Dears. & B. 324; 26 L. J., M. C. 192; 3 Jur. (N.S.) 698; 5 W. R. 738; 7 Cox, C. C. 335.

Jurisdiction shown in Indictment.]—A count for receiving stolen goods in a different county from that in which the trial takes place, coupled with other counts for the larceny, under the 11 & 12 Vict. c. 46, must, by distinct and express averments, show upon the face of it jurisdiction within the 7 & 8 Geo. 4, c. 29, s. 56. *Reg.* v. *Martin*, 3 New Sess. Cas. 575; T. & M. 78; 1 Den. C. C. 398; 2 Car. & K. 950; 18 L. J., M. C. 137; 13 Jur. 368; 3 Cox, C. C. 447.

Goods stolen Abroad.]—A person had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial:—Held, that Guernsey not being part of the United Kingdom, he could not be convicted of receiving in England the goods so stolen in Guernsey. *Reg.* v. *Debruiel*, 11 Cox, C. C. 207.

b. Practice.

Plea.]—Plea by one prisoner, indicted singly for receiving stolen goods, of autrefois acquit, under an indictment against him and four others, on which one was convicted, and the prisoner and three others were acquitted, is good. *Rex* v. *Dann*, 1 M. C. C. 424.

Election.]—In indictments under 11 & 12 Vict. c. 46, s. 3, there may be as many counts charging a felonious receiving as there are counts charging stealing; and the prosecutor cannot be put to his election on what count or counts he will proceed. *Reg.* v. *Beeton*, 1 Den. C. C. 414; T. & M. 87; 2 Car. & K. 960; 4 New Sess. Cas. 60; 18 L. J., M. C. 117; 13 Jur. 394; 3 Cox. C. C. 451.

Principal in Second Degree.]—A principal in the second degree cannot at the same time be treated as a receiver. *Reg.* v. *Perkins*, 2 Den. C. C. 459 ; 21 L. J., M. C. 152 : 16 Jur. 481 ; 5 Cox, C. C. 554.

Principal found Guilty of Embezzlement.]—A. was indicted for embezzling H.'s goods, and for larceny of H.'s goods ; B. for receiving goods, the property of H., knowing them to have been stolen. A. was found guilty of embezzling only, and B. for feloniously receiving :—Held, that the conviction of B. was right, for 7 & 8 Geo. 4, c. 29, s. 47, enacts, that every person who has embezzled within the meaning of that section, "shall be deemed to have feloniously stolen from his master," and that being so, B.'s offence was properly described in the count for receiving. *Reg.* v. *Frampton*, Dears. & B. 585 ; 27 L. J., M. C. 229 ; 4 Jur. (N.S.) 566 ; 8 Cox, C. C. 16.

c. Evidence.

Admissibility of.]—If an indictment against a receiver states the principal felony to have been committed by A. ; whatever would have been evidence of the principal felony to convict A., is receivable to prove this allegation on the trial of the receiver, but is not conclusive. *Rex* v. *Blick*, 4 Car. & P. 377.

Evidence of Thief.]—The principal felon is a competent witness against a receiver of stolen goods. *Rex* v. *Haslam*, 1 Leach, C. C. 418 ; 2 East. P. C. 782.

An admission of his guilt, made by the thief while in custody, in the presence of the receiver, is evidence against the receiver. *Reg.* v. *Cox*, 1 F. & F. 90.

On an indictment for feloniously receiving goods, knowing them to have been stolen, it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed. *Reg.* v. *Robinson*, 4 F. & F. 43.

On an indictment for receiving goods, knowing them to have been stolen, the mere fact that they were found on the prisoner's premises is not sufficient to confirm the evidence of the thief, so far as to make it proper to convict. *Reg.* v. *Pratt*, 4 F. & F. 315.

Stealing must be Proved.]—In an indictment for receiving stolen goods, knowing them to have been stolen by a person named, the stealing by the person must be proved, or the receiver must be acquitted. *Rex* v. *Woolford*, 1 M. & Rob. 384.

Knowledge or Belief that thing Stolen.]—Stolen property being found concealed in an old engine-house, and it being watched, the prisoners were seen taking it away :—Held, that, to warrant the conviction of the prisoners on an indictment charging them as receivers, the jury must be satisfied that the property had been stolen by some other person to the knowledge of the prisoners, and that there should be some evidence to show that such was the case. *Rex* v. *Densley*, 6 Car. & P. 399. Cp. *Reg.* v. *Rymes*, 3 Car. & K. 327.

To justify a conviction for receiving stolen property in the case of goods found, it is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken, unless the jury is also satisfied that he knew that the circumstances were such as constituted a larceny. *Reg.* v. *Adams*, 1 F. & F. 68.

In an indictment for receiving goods, knowing them to have been stolen, belief without actual knowledge is sufficient to sustain it. *Reg.* v. *White*, 1 F. & F. 665.

Possession of other Stolen Property Evidence of Receiving Stolen Goods.]—In order to give evidence of guilty knowledge under s. 19 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner. It must be proved that such "other property" was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment. *Reg.* v. *Drage*, 14 Cox, C. C. 85.

Upon the trial of a prisoner for receiving stolen property with a guilty knowledge, evidence was admitted that shortly before the stealing of the property in question he had been in possession of other stolen property of a similar character, though he had parted with the possession of such other property before the date of the stealing of the property charged in the indictment :—Held, that such evidence was inadmissible, and did not fall within the words of s. 19 of the Prevention of Crimes Act, 1871. *Reg.* v. *Carter*, 53 L. J., M. C. 96 ; 12 Q. B. D. 522 ; 50 L. T. 432, 596 ; 32 W. R. 663 ; 15 Cox, C. C. 448 ; 58 J. P. 456—C. C. R.

On the trial of an indictment for larceny and receiving stolen goods, evidence may be given under 34 & 35 Vict. c. 112, s. 19, that there was found in the prisoner's possession other property stolen within the preceding period of twelve months, although such other property is the subject of another indictment against him, to be subsequently tried at the same assizes. *Reg.* v. *Jones*, 14 Cox, C. C. 3.

On an indictment for receiving stolen goods, the onus of proving the knowledge that the goods were stolen is not shifted from the prosecution to the prisoner by service of a notice under 32 & 33 Vict. c. 99 (Habitual Criminals Act, repealed 34 & 35 Vict. c. 112), s. 11, and proof of a previous conviction. *Reg.* v. *Davis*, 39 L. J., M. C. 135 ; L. R. 1 C. C. 272 ; 22 L. T. 763 ; 18 W. R. 958 ; 11 Cox, C. C. 578.

The Habitual Criminals Act, in case of a previous conviction, has not the effect of throwing upon the prisoner the proof that when he received a stolen banknote, he did not know it to have been stolen, there being no words to that effect in the operative part of the clause. *Reg.* v. *Harwood*, 11 Cox, C. C. 388.

—— **Before these Statutes.**]—If the prisoner at different times receives property stolen from the prosecutor, although the substantive charge must be confined to some one receiving, yet the other receivings may be given in evidence to show a guilty knowledge that the goods were stolen. *Rex* v. *Dunn*, Car. C. L. 132 ; 1 M. C. C. 146.

A prisoner was indicted for receiving stolen goods, knowing them to have been stolen ; to prove the scienter, evidence was given, that on a previous occasion other stolen goods, the property of different owners, had been found in the possession of the prisoner :—Held, that the

evidence was improperly admitted, as it is a general principle of the law of England, that proof that a man had committed one offence is no proof that he has committed another, and as the possession of stolen goods on a previous occasion could not show any knowledge on the part of the prisoner that the particular goods mentioned in the indictment were stolen. *Reg.* v. *Oddy*, 2 Den. C. C. 264; T. & M. 593; 20 L. J., M. C. 198; 15 Jur. 517; 5 Cox, C. C. 210.

A prisoner was to be tried on three indictments; for receiving stolen tin, for stealing iron, and for receiving stolen brass. A constable went with a search-warrant to search the prisoner's premises for stolen iron, and, having read the warrant to the prisoner, the latter made a statement:—Held, on the trial of the first indictment, that the whole of the statement was receivable, although part of it related to the charge respecting the iron; and also, that evidence might be given, that, at the time of the search, the prisoner endeavoured to conceal some brass, and also, that almost immediately after he was taken away from the premises, at the conclusion of the search, his wife carried some tin under her cloak from a warehouse on the premises. *Reg.* v. *Mansfield*, Car. & M. 140.

On an indictment against A. for stealing, and B. for receiving goods, evidence that on various former occasions portions of the commodity stolen have been missed, and that the prisoners have, after such occasions, been found selling such a commodity; and that on the last occasion it was part of what was stolen, is sufficient to fix the receiver with a guilty knowledge. *Reg.* v. *Nicholls*, 1 F. & F. 51.

Any receiving that was before the one in the indictment being tried may be given in evidence, although the subject of another indictment. *Rex* v. *Davis*, 6 Car. & P. 177.

On an indictment for stealing and receiving, where it appears that goods are found on the receiver's premises which have been taken from the prosecutor's premises, evidence may be given of finding other goods at the house of the principal, although there is no evidence to connect the receiver with them. *Reg.* v. *Hinley*, 1 Cox, C. C. 12.

Account given by Prisoner—Evidence to Negative.]—On an indictment for receiving goods, knowing them to have been stolen, the prisoner's account being that he had purchased them of a tradesman in the same town, other circumstances in the case tending to negative it, though the tradesman was not called for the prosecution:—Held, that it was not necessary to call him on the part of the prosecution, there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story. *Reg.* v. *Ritson*, 50 L. T. 727; 15 Cox, C. C. 478; 48 J. P. 630—C. C. R.

Conviction when Evidence justifies Conviction as Principal in Second Degree.]—An indictment charged S. with stealing 18*s.* 6*d.*, and C. with receiving the same. The facts were: S. was a barman at a refreshment bar, and C. went up to the bar, called for refreshments and put down a florin. S. served C., took up the florin, and took from his employer's till some money, and gave C. as his change 18*s.* 6*d.*, which C. put in his pocket and went away with it. On leaving the place he took some silver from his pocket, and was counting it when he was arrested. On entering the bar signs of recognition took place between S. and C., and C. was present when S. took the money from the till. The jury convicted S. of stealing and C. of receiving:—Held, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which C. might have been convicted as a principal in the second degree; and that therefore the conviction for receiving could not be sustained. *Reg.* v. *Coggins*, 29 L. T. 469; 12 Cox, C. C. 517.

Where a person is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. *Reg.* v. *Hilton*, Bell. C. C. 20; 28 L. J., M. C. 28; 5 Jur. (N.S.) 47; 7 W. R. 59; 8 Cox, C. C. 87.

What Sufficient to support Conviction.]—When a woman was indicted for larceny of a gold chain, a banknote, and money, and also for receiving, and the evidence against her consisted of the fact of the stolen property having been found concealed on her person at about ten o'clock on the morning after the night on which the property was stolen, and she made a voluntary statement asserting that she had found the things, the judge directed the jury to acquit her on the count for receiving, but the jury, notwithstanding, acquitted her on the count for larceny, but convicted her of receiving, and the judge did not insist on the direction he had previously given, but reserved the question as to whether the evidence was sufficient in law to sustain the conviction on the count for receiving:—Held, that the evidence was sufficient. *Reg.* v. *McMahon*, 13 Cox. C. C. 275.

Held, also, that whether the judge withdrew his direction as to the count for receiving or not, the evidence being sufficient in law to sustain the conviction, it must stand. *Ib.*

B., a letter carrier, and C. his mother, were indicted for receiving a gold pendant, knowing it to be stolen. Before the 23rd of October, a box containing the pendant, a brooch, and some other articles of jewellery, was sent by post to a Mrs. W., residing at D. A letter was posted at the same time. Both should have arrived that evening. Mrs. W. got the letter the next evening, but not the box. B. was a letter carrier at D., but it would not have been his duty to deliver the letter and parcel. From the way the letters and parcels were sorted, he might have taken them, but so might others. On the 30th of October C. attempted to pawn the pendant. While she was in the pawn-shop, B. remained outside, and left along with her. Early in November, a girl who knew B. received a box by post, directed in B.'s handwriting, containing the brooch which was in the box with the pendant:—Held, by a majority of the Irish judges, that the jury was justified in convicting B. and C. of jointly receiving the pendant, knowing it to be stolen. *Reg.* v. *Bryne*. Ir. R. 4 C. L. 68.

In an indictment for receiving goods knowing them to be stolen, evidence that the thief had at one time been lawfully employed to sell such articles to the prisoner, will warrant an acquittal in the absence of any evidence that the prisoner knew that the authority had been withdrawn. *Reg.* v. *Wood*, 1 F. & F. 497.

Recent Possession.]—Where a prisoner was found in the recent possession of some stolen sheep, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself:—Held, that there was evidence for the jury that he received them knowing them to have been stolen. *Reg.* v. *Langmead*, L. & C. 427; 10 L. T. 350; 9 Cox, C. C. 464.

H. MALICIOUS INJURY TO PROPERTY, CATTLE, AND OTHER ANIMALS.

1. *Houses and Buildings*, 1427.
2. *Manufactures and Materials*, 1429.
3. *Machinery*, 1430.
4. *Mines*, 1432.
5. *Sea Banks and Fishponds*, 1433.
6. *Ships*, 1433.
7. *Trees and Plants*, 1433.
8. *Animals and Fowls*, 1435.
9. *Other Real or Personal Property*, 1436.
10. *Obstructing Railways*, 1438.

1. Houses and Buildings.

Beginning to Demolish House—What is.]—It is not a beginning to demolish a house within 7 & 8 Geo. 4. c. 30, s. 8, unless the jury is satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into full effect, they would, in point of fact, have demolished it. *Rex* v. *Thomas*, 4 Car. & P. 237. S. P., *Reg.* v. *Adams*, Car. & M. 299.

An indictment for feloniously beginning to demolish a house, cannot be supported unless the persons committing the outrage had an intention of destroying the house; and, therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house:—Held, to be not within the statute. *Rex* v. *Price*, 5 Car. & P. 510.

Every man has a right to work for the best price he can get, but if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. Where a party of coal-whippers, having a feeling of ill-will towards a coal-lumper, who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, and broke windows and partitions, and part of a wall, and continued after his escape throwing stones at the house, till they were compelled to desist by the threats of the police:—Held, that they might be convicted of beginning to demolish under 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper; provided it was also their object to demolish the house, either on account of its being used by him or by his men, and though they had not any ill-will against the owner of the house personally. *Rex* v. *Batt*, 6 Car. & P. 329.

A. and others were indicted for feloniously demolishing the house of B. It was proved that A. and a mob of persons assembled at H.; A. there addressed the mob in violent language, and led them in a direction towards a police-office about a mile from H., some of the mob from time to time leaving, and others joining. At the police-office the mob broke the windows, and then went and attacked the house of B., and set it on fire, A. not being present at the attack on the house or at the fire:—Held, that on this state of facts, A. ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at H. was, nor whether any of the mob, who were at H., were the persons who demolished B.'s house. *Reg.* v. *Howell*, 9 Car. & P. 437.

If rioters attack a house, and have begun to demolish it, but leave off of their own accord, after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to demolish the house; but if the mob was prevented from going on by the interference of the police, or any other force, that would be evidence to show that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within 7 & 8 Geo. 4, c. 30, s. 8. *Ib.*

Destroying movable shop-shutters is not a beginning to demolish within that statute, as they are not part of the freehold. *Ib.*

If a part of the object of rioters is to demolish a house, it makes no difference that they also acted with another object such as to injure a person who had taken refuge there. *Ib.*

On an indictment under 7 & 8 Geo. 4, c. 30, s. 8, for riotously beginning to demolish and demolishing a dwelling-house, total demolition is not necessary, though the parties were not interrupted. If the house is destroyed as a dwelling-house, it is enough. *Reg.* v. *Phillips*, 2 M. C. C. 252. *S. C.*, nom. *Reg.* v. *Langford*, Car. & M. 602.

Four men, members of, and connected with the family of, the owner of the cottage, with great violence, and to his great terror, drove him from it, and pulled it down all but the chimney:—Held, sufficient to satisfy the statute, though no other persons were within reach of the alarm; they having no bonâ fide claim of right, but intending to injure the owner. *Ib.*

If persons riotously assemble and demolish a house, really believing that it is the property of one of them, and act bonâ fide in the assertion of a supposed right, this will not be a felonious demolition of the house within 7 & 8 Geo. 4, c. 30, s. 8, even though there was a riot. *Ib.*

Demolition by Fire.]—If rioters destroy a house by fire, this is a felonious demolition of it within 7 & 8 Geo. 4, c. 30, s. 8, and the person guilty of such an offence may be convicted on an indictment founded on that enactment, and need not be indicted for arson. *Reg.* v. *Harris*, Car. & M. 661. S. P., *Reg.* v. *Christian*, 12 L. J., M. C. 26.

If rioters destroy a house by fire, that is as much a demolition as if any other mode of destruction were used. *Reg.* v. *Howell*, 9 Car. & P. 437.

Riotously—What is.]—The 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what shall be a riot within the meaning of that enactment, the common-law definition of a riot must be resorted to, and in such a case, if any one of her Majesty's subjects is terrified, this is a sufficient terror and alarm to substantiate that part of the charge of riot. *Reg.* v. *Phillips*, 2 M. C.

C. 252. *S. C.*, nom. *Reg.* v. *Langford*, Car. & M. 602.

Presence not Necessary.]—If a house is demolished by rioters by means of fire, one of the rioters, who is present while the fire is burning, may be convicted for the felonious demolition under 7 & 8 Geo. 4, c. 30, s. 8, although he is not proved to have been present when the house was originally set on fire. *Reg.* v. *Simpson*, Car. & M. 669.

Question for Jury.]—If, in case of feloniously demolishing a house by rioters, it appears that some of the prisoners set fire to the house itself, and that others carried furniture out of the house and burnt it in a fire made on a gravel-walk on the outside of the house, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying the house and furniture; and if so, the jury ought to convict them. *Reg.* v. *Harris*. Car. & M. 661.

Depositions — Application of Prisoner for Copy.]—A prisoner had been committed on a charge of high treason, and afterwards the grand jury returned a true bill against him, with others, for feloniously demolishing a house, under 7 & 8 Geo. 4, c. 30, s. 8. He pleaded to that indictment, and wished to be tried after the other prisoners, who were indicted with him for feloniously demolishing the house, on the ground that he had had no copy of any depositions as to that charge. But this was not allowed, as the prosecution might have been commenced without going before any magistrate, and then there would have been no depositions at all. *Reg.* v. *Simpson*, Car. & M. 669.

Action against Hundred for Damages caused by Riot.]—*See* HUNDRED.

2. MANUFACTURES AND MATERIALS.

Goods in Stage, Process, or Progress of Manufacture.]—Goods remain in "a stage, process, or progress of manufacture," within 7 & 8 Geo. 4, c. 30, s. 3, though the texture is complete, if they are not yet brought into a condition fit for sale. *Rex* v. *Woodhead*, 1 M. & Rob. 549.

A warp not sized, but on its way to the sizers to be sized to fit it for being used in manufacturing goods, is not a "warp in any stage, process, or progress of manufacture," or prepared for or employed in carding, spinning, &c., within 7 & 8 Geo. 4, c. 30, s. 3, though the indictment is not bad for not averring it to be so. *Reg.* v. *Clegg*, 3 Cox, C. C. 295.

Tackle.]—The cords employed to raise the harness or the working tools of a loom, in order to move the shuttle to and fro, constitute tackle employed in weaving, and, therefore, cutting them was an offence within 7 & 8 Geo. 4, c. 30, s. 3. *Reg.* v. *Smith*, 6 Cox, C. C. 198.

Under this statute, the maliciously cutting such tackle is a complete offence, and it is unnecessary to aver or prove an intent to destroy or render it useless. *Ib.*

Quære, whether cutting the thrum, i.e. the ends of the woollen threads generally left in the machine when a piece of cloth is finished, for the purpose of more readily adjusting the succeeding work, is an offence within the statute. At all events, it does not support a count for maliciously cutting woollen warp; but the fact of cutting the thrum may be given in evidence in support of a count for cutting tackle, in order to show the animus of the latter act, and that it was done maliciously. *Ib.*

Frame—Removing Part.]—The taking out and carrying away the piece of iron called the half-jack, from a frame used for the making of framework-knitted stockings, was a damaging the frame, within 28 Geo. 3, c. 55, s. 4, as it made the frame imperfect and inoperative, although the part taken out was not injured, and the replacing it would again make the frame perfect. *Rex* v. *Tacey*, R. & R. 452.

Loom—Destroying Part of.]—The cutting or destroying part of a loom was not within 22 Geo. 3, c. 40, s. 1, although the charge in the indictment was of an intent to cut and destroy certain tools employed in the woollen trade. *Rex* v. *Hill*, R. & R. 483.

Indictment.]—An indictment on 7 & 8 Geo. 4, c. 30, s. 3, for feloniously damaging warps of linen yarn, with intent to destroy or render them useless, need not allege that the warps at the time of the damage done were prepared for or employed in carding, spinning, weaving, &c., or otherwise manufacturing or preparing any goods or articles of silk, woollen, linen, &c. *Rex* v. *Ashton*, 2 B. & Ad. 750.

3. MACHINERY.

Damaging with Intent to render Useless.]—A person plugging up the feed-pipe of a steam-engine, and displacing other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion if the obstruction had not been discovered, and with some labour removed, is guilty of damaging the engine, with intent to render it useless within 24 & 25 Vict. c. 97, s. 15. *Reg.* v. *Fisher*, 35 L. J., M. C. 57; L. R. 1 C. C. 7; 11 Jur. (N.S.) 983; 13 L. T. 380; 14 W. R. 58; 10 Cox, C. C. 146.

Machines—What are.]—Ploughs of the description commonly used in agriculture are machines within the statute. *Reg.* v. *Gray*, L. & C. 365; 33 L. J., M. C. 78; 10 Jur. (N.S.) 160; 9 L. T. 733; 12 W. R. 350; 9 Cox, C. C. 417.

The silling beneath an engine is a part of a machine or engine within s. 4 of 7 & 8 Geo. 4, c. 30. *Reg.* v. *Foster*, 6 Cox, C. C. 25.

Displacement of.] — A displacement of a machine is within s. 4 of 7 & 8 Geo. 4, c. 30, and therefore placing a sledge-hammer within a machine which caused a trifling injury to the silling and brickwork underneath, but did not prevent the working of the machine, is a damage within the statute. *Reg.* v. *Foster*, 6 Cox, C. C. 25.

Water-wheel Destroyed — Other Means of setting Machine in Motion.]—A. had a threshing-machine worked by water, the water-wheel having been put up for the sole purpose of working this machine, and never having been used for anything else; A., fearing the destruction of the machine by a mob, took it down, leaving the water-wheel standing. The prisoners broke the water-wheel:—Held, to be a felony, under 7 &

8 Geo. 4, c. 30, s. 4; and the fact that A. sometimes worked the threshing-machine by horses made no difference. *Rex* v. *Fidler*, 4 Car. & P. 449.

Machine taken to Pieces—Part only Destroyed.]—If a person has had a threshing-machine taken to pieces, he expecting a mob to come and destroy it, and the mob comes and destroys the different parts of the machine when thus separated, this was a felony within 7 & 8 Geo. 4, c. 30, s. 4. *Rex* v. *Mackerel*, 4 Car. & P. 488.

Where the prisoner was indicted for destroying a threshing-machine, and it appeared that it had been previously taken to pieces by the owner, by separating the arms and other parts of it, for the purpose of placing it in safety, but with a view to put it together again, and it was destroyed whilst in this disjointed state; it was decided that the offence was within 7 & 8 Geo. 4, c. 30, s. 4. *Rex* v. *Hutchins*, Deac. C. L. 1517.

Where certain side boards were wanting to the machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually as if those boards had been made good:—Held, that it was still a threshing-machine within the meaning of the statute. *Rex* v. *Bartlett*, Deac. C. L. 1517.

Where the owner removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and had also taken away the legs, and it appeared in evidence that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the act, notwithstanding the stage and legs were wanting. *Rex* v. *Chubb*, Deac. C. L. 1518.

But where the prosecutor had not only taken the machine to pieces, but had broken the wheel of it, before the mob came to destroy it, for fear of having it set on fire and endangering his premises, and it was proved that without the wheel the engine could not be worked; in this case it was held, that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing-machine within the meaning of the statute. *Rex* v. *West*, Deac. C. L. 1518.

Indictment—"Feloniously."]—An indictment under 24 & 25 Vict. c. 97, s. 15, for damaging a machine, with intent to destroy the same, charging the offence to have been committed "unlawfully and maliciously," in the language of the statute, but omitting the word "feloniously," is bad, as the word "feloniously" is a term of art and necessary in all indictments for felony, whether at common law or created by statute. *Reg.* v. *Gray*, L. & C. 365; 33 L. J., M. C. 78; 10 Jur. (N.S.) 160; 9 L. T. 733; 12 W. R. 350; 9 Cox, C. C. 417.

Evidence—Admissibility.]—On an indictment for breaking a threshing-machine, the judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. *Rex* v. *Crutchley*, 5 Car. & P. 133.

4. Mines.

Servants innocently acting under Master's Orders.]—If A. and B. were the owners of adjoining mines, and A. asserting that a certain airway belonged to him, directed his workmen to stop it up, and they, acting bonâ fide, and believing that A. had a right to give such an order, did so, they were not guilty of felony within the 7 & 8 Geo. 4, c. 30, s. 6, for stopping up the airway of a mine, even though A. knew that he had no right to the airway; but if either of the workmen knew that the stopping up of the airway was a malicious act of his master, such workman would be guilty of the felony. *Reg.* v. *James*, 8 Car. & P. 131.

Acts done in Exercise of Supposed Right.]—The provisions of the 24 & 25 Vict. c. 97, s. 28, which enact that "whosoever shall unlawfully and maliciously do certain acts therein specified, with intent to damage or obstruct a mine, or the working or apparatus of a mine, shall be guilty of felony," do not render a person criminally liable for acts causing such damage, but done in a bonâ fide exercise of a supposed right, and without a wicked mind. *Reg.* v. *Matthews*, 14 Cox, C. C. 5.

Indictment—Property, in whom Laid.]—In an indictment under 7 & 8 Geo. 4, c. 30, s. 6, the mine might be laid as the property of the person in possession and working it, though only an agent for others. *Reg.* v. *Jones*, 2 M. C. C. 293; 1 Car. & K. 181.

Erection used in Business of Mine.]—The bottom of the shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine, for the purpose of working a vein of coal which was on a level with the scaffold:—Held, that this scaffold was an "erection used in the conducting the business of a mine," within 7 & 8 Geo. 4, c. 30, s. 7, and the damaging it, with intent to destroy it, or to render it useless, was felony. *Reg.* v. *Whittingham*, 9 Car. & P. 235.

Engine—Proof of Damage to Drum.]—A coal mine was worked by a steam-engine, which caused a cylinder, called a "drum," to revolve and take up the rope as the coal was drawn up from the mine:—Held, that proof of damaging the drum would not support an indictment which charged the damaging a steam-engine used in working a mine. *Ib.*

—— Driving when no Machinery attached.]—A steam-engine used in draining and working a mine had been stopped and locked up for the night. The prisoner got into the engine-house, and set it going, and there being no machinery attached, the engine went with great velocity, and received damage:—Held, that this was a damaging of the engine, within 7 & 8 Geo. 4, c. 30, s. 7. *Reg.* v. *Norris*, 9 Car. & P. 241.

Acts done in Exercise of Supposed Right.]—The provisions of the 24 & 25 Vict. c. 97, s. 29,

do not render a person criminally liable for acts causing such damage, if done in a bonâ fide exercise of a supposed right, and without a wicked mind. *Reg.* v. *Matthews*, 14 Cox, C. C. 5.

5. Sea Banks and Fishponds.

Obstructing Passage over Sea Bank.]—By a haven improvement act, any person who shall place on any space of ground immediately adjoining to the haven, and within the space of ten feet from high-water mark, any goods, materials, or articles whatsoever, so as to obstruct the free and commodious passage through and over the same, shall forfeit and pay any sum not exceeding 5*l*. B. placed three boats on the space of ground immediately adjoining the haven, and within the space of 10 feet from high-water mark, so as to obstruct the free and commodious passage to and over the same. There was no public right of passage over the space of ground, and it was occupied by B.:—Held, by Cockburn, C.J., Crompton, J., and Blackburn J., that B. could not be convicted, as the provision could only apply to cases where a public right of passage existed; but by Wightman, J., that by the express terms of the act, and the apparent intention, the provision extended to such a case, and that B. was liable to be convicted. *Harrod* v. *Worship*, 1 B. & S. 381; 30 L. J., M. C. 165; 8 Jur. (N.S.) 153; 9 W. R. 865.

Fish-pond—Object to Steal Fish.]—The breaking down the head or mound of a fish-pond was not a felony within 9 Geo. 1, c. 22, if it appeared to have been the object of the offenders to steal the fish, and not to let them escape through the breach in the mound. *Rex* v. *Ross*, R. & R. 10; 2 East, P. C. 1067.

6. Ships.

Revolt on Ship.]—It was an offence within 11 & 12 Will. 3, c. 7, s. 9, to make a revolt in a ship, or to endeavour to make one, though the object is not to run away with the ship, or to commit any act of piracy, but to force the captain to redress supposed grievances. *Rex* v. *Hastings*, 1 M. C. C. 82.

If the crew, or part of the crew, of a ship combine together to resist the captain, especially if the object is to deprive him of his command, it will amount to making a revolt, within 11 & 12 Will. 3, c. 7, s. 9; and it will be no answer to show that there were grievances, which, by their resistance, the men sought to redress. *Reg.* v. *M'Gregor*, 1 Car. & K. 429.

Cast Away or Destroyed.]—If a ship was stranded, and afterwards got off in such a state as to be easily refitted, she could not be said to have been cast away or destroyed, under 4 Geo. 1, c. 12, and 11 Geo. 1, c. 29. *Rex* v. *De Londo*, 2 East, P. C. 1098.

—— **Prejudice of Underwriters—No Goods on Board.**]—The underwriters on a policy on goods fraudulently made were within 7 Will. 4 & 1 Vict. c. 89, s. 6, though no goods were put on board. *Reg.* v. *Wallace*, 2 M. C. C. 200.

7. Trees and Plants.

Total Destruction Unnecessary.] — Cutting down a tree was sufficient to bring the case within 9 Geo. 1, c. 22, although the tree was not thereby totally destroyed. *Rex* v. *Taylor*, R. & R. 373.

Overhanging Tree—Cutting off Blossom.]—B.'s chestnut tree overhung his land, and also part of the highway immediately in front of H.'s grounds, and boys threw stones at the blossoms, which broke H.'s windows:—Held, that H. was properly convicted, under 24 & 25 Vict. c. 97, s. 52, for wilfully damaging B.'s tree by cutting off the blossoms at the top of the tree, and that H. showed no claim of right or other legal defence for the trespass. *Hamilton* v *Bone*, 16 Cox, C. C. 437; 52 J. P. 726.

Where Title to Place in Dispute.]—Where shrubs are cut, upon an unproved allegation that they were likely to be injurious to an adjoining wall, it is a malicious trespass, though the title to the spot on which the shrubs grew is in dispute between the parties. *Rex* v. *Whateley*, 4 M. & Ry. 431.

Trees, what are.]—Apple and pear trees grafted in a wild stock, and producing fruit, were trees within 9 Geo. 1, c. 22. *Rex* v. *Taylor*, R. & R. 373.

Amount of Damage.]—A party might be convicted under the 7 & 8 Geo. 4, c. 30, s. 24, of having wilfully and maliciously damaged growing wood, to the value of sixpence, though s. 20 expressly imposed a penalty for unlawfully and maliciously damaging such wood, "the injury done being to the amount of one shilling at least." *Reg.* v. *Dodson*, 9 A. & E. 704.

Indictment—Name of Owner.]—In an indictment on 6 Geo. 3, c. 36, for destroying trees, the name of the owner of the trees must have been truly stated, otherwise it was fatal. *Rex* v. *Patrick*, 2 East, P. C. 1059. And see *Rex* v. *Howe*, 1 Leach, C. C. 481; 2 East, P. C. 588.

—— **Feloniously.**]—The prisoner was indicted for damaging apple trees growing in a garden, and the indictment alleged that the damage was done feloniously and not unlawfully or maliciously:—Held, bad. *Rex* v. *Lewis*, 2 Russ. C. & M. 799.

Damage Exceeding £5—How Estimated.]—Evidence of damage committed at several times in the aggregate, but not at any one time exceeding 5*l*., will not sustain an indictment. *Reg.* v. *Williams*, 9 Cox, C. C. 338.

A person was indicted under 7 & 8 Geo. 4, c. 30, s. 19, for having feloniously, unlawfully and maliciously done damage to trees in a hedge, thereby doing injury to the owner to an amount exceeding 5*l*. The evidence showed that the actual injury done to the trees was to the amount of 1*l*. only, but that it would be necessary to stub up the old hedge and replace it, the expense of which would be 4*l*. 14*s*. The jury found him guilty:—Held, that the conviction was wrong, inasmuch as the injury exceeding 5*l*. must be actual injury to the trees, and that proof of consequential injury was insufficient. *Reg.* v. *Whiteman*, Dears. C. C. 353; 23 L. J., M. C. 120; 18 Jur. 434; 6 Cox, C. C. 370.

Hopbinds—Death of Plant.]—In order to support an indictment under 7 & 8 Geo. 4, c. 30,

s. 18, for destroying hop-binds, it must be shown that the plant died in consequence of the injury received. Proof of the infliction of injury by cutting, bruising, &c., is insufficient. *Reg.* v. *Boucher*, 5 Jur. 709.

8. Animals and Fowls.

Cattle—What are.]—Horses, mares and colts were included in the word "cattle" in 9 Geo. 1, c. 22. *Rex* v. *Patty*, 2 East, P. C. 1074; 1 Leach, C. C. 72; 2 W. Bl. 721. S. P., *Rex* v. *Moyle*, 2 East, P. C. 1076.

So were geldings. *Rex* v. *Mott*, 2 East, P. C. 1075; 1 Leach, C. C. 73, n.

So were pigs. *Rex* v. *Chapple*, R. & R. 77.

And asses. *Rex* v. *Whitney*, 1 M. C. C. 3.

Maiming or Wounding—What is.]—Wounding a horse out of malice to the owner, by driving a nail into the frog of his hoof, was within 9 Geo. 1, c. 22, though the injury was only temporary. *Rex* v. *Haywood*, 2 East, P. C. 1076; R. & R. 16.

Pouring acid into the eye of a mare, and thereby blinding her, was a maiming. *Rex* v. *Owens*, 1 M. C. C. 205.

Injuring a sheep by setting a dog at it was not such a maiming or wounding as was within 4 Geo. 4, c. 54, s. 2 *Rex* v. *Hughes*, 2 Car. & P. 420. But see *Rex* v. *Elmsley*, 1 Lewin, C. C. 126.

If A. set fire to a cow-house and burnt to death a cow which was in it, A. was indictable under 7 & 8 Geo. 4, c. 30, s. 16, for killing the cow. *Rex* v. *Haughton*, 5 Car. & P. 559.

In order to constitute a maiming of a horse within 7 & 8 Geo. 4, c. 30, s. 16, it was essential that a permanent injury should have been inflicted on the animal. *Reg.* v. *Jeans*, 1 Car. & K. 539.

Destroying—Poisoning Dogs.]—The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under 24 & 25 Vict. c. 97, s. 41. *Daniel* v. *Janes*, 2 C. P. D. 351.

Semble, that it is within 27 & 28 Vict. c. 115, s. 2. *Ib.*

Shooting Domestic Fowls when Trespassing.]—The occupier of land sown with seed shot domestic fowls that were trespassing; he had previously warned the owner of the fowls that unless they were kept off his land he would shoot them:—Held, that the occupier could not be convicted under s. 41 of 24 & 25 Vict. c. 97, of unlawfully killing the fowls. *Smith* v. *Williams*, 56 J. P. 840.

Maliciously—What is.]—If a man causes the death of a mare from internal injuries, not intending by his act to kill, maim or wound her, but knowing that the act would or might kill, maim or wound her, and acting recklessly and not caring whether she was injured or not, though without any ill-will or spite either towards the owner of the animal or the animal itself, and without any motive except the gratification of his own depraved tastes, he is guilty of maliciously killing the mare contrary to 24 & 25 Vict. c. 97, s. 40. *Reg.* v. *Welch*, 45 L. J., M. C. 17; 1 Q. B. D. 23; 33 L. T. 753; 24 W. R. 280; 13 Cox, C. C. 121.

A., a hawker, went to the house of B. to sell goods, and a dog of B. coming out of the house, A. knocked out one of his eyes, for which B.'s wife caused A. to be apprehended:—Held, that it was for the jury to say whether A. had struck the dog for his own preservation, and fairly to protect himself; or whether it was a wilful and malicious trespass on his part. *Hunway* v. *Boultbee*, 4 Car. & P. 350; 1 M. & Rob. 15.

—— **Proof of Malice Unnecessary.**]—On an indictment on 7 Will. 4 & 1 Vict. c. 90, s. 2, for maliciously wounding cattle, it was not necessary to prove that the prisoner was actuated by malice against the owner of the cattle. *Reg.* v. *Tivey*, 1 Car. & K. 704; 1 Den. C. C. 63.

A conviction under 7 & 8 Geo. 4. c. 30, s. 16, of unlawfully, maliciously and feloniously wounding a mare, held right. *Ib.*

Indictment—Property in Agister.]—On an indictment for maliciously killing two sheep, the property in them may be laid to be in the agister. *Rex* v. *Woodward*, 2 East, P. C. 653.

—— **Kind of Cattle.**]—An indictment on 9 Geo. 1, c. 22, must have stated the species and sex of cattle wounded or injured; to state that the prisoner maimed certain cattle was not sufficient. *Rex* v. *Chalkley*, R. & R. 258. *See now* 24 & 25 Vict. c. 97, s. 60.

Evidence.]—If a prisoner mixed poison with the corn intended for the feed of eight horses, and then gave each horse his feed from this mixture, an indictment, charging that he did administer the poison to the eight horses, is correct. *Rex* v. *Mogg*, 4 Car. & P. 363.

—— **Other Cases to show Intent.**]—On an indictment for administering sulphuric acid to eight horses, with intent to kill them, the prosecutor may give evidence of administering, at different times, to show the intent. *Ib.*

—— **To Improve Appearance.**]—But if the jury is satisfied that the offender administered the poison under an idea that it would improve the appearance of the horses, he ought to be acquitted. *Ib.*

—— **Not Necessary to Prove that any Instrument used.**]—Upon an indictment under 24 & 25 Vict. c. 97, s. 40, for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound. *Reg.* v. *Bullock*, 37 L. J., M. C. 47; L. R. 1 C. C. 115; 17 L. T. 516; 16 W. R. 405; 11 Cox, C. C. 125.

9. Other Real or Personal Property.

Maliciously—What is.]—The word "maliciously" in 24 & 25 Vict. c. 97, s. 51, requires that an act to be criminal within that section should be done wilfully. *Reg.* v. *Pembliton*, 43 L. J., M. C. 91; L. R. 2 C. C. 119; 30 L. T. 405; 22 W. R. 553; 12 Cox, C. C. 607.

A conviction under that section, for unlawfully and maliciously committing damage above the value of 5*l.* to a house, where the person, after fighting in a crowd in the street near the window of the house, separated himself from the crowd, picked up a stone, threw it at one of the persons with whom he had been fighting,

missed his aim, and hit a plate-glass window above the value of 5*l.* in the house, but did not intend to break the window, was quashed. *Ib.*

C., whose garden adjoined that of H., so hung up a clothes-line as to overhang H.'s fence, and the drippings from the clothes injured H.'s vegetables. H. cut the clothes-line and caused the clothes to fall:—Held, that H., though he did not first ask C. to remove the clothes-line, was not guilty of malicious injury, under 24 & 25 Vict. c. 97, s. 52. *Heard* v. *Coles*, 56 J. P. 119.

Real Property—Incorporeal Hereditament—Herbage Right.]—The soil of a town moor was vested in the corporation of the town in fee, but freemen and widows of deceased freemen of the town were under statute entitled to the "full right and benefit to the herbage" of the town moor for two milch cows:—Held, that this right to the herbage was not "any real or personal property whatsoever" within the meaning of the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 52, which applies only to tangible property and not to a mere incorporeal right. *Laws* v. *Eltringham*, 51 L. J., M. C. 13; 8 Q. B. D. 283; 46 L. T. 64; 30 W. R. 245; 15 Cox, C. C. 22; 46 J. P. 230.

—— **Playing Football.**]—In playing football, E. trespassed on a grass field, and the justices convicted him of unlawfully and maliciously doing damage, with intent to destroy grass for the food of beasts:—Held, that the conviction was wrong, for neither 24 & 25 Vict. c. 97, s. 24, nor s. 52 applied to damage which was only nominal, and not done with intent to damage. *Eley* v. *Lytle*, 50 J. P. 308.

—— **Damage to Field by Dog.**]—Damage done to a field by a poacher's dog in pursuit of game, was not a malicious injury within 7 & 8 Geo. 4, c. 30, s. 23. *Reg.* v. *Prestney*, 3 Cox, C. C. 505.

—— **Mushrooms growing in a Wild State.**]—In order to constitute the offence of wilfully or maliciously committing damage, injury, or spoil to or upon any real property under s. 52 of the Malicious Injury to Property Act, 1861, there must be proof of actual damage to the realty itself, and mere damage to uncultivated roots or plants growing upon the realty is insufficient to justify a conviction. The respondent gathered mushrooms in a field belonging to the appellant. They were of value to the latter, but they grew spontaneously, and were entirely uncultivated. No damage was done by the respondent to the grass or the hedges:—Held, that, upon the above facts, the respondent had not been guilty of an offence within s. 52 of the act. *Gardner* v. *Mansbridge*, 19 Q. B. D. 217; 57 L. T. 265; 35 W. R. 809; 16 Cox, C. C. 281; 51 J. P. 612.

Diluting Milk.]—The servant of a milkman spilt some of his master's milk, and to prevent loss to his master filled in water to make up the quantity and sold the diluted milk to customers:—Held, that the servant had not committed the offence of wilfully or maliciously damaging his master's property within s. 52 of 24 & 25 Vict. c. 97. *Hall* v. *Richardson*, 54 J. P. 345.

Claim of Right.]—Breaking open a door of a large house under a supposed claim of right was not an offence within 7 & 8 Geo. 4, c. 20, s. 24. *Crick* v. *Crick*, 6 W. R. 594.

A builder undertook to do certain work, and for that purpose took an engine inside a hoarding surrounding the land to be built upon. Upon a dispute occurring, the builder in order to obtain possession of the engine, took down part of the hoarding, doing no more damage than was necessary:—Held, that the builder could not be convicted of malicious injury to property. *Leyson* v. *Williams*, 54 J. P. 631.

Reinstating Works after Notice.]—By the side of the highway and under the entrance to T.'s premises ran a drain. T. substituted for it a culvert, and by so doing raised the entrance and the part of the highway adjoining it. The surveyor of the highways served T. with a notice to reinstate, alleging that the culvert caused a nuisance to the highway. On his failing to reinstate the highway the surveyor himself removed the culvert, and in doing so broke some of the tiles:—Held, that an information against the surveyor under 24 & 25 Vict. c. 97, s. 52, for malicious injury to property, ought to be dismissed. *Denny* v. *Thwaites*, 46 L. J., M. C. 141; 2 Ex. D. 21; 35 L. T. 628.

Indictment, Contents of—Damage exceeding £5.]—In an indictment under 24 & 25 Vict. c. 97, s. 51, for maliciously damaging personal property, the damage exceeding 5*l.*, it is not necessary to allege the value of each article injured, but only that the amount of the damage done to the several articles exceeded 5*l.* aggregately. *Reg.* v. *Thomas*, 24 L. T. 398; 12 Cox, C. C. 54.

10. Obstructing Railways.

Maliciously.]—The prisoners placed a stone upon a line of railway, so as to cause an obstruction to any carriages that might be travelling thereon:—Held, that if this was done mischievously, and with an intention to obstruct the carriages of the company, the jury would be justified in finding that it was done maliciously. *Reg.* v. *Upton*, 5 Cox, C. C. 298.

Act done by Servants of the Defendant.]—Upon an information before justices on behalf of a railway company, for an offence against its act of incorporation, in placing stones and rubbish on the railway, and thereby obstructing the free passage of the same, evidence that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining, and that on one occasion the defendant himself, who was standing by, nodded his head, and directed the workmen to go on, is sufficient to warrant the justices in convicting the defendant. *Roberts* v. *Preston*, 9 C. B. (N.S.) 208.

What is an Obstruction.]—A man unlawfully altered some railway signals at a railway station. The alteration caused a train, which would have passed the station without slackening speed, to come nearly to a stand. Another train going in the same direction, and on the same rails, was due at the station in half an hour:—Held, that he had obstructed a train within the meaning of 24 & 25 Vict. c. 97, s. 36. *Reg.* v. *Hadfield*, 39 L. J., M. C. 131; L. R. 1 C. C. 253; 22 L. T. 664; 18 W. R. 955; 11 Cox, C. C. 574.

A man, who was not a servant of a railway company, stood on a railway between the two lines of rails, at a point between two stations.

As a train was approaching he held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. This, as he intended that it should, caused the driver to shut off steam and diminish the speed, and led to a delay of four minutes:—Held, that he had obstructed a train within the meaning of 24 & 25 Vict. c. 97, s. 36. *Reg.* v. *Hardy*, 40 L. J., M. C. 62; L. R. 1 C. C. 278; 23 L. T. 785; 19 W. R. 359: 11 Cox, C. C. 656.

A party was liable to be indicted under 3 & 4 Vict. c. 97, s. 15, if he designedly placed on a railway substances having a tendency to produce obstruction to the carriages, though he might not have done the act expressly with that object. *Reg.* v. *Holroyd*, 2 M. & Rob. 339.

B. placed a truck across a railway line, in such a manner that if a carriage or engine had come along the line it would have been obstructed, and the safety of passengers, who might have been in any such carriage, would have been endangered. The railway had not opened for passenger traffic, and no carriage or engine was in fact obstructed:—Held, that he was guilty of a misdemeanour, under 3 & 4 Vict. c. 97, s. 15. *Reg.* v. *Bradford*, Bell, C. C. 268; 29 L. J., M. C. 171; 6 Jur. (N.S.) 1102; 2 L. T. 392; 8 W. R. 531; 8 Cox, C. C. 309.

Placing Stones on Private Railway.]—S. was charged with unlawfully putting stones on a railway with intent to upset trucks, in contravention of s. 35 of 24 & 25 Vict. c. 97. The railway was not constructed under any statute, and was used only to convey goods to certain docks:—Held, that the above section applied to a private railway. *O'Gorman* v. *Sweet*, 54 J. P. 663.

I. PERSONATION.

1. *Stockholders*, 1439.
2. *Seamen and Soldiers*, 1439.
3. *Voters.*
   a. Parliamentary, 1440.
   b. Municipal, 1441.

1. STOCKHOLDERS.

What is.]—Obtaining and indorsing a dividend warrant at the bank in the name of a stockholder is "personating a proprietor, and thereby endeavouring to receive the dividend," although no attempt whatever is made to receive the money at the pay-office. *Rex* v. *Parr*, 1 Leach, C. C. 434; 2 East, P. C. 1005.

2. SEAMEN AND SOLDIERS.

Of Person really Entitled to Money.]—Under 31 Geo. 2, c. 10, the personating must be of some existing person entitled, or who primâ facie might be entitled, to receive the wages. *Rex* v. *Brown*, 2 East, P. C. 1007.

To constitute the offence of personating the name of a seaman under 57 Geo. 3, c. 127, s. 4, the person entitled, or really supposed to be entitled to prize-money, must be personated; personating a man who never had any connection with the ship is not an offence within the act. *Rex* v. *Tannet*, R. & R. 351.

Where Person entitled Dead.]—Where a prisoner personated one S. Cuff, who was dead, and whose prize-money had been paid to his mother:—Held, that it did not vary the prisoner's guilt; and that he might be convicted on 54 Geo. 3, c. 93, s. 89. *Rex* v. *Cramp*, R. & R. 327. S. P., *Reg.* v. *Pringle*, 9 Car. & P. 408; 2 M. C. C. 127.

The prisoner applied at Greenwich Hospital for prize-money in the name of J. B.; J. B. was dead, and was supposed to be so at the hospital, and the prisoner did not obtain the money. On an indictment for personating:—Held, that the 54 Geo. 3, c. 93, s. 89, applied, although the seaman was dead. *Rex* v. *Martin*, R. & R. 324.

What Persons Guilty of Offence.]—All persons aiding and abetting the personating a seaman entitled to allowance-money are principals, and the offence is not confined to the person only who personates the seaman. *Rex* v. *Potts*, R. & R. 353.

On an indictment under 2 Will. 4, c. 53, s. 49, two persons were charged, one as having falsely personated a soldier entitled to prize-money, and the other as an accessory before the fact, in causing and procuring him to commit the alleged felony. The former, at the instigation of the other, had personated the soldier entitled to prize-money, but the other had represented that he was entitled to the prize-money, and the defence was that he had purchased it from the soldier, which there was no express evidence to disprove:—Held, nevertheless, that both were guilty. *Reg.* v. *Lake*, 11 Cox, C. C. 333.

3. VOTERS.

a. Parliamentary.

Allegations in Indictment are for the Court to Decide upon.]—An indictment for wilfully making a false answer to a third question put to a party tendering his vote at an election of members of parliament, in pursuance of 2 & 3 Will. 4, c. 45, s. 58, had been removed by certiorari. At the trial, several objections were taken, grounded on the omission of proper allegations in the indictment:—Held, that being on the record, they should be left to the decision of the court. *Reg.* v. *Bowler*, Car. & M. 559; 6 Jur. 287.

By whom Questions are Asked.]—On an indictment under 2 & 3 Will. 4, c. 45, s. 58, for giving a false answer at the poll at an election of members of parliament for a borough, it is not essential that the returning officer should himself put the three questions to the voters under s. 53, it is sufficient if the town clerk does it in his presence, and by his direction; neither is it necessary to show that the agent who required the questions to be put was expressly appointed by the candidate; it is sufficient to show that he has acted as agent for the candidate. *Reg.* v. *Spalding*, Car. & M. 568.

Part Omitted.]—A voter having changed his residence since the last registration, cannot be indicted under 2 & 3 Will. 4, c. 45, for swearing that he has still the same qualification, if the sheriff's deputy should omit, at the time the voter tenders his vote, to read over to him the specific qualification from the register. *Reg.* v. *Lucy*, Car. & M. 511.

Same Qualification.]—The words "the same qualification" mean that the voter must, at the

time of the election, be in possession of the identical qualification in respect of which he was registered. It is not enough if he possesses premises of a similar description. *Reg.* v. *Dodsworth*, 8 Car. & P. 218 ; 2 Jur. 131.

Must be Made Wilfully.]—If a person knew that at the time of polling he gave a false answer as to his having the same qualification as at the time of registration, it would be no defence to an indictment for that offence, that he acted under the advice of an electioneering committee ; but if, possessing property of equal value with that for which he was registered, he acted bonâ fide, and under an impression that he was entitled to vote, he ought to be acquitted. *Ib.*

The word wilfully, in an indictment on the 2 & 3 Will. 4, c. 45, s. 58, for giving a false answer at the poll, should be construed in the same way as in an indictment for perjury, and be supported by the same sort of evidence. *Reg.* v. *Ellis*, Car. & M. 564 ; 6 Jur. 287.

Evidence.]—Where an averment states the words of the affirmative answer, they must be proved as alleged. *Reg.* v. *Bowler*, Car. & M. 559 ; 6 Jur. 287.

—— **Proof of Register.**]—On an indictment against a voter for making a false declaration as to his possession of the same qualification, under 2 & 3 Will. 4, c. 45, s. 58, a copy of the original register, made according to s. 55, may be received in evidence ; and it is sufficient if it resembles the original in respect of the voter's name and description. *Reg.* v. *Dodsworth*, 8 Car. & P. 218 ; 2 Jur. 131.

—— **Sufficiency.**]—Upon an indictment, in falsely taking the freeholder's oath at an election of a knight of the shire in the name of J. W. ; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election in the name of J. W., who swore to his freehold and place of abode, and that there was no such person ; and that the defendant voted on the second day, and was no freeholder, and some time after boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled up for his bad vote ; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W. :—Held, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. *Rex* v. *Price*, 6 East, 323 ; 2 Smith, 525. And see *Rex* v. *Leefe*, 2 Camp. 139 ; 11 R. R. 683 ; and *Purcell* v. *M'Namara*, 9 East, 157 ; 9 R. R. 578.

—— **Writ to Sheriff.**]—On an indictment for fraudulently personating a voter at an election of a member of parliament for a city being a county of itself, the writ to the sheriff must be produced in order to prove that the election was duly made. *Reg.* v. *Vaile*, 6 Cox, C. C. 470.

b. Municipal.

Offence, when Complete.]—The offence of inducing another to personate a voter at a municipal election under 22 & 23 Vict. c. 35, s. 9, is complete upon the personator tendering the voting paper, although, on being asked if he is the person whose name is signed to the voting paper, he answers "No," and the vote is accordingly rejected. *Reg.* v. *Hague*, 4 B. & S. 715 ; 33 L. J., M. C. 81 ; 10 Jur. (N.S.) 359 ; 9 L. T. 648 ; 12 W. R. 310 ; 9 Cox, C. C. 412.

Fabricating Voting Papers.]—At an election of guardians, W., at the request of the voter's wife, who informed him that she had her husband's authority to fill up the voting paper for a particular candidate, caused her to put her mark, and he put the initials of the voter opposite the candidate's name and attested the paper, which the returning officer treated as the mark and vote of the voter himself :—Held, that there was no evidence to justify the conviction of W. for unlawfully fabricating a voting paper within the meaning of 14 & 15 Vict. c. 105, s. 3. *Wickham* v. *Phillips*, 47 J. P. 612.

Person Dead.]—By 14 & 15 Vict. c. 105, s. 3, if any person, pending or after the election of any guardian, shall wilfully, fraudulently, and with intent to affect the result of such election, personate any person entitled to vote at such election, he shall be liable, on conviction by two justices, to three months' imprisonment :—Held, that the section makes no provision against the offence of personating a voter who is dead at the time of the election, as the offender cannot in such case be convicted of personating any one "entitled to vote" at the election. *Whiteley* v. *Chappell*, 38 L. J., M. C. 51 ; L. R. 4 Q. B. 147 ; 19 L. T. 355 ; 17 W. R. 175 ; 11 Cox, C. C. 307.

Untruly Answering — Son same Name as Father.]—The son of a burgess, of the same name as his father, living in the house in respect of which the father had been qualified, but the father having for some time been absent, and the son paying the rates, is not indictable for untruly answering the questions put to voters upon his voting. *Reg.* v. *Goodman*, 1 F. & F. 502.

Indictment—Wilfully.]—An indictment upon 5 & 6 Will. 4, c. 76, s. 34, for giving a false answer on voting for a town councillor, is bad, if it does not allege that the defendant wilfully gave the false answer. *Reg.* v. *Bent*, 2 Car. & K. 179 ; 1 Den. C. C. 157.

Where a count alleged that the prisoner falsely, fraudulently and deceitfully personated a burgess at an election of councillors for a borough :—Held, no offence under this section or at common law. *Ib.*

Evidence.]—On the trial of an indictment for personating a burgess at an election of a councillor for a ward of a borough divided into wards under 5 & 6 Will. 4, c. 76, it is enough for the prosecutor to show that the personation took place at what purported to be a ward election for that ward. It is not necessary to prove the due division of the borough into wards, or that such division was approved by the privy council. *Reg.* v. *Thomson*, 2 M. & Rob. 335.

It is not necessary to produce the charter of a city to prove that it is a municipal corporation ; the production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence, if it proves that the councillors of the ward were present on the occasion,

and it is a sufficient compliance with 5 & 6 Will. 4, c. 76, s. 43. *Reg.* v. *Turner*, 12 Cox, C. C. 313.

II. *AGAINST THE PERSONS OF INDIVIDUALS.*

A. ABDUCTION OF WOMEN AND CHILDREN.

1. *The Offence.*
   - *a.* Women, 1443.
   - *b.* Girls under Sixteen, 1443.
   - *c.* Children under Fourteen, 1446.
   - *d.* Under Criminal Law Amendment Act. See post, col. 1563.
2. *Indictment*, 1447.
3. *Evidence*, 1447.

1. THE OFFENCE.

a. Women.

From Motives of Lucre—Evidence.]—On an indictment for abduction on 9 Geo. 4. 31, s. 19. the jury ought not to convict the prisoner, unless satisfied that he committed the offence from motives of lucre: but evidence of expressions used by him respecting the property of the lady, such as his stating that he had seen the will of one of her relatives (naming him), and that she would have 220*l.* a year, are important for the consideration of the jury, in coming to a conclusion whether he was actuated by motives of lucre or not. *Reg.* v. *Barratt*, 9 Car. & P. 387.

b. Girls under Sixteen.

Taking out of Possession—What is.]—It is not necessary to show a trespass, or anything of that nature, in the taking, other than the act of taking. *Reg.* v. *Frazer*, 8 Cox, C. C. 446.

A., a girl under sixteen, who was in service, was, as she was returning from an errand, asked by B. if she would go to London, as B.'s mother wanted a servant, and would give her 5*l.* wages. A. and B. went away together to Bilston, where both were found, and B. apprehended:—Held, that this was not such a taking, or causing to be taken of A. as was sufficient to constitute the offence of abduction under 9 Geo. 4, c. 31, s. 20. *Reg.* v. *Meadows*, 1 Car. & K. 399; Dears. C. C. 161, n. See next case.

A girl under sixteen having by persuasion been induced by the prisoner to leave her father's house, and go away with him without the consent of the father, left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the prisoner, and then they went away together some distance, without the intention of returning:—Held, first, that there was a taking of the girl out of the father's possession, within 9 Geo. 4, c. 31, s. 20, by the prisoner when he met the girl and went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection. *Reg.* v. *Manktelow*, Dears. C. C. 159; 22 L. J., M. C. 115; 17 Jur. 352; 6 Cox, C. C. 143.

Held, secondly, such taking need not be by force, actual or constructive. *Ib.*

A girl, under sixteen, who was living in her father's house, was induced by the prisoner to go to a chapel and to be married to him. She was only away from her home for an hour or two, and after her return continued to live with her father as before, he being ignorant of what had taken place. The marriage was never consummated:—Held, that there was sufficient evidence of her having been taken out of her father's possession to satisfy 9 Geo. 4, c. 31, s. 20. *Reg.* v. *Baillie*, 8 Cox, C. C. 238.

A. was indicted under 24 & 25 Vict. c. 100, s. 53, for fraudulently alluring C. out of the possession of her mother and stepfather, the latter having the lawful care of her; and B. with being an accessory before the fact. C. was sent by her mother to live with her grandmother. Instead of going there, she went to B.'s house, and did not return home when desired to do so by her mother. After remaining with B. a month, she left with A., her paternal uncle, and was married to him without her mother's knowledge:—Held, upon objection that there was no evidence that the alluring was fraudulent, or that the girl was taken out of her mother's possession, that the facts did not support the indictment. *Reg.* v. *Burrell*, L. & C. 354; 33 L. J., M. C. 54; 9 L. T. 426; 12 W. R. 149; 9 Cox, C. C. 368.

When a servant under sixteen years of age, had permission from her master to go and see her parents from Sunday to Monday night, and went to see them on the Sunday for a few hours only, and then told them (by previous arrangement with the prisoner) that she was going back to her employment, instead of which she remained with him all night, and did not return to her master's employment until some days afterwards:—Held, that the facts would not warrant a conviction for abduction under 24 & 25 Vict. c. 100, s. 55. *Reg.* v. *Miller*, 13 Cox, C. C. 179.

If a man, by previous promises to a girl under sixteen as to what he will do if she will leave her parents' house and go to live with him, induces her at length to do so, and then receives and harbours her secretly, he is liable to be convicted for taking her out of the possession of her parents, even, although he does not meet her by any previous arrangement and is not otherwise actually a party to her act in leaving. *Reg.* v. *Robb*, 4 F. & F. 59.

When a girl, under sixteen, has been found in the streets by herself and seduced away, that is not a taking out of the possession of the father, even though he is living in the place and she lives with him. *Reg.* v. *Green*, 3 F. & F. 274.

The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her, and detained her for some hours. He then took her back to the street where he had met her, and she returned home to her father's:—Held, in the absence of any evidence that the prisoner knew or had reason for knowing, or that he believed that the girl was under the care of her father at the time, that a conviction under 24 & 25 Vict. c. 100, s. 55, could not be sustained. *Reg.* v. *Hibbert*, 38 L. J., M. C. 61; L. R. 1 C. C. 184; 19 L. T. 799; 17 W. R. 384; 11 Cox, C. C. 246.

Whether Girl's Consent Material.]—A. went in the night to the house of B., and placed a ladder against a window, and held it for J., the daughter of B., to descend, which she did, and then eloped with A. J. was a girl under sixteen, viz., fifteen years old:—Held, that this was a taking of J. out of the possession of her father

within 9 Geo. 4, c. 31, s. 20, although J. had herself proposed to A. to bring the ladder, and to elope with him *Reg.* v. *Robins*, 1 Car. & K. 456.

It is immaterial whether the girl consents or not. *Reg.* v. *Manktelow*, supra.

In order to constitute an offence within 9 Geo. 4, c. 31, s. 20, it is sufficient, if, by moral force, a willingness on the part of the girl to go away with the prisoner is created; but if her going away with him is entirely voluntarily, no offence is committed. *Reg.* v. *Handley*, 1 F. & F. 648.

It was no answer to an indictment under 9 Geo. 4, c. 31, s. 20, for taking away a girl under the age of sixteen years, to show that the girl alleged to be abducted went voluntarily from her home in consequence of the persuasion of the prisoner, to a place at some distance, where she met the prisoner, and whence she went away with him without any reluctance. *Reg.* v. *Kipps*, 4 Cox, C. C. 167.

On an indictment for taking an unmarried girl under the age of sixteen from the possession of her father:—Held, that the statute was satisfied, though the man and the girl quitted the house together in consequence of a proposition which emanated from the girl herself to that effect, and a statement by her to the man that she intended to leave her father's house. *Reg.* v. *Boswell*, 2 Cox, C. C. 279.

Taking not Intended to be Permanent.]—A. was convicted for taking an unmarried girl, under sixteen, out of the possession of her father, and against his will. It was proved that A. (who had previously stayed out with the girl for a night), having met her by arrangement, stayed with her away from her father's house for three days, sleeping with her at night; that he took her away without her father's consent, and against his will, in order to gratify his passions and then allowed her to return home, and not with a view of keeping her away from her home permanently:—Held, that the evidence justified the conviction. *Reg.* v. *Timmins*, Bell, C. C. 276; 30 L. J., M. C. 45; 6 Jur. (N.S.) 1309; 3 L. T. 337; 9 W. R. 36; 8 Cox, C. C. 401.

Prisoner's Disapproval of Act of Girl.]—A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home, and has come to him: but if, at any time, he has attempted to induce her to leave home without her parents' consent, and she afterwards does so, he is guilty of the abduction of the girl, even though he disapproves of the act at the particular time at which she gives effect to his previous persuasions. *Reg.* v. *Olifier*, 10 Cox, C. C. 402.

Improper Motive — Question for Jury.]—Where a person was indicted for the abduction of a girl under sixteen, and it did not appear that he had any improper motive, the jury was directed that if they thought he merely wished to have the child to live with him, and honestly believed that he had a right to the custody of the child, although he had no such right, they ought to acquit him. *Reg.* v. *Tinkler*, 1 F. & F. 513. *See Reg.* v. *Booth*, infra.

Prisoner's Knowledge as to Age of Girl.]—To support an indictment for the abduction of an unmarried girl under sixteen, it is not necessary to prove that the person who abducted her knew her to be under sixteen, as the person who does so is bound to ascertain her age, and if she turns out to be under sixteen he must take the consequences. *Reg.* v. *Mycock*, 12 Cox, C. C. 28.

One who takes an unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, is guilty of an offence under 24 & 25 Vict. c. 100, s. 55, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go. *Reg.* v. *Booth*, 12 Cox, C. C. 231.

A man was convicted under 24 & 25 Vict. c. 100, s. 55, of unlawfully taking an unmarried girl, under the age of sixteen, out of the possession and against the will of her father. It was proved that he did take the girl, and that she was under sixteen; but that he bonâ fide believed and had reasonable ground for believing that she was over sixteen:—Held, that the latter fact afforded no defence, and that he was rightly convicted. *Reg.* v. *Prince*, 44 L. J., M. C. 122; L. R. 2 C. C. 154; 32 L. T. 700; 24 W. R. 76; 13 Cox, C. C. 138.

A man dealing with an unmarried girl does so at his peril: and if she turns out to be under sixteen, is liable to be indicted for unlawfully taking her away. *Reg.* v. *Olifier*, 10 Cox, C. C. 402.

It is no defence that the prisoner did not know that an unmarried girl was under sixteen, or that, from her appearance, he might have thought she was a greater age. *Reg.* v. *Robins*, 1 Car. & K. 456.

Taking against will of Parents—Fraud.]—Semble, that where a man by false and fraudulent representation induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away of the girl was an abduction within 9 Geo. 4, c. 31, s. 20. *Reg.* v. *Hopkins*, Car. & M. 254.

On an indictment for unlawfully taking away a girl against the will of her parents, if they have encouraged her in a lax course of life, the case does not come within 9 Geo. 4, c. 31, s. 90, as it cannot be said to be against their will, *Reg.* v. *Primelt*, 1 F. & F. 50.

Who has Lawful Charge of Girl.]—A servant under sixteen years of age had permission from her master to go and see her parents from Sunday to Monday night, and went to see them on Sunday for a few hours only; she then told them (by previous arrangement with the prisoner) that she was going back to her employment, but instead of doing so, she remained with the prisoner all night and did not return to her master until some days afterwards:—Held, that the girl was under the lawful charge of her master, and not of her father at the time of the alleged offence. *Reg.* v. *Miller*, 13 Cox, C. C. 179.

A girl who is away from her home, is still in the custody or possession of her father, if she intends to return to her home. *Reg.* v. *Mycock*, 12 Cox, C. C. 28.

c. Children under Fourteen.

Force or Fraud practised upon Parent and not on Child.]—In order to support an indictment under 24 & 25 Vict. c. 100, s. 56, for unlawfully by fraud taking away a child under the age of fourteen years with intent to deprive the parent

of the possession of such child, it is not necessary to prove that the fraud of the prisoner was practised upon the child itself. Dictum in *Reg.* v. *Barrett* (15 Cox, C. C. 658) dissented from. *Reg.* v. *Bellis*, 62 L. J., M. C. 155; 5 R. 492; 69 L. T. 26; 17 Cox, C. C. 660; 57 J. P. 441—C. C. R.

Such a charge is not supported by evidence of force or fraud exercised upon the child's guardian but must be practised on the child itself. *Reg.* v. *Barrett*, 15 Cox, C. C. 658.

Evidence.]—The prisoner, being indicted under the 24 & 25 Vict. c. 100, s. 56, for that she did, feloniously and unlawfully, by fraud, detain a child, under the age of fourteen, with intent to deprive the mother of the possession of her—the evidence being that the child had been in the service of the prisoner, and was missing and could not be discovered; and that she gave different accounts of what had become of the child, but implying that the prisoner had given her up to some third persons; and there being no evidence that the child was still in her actual custody, nor, indeed, any evidence where she was:—Held, that upon the principle of *Jones* v. *Dowle* (9 M. & W. 19), the prisoner was rightly convicted; because, whether her stories were all utterly false, and the child was secreted by herself, or whether they were so far true, and the child was in the actual custody of some third parties, to whom she had wrongfully delivered her, it was equally true that she unlawfully detained the child by fraud. *Reg.* v. *Johnson*, 50 L. T. 759; 15 Cox, C. C. 481; 48 J. P. 759—C. C. R.

2. Indictment.

Averment as to Possession.]—A. was indicted under 24 & 25 Vict. c. 100, s. 53, for fraudulently alluring C. out of the possession of her mother and stepfather, the latter having the lawful care of her:—Held, that the averments that the girl was in the possession and under the care of her stepfather might be rejected as surplusage. *Reg.* v. *Burrell*, L. & C. 354; 33 L. J., M. C. 54; 9 L. T. 426; 12 W. R. 149; 9 Cox, C. C. 368.

3. Evidence.

Wife a Competent Witness.]—The wife is a witness as well for as against her husband, although she has cohabited with him from the day of the marriage. *Rex* v. *Perry*, 3 Russ. C. & M. 666; 1 East, P. C. 454.

Where several defendants were indicted for a misdemeanor in conspiring to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants:—Held, that, assuming the young lady to be at the time the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. *Rex* v. *Wakefield*, 2 Lewin, C. C. 279.

What Admissible.]—A prisoner was taken into custody at the house of his brother on a charge of abduction; when he was taken, a letter was found in a writing desk in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—Held, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Reg.* v. *Barratt*, 9 Car. & P. 387.

What must be Proved.]—On a prosecution on 3 Hen. 7, c. 2, it was essential that there should be a continuance of the force into the county where the defilement took place. *Rex* v. *Fulwood*, 3 Russ. C. & M. 255.

B. ABORTION, ATTEMPTS TO PROCURE.

What is a Noxious Thing.]—A small quantity of savin, not sufficient to do more than produce a little disturbance in the stomach, was not a noxious thing within 7 Will. 4 & 1 Vict. c. 85, s. 6. *Reg.* v. *Perry*, 2 Cox, C. C. 223.

Upon an indictment, under 24 & 25 Vict. c. 100, s. 59, for supplying a certain noxious thing, knowing that the same is intended to be used with intent to procure miscarriage, it is necessary to prove that the thing supplied is noxious. The supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against that enactment. *Reg.* v. *Isaacs*, L. & C. 220; 32 L. J., M. C. 52; 9 Jur. (N.S.) 212; 7 L. T. 365; 11 W. R. 95; 9 Cox, C. C. 228.

On a charge administering a noxious thing it was proved that a woman in the family way took some bottles of medicine given her by the prisoner, and afterwards became very ill, and next day had a miscarriage:—Held, that there was evidence that the stuff administered was a noxious thing within 24 & 25 Vict. c. 100, s. 58. *Reg.* v. *Hollis*, 28 L. T. 455; 12 Cox, C. C. 463.

The prisoner was convicted, under 24 & 25 Vict. c. 100, s. 58, of having feloniously and unlawfully caused to be taken by E. V. a certain "noxious thing," to wit, half an ounce of oil of juniper, with intent to procure the miscarriage of the said E. V. It was proved that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without any bad effect, but that a half ounce produces ill effects, and is to a pregnant woman dangerous. The question reserved was whether there was evidence that the half ounce of oil of juniper was a "noxious thing" within the statute:—Held, that there was evidence that it was a "noxious thing" within the statute, and that the conviction was right. *Reg.* v. *Cramp*, 49 L. J., M. C. 44; 5 Q. B. D. 307; 42 L. T. 442; 28 W. R. 701; 14 Cox, C. C. 401; 44 J. P. 411. *See also* on the trial of the case, 14 Cox, C. C. 390.

Causing to be Taken.]—If A. procures poison and delivers it to B., both intending that B. should take it for the purpose of procuring abortion, and B. afterwards takes it with that intent in the absence of A., A. might be convicted under 7 Will. 4 & 1 Vict. c. 85, s. 6, of causing it to be taken. *Reg* v. *Wilson*, Dears. & B. 127; 26 L. J., M. C. 18; 2 Jur. (N.S.) 1146; 5 W. R. 70; 7 Cox, C. C. 190.

The prisoner, in a conversation with a woman who was pregnant, told her that he knew of something that would get rid of her child. On

being asked what it was, he said it was savin. He afterwards brought the woman some savin, and gave her directions how to take it. She took the savin accordingly, and the prisoner called from time to time to inquire the effect. The prisoner also made up into pills a drug which the woman had obtained at his request. After taking the savin and the pills the woman became and continued very ill till she was confined :—Held, a causing to be taken within 7 Will. 4 & 1 Vict. c. 85, s. 6. *Reg.* v. *Farrow*, Dears. & B. 164 ; 3 Jur. (N.S.) 167 ; 5 W. R. 269.

Intention to Procure Abortion.]—In order to constitute the offence of supplying a noxious thing, with the intention that it shall be employed in procuring abortion within 24 & 25 Vict. c. 100, s. 59 it is not necessary that the intention of employing it should exist in the mind of any other person than the person supplying it. *Reg.* v. *Hillman*, L. & C. 343 : 33 L. J., M. C. 60 ; 9 L. T. 518 ; 12 W. R. 111 ; 9 Cox, C. C. 386.

—— **Woman not Pregnant.**]—Supplying a noxious thing with the intent that it shall be used by a certain woman to procure abortion is a misdemeanor within the 24 & 25 Vict. c. 100, s. 39, although the woman for whom it was intended by him was not pregnant. *Reg.* v. *Titley*, 14 Cox, C. C. 502.

An indictment under 7 Will. 4 & 1 Vict. c. 85, s. 6, for using an instrument with intent to procure miscarriage :—Held, immaterial whether or not the woman was pregnant at the time of the instrument being used. *Reg.* v. *Goodhall* or *Goodchild*, 1 Den. C. C. 187 ; 2 Car. & K. 294 ; 2 Cox, C. C. 41.

Evidence—Statement by Woman to Police in Absence of Accused.]—On the trial of a person for using an instrument with intent to procure miscarriage, it was proposed to put in evidence a statement made by the woman, upon whom the instrument was alleged to have been used, to the police officers in the absence of the accused, but which was subsequently read to the accused by the police :—Held, that the course adopted by the police was an exceedingly objectionable one, and that the statement should not be put in. *Reg.* v. *Smith*, 18 Cox, C. C. 470 ; 61 J. P. 120.

Conspiracy to procure Abortion—Woman not with Child.]—A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion. *Reg.* v. *Whitechurch*, 59 L. J., M. C. 77 ; 24 Q. B. D. 420 ; 62 L. T. 124 ; 38 W. R. 336 ; 16 Cox, C. C. 743 ; 54 J. P. 472—C. C. R.

Cases under Repealed Statute of 43 Geo. 3, c. 58, s. 1.]—The expression "quick with child," in this statute meant when the woman felt the child move within her. *Rex* v. *Goldsmith*, 3 Camp. 76.

Or, having conceived. *Reg.* v. *Wycherley*, 8 Car. & P. 262.

Or, feeling the child alive and quick within, at whatever time the fœtus might have a separate existence. *Rex* v. *Philips*, 3 Camp. 77.

To constitute the offence of administering poison or other noxious substance, under the same statute, some of the poison or noxious substance must have been taken by or applied to the woman. *Rex* v. *Cadman*, 1 M. C. C. 114.

On an indictment for administering a drug to a woman to procure abortion, she not being quick with child : if it appeared that she was not with child at all, the prisoner was acquitted, although it appeared that he thought that she was with child, and gave her the drug with an intent to destroy such child. *Rex* v. *Scudder*, 3 Car. & P. 605 ; 1 M. C. C. 216. *See* supra.

Corroborative Evidence—What is.]—There being no other evidence but that of the woman that the prisoner incited her to take the excessive doses of a noxious thing, except that her father accused him of giving his daughter such things "to produce abortion," and that he did not deny it :—Held, that this was some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration. *Reg.* v. *Cramp*, 14 Cox, C. C. 390.

C. ASSAULT, BATTERY, WOUNDING, &c.

1. *Shooting, Wounding, &c., with Intent to Maim, &c.*, 1450.
2. *Administering Poison, &c., with Intent to Injure or Annoy*, 1458.
3. *Injuring Persons by Explosive or Dangerous Substances*, 1458.
4. *By Spring Guns*, 1459.
5. *Ill-treatment of Helpless Persons*, 1459.
6. *Assault.*
   a. Common Assaults, 1462.
   b. On Clergymen or Ministers of Religion, 1467.
   c. On Peace and other Officers in Execution of Duty, 1467.
   d. Occasioning Actual Bodily Harm, 1471.
   e. Indictment and Evidence, 1471.
   f. Summary Convictions.
      i. Jurisdiction, 1472.
      ii. Hearing and Certificate, 1475.
7. *Trial*, 1478.

1. SHOOTING, WOUNDING, &c., WITH INTENT TO MAIM, &c.

Attempt to Discharge Loaded Arms—Evidence for the Jury.]—On the trial of an indictment under 24 & 25 Vict. c. 100, s. 18, which enacts that whosoever shall unlawfully and maliciously "by drawing a trigger or in any other manner" attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony, it was proved that the prisoner drew from his pocket a loaded revolver and pointed it towards his mother. His wrists were seized by bystanders as he was raising the pistol, and after a struggle it was taken from him. During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled :—Held, that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of the statute. *Reg.* v. *St. George* (9 C. & P. 483) overruled. *Reg.* v. *Duckworth*, [1892] 2 Q. B. 83 ; 67 L. T. 302 ; 40 W. R. 448 ; 17 Cox, C. C. 495 ; 56 J. P. 473—C. C. R.

G. was charged with a felonious attempt to shoot. He was proved to have presented a pistol

at a man, and to have pulled the trigger, but the pistol did not go off. On examining the pistol, it was found that, if it ever had been primed, it would have been impossible for the priming to fall out, and the pistol must have gone off:—Held, that there was no case to go to the jury. *Reg.* v. *Gamble*, 10 Cox, C. C. 545.

Gun discharged at Great Distance.]—Discharging a gun at the prosecutor at such a distance that the shot only rattled against his back and could not have injured him will not sustain the felonious charge of shooting with intent to maim. *Reg.* v. *Abraham*, 1 Cox, C. C. 208.

Cutting — Malice.]—On an indictment for maliciously cutting, malice against the individual cut is not essential, general malice is sufficient. *Rex* v. *Hunt*, 1 M. C. C. 93.

The question is not what the wound is, but what wound was intended. *Ib.*

Where a party having a deadly weapon lawfully in his possession, in his own defence, but without having previously retreated as far as possible, cut a person who was assaulting, he was guilty of felony, under 7 Will. 4 & 1 Vict. c. 85, s. 4, if he intended grievous bodily harm. *Reg* v. *Odgers*, 2 M. & Rob. 479.

—— **What is.**]—Cutting a female child's private parts, so as to enlarge them for the time, was considered as doing her grievous bodily harm, within 43 Geo. 3, c. 58, and done with that intent, although the hymen was not injured, the incision was not deep, and the wound eventually was not dangerous. *Rex* v. *Cox*, R. & R. 362; 1 Leach, C. C. 71.

A striking over the face and head with the sharp or claw part of a hammer was a sufficient cutting, within 43 Geo. 3, c. 58. *Rex* v. *Atkinson*, R. & R. 104.

An indictment on 43 Geo. 3, c. 58, for cutting the prosecutor, was not supported by evidence that the wounds were inflicted by stabbing. *Rex* v. *McDermot*, R. & R. 356.

—— **To Resist Apprehension.**]—On an indictment for cutting, it appeared that the prisoner was seen in the night entering an outhouse with intent to commit a felony, by a person who went and informed the prosecutor of it. The latter in about a quarter of an hour went in search of the prisoner to apprehend him. The prisoner had left the prosecutor's premises, and was found in a neighbouring garden, crouched down under a tree, with a drawn sword in his hand. The prosecutor apprehended the prisoner, who cut and wounded him. It was objected that the prosecutor had no right to apprehend the prisoner, and that if death ensued, it would have been manslaughter only. The prisoner was convicted, and the judges held the conviction right. *Rex* v. *Howarth*, Car. Supp. 231; 1 M. C. C. 207.

—— **Whether, if Death Ensues, it would be Murder or not.**]—On a charge of feloniously cutting, with intent to do grievous bodily harm, it was immaterial whether, if death had ensued, the crime would have been murder or manslaughter. *Reg.* v. *Nicholls*, 9 Car. & P. 267.

Wounding—What is.]—To constitute a wound it is necessary that there should be a separation of the whole skin; and a separation of the cuticle or upper skin only is not sufficient. *Reg.* v. *M'Loughlin*, 8 Car. & P. 635.

In criminal cases, the definition of a wound is, an injury to the person by which the skin is broken. *Moriarty* v. *Brooks*, 6 Car. & P. 684. S. P., *Rex* v. *Beckett*, 1 M. & Rob. 526.

A blow given with a hammer on the face, which broke the lower jaw in two places; the skin was broken internally, though not externally, and there was not much blood; was a wounding within 7 Will. 4 & 1 Vict. c. 85, s. 4. *Reg.* v. *Smith*, 8 Car. & P. 173.

A. asked permission at the house of B. to go and take some ashes, which he was allowed to do; but as he was coming out B.'s apprentice saw a copper tea-kettle among the ashes in A.'s basket, and told B. B. laid hold of A. to secure him, on the charge of stealing the tea-kettle, and in a scuffle, A. & B. fell, and A. cut B. with a knife:—Held, to be a wounding within 7 Will. 4 & 1 Vict. c. 85, s. 4, provided that the jury was satisfied that A. had stolen the kettle, as B had then a right to apprehend him. *Reg.* v. *Price*, 8 Car. & P. 282.

Evidence of a violent kick on the private parts of a woman, which caused a flow of blood mingled with urine, for some time afterwards, was not a wounding within 7 Will. 4 & 1 Vict. c. 85, s. 4, no proof being given as to the precise point whence the blood originally came. *Reg.* v. *Jones*, 3 Cox, C. C. 441.

A rupture of the lining membrane of the urethra, followed by a small flow, such rupture being caused by a kick on the private parts of the prosecutor, is a wounding within 7 Will. 4 & 1 Vict. c. 85, s. 4. *Reg.* v. *Waltham*, 3 Cox, C. C. 442.

It is a wounding if the injury is caused by the prisoner kicking the prosecutor. *Reg.* v. *Duffill*, 1 Cox, C. C. 49.

—— **Must have been direct.**]—To constitute the offence of wounding with intent to do grievous bodily harm, under 7 Will. 4 & 1 Vict. c. 85, s. 4, the wound must be direct, and therefore an injury occasioned by the prosecutor falling on some iron trams in consequence of a blow from the prisoner, was not within that statute. *Reg.* v. *Spooner*, 6 Cox, C. C. 392.

—— **Whether, if Death ensues, it would be Murder or not.**]—In a case of wounding with intent to do grievous bodily harm, it is not essential that, if death had ensued, the offence of the prisoner should be murder; therefore, if it appears that, had death ensued, the offence would be manslaughter only, this is no ground of acquittal of the felony. *Reg.* v. *Griffiths*, 8 Car. & P. 248; 2 M. C. C. 40.

—— **Character of Instrument.**]—On an indictment for wounding, the jury, upon the question whether, if death had ensued, the offence would have been murder, should consider whether the instrument employed was, in its ordinary use, likely to cause death; or if it is an instrument not likely, under ordinary circumstances, to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continual blows or otherwise. *Rex* v *Howlett*, 7 Car. & P. 274.

—— **What Intent.**]—A broker and his man having levied a distress for rent, the man left in possession was ejected. The owner of the goods

was not in the room at the time of the levy, and it was not proved that he was a party to the turning out of the man, or that he knew of the distress being levied, but on the broker and his assistants breaking open the outer door to re-enter, the prisoner struck one of the assistants with an axe on the forehead :—Held, that, under the circumstances, the prisoner must at least be found guilty of an assault; and also, that, although he might be found guilty of wounding, with intent to do grievous bodily harm, yet he could not be found guilty of wounding, with intent to maim and disable. *Reg.* v. *Sullivan*, Car. & M. 209.

—— **What was, under the Repealed Statute of 9 Geo. 4, c. 31, ss. 11, 12.**]—Breaking a person's collar bone, and bruising him, was not a wounding within 9 Geo. 4, c. 31, s. 12. *Rex* v. *Wood*, 4 Car. & P. 381.

A wound caused by the prosecutor forcing himself in self-defence against a weapon with which the prisoner was attacking him, was not a wound inflicted by the prisoner within 9 Geo. 4, c. 31, s. 11. *Rex* v. *Beckett*, 1 M. & Rob. 526.

To support an indictment under 9 Geo. 4, c. 31, s. 12, for wounding, the wound must have been given with some instrument. *Rex* v. *Stevens*, 1 M. C. C. 409.

If a person, for the purpose of accomplishing a robbery, wounded by means of kicking the shins of the party whom he was endeavouring to rob, he was punishable under 9 Geo. 4, c. 31, s. 12, if the jury found that his intent was either to disable or do grievous bodily harm. *Rex* v. *Shadbolt*, 5 Car. & P. 504.

Biting off the end of a person's nose, was not a wounding within 9 Geo. 4, c. 31, s. 12; nor was biting off a joint from a person's finger; as the statute was intended only to apply to wounding produced by some instrument, and not by the hands or teeth. *Rex* v. *Harris*, 7 Car. & P. 446. S. P., *Reg.* v. *Jennings*, 2 Lewin, C. C. 130.

But a wound from a kick with a shoe was within 9 Geo. 4, c. 31, s. 12. *Rex* v. *Briggs*, 1 M. C. C. 318; 1 Lewin, C. C. 61.

The prisoner struck the prosecutor on the side of his hat with an air-gun, with great force, by which the prosecutor was wounded, but the wound was made by the violence with which the hat was struck, the weapon used by the prisoner never coming in contact with the head of the prosecutor :—Held, a wounding within 9 Geo. 4, c. 31, ss. 11 & 12. *Rex* v. *Sheard*, 7 Car. & P. 846.

Maliciously throwing oil of vitriol over the prosecutor's face, with intent to disfigure, and so wounding his face, was not a wounding within 9 Geo. 4, c. 31, s. 12. *Rex* v. *Murrow*, 1 M. C. C. 456. S. P., *Reg.* v. *Henshall*, 2 Lewin, C. C. 135.

Inflicting a wound on a person by throwing a sledge-hammer at him, was a wounding within 9 Geo. 4, c. 31, ss. 11, 12, although the sledge-hammer, from being blunt, was not an instrument calculated to inflict a wound. *Rex* v. *Withers*, 4 Car. & P. 446; 1 M. C. C. 294.

If a person struck another with a bludgeon, and broke the skin and drew blood, this was a sufficient wounding within 9 Geo. 4, c. 31, ss. 11, 12. *Rex* v. *Payne*, 4 Car. & P. 558.

—— **Indictment.**]—On an indictment for wounding with intent, the actual intent must be proved. *Reg.* v. *Cox*, 1 F. & F. 664.

A party may be guilty of unlawfully wounding though there is no intent to wound, if the weapon used is calculated to wound, and known to be such. *Ib.*

In an indictment for wounding with intent to murder, the instrument or means by which the wound was inflicted need not be stated, and, if stated, do not confine the prosecutor to prove a wound by such means. *Rex* v. *Briggs*, 1 M. C. C. 318: 1 Lewin, C. C. 61.

An indictment for cutting and wounding, which charged the offence to have been committed "feloniously, wilfully and maliciously," was bad, the words of 9 Geo. 4, c. 31, ss. 11 & 12, being "unlawfully and maliciously." *Rex* v. *Ryan*, 7 Car. & P. 854; 2 M. C. C. 15.

Grievous Bodily Harm—What is.]—A woman left her infant child, on a cold wet day, exposed in an open field, intending that it should die. It was found there after some hours, nearly dead from congestion of the lungs and heart, the effects of the exposure. By care, however, the child was restored in a few hours, and there then remained no bodily injury either to the lungs or heart, or otherwise :—Held, that a conviction under 7 Will. 4 & 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, could not be supported, as there was no lesion of any part of the organs of the child. *Reg.* v. *Gray*, Dears. & B. 903; 26 L. J., M. C. 203; 3 Jur. (N.S) 989; 5 W. R. 736; 7 Cox, C. C. 326.

To constitute grievous bodily harm it is not necessary that the injury should be either permanent or dangerous; if it is such as seriously to interfere with comfort or health, it is sufficient. *Reg.* v. *Ashman*, 1 F. & F. 88.

Where a party strikes at A., and B., interposing, receives the blow, he cannot be convicted of wounding with intent to do grievous bodily harm to B. The use of a deadly weapon is not justifiable in repelling a common assault; there must be the apprehension of serious bodily danger or of robbery, or some similar offence of violence. *Reg.* v. *Hewlett*, 1 F. & F. 91.

The prisoner was the first, or almost the first, to leave the gallery of a theatre at the close of the performance; he ran down the stairs, wilfully put out the gas, and placed an iron bar across the doorway. This caused a panic among the persons when leaving the gallery, and several of them were seriously injured through the pressure of the crowd :—Held, that the prisoner was properly convicted of unlawfully and maliciously doing and inflicting grievous bodily harm within the meaning of 24 & 25 Vict. c. 100, s. 20. *Reg.* v. *Martin*, 31 L. J., M. C. 36; 8 Q. B. D. 54; 45 L. T. 444; 30 W. R. 106: 14 Cox, C. C. 633; 46 J. P. 228.

To support a verdict of guilty of unlawfully wounding with intent to do grievous bodily harm, the act must be done maliciously as well as unlawfully. When therefore the prosecutor was in a punt in pursuit of wild fowl and was shot by the prisoner at about 25 yards' distance :—Held, that the act was malicious, though the prisoner only did it with the intention of frightening the prosecutor, and of preventing him from coming there again to shoot fowl. *Reg.* v. *Ward*, 41 L. J., M. C. 69; L. R. 1 C. C. 356; 26 L. T. 48; 20 W. R. 392; 12 Cox, C. C. 123.

Striking a person with the fist and breaking his jaw is not of itself evidence of an intent to do grievous bodily harm. *Reg.* v. *Wheeler*, 1 Cox, C. C. 106.

The intention to do grievous bodily harm is not proved by the fact that the prosecutor in the act of warding off a blow, pushed his hand against a weapon in the prisoner's hand, and so received a wound on his finger. *Reg.* v. *Day*, 1 Cox, C. C. 207.

—— **Injuries suffered while Escaping from Apprehended Danger.**] — Where one person creates in the mind of another person such an immediate sense of danger as causes such other person to endeavour to escape, the person who created such a state of mind is responsible for any injuries which may result from his acts to the person endeavouring to escape. In order to escape from the violence of her husband, who had used threats to his wife amounting to threats against her life, the wife got out of a window, and in doing so fell to the ground and broke her leg. The husband was convicted upon an indictment which charged him, under 24 & 25 Vict. c. 100, s. 20, with having wilfully and maliciously inflicted grievous bodily harm on his wife:—Held, that he was rightly convicted. *Reg.* v. *Halliday*, 61 L. T. 701; 38 W. R. 256; 54 J. P. 312—C. C. R.

—— **Communication of Disease.**] — The prisoner, knowing that he was suffering from gonorrhœa, communicated the disease to his wife. He was convicted of "unlawfully and maliciously inflicting grievous bodily harm" and of an "assault occasioning actual bodily harm":—Held, by a majority of the court, that the conviction was wrong. *Reg.* v. *Clarence*, 58 L. J., M. C. 10; 22 Q. B. D. 23; 59 L. T. 780; 37 W. R. 166; 16 Cox, C. C. 511; 53 J. P. 149—C. C. R.

—— **Blow aimed at one Person accidentally wounding another.**]—The prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding her, the jury found that the blow was unlawful and malicious, and did, in fact, wound her, but that the striking of her was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. The prisoner was convicted:—Held (distinguishing *Reg.* v. *Pembliton*, L. R. 2 C. C. 119), that the conviction was right. *Reg.* v. *Latimer*, 55 L. J., M. C. 135; 17 Q. B. D. 359; 54 L. T. 768; 16 Cox, C. C. 70; 51 J. P. 184—C. C. R.

—— **Mistake as to Person injured.**]—An indictment charging the prisoner with wounding A. with intent to do grievous bodily harm is supported, though it is proved that he mistook A. for some one else. *Reg.* v. *Stopford*, 11 Cox, C. C. 643.

An indictment for cutting and wounding with intent to do grievous bodily harm is supported by evidence that though the prisoner had no quarrel with the prosecutor, he had given him a wound supposing him to be a person with whom shortly before he (the prisoner) had a dispute. *Reg.* v. *Lynch*, 1 Cox, C. C. 361.

—— **Aiming at Persons Indiscriminately.**]—A. was indicted for feloniously shooting at the prosecutor, with intent to do grievous bodily harm to him. The jury found that he did not aim at the prosecutor, or at anyone else in particular, but that he fired into a group of persons, intending generally to do grievous bodily harm, and so unlawfully wounded:—Held, that he was guilty of the felony charged, and not merely of the misdemeanor of unlawfully wounding. *Reg.* v. *Fretwell*, L. & C. 443; 33 L. J., M. C. 128; 10 Jur. (N.S.) 595; 10 L. T. 428; 12 W. R. 751; 9 Cox, C. C. 471.

Intent to Resist Lawful Apprehension.]—On an indictment for cutting and maiming with intent to do grievous bodily harm, a prisoner may be convicted whose main and principal intent was to prevent his lawful apprehension, or, in order to effect the latter intent, he also intended to murder, or do grievous bodily harm. *Rex* v. *Gillow*, 1 M. C. C. 85; 1 Lewin, C. C. 37. See *Rex* v. *Thompson*, 1 M. C. C. 80; *Rex* v. *Davis*, 1 Car. & P. 306.

On a prosecution for cutting and wounding with intent to resist lawful apprehension, it is sufficient to show that the apprehension was in fact lawful. It is quite immaterial that the prisoner had no reason to believe that it was so. *Reg.* v. *Bentley*, 4 Cox, C. C. 408.

A special constable has all the authority of an ordinary constable until his services are either dispensed with or determined. *Reg.* v. *Porter*, 9 Car. & P. 778.

—— **Notice of Purpose.**]—The offence of maliciously cutting, with intent to resist lawful apprehension, is not committed where the party has no notice of the purpose of the officers. *Rex* v. *Ricketts*, 3 Camp. 68; 13 R. R. 753.

—— **Apprehension by Prosecutor.**]—A. asked permission to take some ashes from B.'s house: as A. was going away B. saw that A. had a kettle in the basket and laid hold of him; in the scuffle A. and B. fell, and A. cut B. with a knife:—Held, a question for the jury whether A. stole the kettle, for in that case B. had a right to apprehend him. *Reg.* v. *Price*, 8 Car. & P. 282.

It appeared that the prisoner was seen in the night entering an outhouse with intent to commit a felony by a person who told the prosecutor. The prosecutor went in search of the prisoner and found him in a neighbouring garden and apprehended him. On objection raised that the prosecutor had no right to apprehend the prisoner, held that the conviction was good. *Rex* v. *Howarth*, Car. Supp. 231; 1 M. C. C. 207.

—— **Apprehension by Prosecutor under Magistrates' Direction.**]—A prisoner was indicted for cutting and maiming with intent to prevent his apprehension for an offence for which he was liable to be apprehended, to wit, for that he did violently assault and beat A. He was taken before the magistrates by the prosecutor on a warrant directed to him for an assault on A., and ordered to find bail, which he refused to do, and whilst the commitment was being made out escaped. The prosecutor, by verbal directions of the magistrates, pursued the prisoner, and, in attempting to apprehend him, he was cut by him:—Held, well convicted, and that the offence was rightly described. *Rex* v. *Williams*, 1 M. C. C. 387.

—— **By Gamekeeper on Highway.**]—A gamekeeper, accompanied by his assistant, met four poachers on the highway, one carrying a gun,

another a gun barrel, and the other two bludgeons. There had been previously two shots fired. The gamekeeper said to his assistant, "Mind the gun," and the assistant laid hold of it, and then the gamekeeper called to another person; upon this three of the poachers knocked him down and stunned him, and when he came to himself he saw all of them near, and one said as they passed him, "D—n them, we have done them both," and one turned back and cut him on the left leg, and all then ran away. It was objected, first, that the wounding of the leg was the act of one alone, and there was no evidence to show which of them it was; secondly, that, from the expressions used it was evident that both were thought to be dead, and there could be no intent to murder; and thirdly, that the prisoners being on the highway, the gamekeeper and his assistant had no right to interfere with them. The prisoners were convicted, and the judges held the conviction right. *Rex* v. *Warner*, 5 Car. & P. 525; 1 M. C. C. 380.

—— **Legality of Apprehension by Constable—No Warrant.**]—A constable who had verbal directions from the magistrates to apprehend all persons playing at thimblerig, attempted to apprehend the prisoner and his companions playing at thimblerig in a public fair. The constable with assistance, took one of the party; but the prisoner and the rest rescued him and got off. In the evening of the same day the constable found the prisoner in a public-house, not having been able to find him before, and endeavoured to apprehend him, stating it was for what he had been doing at the fair. He escaped into a privy, and the constable called the prosecutor to his assistance, and together they broke open the privy-door, and endeavoured to take him, who thereupon stabbed the prosecutor. A conviction for feloniously cutting and maiming was held wrong. *Rex* v. *Gardener*, 1 M. C. C. 390.

A police-officer, having been assaulted by W., attempted, two hours afterwards, to take him into custody. W. resisted and wounded the officer:—Held, that the apprehension would not have been lawful, and that W. could not be convicted of wounding with intent to prevent his lawful apprehension. *Reg.* v. *Walker*, Dears. C. C. 358; 2 C. L. R. 485; 23 L. J., M. C. 123; 18 Jur. 409; 2 W. R. 416; 6 Cox, C. C. 371.

—— **Constable Shooting Poacher.**]—A., a constable employed to watch a copse, seeing B. wrongfully carry away wood therefrom, calls to him to stop, and on B.'s running away fires at and wounds him. B. had been frequently convicted summarily of the like offence, and by 7 & 8 Geo. 4, c. 29, s. 39, such stealing after two summary convictions is a felony. The fact of these convictions, as well as of their legal consequences, was wholly unknown to A.:—Held, that A. was rightly convicted of wounding with intent to do grievous bodily harm. *Reg.* v. *Dadson*, 2 Den. C. C. 35; 3 Car. & K. 148; T. & M. 385; 20 L. J., M. C. 57; 14 Jur. 1051; 4 Cox, C. C. 360.

—— **Indictment.**]—An indictment under 43 Geo. 3, c. 58, for cutting and maiming with intent to murder and disable, was not supported by evidence of a cutting with intent to produce a temporary disability in a person lawfully apprehending the prisoner until he could effect his own escape. *Rex* v. *Boyce*, 1 M. C. C. 29.

In an indictment on 43 Geo. 3, c. 58, the intent laid in several counts was to murder, to disable, or to do some grievous bodily harm; the intent found by the jury was to prevent being apprehended:—Held, that the conviction was bad, for that, if the intent was to prevent the lawful apprehension of the prisoner, it should be laid so. *Rex* v. *Duffin*, R. & R. 365; 1 East, P. C. 437.

A conviction on an indictment for maliciously cutting a police officer, with intent to resist and prevent the arrest and detainer of a prisoner for a certain offence, for which he was liable by law to be apprehended and detained, viz., for committing damage and injury upon certain plants and roots in a garden, is good. *Rex* v. *Fraser*, 1 M. C. C. 419.

—— **Evidence.**]—On an indictment for stabbing, with intent to resist lawful apprehension, it must be shewn that the officer was either present or came armed with a warrant. *Rex* v. *Dyson*, 1 Stark. 246.

2. Administering Poison with Intent To Injure or Annoy.

Intent to Injure or Annoy.]—Administering cantharides to a woman, with intent to excite her sexual passion, in order to obtain connection with her, was an administering with intent to injure, aggrieve or annoy, within 23 Vict. c. 8, s. 2. *Reg.* v. *Wilkins*, L. & C. 89; 31 L. J., M. C. 72; 7 Jur. (N.S.) 1128; 5 L. T. 330; 10 W. R. 62; 9 Cox, C. C. 20.

But administering cantharides to a woman, with intent to injure her health, was not a misdemeanor at common law, neither was it an assault, nor within 7 Will. 4 & 1 Vict. c. 85. *Reg.* v. *Hanson*, 2 Car. & K. 912; 4 Cox, C. C. 138. S. P., *Reg.* v. *Walkden*, 1 Cox, C. C. 282.

—— **Inflicting Bodily Harm.**]—Under 24 & 25 Vict. c. 100, ss. 23, 24, if a noxious thing is unlawfully administered with intent only to injure or annoy, and does, in fact, inflict grievous bodily harm, a felony is committed. *Talley* v. *Corrie*, 17 L. T. 140; 10 Cox, C. C. 640. *S. C.*, 10 Cox, C. C. 584, at nisi prius.

What are Noxious Things.]—A man was indicted for wilfully and maliciously administering to Mary Rowe, a poison, to wit, a certain destructive and noxious thing, to wit, cantharides, with intent to injure, annoy, and aggrieve. To constitute this offence, the thing administered must be noxious in itself, and not merely when taken in excess, and that although it may have been administered with intent to injure or annoy. *Reg.* v. *Hennah*, 13 Cox, C. C. 547.

3. Injuring Persons by Explosive or Dangerous Substances.

Explosive Substance—Part of Machine adapted for causing Explosion.]—The Explosive Substances Act, 1883 (46 Vict. c. 3), enacts, s. 9, "The expression 'explosive substance' shall be deemed to include any .... apparatus, machine, implement, or materials used or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement":—Held, that any part of a vessel which, when filled with an explosive substance, is

adapted for causing an explosion (i.e., for caus- it to explode so as to be dangerous to life, limb, or property) is an explosive substance within the act. *Reg.* v. *Charles*, 17 Cox, C. C. 499.

Boiling Water.]—Boiling water was a danger- ous thing within 7 Will. 4 & 1 Vict. c. 85. *Reg.* v. *Crawford*, 2 Car. & K. 129 ; 1 Den. C. C. 100.

A woman pouring boiling water over the face and into the ear of her husband while he was asleep, whereby he was temporarily blind, and permanently deaf on one side ;—Held, that she might be convicted of felony under 7 Will. 4 & 1 Vict. c. 85, s. 5. *Ib.*

4. By Spring Guns.

Liability.]—The plaintiff entered the defen- dant's garden at night, and without his per- mission, to search for a stray fowl and, whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking him down and slightly injuring his face and eyes :—Held, in an action, that the defendant was not liable for this injury at common law, or, in the absence of evidence that it was caused by a spring gun or other engine calculated to inflict grievous bodily harm, under 7 & 8 Geo. 4, c. 18, s. 1. *Wootton* v. *Dawkins*, 2 C. B. (N.S.) 412 ; 5 W. R. 469.

Notwithstanding 7 & 8 Geo. 4, c. 18, a person is entitled to place in his garden an instrument intended by its explosion to give alarm in case of trespass, provided the instrument is not calculated under ordinary circumstances to cause grievous bodily harm ; and he is not liable in respect of an injury caused by the explosion of such an in- strument to a trespasser while very close to it. *Ib.*

The statute applies only to spring guns and instruments set with an intention to do grievous bodily harm, or whereby grievous bodily harm is done, to a human being ; it does not, therefore, apply to setting dog spears on a man's own land. *Jordin* v. *Crump*, 8 M. & W. 782 ; 11 L. J., Ex. 74 ; 5 Jur. 1113.

5. Illtreatment of Helpless Persons.

Parent not Supplying Food and Clothing.]—If a woman, in breach of her maternal duty, wil- fully abandons her child of too tender years to provide for itself, she is not indictable at common law, unless her abandonment causes an injury to the health of the child. *Reg.* v. *Phillpott*, Dears. C. C. 179 ; 22 L. J., M. C. 113 ; 17 Jur. 399 ; 1 W. R. 314 ; 6 Cox, C. C. 140.

Evidence "that the child had suffered injury, but not to any serious extent," does not suffi- ciently support an averment in the indictment that the health of the child had been greatly and materially injured. *Ib.*

In an indictment against a parent for neglect- ing to provide sufficient food and clothing for a child of tender years, for whom he is bound by law to provide, it is not necessary to aver that the parent was, at the time of the alleged offence, of sufficient ability to perform the duty so imposed upon him. *Reg.* v. *Ryland*, 37 L. J., M. C. 10 ; L. R. 1 C. C. 99 ; 17 L. T. 219 ; 16 W. R. 280 ; 10 Cox, C. C. 569.

Upon an indictment for neglecting to provide an infant with sufficient food, it must be proved that the prisoner had the means of doing so ; it is not sufficient to show that relief might have been obtained by applying to the relieving officer. *Reg.* v. *Chandler*, Dears. C. C. 453 ; 3 C. L. R. 680 ; 24 L. J., M. C. 109 ; 1 Jur. (N.S.) 429 ; 3 W. R. 404 ; 6 Cox, C. C. 519.

Master not bound to Provide Medical Advice.]—A master is not by law bound to provide medical advice for his servant ; but with respect to an apprentice, a master is bound, during the illness of his apprentice, to provide him with proper medicines. *Reg.* v. *Smith*, 8 Car. & P. 153.

Master not supplying Food.]—A girl of six- teen is not an infant of tender years, and there- fore her master and mistress, who have not kept her under duress, are not guilty of a misdemeanor in not supplying her with sufficient food and nourishment, whilst in their service. *Anon.*, 5 Cox, C. C. 279.

An indictment lies against a master for not providing sufficient food and sustenance for a servant, whereby she became sick and emaciated. *Rex* v. *Ridley*, 2 Camp. 650.

Non-supply of Food—Idiots.]—If one has his idiot brother, who is helpless, as an inmate in his house, and omits to supply him with proper food, warmth, &c., he is not indictable for the omission. *Rex* v. *Smith*, 2 Car. & P. 449.

—— Prisoners of War.]—It is an indictable offence wilfully and maliciously to supply prisoners of war with unwholesome food not fit to be eaten by man. *Rex* v. *Treere*, 2 East, P. C. 821.

Of Lunatics — Person "having the Care or Charge" of]—The parents of a lunatic, who resides with them under their care, are persons "having the care or charge" of a lunatic within the meaning of 16 & 17 Vict. c. 96, s. 9, and may be convicted under that section for ill-treating such lunatic. *Reg.* v. *Rundle* (1 Dears. C. C. 482) questioned. *Buchanan* v. *Hardy*, 36 L. J., M. C. 42 ; 18 Q. B. D. 486 ; 35 W. R. 453 ; 51 J. P. 741.

A. was convicted on an indictment under 16 & 17 Vict. c. 96, s. 9, which charged that he, having the care and charge of his wife, a lunatic, did abuse and illtreat her :—Held, that he was not a person having the care or charge of a lunatic within the meaning of the statute, inasmuch as its provisions were not intended to apply to persons whose care or charge arises from natural duty. *Reg.* v. *Rundle*, Dears, C. C. 482 ; 3 C. L. R. 659 ; 24 L. J., M. C. 129 : 1 Jur. (N.S.) 430 ; 3 W. R. 403 ; 6 Cox, C. C. 549. *See* 53 & 54 Vict. c. 5.

But a man who has voluntarily taken upon himself the care of a lunatic brother in his own private house is a person having the care and charge of a lunatic within 16 & 17 Vict. c. 96, s. 9, and is liable to be indicted for illtreating him. *Reg.* v. *Porter*, L. & C. 394 ; 33 L. J., M. C. 126 ; 10 Jur. (N.S.) 547 ; 10 L. T. 306 ; 12 W. R. 718 ; 9 Cox, C. C. 449.

The two prisoners, brothers of the lunatic, took a house, and their mother and lunatic sister lived with them. They supported the household, but did not receive any payment for or on account of any special charge of their lunatic sister. The illtreatment of the lunatic was conclusively proved :—Held, that the two prisoners were per- sons having the care or charge, or concerned or taking part in the custody, care, or treatment of

a lunatic within s. 9 of the 16 & 17 Vict. c. 96. *Reg.* v. *Smith*, 42 L. T. 160; 14 Cox, C. C. 398; 44 J. P. 314.

Duty of Overseers.]—It is an indictable offence in an overseer to neglect to supply medical assistance, when required, to a pauper labouring under dangerous illness, although he was not in the workhouse, nor had, previously to his illness, received or stood in need of parochial relief. *Rex* v. *Warren*, R. & R. 48. n. And see *Hays* v. *Bryant*, 1 H. Bl. 253; *Rex* v. *Saunders*, 7 Car. & P. 277.

But an overseer is not indictable for not relieving a pauper, unless there is an order for his relief; except in case of immediate emergency, where there is not time to get an order. *Rex* v. *Meredith*, R. & R. 46. But see contra, *Rex* v. *Booth*, R. & R. 47, n.; and 4 & 5 Will. 4, c. 76, ss. 52, 54.

Indictment.]—An indictment charging a feme covert, living separately and apart from her husband, with neglecting and refusing to provide necessary meat and drink for her servant, and keeping her without sufficient warmth, whereby she became sick and emaciated, is insufficient, in not alleging that the servant was of tender years, and under the dominion and control of the defendant. *Rex* v. *Ridley*, 2 Camp. 650.

So an indictment against a master for not providing necessaries for his apprentice, ought to state that the apprentice was of tender years, and unable to provide for himself. *Rex* v. *Friend*, R. & R. 20.

A count charged that a lunatic was the illegitimate child of the defendant, a female, who had means for the comfortable support and maintenance of both, whereupon it became her duty to take proper care of him, but that she did not take proper care of him, but kept and confined him in a dark, cold and unwholesome room; neglected to provide him with proper clothing; permitted him to become dirty; allowed the room to become foul, so as to cause unwholesome smells; and kept him without proper air, warmth and exercise necessary for his health, to his damage and peril. Judgment arrested, first, because no duty was shown; and secondly, because it was not shown that the conduct of the defendant had or must have occasioned actual injury. *Reg.* v. *Pelham*, 8 Q. B. 959; 15 L. J., M. C. 105; 10 Jur. 659; 2 Cox, C. C. 17.

Abandonment and Exposure of Children—When Indictable.]—It is an indictable offence to expose a person to the inclemency of the weather. *Rex* v. *Ridley*, 2 Camp. 650, 653.

—— **What is.**]—A. and B. were indicted for that they "did abandon and expose a child then being under the age of two years, whereby the life of the child was endangered." A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool; and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro', with care, to be delivered immediately," at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G., leaving M. at 7.45 P.M., and arriving at G. at 8.15 P.M. At 8.40 P.M. the hamper was delivered at its address. The child died, three weeks afterwards, from causes not attributable to the conduct of the prisoners. On proof of these facts, it was objected for the prisoners that there was no evidence that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the 24 & 25 Vict. c. 100, s. 27. The objections were overruled, and the prisoners found guilty:—Held, that the conviction should be affirmed. *Reg.* v. *Falkingham*, 39 L. J., M. C. 47; L. R. 1 C. C. 222; 21 L. T. 637; 18 W. R. 355; 11 Cox, C. C. 475.

A woman, who was living apart from her husband, and who had the actual custody of their child under two years of age, brought the child, in the month of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 P.M. to 1 A.M., when it was removed by a constable, the child then being cold and stiff:—Held, that though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within 24 & 25 Vict. c. 100, s. 27. *Reg.* v. *White*, 40 L. J., M. C. 134; L. R. 1 C. C. 311; 24 L. T. 637; 19 W. R. 783; 12 Cox, C. C. 83.

—— **Indictment.**]—Indictment charging A. with unlawfully leaving a child of a month old of which she had the care, in a highway in a parish with intent to burden the parish with the maintenance of the child, is bad, for not negativing the settlement of the child in the parish, and for not alleging any injury done to the child by the act of A. *Reg.* v. *Cooper*, 1 Den. C. C. 459; 2 Car. & K. 876; T. & M. 125; 18 L. J., M. C. 168; 13 Jur. 502; 3 Cox, C. C. 559.

An indictment charging that a woman deserted her bastard child with intent to throw the burden of its maintenance on the parish, is bad, without an averment that the child had sustained any injury by the abandonment, or that the woman had the means of supporting the child. *Reg.* v. *Hogan*, 2 Den. C. C. 277; T. & M. 601; 20 L. J., M. C. 219; 15 Jur. 805; 5 Cox, C. C. 255.

An indictment charging a party with abandoning a child with the intent to burden a particular parish with its maintenance, is not supported by proof that the child was deposited by the accused in a parish in a secret place where it was not likely to be found. *Reg.* v. *Renshaw*, 11 Jur. 615; 2 Cox, C. C. 285.

6. Assault.

a. Common Assaults.

Not Justifiable if Action brought.]—To support a charge of assault, such an assault must be shown as could not be justified, if an action was brought for it, and leave and licence pleaded. *Reg.* v. *Meredith*, 8 Car. & P. 589.

See also cases, sub tit., Trespass.

Proceedings not authorised by Party aggrieved.]—An indictment for a common assault may be preferred by a person other than the person aggrieved or some one on his behalf. Where proceedings had been instituted before justices in respect of a common assault without the authority of the person assaulted, and the justices committed the defendant in such proceedings for trial under 24 & 25 Vict. c. 100, s. 46, and a true bill was found by the grand jury:—Held, that the grand jury had acted within its jurisdiction in finding a true bill, and that the defendant had been rightly put upon his trial pursuant to such finding. *Reg.* v. *Gaunt*, 73 L. T. 585; 18 Cox, C. C. 210; 60 J. P. 90—C. C. R.

Presenting Pistol.]—If a person presents a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off; semble, that this is an assault, even though the pistol was, in fact, not loaded. *Reg.* v. *St. George*, 9 Car. & P. 483. But see *Blake* v. *Barnard*, 9 Car. & P. 626.

It is an assault to point a loaded pistol at any one; but not an assault to point a pistol at another which is proved not to be so loaded as to be able to be discharged. *Reg.* v. *James*, 1 Car. & K. 530.

Threatening Attitude.]—A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have almost immediately reached B., if he had not been stopped:—Held, that it was an assault in point of law, though at the particular moment when A. was stopped, he was not near enough for his blow to take effect. *Stephens* v. *Myers*, 4 Car. & P. 349.

Self-defence.]—If one man strikes another a blow, that man has a right to defend himself, and strike a blow in his defence, but he has no right to avenge himself; and if, when all the danger is past, he strikes a blow not necessary, he commits an assault and a battery. *Reg.* v. *Driscoll*, Car. & M. 214.

A party struck at may strike again, to prevent a repetition. *Anon.*, 2 Lewin, C. C. 48.

Persons Present at a Prize-fight.]—A prize-fight is illegal, and all persons aiding and abetting therein are guilty of assault, and the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault. *Reg.* v. *Coney*, 51 L. J., M. C. 66; 8 Q. B. D. 534; 46 L. T. 307; 30 W. R. 678; 15 Cox, C. C. 46; 46 J. P. 404.

Semble, that mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of an aiding or abetting in such fight. *Ib.*

Persons who are present at a prize-fight and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants, and it is not at all material which of the combatants struck the first blow. *Rex* v. *Perkins*, 4 Car. & P. 537.

All prize-fights are illegal, and all persons engaged in them are punishable by law. *Reg.* v. *Brown*, Car. & M. 314.

Persons Striking one another.]—If two go out to strike one another, and do so, it is an assault in both, and it is quite immaterial who strikes the first blow. *Reg.* v. *Lewis*, 1 Car. & K. 419.

Effect of Consent.]—A man induced two youths above fourteen years to go out with him in the evening to an out-of-the-way place, where they mutually indulged in indecent practices on each other's persons. The youths were willing and assenting to what was done:—Held, that a conviction for an indecent assault could not be upheld. *Reg.* v. *Wollaston*, 26 L. T. 403; 12 Cox, C. C. 180. *See now* 43 & 44 Vict. c. 45, s. 2.

An assault must, in the absence of fear or fraud to procure consent, be an act done contrary to the consent of the patient, but mere submission by the patient, in ignorance of the moral nature of the act, to an act of indecency done by the agent does not amount to such consent: therefore, where two boys of eight years of age submitted to indecent acts on the part of a grown-up man in ignorance of the nature of the acts to be done and done, the man was held to be rightly convicted of an indecent assault. *Reg.* v. *Lock*, 42 L. J., M. C. 5; L. R. 2 C. C. 10; 27 L. T. 661; 21 W. R. 144; 12 Cox, C. C. 244.

Mere submission to an indecent act, without any positive exercise of a dissenting will, where owing to circumstances, the person submitting is in ignorance of the nature of the act, is not such a consent as the law contemplates, so as to prevent the act from being an assault. *Ib.*

Improper Connection with Female.]—Three boys under fourteen had connection with a girl, aged nine; they were indicted for an assault; the jury found them guilty, the child being an assenting party, but that from her tender years, she did not know what she was about:—Held, that this was not an assault, and that the conviction was wrong. *Reg.* v. *Read*, 2 Car. & K. 957; 1 Den. C. C. 377; T. & M. 52; 3 New Sess. Cas. 405; 18 L. J., M. C. 88; 13 Jur. 68; 3 Cox, C. C. 266. *See now* 43 & 44 Vict. c. 45, s. 2.

Attempting to carnally know and abuse a girl between the ages of ten and twelve is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Reg.* v. *Martin*, 9 Car. & P. 213; 2 M. C. C. 123. S. P., *Reg.* v. *Johnson*, L. & C. 632; 34 L. J., M. C. 192; 11 Jur. (N.S.) 532; 12 L. T. 503; 13 W. R. 815; 10 Cox, C. C. 114. *But see now* 43 & 44 Vict. c. 45, s. 2.

The person making such attempt, with the consent of the girl, is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ib. Cp. cases* post, CARNALLY ABUSING CHILDREN, col. 1557.

If the prisoner obtains possession of a woman by surprise and in attempting to have connection, penetrates her person a little, it is an assault. *Reg.* v. *Stanton*, 1 Car. & K. 415.

If the jury in a case of rape think that the prosecutrix was first laid hold of against her will, but afterwards did not resist, because she in some degree consented to what was afterwards done to her, they ought to acquit of the felony but convict of the assault. *Reg.* v. *Hallett*, 9 Car. & P. 748.

If a man has connection with a woman, she consenting under the belief that it is her husband, this is an assault. *Reg.* v. *Williams*, 8 Car. & P. 286.

Where a prisoner is charged with unlawfully

making an assault on a girl between the ages of ten and twelve years of age and unlawfully and carnally knowing and abusing her against the form of the statute, he may be found guilty of a common assault. *Reg.* v. *Guthrie*, 39 L. J., M. C. 95 ; L. R. 4 C. C. 241 ; 22 L. T. 485 ; 18 W. R. 792 ; 11 Cox, C. C. 522.

On an indictment for carnally knowing and abusing a girl under ten, the prisoner may be acquitted of the felony and convicted of an assault. *Reg.* v. *Folkes*, 2 M. & Rob. 460.

Where a medical practitioner had sexual connexion with a female patient of the age of fourteen, who had for some time been receiving medical treatment from him :—Held that he was guilty of an assault, the jury having found that she was ignorant of the nature of his act, and made no resistance, solely from a bonâ fide belief that he was (as he represented) treating her medically with a view to her cure. *Reg.* v. *Case*, T. & M. 318 ; 1 Den. C. C. 580 ; 4 New Sess. Cas. 347 ; 19 L. J., M. C. 174 ; 14 Jur. 489 ; 4 Cox, C. C. 220.

Abandonment of Child.]—A female abandoned her infant child, having first deposited it in the bottom of a dry ditch among some nettles, by which it was not hurt ; and had not suffered any harm from the exposure, as it had been found shortly afterwards :—Held, that she could not be convicted of a common assault. *Reg.* v. *Renshaw*, 11 Jur. 615 ; 2 Cox, C. C. 285.

Child Placed on Railings.]—C. was delivered of a child at the house at which A. and B. resided, they telling her that the child was to be taken to an institution to be nursed. A. and B. took the child, and put it into a bag, and hung it on some park palings at the side of a footpath, and there left it :—Held, that this was an assault on the child. *Reg.* v. *March*, 1 Car. & K. 496.

Chastisement in Indecent Manner.]—Where a master of a union inflicts personal chastisement on a female pauper in an indecent manner, he is guilty of an assault, even though the extent of the correction is within the limits of moderation. *Reg.* v. *Miles*, 6 Jur. 243.

Medical Examination.]—An examination by medical men in pursuance of a magistrate's order, of the person of a female charged with concealing the birth of her child, constitutes an assault. *Agnew* v. *Jobson*, 13 Cox, C. C. 625.

Making a female patient strip naked, under the pretence that the defendant, a medical man, cannot otherwise judge of her illness, is, if he himself takes off her clothes, an assault. *Rex* v. *Rosinski*, 1 M. C. C. 198.

Indecent Liberties.]—If a schoolmaster takes indecent liberties with a female scholar, without her consent, though she does not resist, he is liable to be punished as for a common assault. *Rex* v. *Nichol*, R. & R. 130.

Constable Removing Person from House.]—Although a constable is not bound in the execution of his duty to assist the occupier of a house in putting out an intruder, yet he lawfully may do so, and if he sustains injury thereby, the person causing it is liable to conviction for an assault, though not for assaulting the constable in the execution of his duty. *Reg.* v. *Roxburgh*, 12 Cox, C. C. 8.

Cutting off Pauper's Hair.]—If parish officers cut off the hair of a pauper in the poor-house by force, and against the will of such pauper, this is an assault ; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde* v. *Skinner*, 4 Car. & P. 439.

Keeping Idiot without Necessaries.]—If one has an idiot brother who is bed-ridden in his house, and keeps him in a dark room, without sufficient warmth or clothing, this will not be an assault or an imprisonment, nor will proof of this support an indictment for an assault or an imprisonment. *Rex* v. *Smith*, 2 Car. & P. 449.

Threatening Language or Behaviour with Intent to Provoke a Breach of the Peace.]—Where a tract distributor followed two Roman Catholic clergymen in the public street, and handed them a bill, inviting them to a discussion on religious matters, and persisted in holding up the bill after he had been informed they were Roman Catholic priests :—It was held that such conduct was making use of threatening, abusive or insulting language or behaviour, which might provoke a breach of the peace. And a magistrate having convicted the tract distributor for such conduct on a charge of assault, the court refused a certiorari to bring up the conviction for the purpose of quashing it. *Reg.* v. *King*, 14 Cox, C. C. 434.

Assault in Legislative Assembly.]—An information by the attorney-general of New South Wales charged, "That on the 26th of February, 1868, at Sydney, in the colony, while the legislative assembly of the colony was sitting, a member of the assembly, whose conduct had been, and was then, under its consideration, after having been heard in his place in the assembly in reference to such conduct, was, in accordance with the practice of the assembly, requested by the speaker to withdraw therefrom, and that the member, in obedience to the request, thereupon withdrew from the assembly, and that immediately on his so withdrawing, the defendant being a member of the assembly, in and upon the member did make an assault, and him (the member) did then beat, wound and ill-treat, in contempt of the assembly, in violation of its dignity, and to the great obstruction of its business" :—Held, that the information charged in proper terms a common assault. That the words, "in contempt of, &c.," did not constitute a separate charge, or derogate from the charge of assault. *Reg.* v. *Macpherson*, 39 L. J., P. C. 59 ; L. R. 3 P. C. 268 ; 23 L. T. 101 ; 18 W. R. 1053 ; 11 Cox, C. C. 604.

Putting Noxious Thing into Drink.]—A. put cantharides into rum, and gave it to B. to drink ; B. drank it, not knowing that the cantharides was in the rum, and became ill :—Held, that A. was neither indictable for an assault, nor for a misdemeanor at common law. *Reg.* v. *Hanson*, 2 Car. & K. 912 ; 4 Cox, C. C. 188. S. P., *Reg.* v. *Wulkden*, 1 Cox, C. C. 282 ; *Reg.* v. *Dilworth*, 2 M. & Rob. 531.

When Assault Justified.]—If a party is turning towards the wall in the street, at night, for

a particular occasion, a watchman is not justified in collaring him to prevent him so doing. *Booth* v. *Hanley*, 2 Car. & P. 288. *See* 2 & 3 Vict. c. 47.

A person may, under particular circumstances, justify laying hands on another in order to serve him with process. *Harrison* v. *Hodgson*, 10 B. & C. 445; 5 M. & Ry. 392; 8 L. J. (o.s.) K. B. 223.

A police-constable is not justified under 10 Geo. 4, c. 44, s. 7, in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing is known to be a reputed thief. *Stocken* v. *Carter*, 4 Car. & P. 477. *See* 2 & 3 Vict. c. 47.

To Prevent Broker Re-entering.]—A broker and his man having levied a distress for rent, the man in possession was ejected. The owner of the goods was not in the room at the time of the levy, and it was not proved that he was a party to turning the man out, or that he knew of the distress being levied: but on the broker and his assistants breaking open the outer door to re-enter, the prisoner struck one of the assistants with an axe on the forehead:—Held, that the prisoner must at least be found guilty of an assault. *Reg.* v. *Sullivan*, Car. & M. 209.

b. On Clergymen or Ministers of Religion.

Indictment.]—An indictment charging that the defendant, in a churchyard, interrupted and obstructed W. C., clerk, in reading the order for the burial of the dead and interring a corpse, and unlawfully, and by threats and menaces, hindered the burial of the corpse, is bad in arrest of judgment, for not averring that W. C. was a clerk in holy orders, and lawfully acting as such in the burial of the corpse, and for not setting out the particular threats and menaces used. *Rex* v. *Cheere*, 7 D. & R. 461; 4 B. & C. 902; 4 L. J. (o.s.) K. B. 79.

c. On Peace and other Officers in Execution of Duty.

Authority of Officer—Warrant.]—A constable and his assistants who take a bailiff into custody during an affray to rescue his prisoner, in which the bailiff struck one of the assistants, and the prisoner was rescued, are guilty of an assault and a rescue, as the bailiff was authorised by his warrant. *Anon.*, 1 East, P. C. 305.

The defendant was convicted in a penalty with costs, or to be imprisoned seven days; the penalty not having been paid, a warrant was issued, under 11 & 12 Vict. c. 43, s. 25, for his apprehension, addressed "To the constable of G." It was given to a county policeman to execute. While he was attempting to apprehend the defendant, the defendant resisted and wounded the constable:—Held, that a county policeman had no authority to execute it, it being addressed to the parish constable; and that the apprehension was therefore illegal. *Reg.* v. *Saunders*, 36 L. J., M. C. 87; L. R. 1 C. C. 75; 16 L. T. 331; 15 W. R. 752; 10 Cox, C. C. 445.

C. was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine, but not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. C. was not pursued from the county, but found in the city:—Held, that the conviction was wrong, that the constables were not acting in the execution of their duty in so executing such warrant. *Reg.* v. *Compton*, 49 L. J., M. C. 41; 5 Q. B. D. 341; 42 L. T. 543; 28 W. R. 539; 44 J. P. 489.

Commissioners of sewers by a warrant under s. 7 of 12 & 13 Vict. c. 50, addressed to A. authorised a distress of K.'s goods. A. handed the warrant to B. who handed it to C. The latter entered and was ejected and assaulted by K. K. was summoned for an assault on C.:—Held, that as the warrant was addressed to A., C. had no authority to execute it, and was rightly ejected by K. *Symonds* v. *Kurtz*, 61 L. T. 559; 53 J. P. 727.

—— **No Warrant.**]—A. was indicted for assaulting a policeman in the execution of his duty. It appeared that the policeman had gone into a public-house where the defendant was having high words with the landlady. The defendant tried to go into a room in the house in which a guest was, and the policeman, without being desired to do so, collared him, and prevented him from going into the room, and A. struck the policeman, and several blows passed on both sides:—Held, that if the jury was satisfied that no breach of the peace was likely to be committed by the defendant on the guest in the room, it was no part of the policeman's duty to prevent the defendant from entering it; but, assuming that to be so, if the defendant used more violence than was necessary to repel the assault committed on him by the policeman, the defendant would be liable to be convicted of a common assault. *Reg.* v. *Mabel*, 9 Car. & P. 474.

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as at prize-fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators. Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize-fight, the chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize-fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize-fight or not:—Held, that the jury was properly directed. *Reg.* v. *Orton*, 39 L. T. 292; 14 Cox, C. C. 226.

A man was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to the summons, a warrant was issued for his apprehension. A police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the man, who thereupon committed an assault upon him:—Held, that he could not be convicted upon an information charging him with assaulting the police officer

in the execution of his duty. *Codd* v. *Cabe*, 45 L. J., M. C. 101; 1 Ex. D. 352; 34 L. T. 453; 13 Cox, C. C. 202.

A policeman can only justify stopping and searching a cart upon a highway under 25 & 26 Vict. c. 114, where he has good cause to suspect that the cart is carrying game which has been unlawfully obtained; and upon an indictment for assaulting the policeman in the execution of his duty under such circumstances, it is necessary to prove the existence of reasonable grounds of suspicion; where no reasonable grounds of suspicion can be shown, persons are justified in resisting the search. *Reg.* v. *Spencer*, 3 F. & F. 857.

A constable (out of the limits of the Metropolitan Acts) when he is clearing a public-house, is not acting in the execution of his duty unless there is a nuisance or a disturbance of the peace. *Reg.* v. *Prebble*, 1 F. & F. 325.

A police constable, whilst standing outside the defendant's house, saw him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him say at the same time, "If it was not for the policeman outside, I would split your head open." In about twenty minutes' time the defendant left his house, after saying that he would leave his wife altogether, and was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence; he resisted the constable, and was tried and convicted upon an indictment charging him with assaulting the constable whilst in the execution of his duty:—Held, that the constable was justified in apprehending the defendant, and that the conviction therefore was right. *Reg.* v. *Light*, Dears. & B. 332; 27 L. J., M. C. 1; 3 Jur. (N.S.) 1130; 7 Cox, C. C. 389.

The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, and after an interval of an hour returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes the constables forced open the door, entered, and arrested the prisoner, who wounded one of them in resisting his apprehension:—Held, that as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. *Reg.* v. *Marsden*, 37 L. J., M. C. 80; L. R. 1 C. C. 131; 18 L. T. 298; 16 W. R. 711; 11 Cox, C. C. 90.

B., a county court bailiff, went to levy a judgment debt on W., and calling at W.'s door, W. opened it; B. then put his foot inside the door, and tried to get in against the wish of W., who assaulted B. W. was summoned for assaulting B., and the complaint was dismissed by the justices:—Held, that they were right, as B. was not in the execution of his duty in attempting to force open a debtor's door. *Broughton* v. *Wilkerson*, 44 J. P. 781.

See also, post, APPREHENSION AND ARREST OF OFFENDERS.

—— Proof of, at Trial.]—D. was indicted for assaulting a sub-bailiff of a county court. The latter was endeavouring to apprehend D. under a warrant issued out of the county court, when the assault was committed, but not with more violence than was necessary to prevent the apprehension:—Held, that the production of the county court warrant at the trial was a sufficient justification of the act of the bailiff, without proof of the previous proceedings in the county court. *Reg.* v. *Davis*, L. & C. 64; 30 L. J., M. C. 159; 7 Jur. (N.S.) 1040; 4 L. T. 559; 9 W. R. 711; 8 Cox, C. C. 486.

The written list of sentences passed upon the prisoners given to the gaoler by the clerk of the assize, and which is his only authority for their detention, is not evidence that they are in legal custody on an indictment for assaulting the turnkey in the execution of his duty. *Reg.* v. *Bourdon*, 2 Cox, C. C. 169.

Knowledge of Defendant.]—To support a charge of assault on a constable in the execution of his duty, it is not necessary that the defendant should know that he was a constable then in the execution of his duty; it is sufficient that the constable should have been actually in the execution of his duty and then assaulted. *Reg.* v. *Forbes*, 10 Cox, C. C. 362

Manner in which Authority Exercised.]—An excise officer gave the defendant a search warrant to look at, who then refused to deliver it up, and a scuffle ensued; on an indictment for an assault, the question left to the jury was, whether the officer used more force than was necessary to recover possession of the warrant. *Rex* v. *Milton*, M. & M. 107. *S. C.*, nom. *Rex* v. *Mitton*, 3 Car. & P. 31.

One of the marshals of the city of London whose duty it was, on the day of a public meeting at Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—Held, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Imeson* v. *Cope*, 5 Car. & P. 193.

Conviction for Common Assault.]—A person was summoned, under 5 & 6 Will. 4, c. 76, s. 81, for assaulting a constable in the execution of his duty. The justices dismissed the charge for assaulting the officer in the execution of his duty, but convicted him of a common assault:—Held, that the justices had exceeded their jurisdiction. *Reg.* v. *Brickhall*, 33 L. J., M. C. 156; 10 Jur. (N.S.) 677; 10 L. T. 385; 12 W. R. 826.

Obstructing Apprehension of Felon.]—An innkeeper, having an escaped felon in his house, to the policeman, who had remarked, "You scoundrel, how dare you harbour a felon?" said, "You had better go and find him"; but he did nothing, and the policeman went upstairs and saw the felon make his escape from the window:—Held, no evidence of an obstruction of the felon's apprehension. *Reg.* v. *Green*, 8 Cox, C. C. 441.

Indictment—Refusing to Assist Constable.]—An indictment against a person for refusing to aid and assist a constable in the execution of his duty, and prevent an assault made upon him by prisoners in his custody on a charge of felony, with intent to resist their lawful apprehension,

is sufficient, without stating how the apprehension became lawful; and it is enough if it states a refusal to assist, without the further allegation that he did not, in fact, aid and assist. *Reg.* v. *Sherlock*, 35 L. J., M. C. 92; L. R. 1 C. C. 20; 12 Jur. (N.S.) 126; 13 L. T. 623; 14 W. R. 288; 10 Cox, C. C. 170. See *Reg.* v. *Brown*, Car. & M. 314.

d. Occasioning Actual Bodily Harm.

Communication of Venereal Disease.]—An indictment for inflicting actual bodily harm is sustainable by evidence that a man, knowing that he has an infectious disease, has intimacy with a girl without informing her of the fact, by means of which the disease was communicated to her. *Reg.* v. *Sinclair*, 13 Cox, C. C. 28.

An assault is within the rule that fraud vitiates consent, and therefore when a man, knowing that he had a foul disease, induced a girl of thirteen, who was ignorant of his condition, to consent to sleep with him, and he infected her:—Held, that he might be convicted of an indecent assault. *Reg.* v. *Bennett*, 4 F. & F. 1105. Cp. *Hegarty* v. *Shine*, 4 L. R., Ir. 288; 14 Cox, C. C. 145—C. A.

The prisoner was convicted upon an indictment charging him with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and with "an assault" upon her "occasioning actual bodily harm," under ss. 20 and 47 respectively of 24 & 25 Vict. c. 100. It appeared that at a time when the prisoner knew, but his wife did not know, that he was suffering from gonorrhœa, he had connection with her, that the result was that the disease was communicated to her, and that, had she been aware of his condition, she would not have submitted to the intercourse:—Held, by a majority of the court that the conduct of the prisoner did not constitute an offence under either section of the statute, and that the conviction must be quashed. *Reg.* v. *Bennett* (4 F. & F. 1105) and *Hegarty* v. *Shine* (14 Cox, C. C. 124, 145) considered. *Reg.* v. *Clarence*, 58 L. J., M. C. 10; 22 Q. B. D. 23; 59 L. T. 780; 37 W. R. 166; 16 Cox, C. C. 511; 53 J. P. 149—C. C. R.

Riding Bicycle at Furious Pace.]—A person riding a bicycle in a wanton or furious manner and thereby causing injuries to any person may be convicted under 24 & 25 Vict. c. 100, s. 35. *Reg.* v. *Parker*, 59 J. P. 793.

e. Indictment and Evidence.

Indictment—Non-use of Statutable Word.]—The 24 & 25 Vict. c. 100, s. 18, enacts that whosoever shall unlawfully and maliciously by any means "cause" any grievous bodily harm to any person, &c., shall be guilty of felony. An indictment framed upon this section alleged that "A. unlawfully and maliciously did 'inflict' grievous bodily harm," not using the statutable word "cause":—Held, that the indictment was sufficient. *Reg.* v. *Bray*, 15 Cox, C. C. 197.

Validity of.]—An indictment for an assault, false imprisonment and rescue, stated that the judges of the court of record of the town and county of P. issued their writ, directed to T. B., one of the serjeants at mace to the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W., within the jurisdiction of the court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest:—Held, that such indictment was bad, it not appearing that T. B. was an officer of the court; and that there could not be judgment after a general verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which, being a breach of the peace, the defendant might, for aught that appeared, have lawfully interfered to prevent. *Rex* v. *Osmer*, 5 East, 304; 1 Smith, 555.

An indictment charging that the defendant made an assault upon Henry B. B., and him the said William B. B. did beat, wound and ill-treat, is good, in arrest of judgment. *Reg.* v. *Crispin*, 11 Q. B. 913; 17 L. J., M. C. 128; 12 Jur. 433.

Against Two.]—An indictment against two for an assault on two, is bad. *Anon.*, Lofft, 271. And see *Rex* v. *Burfield*, 2 Burr. 983.

Joinder of Counts.]—A count for night poaching may be joined with a count on 9 Geo. 4, c. 69, s. 2, for assaulting a gamekeeper authorised to apprehend, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Rex* v. *Finucane*, 5 Car. & P. 551.

Record is Evidence.]—Where a defendant has pleaded guilty to an indictment for an assault, the record is evidence against him in an action for the same assault. *Reg.* v. *Fontaine Moreau*, 11 Q. B. 1033; 17 L. J., Q. B. 187; 12 Jur. 626.

Proof of Assault on Person bearing Name.]—On an indictment for an assault on A. B., it is sufficient to prove that an assault was committed on a person bearing that name, although two persons bore the same name, viz., A. B. the elder, and A. B. the younger, and the assault had been committed on the latter only. *Rex* v. *Peace*, 3 B. & Ald. 579.

f. Summary Convictions.

i. *Jurisdiction.*

Claim of Title to Land.]—The power given to justices by 24 & 25 Vict. c. 100, s. 42, of summarily hearing and determining charges of assault and battery, is, by s. 46, ousted in any case where a question as to the title to land arises, and they cannot in such a case convict a person for using more violence than was necessary. *Reg.* v. *Pearson*, 39 L. J., M. C. 76; L. R. 5 Q. B. 237; 22 L. T. 126; 11 Cox, C. C. 493.

Claim of Right.]—A person making a bonâ fide claim of right to be present as one of the public in a law court at the hearing of a suit, is not justified in committing an assault upon a police constable and an official who endeavour to remove him. Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim. *Reg.* v. *Eardley*, 49 J. P. 551.

And see cases, sub tit. JUSTICE OF THE PEACE.

Complaint by or on behalf of Party aggrieved.]—A court of summary jurisdiction has no power to convict of a common assault unless the party aggrieved, or some one on his behalf, complains of the assault, with a view to the adjudication of the court upon it. *Nicholson* v. *Booth*, 57 L. J., M. C. 43; 58 L. T. 187; 16 Cox, C. C. 373; 52 J. P. 662.

A police officer who appears as complainant on a charge of assault at petty sessions is not a party acting on behalf of the person aggrieved within 24 & 25 Vict. c. 100, s. 42. A complaint by or on behalf of a person aggrieved by a common assault, or affirmative evidence that the aggrieved person has declined or refused to prefer a complaint, is necessary to found the jurisdiction of Justices at Petty Sessions to summarily convict an offender under 24 & 25 Vict. c. 100, s. 42, and 25 & 26 Vict. c. 50, s. 9. *Reg.* v. *Wicklow JJ.*, 30 L. R., Ir. 633.

Aggravated Assaults upon Women and Children.]—The 16 & 17 Vict. c. 30, s. 1 (repealed), gave jurisdiction to two justices of the peace, sitting at a place where petty sessions are usually held to convict persons of certain assaults, and a warrant of commitment in the general form provided by the 11 & 12 Vict. c. 43, Schedule (P.), was sufficient, without any allegation that the convicting justices were sitting at a place where petty sessions are usually held. *Allison, Ex parte*, 10 Ex. 561; 3 C. L. R. 319; 24 L. J., M. C. 73; 18 Jur. 1055; 3 W. R. 57.

An information was laid against a man for assaulting and abusing a woman. On the hearing before the magistrates, she gave evidence tending to show that the man had committed a rape on her. The magistrates convicted him of an aggravated assault, under 16 & 17 Vict. c. 30. The conviction recited the information, and found the assault proved, and sentenced him, for his offence, to be imprisoned in the house of correction for six calendar months:—Held, that the conviction for the minor offence was good. *Thompson, Ex parte*, 6 Jur. (N.S.) 1247; 3 L. T. 294. S. P., *Wilkinson* v. *Dutton*, 3 B. & S. 821; 32 L. J., M. C. 152; 9 Jur. (N.S.) 1104; 8 L. T. 276.

An information before justices charged the defendant with having unlawfully assaulted and abused a female. She and the defendant were each represented by attorneys, and at the hearing, while the attorney for the woman was opening his case, the attorney for the defendant objected that the facts he had stated constituted a case of rape, and that the justices had no jurisdiction. It was then suggested that the case should be treated as a charge of an aggravated assault. The case proceeded, and the defendant was convicted of an aggravated assault. It appeared by affidavits upon an application for a habeas corpus, with a view to the discharge of the defendant, that the evidence of the woman was to the effect that the defendant had ravished her:—Held, per Pollock, C. B., and Wilde, B., that the charge was one over which the justices had no jurisdiction; and that it was competent for the court to look at the evidence with a view to see whether, in point of fact, the case was within the jurisdiction of justices. *Thompson, In re*, 6 H. & N. 193; 30 L. J., M. C. 19; 7 Jur. (N.S.) 48; 3 L. T. 409; 9 W. R. 203; 9 Cox, C. C. 70.

Held, per Bramwell, B., and Channell, B., that the charge did not imply more than a common assault, that the justices had jurisdiction, and that the court could not review the decision of the justices upon the fact. *Ib.*

In order to support a conviction for an aggravated assault there must be an act upon which aggravation supervenes, and with which it is in some way connected. *Munday* v. *Maiden*, 33 L. T. 377; 24 W. R. 57.

A man placed a girl of eight years old on his knee and kissed her. About a quarter of an hour afterwards, without asking her to do anything, or again touching her, he exposed his person and abused himself in her presence. The justices sentenced him to six months' hard labour for an assault of an aggravated nature on a female, under 24 & 25 Vict. c. 100, s. 43:—Held, that what took place after the assault was over could not be said to render the assault one of an aggravated nature within the words of this section, and that the conviction must be quashed. *Ib.*

A conviction before justices, under 24 & 25 Vict. c. 100, s. 43, should show facts to justify the sentence, and show and allege that the offence was of so aggravated a nature that it could not be adequately dealt with under s. 42. *Rice, In re*, Ir. R. 7 C. L. 74.

Amounting to Felony.]—A party was convicted summarily by two justices for an assault. The act appeared to have been done with intent to commit an unnatural offence, or to solicit such offence, but not to have been attended with violence. A certiorari was moved for, on the ground that the offence, if committed, was within 9 Geo. 4, c. 31, s. 29, which prevents justices from convicting where an attempt to commit felony appears. The court refused to interfere, as no excess of jurisdiction appeared on the face of the conviction, and the evidence, of which the magistrates were the judges, did not clearly show an intention to commit felony. *Anon.*, 1 B. & Ad. 382.

Fines—Before 24 & 25 Vict. c. 100, s. 42.]—By 9 Geo. 4, c. 31, s. 27, power was given to two justices, in cases of assault, to impose upon the offender a fine not exceeding 5*l.*, "to be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which the parish, township, or place shall be situate;" and s. 35 provided that the conviction might be drawn up in a given form, or in any other form of words to the same effect:—Held, that a conviction by which the penalty was ordered to be paid "to the treasurer of the county of C., in which the offence was committed, to be by him applied according to the directions of the statute,' or the party in default to be imprisoned for two months, was bad, and that the justices were liable in trespass for the imprisonment of the party under it. *Chaddock* v. *Wilbraham*, 5 C. B. 645; 3 New Sess. Cas. 227; 17 L. J., M. C. 79; 12 Jur. 136.

A. was summoned under 9 Geo. 4, c. 31, ss. 27, 33, for an assault. He did not appear, and the justices, upon proof of service, heard the case and convicted A. The conviction was drawn up, in the form given in s. 35, and by it A. was adjudged to forfeit and pay 2*l.* 10*s.* and 11*s.* 6*d.* for costs; and, in default of immediate payment, to be imprisoned for six weeks, unless the sum

should be sooner paid; and the conviction directed that the 2*l.* 10*s.* should be paid to one of the overseers of the parish within which the offence was committed, and the 11*s.* 6*d.* to the party aggrieved. And directly thereafter, no payment being made, the justices, in the absence of A., and without further summons, issued a warrant of commitment for default of payment: —Held, that the commitment was legal. *Arnold* v. *Dimsdale*, 2 El. & Bl. 580; 22 L. J., M. C. 161; 17 Jur. 1157.

Requiring Recognizances.]—An information was laid against a person for an assault and battery, and a summons issued against him for that offence. At the hearing, the justices dismissed the information, and gave him a certificate, but they ordered him, in respect of the charge, to enter into his own recognizance in 50*l.* to keep the peace for six months:—Held, that, notwithstanding the justices dismissed the information, they were legally justified in requiring a recognizance to keep the peace. *Davis, Ex parte*, 24 L. T. 547.

ii. *Hearing and Certificate.*

Complainant or Informant Protesting against Hearing.]—An information made before a magistrate stated that the informant, having been assaulted and beaten by another person, prayed that he might be bound over to keep the peace towards him. On the magistrates before whom the case was heard proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it:—Held, that the justices had no jurisdiction to convict summarily the offending party of the assault against the will of the informant, as under 9 Geo. 4, c. 31, s. 27, the justices had no jurisdiction to convict of an assault unless the party aggrieved complained of that assault before them with a view to their adjudicating upon it. *Reg.* v. *Deny* or *Totnes JJ.*, 2 L., M. & P. 230; 20 L. J., M. C. 189; 15 Jur. 227.

Hearing, What is.]—A party having been summoned before two justices under 9 Geo. 4, c. 31, s. 27, for an assault, and having appeared and pleaded not guilty, the complainant declined to proceed, stating that he meant to bring an action. The justices thereupon dismissed the complaint, and gave the defendant a certificate as follows:—"We deemed the offence not proved, inasmuch as the complainant did not offer any evidence in support of the information, and have accordingly dismissed the complaint:"—Held, that what passed before the justices constituted a hearing, and that the certificate was a complete bar to an action for the assault. *Tunnicliffe* v. *Tedd*, 5 C. B. 553; 17 L. J., M. C. 67.

A., having laid an information against B. for an assault, under 9 Geo. 4, c. 31, took out a summons, which was served on B., but before the day fixed for the hearing, gave notice to B. that the summons was withdrawn, and also to the magistrate's clerk that he, A., should not attend on the day. B., however, attended on the day, and claimed, in the absence of the complainant, to have the charge dismissed, and to have granted a certificate of dismissal, pursuant to the statute. The justices dismissed the charge, and granted a certificate, which stated the above facts:—Held, that what was done amounted to a hearing within 9 Geo. 4, c. 31, s. 27, and that the certificate accordingly was a bar to an action for the same assault. *Bradshaw* v. *Vaughton*, 9 C. B. (N.S.) 103; 30 L. J., C. P. 93; 7 Jur. (N.S.) 468; 3 L. T. 373; 9 W. R. 120.

A prisoner was charged with a common assault before a stipendiary magistrate, and the charge was dismissed, but the magistrate declined to grant a certificate of dismissal. The prisoner was subsequently indicted for the assault along with three alleged acts of intimidation. At the trial, it was objected that the charge of assault had already been dealt with:—Held, that the charge had not been heard on the merits, and the objection was overruled. *Reg.* v. *Edmondes*, 59 J. P. 776.

—— **Action brought—Power of Court to Inquire.**]—A certificate under 24 & 25 Vict. c. 100, s. 44, of the dismissal by a magistrate of a charge of assault, can only be granted where there has been a hearing "upon the merits," and both parties have attended before the magistrate, and there has been a proper inquiry into the facts of the case. Where, therefore, a prosecutor gave notice to a person against whom he had obtained a summons for an assault, that he should not attend before the magistrate or offer evidence in support of the summons, and did not in fact attend or offer evidence, but the person charged attended and obtained from the magistrate a certificate of dismissal under the above section: —Held, that there had not been a hearing upon the merits; that the magistrate had no jurisdiction to grant the certificate; and that the certificate was therefore no bar under s. 45 to a subsequent action in the county court to recover damages in respect of the same assault:—Held, further, by Lord Esher, M.R. (Lord Coleridge, C.J., doubting), that upon the trial of the action in the county court the judge had power to inquire into the validity of the certificate, and to consider whether the magistrate in granting it had acted within his jurisdiction. *Reed* v. *Nutt*, 59 L. J., Q. B. 311; 24 Q. B. D. 669; 62 L. T. 635; 38 W. R. 621; 54 J. P. 599.

Certificate—To what Offences a Bar.]—Where, under 9 Geo. 4, c. 31, ss. 27—29, a complaint of assault or battery has been made to two justices of the peace, who dismissed the complaint and gave the party a certificate accordingly, the certificate may be pleaded in bar to an indictment founded on the same facts, charging assault and battery, accompanied by malicious cutting and wounding, so as to cause grievous or actual bodily harm. *Reg.* v. *Elrington*, 1 B. & S. 688; 31 L. J., M. C. 14; 8 Jur. (N.S.) 97: 5 L. T. 284; 10 W. R. 13; 9 Cox, C. C. 86. See *Reg.* v. *Stanton*, 5 Cox, C. C. 324.

A previous summary conviction for an assault under 24 & 25 Vict. c. 100, s. 45, is not a bar to an indictment for manslaughter of the party assaulted, founded upon the same facts. *Reg.* v. *Morris*, 36 L. J., M. C. 84; L. R. 1 C. C. 90; 16 L. T. 636; 15 W. R. 990; 10 Cox, C. C. 480.

A man and his wife having each been struck by the defendant, summoned him before justices for the assaults. The justices, after hearing the case, merely fined him for the assault on the man, but committed him to prison for fourteen days in respect of the assault on the woman, who was much hurt. He paid the fine and suffered the imprisonment. An action having been afterwards brought against him for the injuries to the wife, he set up his conviction and imprisonment

as a release, under 24 & 25 Vict. c. 100, s. 45. The plaintiffs contended that he had been punished only for a common assault, and not for the distinct offence of an aggravated assault, and that, therefore, the action in respect of the more serious injury was not "for the same cause" within the meaning of the section. The court thought that the whole case being before the justices, they had power to deal with it as an aggravated assault, and had so treated it; and therefore the defendant was, by s. 45, released from the action. *Holden* v. *King*, 46 L. J., Ex. 75; 35 L. T. 479; 25 W. R. 62.

A man assaulted a wife, and for such assault was fined by the justices under 24 & 25 Vict. c. 100, and paid the fine:—Held, that an action by the husband in respect of the consequential damage to himself by reason of the assault on his wife was barred under s. 45. *Masper* v. *Brown*, 45 L. J., C. P. 203; 1 C. P. D. 97; 34 L. T. 254; 24 W. R. 369.

Conviction for an assault is a bar to an indictment for feloniously stabbing in the same transaction. *Reg.* v. *Walker*, 2 M. & Rob. 446.

Where an assault is committed by a servant acting in the course of his employment, the liability of the master is not affected by the fact that the servant has been released from all further proceedings for the same cause under the provisions of section 45 of the Offences against the Person Act, 1861. *Dyer* v. *Munday*, 64 L. J., Q. B. 448; [1895] 1 Q. B. 742; 14 R. 306; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276—C. A.

—— **Application for—Time.**]—A certificate applied for by the party entitled, five days after a complaint had been dismissed, and granted two days after the application, but dated as of the day upon which the complaint was made, is made out forthwith, and is a good defence to a subsequent action for the same assault. *Costar* v. *Hetherington*, 1 El. & El. 802; 28 L. J., M. C. 198; 5 Jur. (N.S.) 985; 7 W. R. 413; 8 Cox, C. C. 175.

—— **Granting is a Ministerial Act.**]—The granting a certificate of dismissal of the complaint is, when a case is brought within s. 27 of the 9 Geo. 4, c. 31, a ministerial, not a judicial act, and a magistrate is therefore bound to grant it. *Hancock* v. *Somes*, 1 El. & El. 795; 28 L. J., M. C. 196; 5 Jur. (N.S.) 983; 7 W. R. 422; 8 Cox, C. C. 172.

The certificate, if drawn up forthwith and delivered to the party against whom the complaint is preferred, is a good bar to a subsequent action for the assault, though not drawn up in the presence of the parties, or applied for by the party against whom the complaint was preferred. *Ib.*

—— **Pleading.**]—To an action for an assault, the defendant pleaded that he had been summoned by the plaintiff before a magistrate, who convicted him in the costs of the complainant and hearing, which he had paid. At the trial the magistrate's clerk produced his note-book, by which it appeared that the magistrate had merely ordered the defendant to enter into his recognizances, and pay the expenses thereof; the clerk also said in such cases no conviction was ever drawn up:—Held, that the plea was bad, and did not disclose a defence under 24 & 25 Vict. c. 100, s. 45; that it was not proved; and that, even if there was a conviction, the proper proof was not adduced. *Hartley* v. *Hindmarsh*, 35 L. J., M. C. 255; 1 H. & R. 607; L. R. 1 C. P. 553; 12 Jur. (N.S.) 502; 14 W. R. 862.

If a party is charged before two magistrates with an assault, and they dismiss the complaint, giving him a certificate, he cannot avail himself of this certificate as a defence to an action for the same assault, unless it is specially pleaded. *Harding* v. *King*, 6 Car. & P. 427.

To an action of assault and battery, a certificate, under 24 & 25 Vict. c. 94, s. 44, may be pleaded, together, with a plea that the assault was committed in order to prevent a breach of the peace. *Lawler* v. *Kelly*, 15 Ir. C. L. R., App. 1.

—— **Proof of—Primâ facie only one Assault on one Day.**]—When an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day, it is primâ facie evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day, if he alleges that such is the case. *Reg.* v. *Westley*, 11 Cox, C. C. 139.

The appearance of the defendant before the magistrate, the recital in the certificate of the fact of a complaint having been made, and of a summons having been issued, are sufficient evidence of those facts. *Ib.*

Order to pay Costs—Bar to Subsequent Action.]—A conviction of a defendant for unlawfully wounding, and his being sentenced therefore to term of imprisonment, and to pay a sum of money to the prosecutor of the indictment, for his necessary costs of the prosecution, and a moderate allowance for his loss of time, pursuant to 24 & 25 Vict. c. 100, s. 74, form no bar to his subsequently suing the defendant for the same assault, and recovering damages for his bodily suffering and medical expenses occasioned thereby. *Lowe* v. *Horwarth*, 13 L. T. 297.

7. TRIAL.

Indictment — Joinder of Counts.] — Under 1 Vict. c. 85, ss. 2 and 4, the offences of stabbing with intent to murder and with intent to do grievous bodily harm may be included in one indictment, though the punishments are different. And the prosecution will not be put to their election. *Reg.* v. *Strange*, 8 Car. & P. 172.

Prisoner must Plead to Felony.]—Where a prisoner is indicted for feloniously cutting and wounding, he will not be permitted to plead guilty to a common assault merely. He must plead to the felony, and if no evidence of the felony is offered he may be acquitted of the felony and found guilty of the assault on his own confession. *Reg.* v. *Calverte*, 3 Car. & K. 201.

When Verdict for Unlawfully Wounding is Sustainable.]—A., an under servant, who had lost his right arm, was beaten by B., an upper servant, for misconduct. A. took out a knife and wounded B.:—Held, on a trial for feloniously wounding, that if A. did this in self-defence only he ought to be acquitted; but if A. used more violence than was necessary for that purpose he ought to be convicted of the misdemeanor of wounding only under 14 & 15 Vict. c. 12, s. 5. *Reg.* v. *Huntley*, 3 Car. & K. 142.

The statute 14 & 15 Vict. c. 19, s. 5, only

applies where the indictment alleges a felonious cutting, stabbing or wounding. Upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grievous bodily harm with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawfully wounding. *Reg.* v. *Miller*, 14 Cox, C. C. 356.

To support a verdict of guilty of unlawfully wounding, under 14 & 15 Vict. c. 19, s. 5, the act must be done as well maliciously as unlawfully. *Reg.* v. *Ward*, 41 L. J., M. C. 69; L. R. 1 C. C. 356; 26 L. T. 43; 20 W. R. 392; 12 Cox, C. C. 123.

A man, who was jealous of persons going in pursuit of wild-fowl, fired, while the prosecutor was on the water in his punt in pursuit of wild-fowl about twenty-five yards off, to frighten and deter him from again coming into the creek for the purpose of fowling. As the prosecutor slewed his punt round, he was struck by the shots from the prisoner's gun; but if he had not slewed the boat round the shot would not have struck him:—Held, that a conviction for unlawfully and maliciously wounding the prosecutor under 14 & 15 Vict. c. 99, s. 5, was supported by the evidence. *Ib.*

On what Count Verdict Entered.]—To an indictment for stabbing, was added a count for a common assault. The trial had considerably advanced before this was discovered, and the judge allowed the case to proceed, and left it to the jury without noticing the count for the common assault. The jury returned a verdict of guilty, which was entered on the count for stabbing with intent to do grievous bodily harm. The judges held the conviction right. *Reg.* v. *Jones*, 8 Car. & P. 776; 2 M. C. C. 94.

An indictment contained counts charging an assault, and unlawfully and maliciously inflicting grievous bodily harm, and also a count for a common assault. At the trial evidence was given that the prisoner inflicted serious bodily injuries upon the prosecutor. The jury found the prisoner guilty of an aggravated assault without premeditation, and that it was done under the influence of passion:—Held, that the verdict was rightly entered on the record on the counts charging an assault and unlawfully and maliciously inflicting grievous bodily harm. *Reg.* v. *Sparrow*, Bell, C. C. 298; 30 L. J., M. C. 43; 6 Jur. (N.S.) 1122; 3 L. T. 445; 9 W. R. 58; 8 Cox, C. C. 393.

On what Indictments Conviction for Common Assault Sustainable.]—Upon a count for assaulting, beating, wounding, and occasioning actual bodily harm against the statute, the prisoner may be convicted of a common assault. *Reg.* v. *Oliver*, Bell, C. C. 287; 30 L. J., M. C. 12; 6 Jur. (N.S.) 1214; 3 L. T. 311; 9 W. R. 60; 8 Cox, C. C. 384.

Upon an indictment charging the defendants in the first count with inflicting grievous bodily harm; in the second count with unlawfully and maliciously cutting, stabbing and wounding; and in the third count with assaulting and occasioning actual bodily harm; the jury returned a verdict of guilty of a common assault. The chairman declined to take that verdict, on the ground that a common assault was not included in the indictment, and told the jury to reconsider their verdict. The jury then found the defendants guilty, and a verdict was entered of guilty of an assault occasioning bodily harm, whereupon the chairman sentenced the prisoners:—Held, that the first verdict ought to have been taken, and that the second ought not, and that the prisoners ought not to undergo the sentence; that there had been a mis-trial, and that a venire de novo should issue. *Reg.* v. *Vradon*, L. & C. 81; 31 L. J., M. C. 70; 7 Jur. (N.S.) 1128; 5 L. T. 329; 10 W. R. 64; 9 Cox, C. C. 91.

If, on an indictment for abduction on 9 Geo. 4, c. 31, s. 19, the jury was not satisfied that the prisoner was actuated by motives of lucre, and they were satisfied that he used force to the person of the lady in taking her away, and that he took her away against her consent, they might convict him of an assault under 7 Will. 4 & 1 Vict. c. 85, s. 11. *Reg.* v. *Barratt*, 9 Car. & P. 387.

An indictment charged the prisoner in a first count with unlawfully and maliciously wounding, and in the second count with unlawfully and maliciously inflicting grievous bodily harm. The jury found the prisoner guilty of an assault:—Held, that he could be properly convicted of an assault on the indictment under 24 & 25 Vict. c. 100, s. 20, as the offences charged were misdemeanours, and each of them necessarily included the lesser misdemeanour of an assault. *Reg.* v. *Taylor*, *Reg.* v. *Canwell*, 38 L. J., M. C. 106; L. R. 1 C. C. 194; 20 L. T. 402; 17 W. R. 623; 11 Cox, C. C. 261.

Two were indicted, under 24 & 25 Vict. c. 96, s. 42, for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged:—Held, that they could not, upon this indictment and finding, be convicted of a common assault. *Reg.* v. *Wilkes*, 12 Cox, C. C. 240.

A. presented a loaded pistol at B., but was prevented from pulling the trigger:—Held, that A. could be properly convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at B. *Reg.* v. *St. George*, 9 Car. & P. 483.

B. was indicted, with three others, for an assault with intent to do some grievous bodily harm. It was proved that he, with the other prisoners, had assaulted the prosecutor, and afterwards they had returned together and picked up some stones. Then B. withdrew, and the other prisoners threw the stones and wounded the prosecutor. The jury found the three prisoners who threw the stones guilty of the felony, and B. guilty only of a common assault:—Held, that B. was rightly convicted. *Reg.* v. *Phillips*, 3 Cox, C. C. 225.

—— **In Cases of Robbery.**]—*See* ante, cols. 1377, 1378.

Jury Discharged—Prisoner Pleading Guilty to Common Assault.]—On an indictment for a felonious assault, the jury, being unable to agree as to the felonious intent, was discharged by arrangement, in order that the prisoner might plead guilty to a common assault with a view to compensation. *Reg.* v. *Roxburgh*, 12 Cox, C. C. 8.

Passing Sentence — Action Pending.]—The court will not pass sentence on a defendant for an assault where the prosecutor has an action pending for the same assault, even if the prosecutor offers to discontinue the action. *Rex* v. *Mahon*, 4 A. & E. 575.

D. BESTIALITY AND SODOMY.

What Constitutes.]—Proof of injecto seminis, as well as penetration, was essential on an indictment for sodomy. *Rex* v. *Duffin*, 1 East, P. C. 437; R. & R. 365.

But since 9 Geo. 4, c. 31, s. 18, the crime is complete if the jury is satisfied that penetration took place. *Rex* v. *Reekspear*, 1 M. C. C. 342; *Rex* v. *Cozins*, 6 Car. & P. 351.

To constitute the offence of sodomy, the act must be in that part where sodomy is usually committed; for the act in a child's mouth does not constitute the offence. *Rex* v. *Jacobs*, R. & R. 331.

A fowl is an animal within the meaning of s. 61 of the 24 & 25 Vict. c. 100. *Reg.* v. *Brown*, 59 L. J., M. C. 47; 24 Q. B. D. 357; 61 L. T. 594; 38 W. R. 95; 16 Cox, C. C. 715; 54 J. P. 408—C. C. R.

An unnatural connection with an animal of the fowl kind was not sodomy before 9 Geo. 4, c. 31, s. 15, a fowl not coming under the term "beast:" [the words of the 9 Geo. 4, c. 31, s. 15, were "any animal"]: and it was agreed clearly not to be sodomy when the fowl was so small that its private parts would not admit those of a man, and were torn in the attempt. *Rex* v. *Mulreaty*, 3 Russ. C. & M. 250.

Gross Indecency.]—On the true construction of the 11th section of the Criminal Law Amendment Act, 1885, any male person, who procures or attempts to procure the commission by any male person of any act of gross indecency with himself the first-named male person, comes within the language of the section, and is guilty of a misdemeanour thereunder. *Reg.* v. *Jones*, 65 L. J., M. C. 28; [1896] 1 Q. B. 4; 73 L. T. 584; 44 W. R. 110; 18 Cox, C. C. 207; 60 J. P. 89—C. C. R.

Indictment.]—An indictment for bestiality, which describes the animal as a certain animal called a bitch, is sufficiently certain, although the females of foxes and some other animals are called bitches, as well as the female of the dog. *Reg.* v. *Allen*, 1 Car. & K. 495.

Indictment against two, charging that they, being persons of wicked and unnatural dispositions, did, in an open and a public place, unlawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently in that public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly, and indecently, did commit with each other, in the sight and view of divers of the liege subjects, in the said public place there passing, divers such practices as aforesaid, is bad, in arrest of judgment, for want of a real certainty. *Reg.* v. *Rowed*, 2 G. & D. 518; 3 Q. B. 180; 11 L. J., M. C. 74; 6 Jur. 396.

Who Guilty of.]—Where an adult and a boy of twelve years of age commit an unnatural offence, the adult being the pathic may be convicted. *Reg.* v. *Allen*, 1 Den. C. C. 364; T. & M. 55; 2 Car. & K. 869; 18 L. J., M. C. 72; 13 Jur. 108; 3 Cox, C. C. 270.

Crime committed long before Complaint made.]—Where a long period of time, nearly two years, has elapsed from the time of committing the offence of bestiality before complaint is made to the justices, the case will not be permitted to go to the jury. *Reg.* v. *Robins*, 1 Cox, C. C. 114.

Evidence.]—It is not allowable to show that the prisoner has a general disposition, or a natural inclination to commit the same kind of offence as that charged against him. *Rex* v. *Cole*, 3 Russ. C. & M. 251.

A married woman who consents to her husband's committing an unnatural offence with her, is an accomplice in the felony, and, as such, her evidence requires confirmation, although consent or non-consent is quite immaterial to the offence. *Reg.* v. *Jellyman*, 8 Car. & P. 604.

Verdict of Jury.]—On an indictment against a prisoner charging him with the capital offence of bestiality, the jury could not find him guilty of an assault under 7 Will. 4 & 1 Vict. c. 85, s. 11; but if they acquitted him of the capital charge he might be detained in custody, and indicted for a misdemeanour, in attempting to commit a felony. *Reg.* v. *Eaton*, 8 Car. & P. 417.

E. CONCEALMENT OF THE BIRTH OF CHILDREN.

1. *The Offence*, 1482.
2. *Indictment*, 1485.

1. THE OFFENCE.

What is a "Child."]—On an indictment for concealing the birth of her child, it appeared that the prisoner had been confined of a child which had not attained to seven months from conception, it had never lived, and was slightly malformed; it was left to the jury to say whether the offspring had so far matured as to become a child, or was only a fœtus, or the unformed subject of a premature miscarriage. *Reg.* v. *Hewett*, 1 F. & F. 1101.

A fœtus not bigger than a man's finger, but having the shape of a child, is a child within the statute. *Reg.* v. *Colmer*, 9 Cox, C. C. 506.

On a charge of concealment of birth, it must appear that the child had gone such a time in its mother's womb that it would in the ordinary course of things, when born, have had a fair chance of life. Under seven months it may be fairly presumed that it would not be born alive. *Reg.* v. *Berriman*, 6 Cox, C. C. 388.

Purpose of 9 Geo. 4, c. 31, s. 14.]—The concealment sought to be checked by 9 Geo. 4, c. 31, s. 14, was that which would keep the world at large in ignorance of the birth of a child. *Reg.* v. *Morris*, 2 Cox, C. C. 489.

While, therefore, the offence may on the one hand be committed, even though the pregnancy and delivery be made known to a confidant, so on the other it is not an offence within the act if the endeavour to conceal proceed from a desire to escape individual observation or anger. Where, therefore, it appeared that the body of a bastard child would have been buried by the prisoner in the churchyard, but for her fear to provoke her father, under the operation of which she conveyed it secretly to a pond:—Held, that the case did not fall within the act. *Ib.*

Concealment, what is.] — To support an indictment for concealing the birth of a child it

is necessary to prove some act of concealment by the prisoner. *Reg.* v. *Derham*, 1 Cox, C. C. 56.

The question is whether or not the place in which the body of the child is put is such that it will in all probability be found. *Reg.* v. *Brown*, 39 L. J., M. C. 94; L. R. 1 C. C. 244; 22 L. T. 484; 18 W. R. 792; 11 Cox, C. C. 517.

Although the fact of the mother having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of concealment of birth, yet all the attendant circumstances of the case must be taken into consideration, in order to determine whether or not an offence has been committed. *Reg.* v. *Cook*, 21 L. T. 216; 11 Cox, C. C. 542.

Leaving the dead body of a child in two boxes, closed, but not locked or fastened, one being placed inside the other in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body within 24 & 25 Vict. c. 100, s. 60. *Reg.* v. *George*, 11 Cox, C. C. 41.

On an indictment against the mother for concealment of the birth of her illegitimate child, it appeared that the body of the child was found, three days after it was born, behind the door of the privy belonging to the house where she lived as a domestic servant, in a tub covered over with a small cloth:—Held, that there was no conclusive evidence to warrant the jury in finding a verdict for concealment of the birth. *Reg.* v. *Opie*, 8 Cox, C. C. 332.

To endeavour to conceal the birth of a child by a secret disposition of the dead body within 24 & 25 Vict. c. 100, s. 60, it must be by putting it into some place where it is not likely to be found. Placing it in an open box in the prisoner's bedroom, and afterwards, on inquiry by the medical man, informing him that the child was in the box, where it was found, is not a secret disposition. *Reg.* v. *Sleep*, 9 Cox, C. C. 559.

A woman, delivered of a child born alive, endeavoured to conceal the birth by depositing the child, while alive, in the corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner:—Held, that she could not be convicted of concealing the birth of the child under 24 & 25 Vict. c. 100, s. 60, which relates to the secret disposition of the dead body of a child. *Reg.* v. *May*, 16 L. T. 362; 15 W. R. 751; 10 Cox, C. C. 448.

A woman who places a living child in a place of concealment, and on subsequently revisiting the place finds the child dead and leaves it there, is guilty of concealing the birth of a child by a secret disposal of the dead body within 9 Geo. 4, c. 31, s. 14, although she does not actually remove the body but merely replaces the clothing or other articles with which the concealment was effected or assisted. *Reg.* v. *Hughes*, 4 Cox, C. C. 449.

Semble, taking the body of a child away from the place where it was born to the house of the mother's married sister who lived at a distance, for the purpose of having it buried in the churchyard there, is not a concealment within 9 Geo. 4. c. 31, s. 14. *Reg.* v. *Waterage*, 1 Cox, C. C. 338.

On an indictment against the mother for the murder of her illegitimate child, it appeared that the body of the child was found, a few hours after its birth, on the floor of an attic in a house where she lived as domestic servant, the head severed from the body, and both lying in sheets which had been removed from the bedroom below, which was occupied by the prisoner and her mistress, and where there was evidence to show that the birth had taken place, but it was doubtful whether the severance of the head from the body was effected there or in the attic:—Held, that there was no evidence to warrant the jury in finding a verdict for the statutable misdemeanor of endeavouring to conceal the birth. *Reg.* v. *Goode*, 6 Cox, C. C. 318.

The mother of a child, of which she had been recently delivered, with the intention of concealing the dead body of the child from a surgeon, placed it under a bolster on which she laid her head. It was assumed that she meant to remove the body elsewhere when an opportunity occurred:—Held, that she was properly convicted of endeavouring to conceal the birth of the child by secretly disposing of the dead body, as it was not necessary in order to constitute that offence, under 9 Geo. 4, c. 31, s. 14, that the body should be put in a place which was intended to be the place of its final deposit. *Reg.* v. *Perry*, Dears. C. C. 471; 3 C. L. R. 691; 24 L. J., M. C. 137; 1 Jur. (N.S.) 408; 3 W. R. 404; 6 Cox, C. C. 331. S. P., *Reg.* v. *Goldthorp*, Car. & M. 335; 2 M. C. C. 244; *Reg.* v. *Farnham*, 1 Cox, C. C. 349.

A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal on the charge of endeavouring to conceal the birth. *Rex* v. *Higley*, 4 Car. & P. 366.

A prisoner found with the body still in her possession, though about to dispose of it, could not be convicted. *Rex* v. *Snell*, 2 M. & Rob. 44.

In a case of concealment of birth under 9 Geo. 4, c. 31, s. 14, it was essential to the commission of the offence that the prisoner should have done some act of disposal of the body after the child was dead; therefore, if the prisoner had gone to a privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted of this charge, notwithstanding her denial of the birth of the child. *Reg.* v. *Turner*, 8 Car. & P. 755. S. P., *Reg.* v. *Coxhead*, 1 Car. & K. 623.

The act of throwing a bastard child down the privy, by its mother, was evidence of an endeavour to conceal the birth, within 43 Geo. 3, c. 58, s. 3. *Rex* v. *Cornwall*, R. & R. 337.

Question for Judge and Jury.]—On an indictment for secretly disposing of the dead body of a bastard child, with intent to conceal its birth, it is a question of law for the judge, whether there has been a secret disposing of the body, i.e. a disposing of it in such a place as that the offence may have been committed (and a dust-bin is such a place); but it is for the jury to say whether there has been such a disposing of the body by the prisoner with such an intent, and the jury must be satisfied that the prisoner so disposed of it, or was a party to such a disposition of it, with intent. *Reg.* v. *Clarke*, 4 F. & F. 1040.

Evidence—Dead Body must be Found.]—In

order to convict a woman of attempting to conceal the birth of her child a dead body must be found, and identified as that of the child of which she is alleged to have been delivered. *Reg.* v. *Williams*, 11 Cox, C. C. 684.

Mere proof that a woman was delivered of a child, and allowed two others to take away its body, is insufficient to sustain an indictment against her for concealment of its birth. *Reg.* v. *Bate*, 11 Cox, C. C. 686.

On an indictment for endeavouring to conceal the birth of a child "by a secret disposition of the dead body of the said child," the evidence for the prosecution having failed to prove the death of the child, the conviction was quashed. *Reg.* v. *Bull*, Ir. R. 8 C. L. 541.

Who may be Convicted of.]—On an indictment for child murder, no one but the mother can be convicted of a concealment of the birth of the child. *Reg.* v. *Wright*, 9 Car. & P. 754.

—— **Aiding and Assisting.**]—A woman was delivered of a child, which died soon after its birth; she concurred with her paramour in endeavouring to conceal the birth, and he, in consequence of her persuasion, she remaining in bed, took the body, and buried it in a field intending thereby to conceal the birth:—Held, that she could be convicted of endeavouring to conceal the birth, under 9 Geo. 4, c. 31, s. 14, and he of counselling, aiding and abetting her in the offence. *Reg.* v. *Bird*, 2 Car. & K. 817.

If a woman is delivered of a child which is dead, and a man takes the body and secretly buries it, she is indictable for the concealment by secret burying, under 9 Geo. 4, c. 31, s. 14, and he for aiding and abetting under s. 31, if there was a common purpose in both in thus endeavouring to conceal the birth of the child: but the jury must be satisfied not only that she wished to conceal the birth, but was a party to the carrying that wish into effect by the secret burial by the hand of the man, in pursuance of a common design between them. *Reg.* v. *Skelton*, 3 Car. & K. 119.

If the body of a dead child was secretly buried, or otherwise disposed of, by an accomplice of its mother, the accomplice acting as her agent in the matter, the mother of the child was punishable under 9 Geo. 4, c. 31, s. 14. *Rex* v. *Douglas*, 7 Car. & P. 644; 1 M. C. C. 480.

2. Indictment.

Form of—Death of Child.]—An indictment for concealing the birth of a child must expressly allege that the child is dead. *Rex* v. *Davis*, 3 Russ. C. & M. 167.

An indictment on 9 Geo. 4, c. 31, s. 14, for endeavouring to conceal the birth of a dead child, need not have stated whether the child died before, at, or after its birth. *Reg.* v. *Cox-head*, 1 Car. & K. 623.

—— **Mode of disposing of Body.**]—An indictment for concealing the birth of a child "by secretly disposing of the dead body," under 9 Geo. 4, c. 31, s. 14, without showing the mode of disposing of the dead body, was bad. *Reg.* v. *Hounsell*, 2 M. & Rob. 292.

—— **Endeavour to Conceal.**]—An indictment for that offence, which charged that the defendant did cast and throw the dead body of the child into soil in a privy, "and did thereby then and there unlawfully dispose of the dead body of the child, and endeavour to conceal the birth thereof," sufficiently charged the endeavour to conceal the birth, as the word "thereby" applied to the endeavour as well as to the disposing of the dead body. *Reg.* v. *Coxhead*, 1 Car. & K. 623.

Where an indictment for concealing the birth of a child alleged the concealment to have been in and among a certain heap of carrots, and the evidence was that the body was laid upon the heap, but behind, so that it was hidden from the passers-by by the upper part of the heap. Semble, that the evidence did not support the indictment. *Reg.* v. ——, 6 Cox, C. C. 391.

Amendment.]—Held, that the provisions of 14 & 15 Vict. c. 100, s. 1, empowering the judge to amend certain variances between the indictment and the evidence, did not extend to such an amendment as this. *Ib.*

F. False Imprisonment.

Confining Captain of Ship.]—In an indictment for confining a captain of a ship, constructive confinement will satisfy the requirements of the statute, and this will be supported by evidence that, although no force was used, the captain was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel. *Reg.* v. *Jones*, 11 Cox, C. C. 393.

—— **On board Ship.**]—The defendant was convicted on an indictment charging him with assaulting the prosecutors on the high seas, and imprisoning and detaining them. They were Chilian subjects and had been ordered by the government of Chili to be banished from that country to England. The defendant being master of an English merchant vessel lying in the territorial waters of Chili, contracted with the Chilian government to take the prosecutors from Chili to Liverpool; they were accordingly brought on board his vessel by the officers of the government and carried by the defendant to Liverpool under his contract:—Held, that though the conviction could not be supported for the assault and imprisonment in the Chilian waters, it must be sustained for that which was done out of the Chilian territory, and that although the defendant was justified in receiving the prosecutors on board his vessel in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and that the detention amounted to a false imprisonment and was triable by English law. *Reg.* v. *Lesley*, Bell, C. C. 220; 29 L. J., M. C. 97; 6 Jur. (N.S.) 202; 1 L. T. 452; 8 W. R. 220; 8 Cox, C. C. 269.

Keeping Idiot without Necessaries.]—If one has an idiot brother who is bed-ridden in his house, and keeps him in a dark room without sufficient warmth or clothing, this will not be an assault or an imprisonment, nor will proof of this support an indictment for an assault or an imprisonment. *Rex* v. *Smith*, 2 Car. & P. 449.

Preventing Person from going on Public Footway.]—Forcibly preventing a person from proceeding in a particular direction along a public footway is not an imprisonment. *Bird* v.

Jones, 7 Q. B. 742; 15 L. J., Q. B. 82; 9 Jur. 870.

Bailiff—Writ.]—It is an imprisonment where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him. *Grainger* v. *Hill*, 4 Bing. (N.C.) 212; 5 Scott, 561: 7 L. J., C. P. 85. S. P., *Whalley* v. *Pepper*, 7 Car. & P. 506; *Bristow* v. *Haywood*, 1 Stark. 48; 4 Camp. 213.

Giving Persons in Charge.]—Merely giving a person in charge of a peace officer, when the officer never takes the person of the defendant into custody, is not an imprisonment. *Simpson* v. *Hill*, 1 Esp. 431.

If a constable tell a person given into his charge that he must go with him before a magistrate, and such person in consequence goes quietly without any force being used by the constable, it is an imprisonment. *Chinn* v. *Morris*, 2 Car. & P. 361. S. P., *Pocock* v. *Moore*, Ry. & M. 321.

See also infra, ARREST AND APPREHENSION OF OFFENDERS *and* MALICIOUS PROSECUTION.

G. MURDER AND MANSLAUGHTER.

1. *Unlawful Killing*, 1487.
2. *Reasonable Creature in Being*, 1491.
3. *Malice, Express or Implied.*
   a. Generally, 1492.
   b. By Poison or Operations, 1493.
   c. By Fighting, 1495.
   d. Upon Provocation, 1497.
   e. By Correction, 1499.
   f. In Defence of Life and Property, 1500.
   g. Killing without Intention whilst doing another Act.
      i. Blow Intended for Another, 1501.
      ii. Negligence by Omission or Commission, 1502.
   h. By Persons having Charge of Helpless Beings, 1508.
   i. Killing Officers of Justice, 1513.
   j. Killing by Officers of Justice, 1516.
4. *Indictment*, 1517.
5. *Evidence.*
   a. Generally, 1521.
   b. What Admissible, 1524.
   c. Dying Declarations, 1528.
6. *Trial, Sentence, and Punishment*, 1535.
7. *Conspiring or Soliciting to Commit Murder*, 1540.
8. *Attempts to Murder.*
   a. By Administering Poison, 1541.
   b. By Shooting or Wounding, 1542.
   c. By other Means, 1545.
9. *Threats to Murder*, 1545.

1. UNLAWFUL KILLING.

Death accelerated by Violence.]—The prisoner violently assaulted his wife. The medical evidence showed that she was diseased, but that she might have lived for an indefinite period; and that the effect of the violence was to hasten her death, by a shock to the nervous system calculated to aggravate the disease:—Held, that he was guilty of manslaughter. *Reg.* v. *Murton*, 3 F. & F. 492.

No care taken after Injury.]—If a man who has received a serious blow or injury does not alter his mode of life in consequence, that does not exonerate the wrong doer from criminal liability if such conduct has the effect of causing death. *Reg.* v. *Flynn*, 16 W. R. 319.

Injury rendering Restorative necessary—Choking.]—Where a blow is given which necessitates in a surgeon's opinion the administering of restoratives to the person injured, and the person being unable to swallow is choked, the death is caused by the blow. *Reg.* v. *McIntyre*, 2 Cox, C. C. 379.

Injury rendering Operation Necessary.]—When an injury was inflicted on a person by a blow which, in the judgment of a competent medical man, rendered an operation advisable, and, as a preliminary to the operation, chloroform was administered to the patient, who died during its administration, and it was agreed that the patient would not have died but for its administration:—Held, that the person causing the injury was liable to be indicted for manslaughter. *Reg.* v. *Davis*, 15 Cox, C. C. 174.

Refusal to submit to Operation.]—Where a wound is wilfully, and without justifiable cause, inflicted, and ultimately becomes the cause of death, the party who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. *Reg.* v. *Holland*, 2 M. & Rob. 351.

Death caused by Fright.]—When A., in unlawfully assaulting B., who at that time had in her arms an infant, so frightened the infant that it had convulsions, although previously healthy, and from the effects of which it eventually died in about six weeks, A. is guilty of manslaughter, if the jury thinks that the assault on B. was the direct cause of death. *Reg.* v. *Towers*, 12 Cox, C. C. 530.

Death caused by Apprehension of Violence.]—If a person being attacked should, from an apprehension of immediate violence—an apprehension which must be well grounded and justified by the circumstances—throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder. *Reg.* v. *Pitts*, Car. & M. 284.

Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder. *Rex* v. *Evans*, 3 Russ. C. & M. 12.

And threats may constitute such force. *Ib.*

An indictment charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced and threw him, whereby he was killed:—Held, that this evidence sufficiently supported the indictment. *Rex* v. *Hickman*, 5 Car. & P. 151.

Falsely charging Person with Capital Offence.]—A person cannot be indicted for

murder in procuring another to be executed by falsely charging him with a crime of which he was innocent. *Rex* v. *Macdaniel*, 1 Leach, C. C. 44; 1 East, P. C. 333.

Unlawful Acts—What are.]—Accidental homicide may be murder, if it happens in the prosecution of any illegal act: as in carrying away furniture to avoid a distress for rent. *Rex* v *Hodgson*, 1 Leach, C. C. 6; 1 East, P. C. 258.

Act known to be dangerous to Life.]—If a person causes death by an act known to be in itself eminently dangerous to life, he is guilty of murder. *Reg.* v. *Serné*, 16 Cox, C. C. 311.

Act done in committing Felony.]—Where the prisoner committed a felony on the person of a child whereby she died, a verdict of manslaughter can be upheld. *Reg.* v. *Greenwood*, 7 Cox, C. C. 404.

Quære, whether the rule, that an act done in the commission of a felony which causes death is in all cases murder, is not stated too broadly; and whether it should not be confined to felonious acts dangerous to life. *Reg.* v. *Serné*, 16 Cox, C. C. 311.

Caused by Unlawful Assembly.]—If persons assemble to obstruct the officers of the law, all so assembling are guilty of an unlawful assembly, whether a riot takes place or not, and if a homicide be committed in consequence of that unlawful assembly, every one taking part in the unlawful assembly may be personally responsible for the homicide. *Reg.* v. *McNaughton*, 14 Cox, C. C. 576.

Whilst Playing at Football.]—If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter. In such a case it is immaterial to consider whether the act which caused the death was in accordance with the rules and practice of the game. The act would be unlawful if the person committing it intended to produce serious injury to another, or if, committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences. *Reg.* v. *Bradshaw*, 14 Cox, C. C. 83.

Playing.]—A drunken man went into a shop, and in a joke seized a boy round the neck, and began spinning him round until they got together into the street. The boy having at length broken away, the prisoner, in consequence, staggered into the road, and fell against a woman who was passing, knocking her down; she shortly after died of the injuries which she had received. The boy made no resistance to the prisoner's treatment of him, believing that it was merely done in play:—Held, that there was no evidence of manslaughter. *Reg.* v. *Bruce*, 2 Cox, C. C. 262.

Kicking out Trespasser.]—A kick is not a justifiable mode of turning a man out of your house, though he is a trespasser; therefore, if it causes death, it is manslaughter. *Rex* v. *Wild*, 2 Lewin, C. C. 214.

Command to kill Person.]—He who kills another upon his desire or command, is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. *Rex* v. *Sawyer*, 3 Russ. C. & M. 5.

By Firing Buildings or Stacks.]—Where a person indicted for murder had wilfully set fire to a stack of straw, close to an out-house or a barn, in an inclosure not adjoining to a dwelling-house, and the deceased was burnt to death, either in the out-house or on or by the side of the stack:—Held, that he was not guilty of murder, unless the deceased was there when he set fire to the stack. *Reg.* v. *Horsey*, 3 F. & F. 287.

Causing Death by Excessive Drink.]—An indictment stated that the prisoners gave, administered and delivered to A. large and excessive quantities of spirits and water, wine and porter, and induced, procured and persuaded him to drink them, being likely to cause death, which they well knew. The deceased was a man in possession under the sheriff, and one of the prisoners, of whose goods he was in possession, assisted by his brother and a friend, plied the man with liquor, themselves drinking freely also, and when he was very drunk put him into a cabriolet, and caused him to be driven about the streets; and about two hours after he had been put into the cabriolet he was found dead:—Held, that if it was essential to prove that the prisoners knew that the liquors were likely to cause death, the case would be one of murder and not of manslaughter, but that such allegation was not a material part of the indictment, but might be dismissed from the jury's consideration. *Reg.* v. *Packard*, Car. & M. 236.

Held, also, that if the prisoners, when the deceased was drunk, put him into a cabriolet and drove him about in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. *Ib.*

Who Liable for—Inspector or Foreman.]—Where a fatal railway accident had been caused by the train running off the line, at a spot where rails had been taken up, without allowing sufficient time to replace them, and also without giving sufficient, or, at all events, effective warning to the engine-driver: and it was the duty of the foreman of plate-layers to direct when the work should be done, and also to direct effective signals to be given:—Held, that though he was under the general control of an inspector of the district, the inspector was not liable, but that the foreman was, assuming his negligence to have been a material and a substantial cause of the accident, even although there had also been negligence on the part of the engine-driver in not keeping a sufficient look-out. *Reg.* v. *Benge*, 4 F. & F. 504.

—— **Engine Set in Motion during Absence.**]—A party having the charge of a steam-engine, stopped it and went away; another party came and set it in motion, whereby a person was killed:—Held, that the party who went away was not the party by whose negligence the death was caused, and therefore he was not guilty of manslaughter. *Rex* v. *Hilton*, 2 Lewin, C. C. 214.

Where a man, appointed to superintend a steam-engine, employed in a colliery for the purpose of raising colliers from the pits, left the engine in the charge of an ignorant boy, who told him that he was unable to manage it, and

in the absence of an engineer a man was drawn up, who was killed from the want of skill in the boy to manage the engine :—Held, that this was manslaughter in the engineer. *Reg.* v. *Lowe*, 3 Car. & K. 123 ; 4 Cox, C. C. 449.

—— **Master or Servants.**]—B. was a person who made fireworks, contrary to 9 & 10 Will. 3, c. 7. He kept a quantity of combustibles at his house, for the purpose of his business, as a maker of fireworks ; and during his absence, through the negligence of his servants, a fire broke out amongst such combustibles, and a rocket becoming thereby ignited flew across a street, setting fire to a house opposite, caused the death of a person therein :—Held, that a conviction of manslaughter was wrong, as the death was not occasioned by the unlawful act of B., but by the negligence of his servants. *Reg.* v. *Bennett*, Bell, C. C. 1 ; 28 L. J., M. C. 27 ; 4 Jur. (N.S.) 1088 ; 7 W. R. 40 ; 8 Cox, C. C. 74.

—— **By Soldiers in the Exercise of their Profession.**]—A gun discharged in the ordinary and regular course of ball practice by an artilleryman in a garrison town, missed the mark, and killed a man who was lawfully passing near the spot in a boat, the place being a public one, and open to all her Majesty's subjects. The artilleryman who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the major-general :—Held, that the major-general was not guilty of manslaughter. *Reg.* v. *Hutchinson*, 9 Cox, C. C. 555. *But see* 3 Russ. C. & M. 189.

2. Reasonable Creature in Being.

Child Born Alive.]—To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which was born alive, the jury must be satisfied affirmatively that the whole body was brought alive into the world ; and it is not sufficient that the child has breathed in the progress of the birth. *Rex* v. *Poulton*, 5 Car. & P. 329. S. P., *Rex* v. *Enoch*, 5 Car. & P. 329.

A prisoner was charged with the murder of her new-born child, by cutting off its head :—Held, that in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state ; and that the fact of its having breathed is not a decisive proof that it was born alive, as it may have breathed, and yet died before birth. *Rex* v. *Sellis*, 7 Car. & P. 850.

On a charge of child-murder, it appeared that the child must have died before it had an independent circulation :—Held, that as the child had never had an independent circulation, the charge of murder could not be sustained. *Reg.* v. *Wright*, 9 Car. & P. 754.

Separation from Mother.]—If a child has been wholly produced from the body of its mother, and she wilfully, and of malice aforethought, strangles it while it is alive and has an independent circulation, this is murder, although the child is still attached to its mother by the umbilical cord. *Reg.* v. *Trilloe*, Car. & M. 650 ; 2 M. C. C. 260. S. P., *Rex* v. *Crutchley*, 7 Car. & P. 814 ; *Reg.* v. *Reeves*, 9 Car. & P. 25.

A child is born alive when, breathing and living by reason of breathing through its own lungs alone, it exists as a live child without deriving any of its living or power of living by or through any connection with its mother. *Reg.* v. *Handley*, 13 Cox, C. C. 79.

Child en ventre sa mère.]—An unskilful practitioner of midwifery wounded the head of a child before the child was perfectly born. The child was afterwards born alive, but subsequently died of this injury :—Held, manslaughter, although the child was en ventre sa mère at the time when the wound was given. *Rex* v. *Senior*, 1 M. C. C. 344 ; 1 Lewin, C. C. 183, n.

Child Born Earlier than Natural—Less Capable of Living.]—If a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder, and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. *Reg.* v. *West*, 2 Car. & K. 784 ; 2 Cox, C. C. 500.

Before Birth—No Necessary Precautions.]—A woman who knows she is to be confined, and who wilfully abstains from taking the necessary precautions to preserve the life of the child after its birth, in consequence of which the child dies, is not guilty of manslaughter. *Reg.* v. *Knights*, 2 F. & F. 46.

3. Malice, Express or Implied.

a. Generally.

Manslaughter is homicide, not under the influence of malice. *Rex* v. *Taylor*, 2 Lewin, C. C. 215.

If persons cover another with straw and set fire to it, intending to do him a serious injury, and he dies, it is murder, though they did not intend to kill him. But if they intended the act in sport, and merely to frighten him, it is manslaughter. *Rex* v. *Errington*, 2 Lewin, C. C. 217.

Drunkenness.]—To do an act with malice aforethought means to do a cruel act voluntarily ; and anybody who intentionally inflicts grievous bodily harm on another, intending to do bodily harm, is guilty of murder if he causes death. The intention of the party guilty of murder being an element of the crime itself, the fact that a man was intoxicated at the time he caused the death of another may be taken into consideration by the jury in considering whether he formed the intention necessary to constitute the crime of murder. *Reg.* v. *Doherty*, 16 Cox, C. C. 306.

Suicide.]—If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not ; and the person who furnished her with the poison for that purpose, will, if absent when she took it, be an accessory before the fact only. *Rex* v. *Russell*, 1 M. C. C. 356.

—— **Agreement to Commit.**]—If two persons mutually agree to commit suicide together, and

the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. *Reg.* v. *Alison*, 8 Car. & P. 418. S. P., *Reg.* v. *Jessop*, 16 Cox, C. C. 204.

If two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other. *Rex* v. *Dyson*, R. & R. 523.

But if it is uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Ib.*

Where two persons mutually agree to commit suicide together, and accordingly take poison or attempt to destroy themselves, and one of them survives, such survivor is guilty of murder. The fact that such survivor only pretended to agree to commit suicide or that he changed his mind does not affect his guilt. *Reg.* v. *Stormonth*, 61 J. P. 729.

b. By Poison or Operations.

What Skill required.]—A medical man is bound to use proper skill and caution in dealing with a poisonous drug or a dangerous instrument, and if he does not do so, and death ensues, he is guilty of manslaughter; alter, if it is want of skill arising from mere error of judgment. *Reg.* v. *Macleod*, 12 Cox, C. C. 534.

Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill; and is bound to treat his or her patients with care, attention, and assiduity; and if a person dies for want of either, the person is guilty of manslaughter. *Rex* v. *Spiller*, 5 Car. & P. 333. See *Rex* v. *Simpson*, 1 Lewin C. C. 172; *Rex* v. *Ferguson*, 1 Lewin C. C. 181.

If a person, bonâ fide and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person is a regular surgeon or not, nor whether he has had a regular medical education or not. *Rex* v. *Van Butchell*, 3 Car. & P. 629.

Gross Misconduct and Rashness.]—A person in the habit of acting as a man midwife, tearing away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by means of which the patient dies, is not indictable for manslaughter, unless he is guilty of criminal misconduct arising either from the grossest ignorance or from the most criminal inattention. *Rex* v. *Williamson*, 3 Car. & P. 635.

A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterised either by gross ignorance of his art, or by gross inattention to his patient's safety. *Rex* v. *St. John Long*, 4 Car. & P. 398.

Where a person, undertaking the cure of a disease (whether he has received a medical education or not), is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter. *Rex* v. *St. John Long*, 4 Car. & P. 423.

Where a person, grossly ignorant of medicine, administers a dangerous remedy to one labouring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter. *Rex* v. *Webb*, 1 M. & Rob. 405; 2 Lewin, C. C. 196.

If a medical man, though lawfully qualified to practise as such, causes the death of a person by the grossly unskilful, or the grossly incautious use of a dangerous instrument, he is guilty of manslaughter. *Reg.* v. *Spilling*, 2 M. & Rob. 107.

The application by an ignorant person of a corrosive sublimate which caused death, is evidence for the jury on an indictment for manslaughter, the question being, under all the circumstances, whether he acted with criminal inattention and carelessness. *Reg.* v. *Crook*, 1 F. & F. 521.

Where a person, not a regular practitioner, administers lobelia, a dangerous medicine, which produces death, the question for the jury is, under all the circumstances, whether he has acted so rashly and carelessly as to cause the death. *Reg.* v. *Crick*, 1 F. & F. 519.

An unskilled practitioner who ventures to prescribe dangerous medicines, of the use of which he is ignorant, shows culpable rashness, for which he will be responsible. *Reg.* v. *Markuss*, 4 F. & F. 356.

On an indictment for manslaughter against a medical man, for administering poison by mistake for some other drug, the prosecution is bound to show that the poison got into the mixture in consequence of his gross negligence, and it is not sufficient to show merely that the prisoner, who dispensed his own drugs, supplied a mixture which contained a large quantity of poison. The jury must be satisfied that there was such gross and culpable negligence as would show an evil mind. *Reg.* v. *Spencer*, 10 Cox, C. C. 525.

There must be a competent knowledge and care in dealing with a dangerous drug. If a person is ignorant of the nature of the drug he uses, or is guilty of gross want of care in the use of it, he will be criminally responsible for the consequences. *Reg.* v. *Chamberlain*, 10 Cox, C. C. 486.

A person, professing himself to be a herbalist, administered arsenical ointment to a woman having a tumour, of which she died. He gave her no caution or directions as to the use of it. The judge directed the jury, that if he administered the arsenic without knowing or taking the pains to find out what its effects would be; or if, knowing this, he gave it to the deceased to be used by her without giving her adequate directions as to its use, he would be guilty of culpable negligence, and therefore of manslaughter. *Ib.*

A mistake on the part of a chemist in putting a poisonous liniment into a medicine bottle, instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally, with fatal results, the mistake being made under circumstances which rather threw the prisoner off his guard, does not amount to such criminal negligence as will warrant a conviction for manslaughter. *Reg.* v. *Noakes*, 4 F. & F. 920.

Quantity of Poison Administered.]—A medical man who administered to his mother for some disease prussic acid, of which she almost imme-

diately died, is not guilty of manslaughter, it not appearing distinctly what the quantity was which he had administered, or what quantity would be too great to be administered with safety to life. *Reg.* v. *Bull*, 2 F. & F. 201.

Given for improper Purpose.]—A., at the instigation of a woman who was pregnant by him, and influenced by her threats of self-destruction if the means of procuring abortion were not supplied to her, procured some corrosive sublimate, and handed it to the woman, who took it and died from its effects. He was not present when the poison was taken by the woman. He was indicted for murder. The jury negatived the fact of his having administered the poison, or caused it to be taken by the woman, but said that he delivered it to her with the full knowledge of the purpose to which she intended to apply it:—Held, that he was not guilty of murder. *Reg.* v. *Fretwell*, L. & C. 161; 31 L. J., M. C. 145; 8 Jur. (N.S.) 466; 6 L. T. 333; 10 W. R. 345; 9 Cox, C. C. 152. *But see now* 24 & 25 Vict. c. 100, ss. 58, 59.

The prisoner was convicted of manslaughter. It appeared that he procured sulphate of potash, and gave it to his wife, intending her to take it for the purpose of procuring abortion, and that she, believing herself to be pregnant, although in reality she was not, took the sulphate of potash in his absence, and died from its effects:—Held, that the conviction was right. *Reg.* v. *Gaylor*, Dears. & B. 288; 7 Cox, C. C. 253.

c. By Fighting.

Duelling upon Provocation—Mere Presence, whether Sufficient.]—When, upon a previous agreement, and after there has been time for the blood to cool, two persons met with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty; and with respect to others shown to be present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence will not be sufficient; but if they sustain the principals, either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet, if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder. *Reg.* v. *Young*, 8 Car. & P. 644.

If one kills another in a deliberate duel, under provocation of charges against his character and conduct, however grievous, it is murder in him, and his second, and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensues thereon against the peace. *Rex* v. *Rice*, 3 East, 581. See *Rex* v. *Kinnear*, 2 B. & Ald. 462; *Rex* v. *Oneby*, 2 Str. 766.

Where two persons go out to fight a deliberate duel, and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned. *Reg.* v. *Cuddy*, 1 Car. & K. 210.

Excessive Force used.]—Where there had been mutual blows, and then upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter. *Rex* v. *Ayes*, R. & R. 166.

Death caused by up-and-down fighting is murder. *Rex* v. *Thorpe*, 1 Lewin, C. C. 171.

If two persons fight, and one overpowers the other, and knocks him down, and puts a rope round his neck and strangles him, this will be murder. *Rex* v. *Shaw*, 6 Car. & P. 372.

Sparring Match.]—There is nothing unlawful in sparring, unless, perhaps, the men fight until they are so weak that a dangerous fall is like to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter. *Reg.* v. *Young*, 10 Cox, C. C. 371.

Struggles in Anger.]—All struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. *Reg.* v. *Cunniff*, 9 Car. & P. 359.

Deadly Weapon used.]—If, after an interchange of blows on equal terms, one of the parties, on a sudden and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter. *Rex* v. *Anderson*, 3 Russ. C. & M. 63.

If, on any sudden quarrel, blows pass without any intention to kill or injure any one materially, and in the course of the scuffle, after the parties are heated by the contest, one kills the other with a deadly weapon, it is only manslaughter. *Rex* v. *Snow*, 1 Leach, C. C. 151; 1 East, 244. And see *Rex* v. *Taylor*, 5 Burr. 2792.

Use of Deadly Weapon intended from the first.]—But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, whom he kills with such weapon; or if at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and accordingly does so and kills the other party; the killing in both these cases will be murder. *Rex* v. *Whiteley*, 1 Lewin, C. C. 173.

If a person, being in possession of a deadly weapon, enters into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually uses it, and kills the other, it will be murder; but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he uses it to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be justifiable homicide. *Reg.* v. *Smith*, 8 Car. & P. 160.

If, before the conflict began, the party had drawn his knife in cool blood, in case death had

ensued, the offence would have been murder. *Rex* v. *Kessel*, 1 Car. & P. 437.

Deadly Weapon used after Running Away.]—If two persons quarrel and begin to fight on even terms, where one, finding himself not equal to his adversary, runs away, and being pursued, draws his knife, and when overtaken by his adversary, stabs him; if death ensues, this would be only manslaughter. *Ib.*

Deadly Weapon used after Feigned Reconciliation.]—If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and, on such renewal, uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. *Reg.* v. *Selten*, 11 Cox, C. C. 674.

But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other, having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter. *Ib.*

Death of Third Party on Interfering.]—A. was fighting with his brother; and, to prevent this, B. laid hold of A., and held him down upon a locker on board the barge in which they were, but struck no blow. A. stabbed B.:—Held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only. *Rex* v. *Bourne*, 5 Car. & P. 120.

d. Upon Provocation.

General Principles.]—The killing a person in an affray, by another who was in a violent heat and passion at the time, will not amount to murder, but manslaughter. *Rex* v. *Rankin*, R. & R. 43.

If a blow without provocation is wilfully inflicted, the law infers that it was done with malice aforethought, and if death ensues, the offender is guilty of murder, although the blow may have been given in a moment of passion. *Reg.* v. *Noon*, 6 Cox, C. C. 137.

Revenge Disproportionate.]—As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, when the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. *Rex* v. *Willoughby*, 1 East, P. C. 288.

Intention to Kill with Deadly Weapon.]—When a person has killed another with a deadly weapon, even upon sudden passion, the question as to the sufficiency of provocation to reduce the crime to manslaughter, is not merely whether there was passion in point of fact, but whether there was such provocation as might naturally kindle ungovernable passion in the mind of any ordinary and reasonable man. *Reg.* v. *Welsh*, 11 Cox, C. C. 336.

Where there is the intention to kill (as shown by the use of a deadly weapon and the infliction of a fatal blow in a mortal part), and there is absence of such serious provocation as might naturally kindle ungovernable passion in the mind of a reasonable man, the crime is murder. *Ib.*

If a person receives a blow, and immediately avenges it with any instrument he may happen to have in his hand, and death ensues, this will be only manslaughter, provided the fatal blow is to be attributed to the passion of anger arising from the previous provocation. *Rex* v. *Thomas*, 7 Car. & P. 817.

Where Provocation only Slight.]—It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon and death ensues, reduce the crime from murder to manslaughter. *Rex* v. *Lynch*, 5 Car. & P. 324.

The prisoner, having after a trifling and casual altercation, sustained several blows from the deceased (a stranger to him), instantly stabbed him with a clasp knife he had about him:—Held, that it was for the jury, whether or not the blow was struck in the heat of sudden passion, without previous malice, so as to reduce the offence to manslaughter. *Reg.* v. *Eagle*, 2 F. & F. 827.

Where one having had his pockets picked, seized the offender, and being encouraged by a concourse of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned:—Held, that it only amounted to manslaughter. *Rex* v. *Fray*, 1 East, P. C. 236.

Such provocation must be something serious, as a blow; and mere words, or gestures, not accompanied with anything of such a serious character, will not in point of law, be sufficient to reduce the crime to manslaughter. *Reg.* v. *Welsh*, 11 Cox, C. C. 336.

The general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter; but special circumstances attending such a provocation might be held to take the case out of the general rule. *Reg.* v. *Rothwell*, 12 Cox, C. C. 145.

—— **Insulting Words in Addition.**] — An assault, too slight in itself to be a sufficient provocation to reduce murder to manslaughter, may become sufficient for that purpose when coupled with words of great insult. *Reg.* v. *Smith*, 4 F. & F. 1066. S. P., *Reg.* v. *Sherwood*, 1 Car. & K. 556.

Killing Wife caught in Adultery.]—If a man finds his wife in the act of committing adultery, and kills her, this will be but manslaughter only; but if a man takes away the life of a woman, even his own wife, because he suspects, however strongly, that she has been engaged in some illicit intrigue, this will be murder. *Reg.* v. *Kelley*, 2 Car. & K. 814.

If a man kills his wife, or the adulterer, in the act of adultery, it is manslaughter, and not murder. *Rex* v. *Pearson*, 2 Lewin, C. C. 216.

Wife's Father Killing Husband.]—A father struck a fatal blow at the husband of his daughter under the impulse of strong resentment, caused by seeing his daughter violently assaulted by her husband, although not in a manner to

endanger her life :—Held, that this might be a ground upon which the offence of murder might be reduced to that of manslaughter. *Reg.* v. *Harrington*, 10 Cox, C. C. 370.

Killing Person committing Offence on Son.]—If a father sees a person in the act of committing an unnatural offence with his son, and instantly kills him, it seems that it would be only manslaughter, and that of the lowest degree; but if he only hears of it, and goes in search of the person, and meeting him, strikes him with a stick, and afterwards stabs him with a knife and kills him, in point of law it will be murder. *Reg.* v. *Fisher*, 8 Car. & P. 182.

Where only a Colourable Excuse.]—If A. has formed a deliberate design to kill B., and after this they meet and have a quarrel, and many blows pass, and A. kills B., this will be murder, if the jury is of opinion that the death was in consequence of previous malice, and not of the sudden provocation. *Reg.* v. *Kirkham*, 8 Car. & P. 115.

Even blows previously received will not extenuate homicide upon deliberate malice and revenge; especially where it is to be collected from the circumstances that the provocation was sought for the purpose of colouring the revenge. *Rex* v. *Mason*, 1 East, P. C. 239.

Where Passion has Time to Cool.]—In a case of death by stabbing, if the jury is of opinion that the wound was inflicted by the prisoner while smarting under a provocation, so recent and so strong that he may be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there has been, after provocation, sufficient time for the blood to cool, for reason to resume its seat, before the mortal wound was given, the offence will amount to murder; and if the prisoner displays thought, contrivance and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion. *Rex* v. *Hayward*, 6 Car. & P. 157. See also *Reg.* v. *Fisher*, supra,

—— **Questions for Court and Jury.**]—In a case of killing, whether the blood has had time to cool or not, is a question for the court, and not for the jury; but it is for the jury to find what length of time elapsed between the provocation received and the act done. *Reg.* v. *Fisher*, 8 Car. & P. 182.

No Evidence by whom Blow Struck.]—When two or more, one of whom has received the provocation of a blow, are charged with murder, and one of them has received a provocation (as a blow) which would reduce homicide to manslaughter, and it cannot be proved which of them inflicted the fatal blow, neither of them can be convicted of murder, without a proof of a common design to inflict the homicidal act; nor of manslaughter, without proof of a common design to inflict unlawful violence. *Reg.* v. *Turner*, 4 F. & F. 339.

e. By Correction.

Excessive, by Person permitted to Correct Moderately.]—A schoolmaster who, on the second day of a boy's return to school, wrote to his parent, proposing to beat him severely, in order to subdue his alleged obstinacy, and on receiving the father's reply, assenting thereto, beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, is guilty of manslaughter. *Reg.* v. *Hopley*, 2 F. & F. 202.

If a father beats his son for theft so severely with a rope that he dies, it is only manslaughter. *Anon.*, 1 East, P. C. 261.

Where a person in loco parentis inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder, but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required. *Rex* v. *Cheeseman*, 7 Car. & P. 454.

In a case of manslaughter against the captain and the mate of a vessel for accelerating the death of a seaman, really in ill health, but who, they alleged, they believed to be a skulker, the question will be, in determining whether it is a slight or an aggravated case, whether the phenomena of the death were such as would excite the attention of reasonable and humane men; and in such a case, if the deceased is taken on board after he was discharged from a hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital, as a person in a fit state of health to perform the duties of a seaman. *Reg.* v. *Leggett*, 8 Car. & P. 191.

Where a butcher employed the deceased, a shepherd boy, to tend some sheep which were penned, and he negligently suffered some of them to escape through the hurdles; and the butcher, upon seeing it, ran towards the boy, and, taking up a stake, which was lying on the ground, threw it at him, and inflicted an injury of which he died :—Held, that under the circumstances it was a question for the jury whether it was murder or manslaughter; and they found the latter. *Rex* v. *Wiggs*, 1 Leach, C. C. 379.

Infant incapable of appreciating Correction.]—An infant, two years of age, is not capable of appreciating correction: a father, therefore, is not justified in correcting it, and if the infant dies owing to such correction the father is guilty of manslaughter. *Reg.* v. *Griffin*, 11 Cox, C. C. 402.

f. In Defence of Life and Property.

Safety of Ship.]—If a ship's sentinel shoots a man because he persists in approaching the ship when he has been ordered not to do so, it will be murder unless such an act was necessary for the ship's safety. *Rex* v. *Thomas*, 3 Russ. C. & M. 94.

Trespass to Garden.]—A person set to watch a yard or a garden is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's henroost; but if, from the conduct of the party, he has fair grounds for believing his own life to be in actual and immediate danger, he is justified

in shooting him. *Rex* v. *Scully*, 1 Car. & P. 319; 28 R. R. 780.

Killing in Self-Defence.]—The use of such a weapon as a gun even against an unarmed man, may be excused or justified, not only by necessity for defence against death or serious injury, but the reasonable apprehension of it. *Reg.* v. *Weston*, 14 Cox, C. C. 346.

The killing a man on the highway is not justifiable homicide, unless there was an intention on the part of the person killed to rob or murder, or do some dreadful bodily injury to the person killing; or, in other words, the conduct of the party must be such as to render it necessary on the part of the party killing to do the act in self-defence. *Reg.* v. *Bull*, 9 Car. & P. 22.

The right of self-defence does not justify counter-blows struck with a desire to fight. *Reg.* v. *Knock*, 14 Cox, C. C. 1. And see, *Rex* v. *Scully*, supra.

Before a person charged with manslaughter can avail himself of the defence that he acted in defence of his life he must satisfy the jury that that defence was necessary; that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. In repelling an attack upon property, for manslaughter to be justifiable the prisoner must show that the infliction of death was to prevent no ordinary crime, but a crime of a serious and felonious nature, intended to be carried out by force. *Reg.* v. *Symondson*, 60 J. P. 645.

Life of another Person.]—Under circumstances which might have induced the belief that a man was cutting the throat of his wife, their son shot and killed his father. On the trial of the son for murder:—Held, that if the accused had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable. *Reg.* v. *Rose*, 15 Cox, C. C. 540.

Extreme Necessity—Hunger.]—A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. *Reg.* v. *Dudley*, 54 L. J., M. C. 32; 14 Q. B. D. 273, 560; 52 L. T. 107; 33 W. R. 347; 15 Cox, C. C. 624; 49 J. P. 69—C. C. R.

g. Killing without Intention whilst doing another Act.

i. *Blow intended for Another.*

If, on a sudden quarrel between two parties of keelmen and soldiers, a blow intended for an individual of one party would, if death ensued, have amounted only to manslaughter; it will be manslaughter though by accident it kills another. *Rex* v. *Brown*, 1 Leach, C. C. 148; 1 East, P. C. 231, 245, 274.

Throwing Poker at Child.]—Where a mother, being angry with one of her children, took up a small piece of iron used as a poker, and on his running to the door of the room, which was open, threw it after him, and hit another child who happened to be entering the room at the moment, in consequence of which he died:—Held, to be manslaughter, although it appeared the mother had no intention of hitting the child with whom she was angry, and only intended to frighten him. *Rex* v. *Conner*, 7 Car. & P. 438.

ii. *Negligence by Omission or Commission.*

General Rule.]—Generally, it may be laid down, that, where one by his negligence has contributed to the death of another, he is guilty of manslaughter. *Reg.* v. *Swindall*, 2 Car. & K. 230; 2 Cox, C. C. 141.

That which constitutes murder when by design, and of malice prepense, constitutes manslaughter when arising from culpable negligence. *Reg.* v. *Hughes*, Dears. & B. 248; 26 L. J., M. C. 202; 3 Jur. (N.S.) 696; 5 W. R. 732; 7 Cox, C. C. 301.

Manslaughter by negligence occurs when a person in doing anything dangerous in itself, or having charge of anything dangerous in itself, conducts himself in regard to it in such a careless manner as to be guilty of culpable negligence. *Reg.* v. *Doherty*, 16 Cox, C. C. 306.

To render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence. *Reg.* v. *Finney*, 12 Cox, C. C. 625.

An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter. *Reg.* v. *Lowe*, 3 Car. & K. 123; 4 Cox, C. C. 451.

Conduct and Management of Steam Engines and Railway Trains.]—Where a man, appointed to superintend a steam-engine, employed in a colliery for the purpose of raising colliers from the pits left the engine in the charge of an ignorant boy, who told him that he was unable to manage it, and in the absence of the engineer a man was drawn up, who was killed from the want of skill in the boy to manage the engine:—Held, that this was manslaughter in the engineer. *Reg.* v. *Lowe*, 3 Car. & K. 123; 4 Cox, C. C. 451.

An explosion occurred on board a steamer, whereby one of three persons in charge of her was killed. The circumstance that the valves were out of order is not sufficient to make out, against either or both of them (one being the master and the other engineer), a case of such culpable negligence as would sustain a charge of manslaughter. *Reg.* v. *Gregory*, 2 F. & F. 153.

On an indictment against an engine-driver and a fireman of a railway train, for the manslaughter of persons killed while travelling in a preceding train, by the prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger, so as to make it mean not "stop" but "proceed with caution;" that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution; that their train was being driven at an excessive rate of speed; and that then they did not slacken im-

mediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train they did their best to stop, but without effect :—Held, first, that the special rules, so far as not consistent with the general rules, superseded them. *Reg.* v. *Trainer*, 4 F. & F. 105.

Held, secondly, that if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible. *Ib.*

Held, thirdly, that the fireman, being bound to obey the directions of the engine driver, and, so far as appeared, having done so, there was no case against him. *Ib.*

Upon a trial for manslaughter, it appeared that the prisoner was the driver and the deceased was the fireman of a steam-engine on a railway, and that the death of the latter was caused by the engine coming into collision with a train standing on the same line of rails, owing to a neglect on the part of the person in charge of the engine to keep a sufficient look out. There was evidence that it was the duty of the prisoner, or of the deceased, to keep the look out, but there was no evidence as to which of the two was charged with the duty at the time of the collision :—Held, that the prisoner was entitled to an acquittal. *Reg.* v. *Gray*, 4 F. & F. 1098.

When a collision occurs on a railway, and death is caused, the person responsible is the man actually in charge of the engine, and whose negligence caused the accident at the time of the collision. *Reg.* v. *Birchall*, 4 F. & F. 1087.

The prisoner was indicted for the manslaughter of a passenger in a train, of which he was in charge as guard. The prisoner had directed the train to be divided on an incline, whereby a portion of the train ran backwards and collided with another train, causing the death of many of the passengers :—Held, that in order to convict the prisoner the jury must find him guilty of gross negligence or recklessly negligent conduct, and that mere intellectual defect or mistake of judgment, without wilful disobedience as to a traffic regulation, would not create criminal liability. *Reg.* v. *Elliott*, 16 Cox, C. C. 710.

Navigating Vessels.]—Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct. *Reg.* v. *Taylor*, 9 Car. & P. 673.

To make the captain of a steam vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain ; and a mere omission on his part, in not doing the whole of his duty, is insufficient. *Rex* v. *Green*, 7 Car. & P. 156.

But if there is sufficient light, and the captain of a steamer is either at the helm or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *Ib.*

The captain and pilot of a steam boat were both indicted for the manslaughter of a person who was on board a smack, by running the smack down. The running down was attributed, on the part of the prosecution, to improper steerage of the steam boat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved that there was a man on the look-out when the vessel started, about an hour previously. According to one witness, the captain and pilot were both on the bridge between the paddle-boxes ; according to another, the pilot was alone on the paddle box :—Held, that there was not such personal misconduct on the part of either as to make them guilty of felony. *Rex* v. *Allen*, 7 Car. & P. 153.

Where an English pilot on board a foreign vessel by his own negligence fails to make the foreign sailors understand his directions, he will be guilty of manslaughter if a boat is run down by the vessel and life is in consequence lost. *Reg.* v. *Spence*, 1 Cox, C. C. 352.

Persons on board a ship are necessarily subject to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them. *Reg.* v. *Leggett*, 8 Car. & P. 191.

Boat Upsetting.]—A., being on board a ship, and B. in a boat alongside, they had a dispute about the payment for some goods, both being intoxicated. A., to get rid of B., pushed away the boat with his foot ; B. reaching out, to lay hold of a barge, to prevent his boat from drifting away, overbalanced himself, and fell into the water and was drowned. A. was charged with manslaughter :—Held, that these facts did not constitute that offence. *Rex* v. *Waters*, 6 Car. & P. 328.

Where a man was drowned by the upsetting of a boat the waterman in charge of it would be guilty if he was grossly careless in managing the boat or in taking on board in the first instance a greater number of passengers than it was capable of carrying safely. *Reg.* v. *Williamson*, 1 Cox, C. C. 97.

Maker of Imperfect Cannon.]—An iron-founder being employed by an oilman and a dealer in marine stores to make some cannon, to be used on a day of rejoicing, and afterwards to be put into a sailing boat ; after one of them had burst, and been returned to him in consequence, sent it back in so imperfect a state, that on being fired it burst again, and killed a third person :—Held, that the maker was guilty of manslaughter. *Rex* v. *Carr*, 8 Car. & P. 163, n.

Causing Mine to be Ventilated.]—If it is the duty of a person, as a ground bailiff of a mine, to cause the mine to be properly ventilated by causing air-headings to be put up where necessary, and by reason of his omission in this respect another is killed by an explosion of fire-damp, such person is guilty of manslaughter, if by such his omission he was guilty of a want of ordinary and reasonable precaution, and if it was his plain and ordinary duty to have caused an air-heading to have been made, and a man using reasonable diligence would have done it. *Reg.* v. *Haines*, 2 Car. & K. 368.

Causing Cart to Upset.]—A lad, as a frolic, without any intention to do any harm to any one, took the trap stick out of the front part of a cart, in consequence of which it was upset, and the carman who was in it, putting in a sack of potatoes, was pitched backwards on the stones

and killed :—Held, that the lad was guilty of manslaughter. *Rex* v. *Sullivan*, 7 Car. & P. 641.

Throwing Box into Sea.]—The mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case, apart from the question of criminal negligence. Therefore the mere fact of a person wrongfully taking up a box from a refreshment stall on a sea pier, and wantonly throwing it into the sea, and thereby unintentionally causing the death of another bathing in the sea, is not per se, and apart from the question of negligence, sufficient to constitute the offence of manslaughter. *Reg.* v. *Franklin*, 15 Cox, C. C. 163.

Incautious Working in Shaft.]—The deceased was with others employed in walling the inside of a shaft. It was the duty of the prisoner to place a stage over the mouth of the shaft, and the death of the deceased was occasioned by the negligent omission on his part to perform such duty. He was convicted of manslaughter :—Held, that the conviction was right. *Reg.* v. *Hughes*, Dears. & B. 248 ; 26 L. J., M. C. 202 ; 3 Jur. (N.S.) 696 ; 5 W. R. 732 ; 7 Cox, C. C. 301.

Letting Loose Vicious Animals.]—A man who having a horse, which he knows to be vicious and dangerous, turns it out upon a common, through which, to his knowledge, pass much-frequented public footpaths, which are not fenced off, is guilty of culpable negligence, and if the horse kills anyone passing over the common, he may be convicted of manslaughter ; nor is it any defence that the deceased had strayed from the way, where he is still so near it that the jury cannot say whether he is on or off the path. *Reg.* v. *Dant*, L. & C. 567 ; 34 L. J., M. C. 119 ; 11 Jur. (N.S.) 549 ; 12 L. T. 396 ; 13 W. R. 663 ; 10 Cox, C. C. 102.

Non-repair of Roads.]—Trustees appointed under a local act for the purpose of repairing roads in a district, with power to contract for executing such repairs, are not chargeable with manslaughter if a person using one of such roads is accidentally killed in consequence of the roads being out of repair through neglect of the trustees to contract for repairing it. *Reg.* v. *Pocock*, 17 Q. B. 34 ; 3 Cox, C. C. 172.

Servant not Watching Tramway.]—The private servant of the owner of a tramway crossing a public road was entrusted to watch it : while he was absent from his duty an accident happened, and a person was killed. The private act did not require the owner to watch the tramway :—Held, that there was no duty between the owner and the public, and, therefore, his servant was not guilty of negligence, so as to make him guilty of manslaughter. *Reg.* v. *Smith*, 11 Cox, C. C. 210.

Exposure to Cold.]—A person was indicted for manslaughter. The evidence was that he struck the deceased twice with a heavy stick, that he afterwards left him asleep by the side of a small fire in a country lane during the whole of a frosty night in the month of January, and the next morning, finding him just alive, put him under some straw in a barn, where his body was found some months afterwards. The jury was directed that if death resulted from the beating or from the exposure during the night in question, such exposure being the result of criminal negligence, or from the prisoner leaving the boy under the straw ill, but not dead, the prisoner was guilty of manslaughter. *Reg.* v. *Martin*, 11 Cox, C. C. 136.

Driving Carriages or Horses.]—If a person is driving a cart at an unusually rapid pace, and drives over another and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. *Rex* v. *Walker*, 1 Car. & P. 320.

The fact that streets are usually crowded from any public procession, or other cause, instead of excusing a driver when proceeding at his ordinary pace, and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally answerable for any accidents ensuing from driving at a rate, and with those precautions which he might have ordinarily observed. *Reg.* v. *Murray*, 5 Cox, C. C. 509.

A foot passenger walking by lamplight in the carriage road along a public highway, the owner of a cart, who was proved to be near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot passenger and killed him :—Held, that he was guilty of such carelessness as amounted to the crime of manslaughter. *Rex* v. *Grout*, 6 Car. & P. 629.

If the driver of a carriage is racing with another carriage, and, from being unable to pull up his horses in time, the first-mentioned carriage is upset, and a person thrown off it and killed, this is manslaughter in the driver of the carriage. *Rex* v. *Timmins*, 7 Car. & P. 440.

If A. and B. are riding fast along a highway, as if racing, and A. rides by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A. *Rex* v. *Mastin*, 6 Car. & P. 396.

If each of two persons is driving a cart at a dangerous and a furious rate, and they are inviting each other to drive at a dangerous and a furious rate, along a turnpike road, and one of the carts runs over a man and kills him, each of the two persons is guilty of manslaughter. *Reg.* v. *Swindall*, 2 Car. & K. 230 ; 2 Cox, C. C. 141.

A driver of a spring cart, standing in the cart and driving along a public road without reins, but not driving furiously, when a child runs across the road before the cart, and is killed by the wheel passing over it, is not guilty of manslaughter, unless he could have saved the life of the child if he had been driving with the reins in his hand. *Reg.* v. *Dalloway*, 2 Cox, C. C. 273.

If the driver of a conveyance uses all reasonable care and diligence, and an accident happens through some chance which he could not foresee or avoid, he is not to be held liable for the results of such accident. *Reg.* v. *Murray*, 5 Cox, C. C. 509.

If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge, and if, by culpably negligent driving, he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of

manslaughter if the deceased himself interfered in the management of the horse, and thereby assisted in bringing about an accident. Even if the doctrine of contributory negligence applies to criminal cases, yet there is no contributory negligence on the part of anyone in merely getting into a vehicle and allowing himself to be driven, although the driver be perceptibly drunk. *Reg.* v. *Jones*, 22 L. T. 217; 11 Cox, C. C. 544.

By Deadly Weapons.]—When a person fires at another a firearm knowing it to be loaded, and therefore intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and if in such case the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is manslaughter. *Reg.* v. *Campbell*, 11 Cox, C. C. 323.

One who points a gun at another without previously examining whether it is loaded or not, if the weapon should accidentally go off and kill him towards whom it is pointed, is guilty of manslaughter. *Reg.* v. *Jones*, 12 Cox, C. C. 628.

If there is no legal excuse for using a gun, but nevertheless it is resorted to, and is fired even accidentally, it is manslaughter, and the jury having found that there was no necessity, but that the gun, being levelled at the deceased with no intention of discharging it, went off by accident:—Held, that the prisoner was guilty of manslaughter. *Reg.* v. *Weston*, 14 Cox, C. C. 346.

Where A., having a right to the possession of a gun which was in the hands of the deceased, and which he knew to be loaded, attempted to take it away by force, and in the struggle which ensued the gun went off accidentally and caused the death of the deceased:—Held, that as the death was caused by the discharge of the gun, which was the result of the unlawful act of A., he was guilty of manslaughter. *Reg.* v. *Archer*, 1 F. & F. 361.

Where a gamekeeper tried to arrest a man whom he found poaching, and a gun which the poacher had went off and shot the keeper:—Held, that, even although the gun went off accidentally in the course of the scuffle with the keeper, he having a right to take the gun, it was manslaughter in the man who caused it. *Reg.* v. *Skeet*, 4 F. & F. 931.

A., B. and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one, of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yards from the firing point. A., B. and C. were all found guilty by a jury of manslaughter:—Held, that A., B. and C. had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter. *Reg.* v. *Salmon*, 50 L. J., M. C. 25; 6 Q. B. D. 79; 43 L. T. 573; 29 W. R. 246; 14 Cox, C. C. 494; 45 J. P. 270.

Negligence of Others as well as of Prisoner.]—Although it is manslaughter where the death was the result of the joint negligence of the prisoner and others; yet it must have been the direct result, wholly or in part, of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other person has intervened between his act or omission and the fatal result. *Reg.* v. *Ledger*, 2 F. & F. 857.

It is no defence in a case of manslaughter that the death of the deceased was caused by the negligence of others as well as by that of the prisoner; for if the death of the deceased is caused partly by the negligence of the prisoner and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter. *Reg.* v. *Haines*, 2 Car. & K. 368.

Contributory Negligence of Deceased no Defence.]—Wherever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appears that the deceased had materially contributed to his death by his own negligence. *Reg.* v. *Longbottom*, 3 Cox, C. C. 439.

If a person is driving a cart at a very rapid pace and kills a man, he is guilty of manslaughter though he called to deceased to get out of the way, and the deceased might have done so, if he had not been in a state of intoxication. *Rex* v. *Walker*, 1 Car. & P. 320.

It is no ground of defence that the death was partly caused by the negligence of the deceased himself or that he was either deaf or dumb at the time. *Reg.* v. *Swindall*, 2 Car. & K. 230; 2 Cox, C. C. 141.

Contributory negligence is not an answer to a criminal charge as it is to a civil action. *Reg.* v. *Kew*, 12 Cox, C. C. 355.

If a person undertakes to drive another and drives so unskilfully and negligently as to cause death, he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the horse, and thereby assisted in bringing about an accident. *Reg.* v. *Jones*, 22 L. T. 217; 11 Cox, C. C. 544.

In one case it was held that a man was not criminally responsible for the death of another party caused by his negligence, where he would not have been civilly liable in an action at the suit of the party injured, if the injuries sustained had fallen short of causing his death. *Reg.* v. *Birchall*, 4 F. & F. 1087.

h. By Persons having Charge of Helpless Beings.

Must not be Guilty of Gross Negligence.]—A grown-up person who chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, is bound to execute that charge without wicked negligence; and if such person, by wicked negligence, lets the helpless creature die, that person is guilty of manslaughter. *Reg.* v. *Nicholls*, 13 Cox, C. C. 75.

Mere negligence is not enough; there must be negligence so great as to satisfy the jury that the person had a wicked mind, in the sense of being reckless and careless whether death occurred or not. *Ib.*

Not procuring Assistance.]—On the trial of

an indictment against a woman for the manslaughter of her new-born child, the evidence went to prove that the child had dropped from her whilst she was on the privy, and that it had been smothered in the soil:—Held, that if the jury was of opinion that after it had been born the mother had the power of procuring such assistance as might have saved the child's life, and she neglected to procure it, she was guilty of manslaughter. *Reg.* v. *Middleship*, 5 Cox, C. C. 275.

On an indictment against a woman for the wilful murder of her new-born child, she is guilty of murder if either before or after the birth of the child she makes up her mind that it shall die, and the child being born alive, she, with the intent that it shall die, leaves it to die, and it does die in consequence. Or again, she is guilty of murder, if without intending murder she resolves to conceal the birth of the child by methods which will probably end in its death, and which being carried out do end in its death. *Reg.* v. *Handley*, 13 Cox, C. C. 79.

She is guilty of manslaughter if, without having made up her mind that the child shall die, she determines to be alone at the birth, for the purpose of temporary concealment, and the child afterwards dies by reason of her wicked negligence. *Ib.*

Correction.]—A father is not justified in correcting an infant of two years of age, and if he does so and the infant dies therefrom, he is guilty of manslaughter. *Reg.* v. *Griffin*, 11 Cox, C. C. 402.

Giving Spirituous Liquors.]—A party causing the death of a child, by giving it spirituous liquors in a quantity quite unfit for its tender age, is guilty of manslaughter. *Rex* v. *Martin*, 3 Car. & P. 211.

Exposure of Children.]—A. was convicted of the manslaughter of an infant female child, on an indictment which stated the death to have been caused by exposure, whereby the child became mortally chilled, frozen, and benumbed:—Held, that as the death was attributable to an act of misfeasance, it was necessarily implied that the child was of such tender age and feebleness as to be incompetent to take care of herself. *Reg.* v. *Waters*, T. & M. 57; 1 Den. C. C. 356: 2 Car. & K. 864: 18 L. J., M. C. 53; 13 Jur. 133; 3 Cox, C. C. 300.

If a person does an act towards another who is helpless, which must necessarily lead to the death of that other, the crime amounts to murder; but if the circumstances are such that the person could not have been aware that the result would be death; that would reduce the crime to manslaughter, provided that the death was occasioned by an unlawful act, but not such an act as showed a malicious mind. *Reg.* v. *Walters*, Car. & M. 164.

If a woman leaves her child, a young infant, at a gentleman's door, or other place where it is likely to be found and taken care of, and the child dies, it will be manslaughter only: but if the child is left in a remote place, where it is not likely to be found, e. g. on a barren heath, and the death of the child ensues, it will be murder. *Ib.*

Not Providing Medical Aid.]—M. was convicted of the manslaughter of his son, a child of tender years. The child died of confluent smallpox, and the prisoner, though able to do so, did not, owing to certain religious views he held, employ any medical practitioner, nor afford to the child during its illness any medical aid or attendance. It was proved that proper medical aid and attendance might have saved or prolonged the child's life, and would have increased its chance of recovery, but that it might have been of no avail; and there was no positive evidence that the death was caused or accelerated by the neglect to provide medical aid or attendance:—Held, that under the above circumstances the conviction could not be sustained. *Reg.* v. *Morby*, 31 L. J., M. C. 85; 8 Q. B. D. 571; 46 L. T. 288; 30 W. R. 613; 15 Cox, C. C. 35; 46 J. P. 422.

By 31 & 32 Vict. c. 122, s. 37, when any parent shall wilfully neglect to provide medical aid for his child, being in his custody and under the age of fourteen years, whereby the health of such child shall be seriously injured, he is guilty of an offence punishable summarily before justices. Since that statute, if from a conscientious religious conviction that in answer to prayer God would heal the sick, and in obedience to the tenets of a sect called the Peculiar People, and not from any intention to avoid the performance of his duty to his child, or to break the law, the parent of a sick child, being one of such sect, while furnishing it with all necessary food and nourishment, refuses to call in medical aid, though well able to do so, and the child, in the opinion of the jury, dies from not having such medical aid, it is manslaughter. *Reg.* v. *Downes*, 45 L. J., M. C. 8; 1 Q. B. D. 8; 33 L. T. 675; 25 W. R. 278; 13 Cox, C. C. 111.

Where, from a conscientious religious conviction that God would heal the sick, and not from any intention to avoid the performance of their duty, the parents of a sick child refuse to call in medical assistance, though well able to do so, and the child consequently dies, it is not culpable homicide. *Reg.* v. *Wagstaffe*, 10 Cox, C. C. 530.

Not Providing Food and Necessaries.]—It is a misdemeanour to refuse or neglect to provide sufficient food or other necessaries for any infant of tender years, unable to provide for and take care of itself (whether such infant is a child, an apprentice, or a servant whom the party is obliged by duty or contract to provide for), so as thereby to injure his health. *Rex* v. *Friend*, R. & R. 20. And see *Rex* v. *Squire*, 3 Russ. C. & M. 13.

A parent who wilfully withholds necessary food from his child, with the wilful determination by such withholding to cause the death of the child, is guilty of murder if the child dies. *Reg.* v. *Conde*, 10 Cox, C. C. 547.

A parent who has the means to supply necessaries, but who negligently, though not wilfully, withholds from a child food, which, if administered, would sustain its life, and the child consequently dies, is guilty of manslaughter. *Ib.*

A single woman, the mother of an infant child, was indicted for neglecting to provide it with sufficient food, the indictment alleging that she was able, and had the means so to do. There was no evidence of the actual possession of means by the mother; but it was proved that she could have applied to the relieving officer of the union, and that if she had so applied, she would have been entitled to and would have received relief

adequate to the due support and maintenance of herself and child:—Held, that the allegation in the indictment was not supported by this evidence. *Reg.* v. *Chandler*, Dears. C. C. 453; 3 C. L. R. 680; 24 L. J., M. C. 109; 1 Jur. (N.S.) 429; 3 W. R. 404; 6 Cox, C. C. 519.

If parents have not the means of providing proper food and nourishment for their infant children who are incapable of taking care of themselves, it is their duty to apply for the assistance provided by means of the poor laws. *Reg.* v. *Mabbett*, 5 Cox, C. C. 339.

A married woman who, having a child under such circumstances, wilfully neglects for several days going to the union for the purpose of getting support for it, she knowing that such neglect is likely to cause the child's death, is guilty of manslaughter. *Ib.*

Where any person undertaking the duty of supplying an infant with proper food and clothing, and furnished with the means of discharging that duty properly, wilfully neglects to do so, with an intention to cause the death of the child, or to do it some grievous injury, and the child dies in consequence of such neglect, such person is guilty of murder. Where the neglect is culpable only, and not malicious, such person is guilty of manslaughter. Where a parent supplies sufficient food and clothing to another for the purpose of administering to his child, and that other person wilfully withholds it from the child, and the parent is conscious that it is so withheld, and does not interfere, and the child dies for want of proper food and clothing, the parent is guilty of manslaughter. *Reg.* v. *Bubb*, 4 Cox, C. C. 457.

A married woman cannot be convicted of the murder of her illegitimate child three years old, by omitting to supply it with proper food, unless it is shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. *Rex* v. *Saunders*, 7 Car. & P. 277.

A count charged a married woman with the murder of her illegitimate child of three years old, by omitting to supply it with sufficient food, and also by beating; it was not shown that her husband had supplied her with food to give to the child:—Held, that this count could not be supported. *Ib.*

An indictment alleged in a first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child, she being able and having the means to do so. The second count charged that she unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so. The jury found a verdict of guilty, on the ground that if she had applied (to the guardians) for relief she would have had it:—Held, that neither count was proved, as it was not enough that she could have obtained the food on application to the guardians. *Reg.* v. *Rugg*, 24 L. T. 192; 12 Cox, C. C. 16—C. C. R.

An indictment against a woman for manslaughter, in neglecting to supply an infant of tender age with sufficient food, is bad, if it does not state a duty to supply the child with food; but, if the indictment charges that the person not supplied with food was imprisoned by the party accused, that sufficiently shows the duty to supply food. *Reg.* v. *Edwards*, 8 Car. & P. 611.

An indictment charging the prisoner with the wilful murder of her child by exposure and neglect to supply due care and necessaries, must allege that it was the duty of the prisoner to supply such care and necessaries. *Reg.* v. *Pinhorn*, 1 Cox, C. C. 70.

Wife Living Apart from Husband.]—Where a man and his wife are living apart by mutual consent, he granting her a fixed allowance, which is regularly paid, he is not primâ facie bound to supply her with shelter; but if he is made acquainted with the fact that she is without shelter, and refuses to provide her with it, in consequence of which her death ensues, semble, that he is guilty of manslaughter. *Reg.* v. *Plummer*, 1 Car. & K. 600; 8 Jur. 921.

Duty of Mother to procure Midwife for Daughter.]—An unmarried woman, eighteen years of age, who usually supported herself by her own labour, being about to be confined, returned to the house of her stepfather and her mother. She was taken in labour (the stepfather being absent at his work), and, in consequence of the mother's neglect to use ordinary diligence in procuring the assistance of a midwife, the daughter died in her confinement. There was no proof that the mother had any means of paying for the services of a midwife:—Held, that no legal duty was cast upon the mother to procure a midwife, and therefore that she could not be convicted of the manslaughter of her daughter. *Reg.* v. *Shepherd*, L. & C. 147; 31 L. J., M. C. 102; 8 Jur. (N.S.) 418; 5 L. T. 687; 10 W. R. 297; 9 Cox, C. C. 123.

Neglect by Master.]—If a master, by premeditated negligence or harsh usage, causes the death of his apprentice, it is murder. *Rex* v. *Self*, 1 Leach, C. C. 137; 1 East, P. C. 226.

Where a master culpably neglects to supply proper and sufficient food and lodging to a servant during a time when the servant is reduced to and in such an enfeebled state of body and mind as to be helpless, and unable to take care of himself, or is under the dominion and restraint of the master, and unable to withdraw himself from his control, and the servant's death is caused or accelerated by such neglect, the master is guilty of manslaughter. *Reg.* v. *Smith*, L. & C. 607; 34 L. J., M. C. 153; 11 Jur. (N.S.) 695; 12 L. T. 608; 13 W. R. 816; 10 Cox, C. C. 82.

Care of Aged Persons.]—On an indictment for the murder of an aged and infirm woman, by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines, and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty; if the jury thinks that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. *Reg.* v. *Marriott*, 8 Car. & P. 425.

The prisoner, a woman of full age, was indicted for manslaughter. She lived and was supported by the deceased, her aunt, who was seventy-three. No one else lived with them. For some days before her death the deceased was incapable through illness of moving about or attending to her wants or procuring assistance;

the prisoner during that time continued to live in the house, and to receive and use articles of food which were brought to the house; but she failed to supply the wants of the deceased, either as to food or the obtaining of medical or nursing attendance, or to make known the condition of the deceased to her neighbours. The death of the deceased was substantially accelerated by neglect, want of food and of nursing and medical attendance:—Held, that there was a duty implied by law on the part of the prisoner to attend to the wants of the deceased, and that, the prisoner's failure to perform that duty having accelerated the death of the deceased, the conviction was right. *Reg.* v. *Instan*, 62 L. J., M. C. 86: [1893] 1 Q. B. 450; 5 R. 248; 68 L. T. 420; 41 W. R. 368; 17 Cox, C. C. 602; 57 J. P. 282—C. C. R.

Relieving Officer—Refusal of Medical Assistance.]—The law imposes upon relieving officers the duty and obligation, in cases where bonâ fide applications are made to them for medical assistance by destitute persons in cases of sudden and urgent necessity, to give such assistance promptly, so that the mischief may be dealt with at an early stage. Where an application is made to a relieving officer for medical assistance in a case of emergency, and death or bodily harm results from a refusal to grant such assistance, it is no answer to an indictment against the relieving officer for manslaughter or for causing bodily harm that the applicant was in employment for wages or other hire or remuneration, if at the time the application was made the applicant was, in fact, destitute of the means of providing independent medical assistance. *Reg.* v. *Curtis*, 15 Cox, C. C. 746.

i. Killing Officers of Justice.

Illegal Arrest.]—Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow. *Rex* v. *Thompson*, 1 M. C. C. 80. See *Reg.* v. *Carey*, 14 Cox, C. C. 314.

—— **Person aiding Constable in.**]—If a constable takes a man without warrant upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kills J. S. to prevent his retaking him, it will not be murder, but manslaughter only: because, if the original arrest was illegal, the recaption would have been so likewise. *Rex* v. *Curran*, 1 M. C. C. 132. See *Reg.* v. *Porter*, and *Reg.* v. *Phelps*, infra.

By Prisoner Escaping.]—If a man, having been lawfully apprehended by a police constable on a criminal charge, uses violence to the constable or to anyone lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder. *Reg.* v. *Porter*, 12 Cox, C. C. 444.

And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter. *Ib.*

Warrant—Issued in Blank.]—A warrant leaving a blank for the christian name of the person to be apprehended, and giving no reason for omitting it, but describing him only as the son of J. S. L. (it appeared that J. S. L. had four sons, all living in his house), and stating the charge to be for assaulting A., without particularising the time, place, or any other circumstances of the assault, is too general and unspecific. A resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder. *Rex* v. *Hood*, 1 M. C. C. 281. S. P., *Hoye* v. *Bush*, 2 Scott (N.R.) 86: 1 Man. & G. 775; 1 Dunk. 15; 10 L. J., M. C. 168: *Rex* v. *Stockley*, 1 East, P. C. 310: *Rex* v. *Winwick*, 8 Term Rep. 454.

—— **Given to Constable's Son.**]—A constable, having a warrant to apprehend A., gave it to his son, who, in attempting to arrest A., was stabbed by him with a knife which A. happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off:—Held, that his arrest was illegal: and that, if death had ensued, this would have been manslaughter only, unless it was shown that A. had prepared the knife beforehand to resist the illegal violence. *Rex* v. *Patience*, 7 Car. & P. 795.

—— **Informality of, Unknown to Prisoner.**]—K. and D. were arrested in England upon Irish warrants which were not backed in England, and which did not specify with what particular felony they were charged. They were brought before a magistrate and remanded. When being conveyed in a police-van through the streets of Manchester in the daytime, the now prisoners, armed with revolvers, attacked the van, the police-sergeant in charge of it was shot by one of the prisoners, and K. and D. escaped. Upon the trial of the prisoners for wilful murder, it was contended that, the arrest of K. and D. being illegal by reason of the informality of the warrants, the offence committed amounted only to manslaughter:—Held, that in view of the facts that K. and D. had been for some time in custody, that the informality of the warrants was unknown to the prisoners, and that they deliberately, and with premeditation, devised and carried out the attack which resulted in the death of the police-sergeant, the offence was murder and not manslaughter. *Reg.* v. *Allen*, 17 L. T. 222.

A police-officer is protected if he acts upon a warrant, even though the warrant is informal, and if he is killed when so acting by a premeditated attack, with a view to a rescue, the crime will be murder, the proper course being to apply to a court of law for a habeas corpus to have the prisoner discharged from custody. *Ib.*

No Warrant—Felony.]—Killing an officer will amount to murder, though he had no warrant, and was not present when any felony was committed, but takes the party upon a charge only; and though such charge does not in terms specify all the particulars necessary to constitute the felony. *Rex* v. *Ford*, R. & R. 329.

Killing an officer who attempts to arrest a man on a charge of felony will be murder, though the officer had no warrant, and though the man had done nothing for which he was

liable to be arrested, if the man knows the individual to be an officer, though the officer does not notify to him that he has such a charge. *Rex* v. *Woolmer*, 1 M. C. C. 334.

—— **Misdemeanour.**]—A constable has no power to arrest for a misdemeanour under a warrant unless he has it with him at the time, and where resistance to an arrest causes the constable's death, it is not murder but manslaughter. *Reg.* v. *Chapman*, 12 Cox, C. C. 4. S. P., *Reg.* v. *Carey*, 14 Cox, C. C. 214.

Disorderly Conduct.]—A constable (not in the metropolis) is not acting in the execution of his duty in clearing a public-house unless there be a breach of the public peace therein or a danger of it. *Reg.* v *Prebble*, 1 F. & F. 325.

A constable should not arrest a person for mere disorderly conduct unless he be on the point of committing a breach of the peace: and force may be used to prevent such an arrest. If the force used be excessive and the constable is killed, it will be manslaughter. If the constable has given up his intention of making the arrest, and those using force to prevent the arrest know that it is his intention, but continue their violence and the constable is killed, it is murder. *Reg.* v. *Lockley*, 4 F. & F. 155.

When Person found committing Offence.]—If the servant of the owner of property found a party actually committing an offence against 7 & 8 Geo. 4, c. 29, and apprehended him under s. 63, and, while taking the party to a magistrate, such party killed him, this will be murder: but if the servant either did not see him in the actual commission of the offence, or is taking him to any other place than before a magistrate, it will not be murder. *Rex* v. *Curran*, 3 Car. & P. 397: *Rex* v. *Weir*, 1 B. & C. 261.

Stolen Potatoes in Possession.]—A police officer found N. with potatoes under his shirt, which had been recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so, and a rescue being attempted, O. was struck by A., who went away, and O. was afterwards killed by other persons, who attempted the rescue:—Held, that the police officer had no right to apprehend N., and that the killing of O., therefore did not amount to murder. *Reg.* v. *Phelps*, Car. & M. 180; 2 M. C. C. 240.

Apprehension of Poachers by Gamekeepers.]—Under 9 Geo. 4, c. 69, s. 2, a gamekeeper may apprehend poachers, though there are three or more, and found armed: for though s. 2 only authorises apprehending for what are offences under s. 1, and when there are three or more armed, they are punishable under s. 9; yet what is punishable under s. 9 is nevertheless an offence under s. 1, though the circumstances of aggravation make it liable to a greater punishment; and if the gamekeeper is killed in the attempt to apprehend, the offender will be guilty of murder, though the gamekeeper had previously struck the offender, or any of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not vindictively to punish. *Rex* v. *Bull*, 1 M. C. C. 330.

If a gamekeeper, attempting lawfully to apprehend a poacher, is met with violence, and in opposition to such violence, and in self-defence, strikes the poacher, and then is killed by the poacher, it will be murder. *Rex* v. *Ball*, 1 M. C. C. 333.

A servant of C. attempted to apprehend A., who was out night-poaching in a wood, and the servant was killed by A. C. was neither the owner nor the occupier of the wood, nor the lord of the manor, C. having only the permission of the owner of the wood to preserve game there:—Held, that this was manslaughter only in A. *Rex* v. *Addis*, 6 Car. & P. 388.

If a servant of A. (who is not lord of the manor) finds a night poacher on the lands of B., and pursues him with intent to take him, this is such an attempt at an illegal arrest, that if the poacher shoots the servant with the gun which he has in his hand, and kills him, this will be manslaughter only. *Rex* v. *Davis*, 7 Car. & P. 783.

Prosecution must show Lawful Authority.]—Where a common soldier stabbed a sergeant in the same regiment who had arrested him for some alleged misdemeanour:—Held, that as the articles of war were not produced, by which the arrest might have been justified, it was only manslaughter, as no authority appeared for the arrest. *Rex* v. *Withers*, 1 East, P. C. 295, 360.

Knowledge or Notification that Person is an Officer.]—In order to make the killing of an officer of justice, whether he is authorised in right of his office, or by warrant, amount to murder upon his interference in an affray, it is necessary that he should have given some notification of his being an officer, and of the intent with which he interfered. *Rex* v. *Gordon*, 1 East. P. C. 315, 352.

If a man knows that the person arresting him is an officer, the latter need not notify the fact to the former. *Rex* v. *Woolmer*, 1 M. C. C. 334.

Manner in which Authority Exercised.]—If a person is playing music in a public thoroughfare, and thereby collects together a crowd of people, a policeman is justified in desiring him to go on, and in laying his hand on him and slightly pushing him, if it is only done to give effect to his remonstrance; and if the person, on so small a provocation, strikes the policeman with a dangerous weapon and kills him, it will be murder: but otherwise, if the policeman gives him a blow and knocks him down. *Rex* v. *Hagan*, 8 Car. & P. 167.

If a police constable, on being sent for at a late hour of the night to clear a beer-house, does so, and one of the persons, on leaving the house, and being told to go away, refuses to do so, and uses threatening language, the constable is justified in laying hands on him to remove him; and if he cuts the constable with a knife, with intent to do grievous bodily harm, this is a capital offence, and the fact of the constable having laid hands on the party, would not have reduced the crime to manslaughter, if death had ensued. *Rex* v. *Hems*, 7 Car. & P. 312.

j. Killing by Officers of Justice.

No Means of Apprehension.]—It is no excuse for killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighbourhood, that he could not otherwise be taken. *Rex* v. *Smith*, 3 Russ. C. & M. 131.

Without Authority.]—Two soldiers not belonging to a recruiting party, who were in a public-house, wished to enlist M. and gave him a shilling for that purpose, and M. afterwards wishing to go away, an altercation ensued, and one of the soldiers stood at the door with his drawn sword and swore he would stab any person who attempted to come out. The landlord of the house was stabbed in the scuffle. It was argued that the soldiers had authority to enlist M., and that what was done was merely to prevent his rescue; but it was held that they had no authority, and therefore that it was murder. *Rex* v. *Longden*, R. & R. 228.

To prevent Impressment.]—If a person is impressed who is not a proper object of impressment, or if the impressment is made without any legal warrant, it is lawful for the party to make resistance; and if the death of the party impressed ensues it is murder. *Rex* v. *Dixon*, 1 East, P. C. 313; R. & R. 53. S. P., *Rex* v. *Rokeby*, 1 East, P. C. 312.

4. INDICTMENT.

Manner and Means of Death—Coroner's Inquisition.]—A coroner's inquisition is an indictment, within 24 & 25 Vict. c. 100, s. 6, and it is, therefore, unnecessary to set forth therein the manner in which, or the means by which, the death of the deceased was caused. *Reg.* v. *Ingham*, 5 B. & S. 257; 33 L. J., Q. B. 183; 10 Jur. (N.S.) 968; 10 L. T. 456; 12 W. R. 793; 9 Cox, C. C. 508.

—— **Before 24 & 25 Vict. c. 100, s. 6.**]—An indictment for murder must have set forth particularly the manner of the death, and the means by which it was effected. *Rex* v. *Sharwin*, 1 East, P. C. 341, 421.

An indictment for murder, which stated wounds as contributing to the death, need not have stated their length, depth, or breadth. *Rex* v. *Mosley*, 1 M. C. C. 97; 1 Lewin, C. C. 189. S. P., *Rex* v. *Tomlinson*, 6 Car. & P. 370.

An indictment for murder must state that the prisoner gave the deceased a mortal wound. *Rex* v. *Lad*, 1 Leach, C. C. 96.

Where death proceeded from suffocation, by the swelling up of the passage of the throat, and such swelling proceeded from wounds occasioned by forcing things into the throat, the statement might be, that the things were forced into the throat, and the deceased thereby suffocated; and it was not necessary to mention the immediate cause of suffocation, namely, the swelling of the throat. *Rex* v. *Tye*, R. & R. 345.

A. was charged with suffocating B. by placing both her hands about the neck of B.:—Held, that she might be convicted, if B. was suffocated in any manner, either by A. or by any other person in her presence, she being privy to the commission of the offence. *Rex* v. *Culkin*, 5 Car. & P. 121.

If the death of a deceased was charged to be by suffocation, by placing the hand on the mouth of the deceased, this allegation was made out, if the jury was satisfied that any violent means were used to stop the respiration of the deceased. *Rex* v. *Waters*, 7 Car. & P. 250.

In an indictment for murder, an allegation that it was committed "with a certain sharp instrument, to the jurors aforesaid unknown," was sufficiently certain. *Rex* v. *Grounsell*, 7 Car. & P. 788.

An indictment, which stated the death to be by striking and beating the deceased with a piece of brick, was not supported by proof that the prisoner knocked him down with his fist, and that the death was caused by the deceased striking his head by falling on a piece of brick, in consequence of the blow. *Rex* v. *Kelly*, Car. C. L. 75; 1 M. C. C. 113; 1 Lewin, C. C. 193: *Rex* v. *Wrigley*, 1 Lewin, C. C. 127.

Or by proof that he knocked him down by a blow upon the head, and that he was killed by a mortal wound received by falling on the ground. *Rex* v. *Thompson*, Car. C. L. 75; 1 M. C. C. 139; 1 Lewin, C. C. 194.

An indictment charging that the prisoner a musket loaded with gunpowder and a leaden bullet to, against, and upon M. G., feloniously, &c., "did shoot, discharge, and send forth; and that he, with the leaden bullet aforesaid, out of the musket aforesaid, then and there by the force of the gunpowder so shot, discharged, and sent forth as aforesaid," M. G. did strike, &c., was good, and the words "sent forth," and the other added words which did not occur in the usual form, might be rejected as surplusage. *Reg.* v. *Stokes*, 2 Car. & K. 536; 17 L. J., M. C. 116.

In an indictment for murder by poisoning, it is sufficient, after alleging the administering the deadly poison, and the mortal sickness occasioned thereby, to aver, "of which said mortal sickness and distemper the said E. S. died." *Reg.* v. *Sandys*, 2 M. C. C. 227; Car. & M. 345.

An indictment for manslaughter, that J. E. caused R. D. to become mortally sick, of which mortal sickness, especially of a mortal congestion of the lungs and heart, occasioned by the means aforesaid, he died, properly charged a death from a mortal congestion caused by those means. *Reg.* v. *Ellis*, 2 Car. & K. 470.

In a count for murder, the death was stated to be by a blow of a stick, and, in another count, by the throwing of a stone. The jury found the prisoners guilty of manslaughter, generally, on both counts, and the judges held the conviction right. *Reg.* v. *O'Brian*, 2 Car. & K. 115; 1 Den. C. C. 9; 1 Cox, C. C. 126.

An indictment charged A. with giving a mortal wound to G. on the 27th of May, of which wound he died on the 29th of May; and that Y. and Z., on the day and year first aforesaid, were present, aiding and abetting A. the felony aforesaid to do and commit. The jury found all the prisoners guilty of manslaughter; and it was objected for Y. and Z., that the felony of A. was not complete till the death of G.; but the judges held the conviction right. *Ib.*

A. and B. were indicted for the murder of C., by shooting him with a gun. In the first count A. was charged as principal in the first degree, B. as present, aiding and abetting him. In the second count, B. as principal in the first degree, A. aiding and abetting. The jury convicted both, but said that they were not satisfied as to which fired the gun:—Held, first, that the jury was not bound to find the prisoners guilty of one or other of the counts only. *Reg.* v. *Dowing*, 1 Den. C. C. 52; 2 Car. & K. 382; 1 Cox, C. C. 156.

Held, secondly, that, notwithstanding the word "afterwards" in the second count, both the counts related substantially to the same person killed and to one killing, and might have been transposed without any alteration of time or meaning. *Ib.*

A. was indicted for the manslaughter of B. by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or the key of a door:—Held, that if it was occasioned by a blow with a hammer, or any other hard substance held in the hand, it was sufficient to support an indictment; but otherwise, if it was the result of a push against the door. *Rex* v. *Martin*, 5 Car. & P. 128.

In an indictment for manslaughter, it was not necessary to allege the causes merely natural which conduced to the death of the party: it was sufficient to allege truly the act with which the prisoner was charged, if that act accelerated the death. *Rex* v. *Webb*, 1 M. & Rob. 405; 2 Lewin, C. C. 196.

Name of Deceased—When unknown.]—If the name of the party killed is not known, it may be alleged to be a certain person to the jurors unknown. *Rex* v. *Clark*, R. & R. 358.

C. was indicted for manslaughter, in killing "a woman, whose name to the jurors is unknown." C. cohabited with the woman, and sometimes said that she was his wife, and sometimes that she was not; and none of the witnesses had heard her called by any name:—Held, that, if the jury was satisfied that the deceased was not the wife of the prisoner, and that the name of the deceased could not be ascertained by any reasonable diligence, the description of the deceased was proper; but that, if the jury should think that the deceased was the wife of the prisoner, the description was bad; for, although there was no evidence of her christian name, she was entitled to the surname of C., as being that of her husband. *Reg.* v. *Campbell*, 1 Car. & K. 82.

—— **Accounting for Omission.**]—An indictment for child murder is bad for not stating the name of the child or accounting for the omission. *Reg.* v. *Hicks*, 2 M. & Rob. 302.

—— **Illegitimate Child.**]—A bastard must not be described by his mother's name, till he has gained that name by reputation. *Rex* v. *Clark*, R. & R. 358.

Where a deceased illegitimate child had not been baptized, but the mother had, on two occasions, called it Mary Anne, a witness stating that the putative father had said he was a Baptist:—Held, that it was rightly described as a female child whose name was unknown. *Rex* v. *Smith*, 6 Car. & P. 151; 1 M. C. C. 402. S. P., *Rex* v. *Poulton*, 5 Car. & P. 329.

In an indictment for the murder of a bastard child, the absence of a name is sufficiently accounted for by the child being described as "lately before born of the body of J. H." *Reg.* v. *Hogg*, 2 M. & Rob. 380.

Indictment stated, that the prisoner, a single woman, on the 27th August, 1844, brought forth a male child alive; that she afterwards, to wit, on the day and year aforesaid, killed this child. Objection, that the indictment ought to have stated the name of the child, or that its name was unknown to the jurors, overruled at the trial, on the ground that there was no presumption, from the mere fact of birth, that the child had a name, it being a bastard; that the indictment afforded no presumption of its having acquired a name by reputation or baptism; that an averment that the name was unknown implied the acquisition of some name:—Conviction held right. *Reg.* v. *Willis*, 1 Den. C. C. 80; 1 Car. & K. 722; 1 Cox, C. C. 136.

An indictment for murder of a bastard child described as Harriet Stroud is not sustained by proof of a child christened Harriet, and only called by that name, though the mother's name was Stroud. The proper description is Harriet. A child "whose name is to the jurors unknown" is not good, because the name of Harriet was known. *Reg.* v. *Stroud*, 2 M. C. C. 270; 1 Car. & K. 187. See *Reg.* v. *Drake*, 4 Cox, C. C. 333.

An indictment charged the prisoner with the murder of William Scarborough, who was the infant illegitimate son of the prisoner, Sarah Scarborough: it was proved that the child was called William and Coley, and on two occasions in his mother's presence as William Scarborough; it did not appear that the child had been baptized:—Held evidence to go to the jury that the deceased acquired the name by reputation. *Reg.* v. *Scarborough*, 3 Cox, C. C. 72.

—— **Proof.**]—An illegitimate child, six weeks old, baptized on a Sunday, and from that day to the following Tuesday called by its name of baptism and its mother's surname, is sufficient evidence to warrant the jury in finding that the deceased was properly described by those names. *Reg.* v. *Evans*, 8 Car. & P. 765.

An indictment charged the murder of Eliza Waters. The deceased was the illegitimate child of the prisoner, whose name was Ellen Waters; and a witness said, on the trial, "The child was called Eliza; I took it to be baptized, and said it was Eleanor Waters's child":—Held, that it was not sufficient proof that the surname of the deceased was Waters. *Rex* v. *Waters*, 1 M. C. C. 457.

—— **Unbaptized Child.**]—Not named is a good description of an unbaptized infant child in an indictment for its murder. *Reg.* v. *Waters*, 2 Car. & K. 864: 1 Den. C. C. 356; T. & M. 57; 18 L. J., M. C. 53; 13 Jur. 130; 3 Cox, C. C. 390.

But not baptized would be insufficient. *Ib.* S. P., *Reg.* v. *Bliss*, 8 Car. & P. 773.

Averment of Malice.]—The indictment must state, that the act by which death ensued was done of malice aforethought. *Rex* v. *Nicholson*, 1 East, P. C. 346.

Negligence—Averment of Omission.]—In an indictment for manslaughter it is not necessary that it should specifically charge that it was by an act of omission. *Reg.* v. *Smith*, 11 Cox, C. C. 210.

Negligence of Railway Signalmen.]—In an indictment for manslaughter by neglect to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed: it was charged that the prisoner's duty was to attend to the proper working of the signals according to the rules:—Held, that it was not necessary to set out the rules. *Reg.* v. *Pargeter*, 3 Cox, C. C. 191.

An averment that it was the prisoner's duty to signal an obstruction, and that there was an obstruction which the prisoner neglected to signal, was a sufficient description of the offence. *Ib.*

A count charging both a neglect to give the

right signal and the giving of a wrong signal, is not bad for duplicity. *Ib.*

It is sufficient to charge that the prisoner neglected and omitted to alter the signal without stating more particularly which was the specific alteration which he so neglected to make. *Ib.*

Negligence by Medical Practitioner.]—An indictment against a medical practitioner charged that he made divers assaults on the deceased, a patient, and applied wet clothes to his body and caused him to be put in baths:—Held, that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased; and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty. *Reg.* v. *Ellis*, 2 Car. & K. 470.

Allegation of Duty.]—Where an engineer who had charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine neglected his duty, so that the engine stopped, and the mine thereby became charged with foul air, which afterwards exploded and caused the death of one of the miners:—Held, that the engineer could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform. *Reg.* v. *Barrett*, 2 Car. & K. 343.

Offence committed on High Seas or Abroad.]—On a charge of murder on the high seas, on board a British ship, afloat; the deceased having been thrown out of a foreign ship in a foreign port, the question whether all these facts must not be averred in each count of the indictment, in order to give a judge sitting under an ordinary commission of oyer and terminer and general gaol delivery jurisdiction to try the offence, as it arises on the record, is a point which will not be reserved for the Court of Criminal Appeal. *Reg.* v. *Menham*, 1 F. & F. 369.

An indictment on 33 Hen. 8, c. 23, for the murder of one British subject by another in a foreign state, stating that the person murdered was at the time in the king's peace, was sufficient to show that he was a British subject. *Rex* v. *Sawyer*, R. & R. 294; 2 Car. & K. 101.

Amendment.]—A woman, charged with the murder of her husband, was described as A., the wife of J. O., late of the parish of S., in the county of W., labourer. The judge ordered this to be amended, by striking out the word wife, and inserting the word widow. *Reg.* v. *Orchard*, 8 Car. & P. 565.

5. Evidence.

a. Generally.

Onus of Proof of Mitigation.]—Where it appears that one person's death is occasioned by the hand of another, it is for that other to show, either by evidence or by inference from the circumstance of the case, that his offence is of a mitigated character, and does not amount to the crime of murder. *Rex* v. *Greenacre*, 8 Car. & P. 35.

A man was indicted for the manslaughter of a woman by driving a cab over her in a public street, and his defence was that he had used due and proper care in driving the cab upon the occasion in question:—Held, that the burden of proving negligence did not lie on the crown, but that, upon the fact of the killing being proved, it was cast upon the prisoner to show that he had used due and proper care in driving the cab. *Reg.* v. *Cavendish*, Ir. R. 8 C. L. 178.

Proof that Deceased was an Apprentice.]—An indictment for manslaughter stated in a first count, that the deceased was the apprentice of the prisoner, and that it was the duty of the prisoner to provide the deceased with proper nourishment and medicine, and charged the death to be from neglect. A second count charged that the deceased, "so being such apprentice as aforesaid," was killed by the prisoner by over-work and beating. No evidence was given of any indenture, but a witness proved that the prisoner told him that the deceased was his apprentice:—Held, that this was sufficient proof of the allegation of the apprenticeship in the second count, but not of that in the first count. *Reg.* v. *Crumpton*, Car. & M. 597.

Semble, that where the charge is, that the prisoner received a child as an apprentice, an indictment, importing that a former master, with the child's consent, bound the child to the prisoner, will be sufficient evidence of the receiving as an apprentice, though such indenture is executed by a stranger as trustee for the former master, and not in the former master's name. *Rex* v. *Friend*, R. & R. 20.

Proof that Deceased was a Constable.]—On an indictment for the murder of a constable in the execution of his office, it is not necessary to produce his appointment: it is sufficient if it is proved that he was known to act as a constable. *Rex* v. *Gordon*, 1 Leach, C. C. 515; 1 East, P. C. 312.

Everyone Present should be called by Prosecution.]—On a trial for murder, every person who was present at the time of the transaction which gives rise to the charge ought to be called as a witness on the part of the prosecution; for, even if they give different accounts, the jury should hear their evidence, and draw their own conclusion as to the truth. *Reg.* v. *Holden*, 8 Car. & P. 606.

Proof of Death of Deceased.]—On the trial of an indictment for murder, the death of the person charged to have been killed may be collected from the circumstances, if incapable of being proved by other evidence. *Rex* v. *Hindmarsh*, 2 Leach, C. C. 569.

As where the deceased was thrown overboard into the sea, and never heard of afterwards. *Ib.*

Although it is necessary, in a case of murder, that there should be evidence that the body found is the body of the murdered person, the circumstances may be sufficient evidence of identity. *Reg.* v. *Cheverton*, 2 F. & F. 833.

A girl was indicted for the murder of her child, aged sixteen days. She was proceeding from Bristol to Llandogo, and was seen near Tintern, with the child in her arms, at 6 p.m.; she arrived at Llandogo between 8 and 9 p.m., without the child. The body of a child was afterwards found in the river Wye, near Tintern, which appeared not to be the child of the prisoner:—Held, that she must be acquitted, and that she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that her child was actually dead. *Reg.* v. *Hopkins*, 8 Car. & P. 591.

Circumstantial Evidence.]—Where a charge of murder depends upon circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion. *Rex* v. *Hodge*, 2 Lewin. C. C. 227.

On a charge of murder, the deceased having been found tied hand and foot, and with something forced into the throat, apparently to prevent any outcry, but which had caused suffocation, and the state of the premises showing that a burglary had been committed; and the evidence against the prisoner being a chain of circumstances tending to identify him as one of two persons employed in the burglary, the jury was directed, that, if satisfied that the prisoner was engaged in the burglary, and a party to the violence on the person of the deceased, they should find him guilty of the murder. *Reg.* v. *Franz*, 2 F. & F. 580.

—— **Exhaustive Process of Proof.**]—On an indictment for manslaughter by causing a fire, it is necessary, in order to sustain the case by an exhaustive process of proof, to show that the fire could not have arisen from any other cause than that charged; it is necessary to leave no considerable interval of time in which some other cause might have acted. *Reg.* v. *Gardner*, 1 F. & F. 669.

Intent to Kill another Person.]—Although, where it is clearly proved that the prisoner wilfully gave the fatal blow, it is not necessary to show motive or personal malice, or a particular intent to kill the deceased; and if he killed A., meaning to kill B., it is clearly murder; yet, where it is a main part of the proof that he killed the deceased, that he meant to kill someone else, it is essential to prove that he had an intent to kill such other person, and that such person was or might be supposed to be at or near the spot, at or about the time of the fatal blow. *Reg.* v. *Cleary*, 2 F. & F. 850.

Sufficiency of Proof.]—An allegation in an indictment, charging that the death of a person was caused by a plaister made and applied by the prisoner, is sufficiently proved by showing that three plaisters were applied, and that two of them were applied by the prisoner, and the third made from materials furnished by the prisoner. *Rex* v. *Spiller*, 5 Car. & P. 333.

An indictment charged that the death of the deceased was caused by a mortal wound of the head, inflicted with a swingle. It was proved that the death was caused by a blow on the head by a piece of wood, and that the external skin was not broken, but that there was extravasation of blood, pressing on the brain, and a collection of blood between the scalp and the brain. The surgeon stated this to be a contused wound, with effusion of blood:—Held, that the evidence supported the indictment. *Reg.* v. *Warman*, 2 Car. & K. 195; 1 Den. C. C. 163.

—— **Admission of Prisoner.**]—The evidence against a prisoner charged with manslaughter was an admission on his part, that, unfortunately, he was the man who shot the deceased; and the fact that, on their coming together, apparently not in ill-humour, from the South Metropolitan Cemetery, where the prisoner was a watchman, but with which the deceased had no connection, the prisoner said to the deceased, "Now, you mind, don't let me see you on my premises any more." At the time this was said, the wound had been given of which the deceased eventually died:—Held, that, in point of law, the evidence was sufficient to sustain the charge. *Rex* v. *Morrison*, 8 Car. & P. 22.

b. What Admissible.

To show Danger of Violence, or Reasonable Apprehension of it.]—On an indictment for murder, the death having been caused by shot from a gun in the hands of the prisoner, evidence of former threats by deceased of deadly violence, with words and circumstances on the occasion in question likely to provoke similar threats, received as evidence of danger to life, of serious violence or reasonable apprehension of it, on the occasion, such as might excuse or justify recourse to a loaded firearm in self-defence. *Reg.* v. *Weston*, 14 Cox, C. C. 346.

On a trial of a husband for the murder of his wife by the use of a knife on her assaulting him, evidence of former attacks by her upon him were allowed to be given as showing the nature of the assault the prisoner had reason to apprehend. *Reg.* v. *Hopkins*, 10 Cox, C. C. 229.

Previous Expressions of Bad Feeling.]—Expressions denoting a bad feeling towards the deceased, made use of some time before the crime is committed, are admissible, but the jury must receive them with great caution. *Reg.* v. *Hagan*, 12 Cox. C. C. 357.

A. hires H. to murder P.—Evidence that H. murdered P. when A. charged with Murder of H.]—A. was indicted for the murder of H. It was opened, that A., having malice against P., had hired H. to murder him, and that H. did so; but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P.:—Held, that the prosecutor might also give evidence to show that H. was in fact the person by whom P. had been murdered. *Rex* v. *Clewes*, 4 Car. & P. 221.

Evidence of res gestæ.]—A man was indicted for the wilful murder of Jane Maria Clousen. The murder was committed on the night of the 25th or the morning of the 26th of April, 1871, at Eltham. The deceased was discovered in a dying state in Kidbrooke-lane. She had lived in the prisoner's family, and suspicion attached to him. One of the witnesses, Fanny Hamilton, called by the prosecution, proved that for ten days prior to the 25th of April, the deceased had lodged in her house, that on the evening of that day she went out in her company, and that after walking about for some time, they parted, when the deceased told her where she was going. It was proposed by the counsel for the crown to ask the question, "What did she say to you?" To this the prisoner's counsel objected, on the ground that whatever was said was said in the prisoner's absence, and he had no means of cross-examining upon it. It was thereupon contended by the counsel for the crown, that it was a declaration so far accompanying the act itself as to render it part of the res gestæ: the judge refused to permit the question to be put. *Reg.* v. *Pook*, 13 Cox, C. C. 172, n. S. P., *Reg.* v. *Wainwright*, 13 Cox, C. C. 171.

A. was charged with manslaughter, in killing B., by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing B. groan, C. went up to him, when B. made a statement as to how the accident had happened:—Held, that this statement, being made at the moment of the accident occurring, was receivable on the trial of A. for the manslaughter of B. *Rex* v. *Foster*, 6 Car. & P. 325.

Statements made by the deceased to the first person who comes up after he has been wounded, are admissible as part of the res gestæ. The deceased died from the effects of a wound on his head, inflicted by a stick. A girl in the neighbourhood heard a cry, and coming out found the deceased standing with his cap in his hand, and apparently weak and injured. The deceased did not survive more than a few hours:—Held, the statement made by the deceased to the witness immediately on her coming up, complaining of the injury, was admissible in evidence, being part of the res gestæ. *Reg.* v. *Lunny*, 6 Cox, C. C. 477.

On an indictment for murder, it appearing that the deceased, with her throat cut through, came suddenly out of a room, in which she left the prisoner, who also had his throat cut, and was speechless, and that she said something immediately after coming out of the room, and a few minutes before she died—the question being whether murder or suicide:—Held, that her statement was not admissible as part of the res gestæ. *Reg.* v. *Bedingfield*, 14 Cox, C. C. 341.

On a trial for murder alleged to have been committed on the 24th, semble that evidence of acts done by the prisoner on the 13th, unaccompanied by any declaration to explain them, is not admissible. *Reg.* v. *Mobbs*, 6 Cox, C. C. 223.

On the trial of a husband for the murder of his wife, a neighbour swore that a week before it was committed the wife had visited her house, bringing an axe and a carving-knife, and gave them to her to take care of:—Held, that the evidence of what was said by the wife to the witness on handing to her the instruments was admissible. *Reg.* v. *Edwards*, 12 Cox, C. C. 230.

A witness being called to prove that he manufactured certain grenades, by which the death in question had been caused, can be asked the name of the person who gave him the order for them, even though it had not then been shown that the person ordering them and the prisoner were connected. *Reg.* v. *Bernard*, 1 F. & F. 240.

Statements and Reports made in Absence of Prisoner.]—When the deceased person, a constable, in the course of his duty, made, shortly before his death, and in the absence of the accused, a verbal statement in the nature of a report to his superior officer (an inspector of police), as to where the deceased was going, and what he was going to do, such report being material for the case of the crown:—Held, that such statement and report were admissible for the prosecution. *Reg.* v. *Buckley*, 13 Cox, C. C. 293.

Upon an indictment for murder, statements made by the deceased in the absence of the prisoner, are admissible as evidence of the bodily condition of the deceased, so far as they relate to symptoms contemporaneous with the making of the statement, in order to prove that her death resulted from the condition she was then in. Such statements are however inadmissible as far as they narrate the cause of the symptoms, and cannot be given in evidence to prove that the condition of the deceased was caused by the act of any particular person. *Reg.* v. *Gloster*, 16 Cox, C. C. 471.

In a case of manslaughter, it was proved that the deceased was at an inn for three days, and that the innkeeper asked him what his name was, and that while there letters arrived at the inn directed in that name, which letters were delivered to the deceased, and received by him:—Held, that the innkeeper might be asked what name the deceased gave. *Rex* v. *Timmins*, 7 Car. & P. 499.

On a trial for murder by poisoning, statements made by the deceased in a conversation shortly before the time at which the poison is supposed to have been administered, are evidence to prove the state of his health at that time. *Reg.* v. *Johnson*, 2 Car. & K. 354.

Evidence of other Cases to Negative Death by Accident.]—Where a woman was charged with the murder of her son by poison, and the defence was, that his death resulted from an accidental taking of such poison, evidence to prove that two other children of hers, and a lodger in her house, had died previously to the present charge from the same poison, was held to be admissible. *Reg.* v. *Cotton*, 12 Cox, C. C. 400.

Upon the trial of a woman for the murder of her infant by suffocation in bed, evidence to prove the previous death of her other children at early ages is admissible, although such evidence does not show the causes from which those children died. *Reg.* v. *Roden*, 12 Cox, C. C. 630.

Upon an indictment for murder by poison of S. in October, 1877, evidence is admissible of the previous and subsequent deaths of J. and L., under like circumstances and from similar symptoms, to show that the poisoning was not accidental. *Reg.* v. *Heesom*, 14 Cox, C. C. 40.

Where it is proved that a motive for the death of S. might exist, by the fact of the prisoner having insured the life of S. in a benefit insurance society, evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L., by showing that they also were each of them insured by the prisoner in the same or kindred societies. *Ib.*

On an indictment against a woman for the murder of her husband by arsenic, in September, evidence was tendered on behalf of the prosecution of arsenic having been taken by her two sons, one of whom died in December and the other in March subsequently, and also by a third son, who took arsenic in April following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that she lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals, and distributed them to the four parties:—Held, that this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. *Reg.* v. *Geering*, 18 L. J., M. C. 215.

On an indictment for the murder of A., evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was at all the deaths, and administered something to two of these patients. *Reg.* v. *Winslow*, 8 Cox, C. C. 397.

Upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her and occasionally tasted her food, showed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison. *Reg.* v. *Garner*, 4 F. & F. 346.

F. and H. were jointly charged upon an indictment for the murder of the husband of H., with causing his death by the administration of arsenic. Evidence having been given that the deceased had died from arsenic, and had been attended by the prisoners:—Held, that it was competent for the prosecution to tender evidence of other cases of persons who had died from arsenic, and to whom the prisoners had access, exhibiting exactly similar symptoms before death to those of the case under consideration, for the purpose of showing that this particular death arose from arsenical poisoning—not accidentally taken, but designedly administered by someone. Such evidence, however, is not admissible for the purpose of establishing motives; though the fact that the evidence offered may tend indirectly to that end is no ground for its exclusion. The true principle on which the admissibility of all such evidence rests is that laid down in *Reg.* v. *Geering* (18 L. J., M. C. 215). *Reg.* v. *Winslow* (8 Cox. C. C. 397) commented on and disapproved. *Reg.* v. *Flannagan*, 15 Cox, C. C. 403.

The question being whether A. murdered B. (an infant), adopted permanently by him on certain representations in consideration of a fee of 3*l*., and the body of the infant being subsequently found buried in a garden belonging to A.:—Evidence of previous permanent adoptions with similar representations and on similar inadequate terms is relevant to the issue. Evidence that the bodies of other infants had been found buried in a similar manner to that of B. in gardens belonging to A. is relevant to the issue. *Makin* v. *Att.-Gen. for New South Wales*, 63 L. J., P. C. 41; [1894] A. C. 57; 6 R. 373; 69 L. T. 778; 17 Cox, C. C. 704; 58 J. P. 148—P. C.

Former Cases Treated by Surgeon.]—On an indictment for manslaughter, by reason of gross negligence and ignorance in surgical treatment, neither on the one side nor the other can evidence be gone into of former cases treated by the prisoner, but witnesses may be asked *causâ scientiæ* their opinion as to his skill. *Reg.* v. *Whitehead*, 3 Car. & K. 202.

Evidence as to Effect of Noxious Substance.]—On an indictment for manslaughter, where the death is occasioned by the application of a lotion to the skin, evidence may be given of the effect of the lotion when applied to other patients. *Rex* v. *St. John Long*, 4 Car. & P. 398.

Upon a charge of murder by means of explosive grenades, evidence of the death and wounds suffered by others at the same time is admissible to show the character of the grenades. *Reg.* v. *Bernard*, 1 F. & F. 240.

c. Dying Declarations.

In Favour of the Accused.]—Dying declarations may be given in evidence in favour of the accused. *Rex* v. *Scaife*, 1 M. & Rob. 551; 2 Lewin, C. C. 150.

As to Contents.]—Nothing can be evidence in a declaration in articulo mortis which would not be so if the party was examined. *Rex* v. *Sellers*, Car. C. L. 233.

Credibility of.]—A dying declaration is equal, in point of sanction, to an examination on oath, but the opportunity of investigating the truth is very different. *Rex* v. *Ashton*, 2 Lewin, C. C. 147.

Question of Admission for the Judge.]—Whether or not dying declarations were made under an apprehension of danger, must be determined by the judge, in order to receive or reject the evidence; and not by the jury after the evidence is received. *Rex* v. *John*, 1 East, P. C. 357. S. P., *Rex* v. *Wellbourn*, 1 East, P. C. 358; *Rex* v. *Hucks*, 1 Stark. 523; 1 Leach, 503, n.

Repetition of Prior Inadmissible Statement.]—A statement made by the deceased under circumstances which would not render it admissible as a dying declaration, becomes admissible as such if repeated in his presence and at his request by the person to whom it was previously made and assented to by the deceased who had then abandoned all hope. *Reg.* v. *Steele*, 12 Cox. C. C. 168.

Made in Answer to Questions.]—It is no objection against a declaration in articulo mortis, that it was made in answer to questions put to the deceased by the surgeon, and not a continuous statement made by the deceased. *Rex* v. *Fagent*, 7 Car. & P. 238.

It is no objection to the admissibility of a dying declaration that it was made in answer to leading questions. *Reg.* v. *Smith*, L. & C. 607; 34 L. J., M. C. 153; 11 Jur. (N.S.) 695; 12 L. T. 699; 13 W. R. 816; 10 Cox, C. C. 82.

Whose Declarations Admissible.]—The declaration of a convict at the moment of execution could not be given in evidence as the declaration of a dying man, for, being attainted, his testimony could not have been received on oath. *Rex* v. *Drummond*, 1 Leach, C. C. 337; 1 East, P. C. 353, n. *But see* 6 & 7 Vict. c. 85.

A declaration in articulo mortis, made by a child only four years old, is not admissible on the trial of an indictment for the murder of such child; because a child of such tender years cannot have that idea of a future state which is necessary to make such a declaration admissible. *Rex* v. *Pike*, 3 Car. & P. 598. See *Reg.* v. *Perkins*, 9 Car. & P. 395.

On what Charges Admissible.]—It is a general rule in criminal cases, that dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the

dying declaration; therefore, where a defendant had been convicted of perjury, and obtained a rule nisi for a new trial, pending which he shot the prosecutor, and on showing cause against the rule for a new trial, an affidavit of the dying declarations of the prosecutor, relating to the transaction out of which the prosecution for perjury arose, was produced:—Held, that it was inadmissible. *Rex* v. *Mead*, 4 D. & R. 120; 2 B. & C. 605; 26 R. R. 484.

Dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. *Reg.* v. *Hind*, Bell, C. C. 253; 29 L. J., M. C. 147; 6 Jur. (N.S.) 514; 2 L. T. 253; 8 W. R. 421; 8 Cox, C. C. 300.

Therefore, on an indictment for feloniously using certain instruments upon the person of a woman with intent to procure a miscarriage, her dying declaration is inadmissible. *Ib.*

On an indictment against a prisoner for the murder of A. by poison, which was also taken by B., who died in consequence, B.'s dying declaration is admissible. *Rex* v. *Baker*, 2 M. & Rob. 53.

A woman having had a rape committed upon her by two persons, the next day, in distress of mind, cut her throat, and being likely to die, a magistrate was sent for, and in the presence of the prisoners her deposition was properly taken. She was told she was likely to die, and she died a few days afterwards:—Held, that the deposition of the deceased was not admissible as a dying declaration, as it did not relate to the offence which caused the death. *Reg.* v. *Newton*, 1 F. & F. 641.

In trials for robbery, the dying declarations of the party robbed have been held to be inadmissible. *Rex* v. *Lloyd*, 4 Car. & P. 233.

Declarations in articulo mortis are not admissible on an indictment for administering medicine to procure abortion. *Rex* v. *Hutchinson*, 2 B. & C. 608, n.

Declaration made before Statement as to Non-Recovery.]—On a trial for murder it was proved that the deceased, who lived a few hours after the wound was inflicted, made a statement, at the conclusion of which he exclaimed, "Oh, God! I am going fast; I am too far gone to say any more;" but he did not appear to have previously said anything about his condition, and there was no evidence, one way or the other, to show that he was aware of it:—Held, that the statement was inadmissible as a dying declaration. *Reg.* v. *Nicolas*, 6 Cox, C. C. 120.

In order to render dying declarations admissible in evidence, the facts, to show that the deceased was conscious of his state, must point to the time of the statement, and therefore declarations some days prior to an expression that the deceased "had given up all in this world," are inadmissible. *Reg.* v. *Qualter*, 6 Cox, C. C. 357.

General Rule.]—Statements by a deceased person who at the time thought he was dying, and had no hope of recovering, are admissible as dying declarations. *Reg.* v. *Howell*, 1 Den. C. C. 1; 1 Car. & K. 689; 1 Cox, C. C. 151.

It is not sufficient that the person making declarations was dying, to constitute those declarations evidence unless the deceased was clearly and expressly warned that he could not live, or unless he had expressed his knowledge that he was dying. *Reg.* v. *Mooney*, 5 Cox, C. C. 318.

—— **Onus on Prosecution**]—A dying declaration cannot be received without direct and not merely inferential proof that the deceased was then aware of her danger. *Reg.* v. *Dalmas*, 1 Cox, C. C. 95.

In order to render a statement of a deceased person, not on oath, evidence, the prosecution must show that such person at the time of making the statement was distinctly aware of the approach of death, and had no hope of possible recovery. *Reg.* v. *Mackay*, 11 Cox, C. C. 148.

Prospect of almost Immediate Death.]—To render the declaration of the deceased admissible on a trial for manslaughter, it must have been made by him under an impression of almost immediate dissolution; and it is not enough that the deceased should have thought that he would ultimately never recover. *Rex* v. *Van Butchell*, 3 Car. & P. 629.

To render a statement admissible as a dying declaration, it is not enough that it appears that the person making it was under the impression that death must ultimately ensue, but it is necessary that it should appear that the person was conscious at the time that death was actually imminent. *Reg.* v. *Forrester*, 4 F. & F. 857; 10 Cox, C. C. 368.

The result of the various decisions with regard to the admissibility of dying declarations is that a dying declaration is only admissible where it appears that at the time it was made the declarant had an unqualified belief in the nearness of death; that is to say, a belief without hope that he was about to die. *Reg.* v. *Gloster*, 16 Cox, C. C. 471.

Surgeon taking more Favourable View.]—A dying declaration is admissible, if the declarant conceives himself to be past recovery, although the surgeon attending him may believe him to be progressing favourably. *Reg.* v. *Peel*, 2 F. & F. 21.

Slight Hope of Recovery.]—Any hope of recovery, however slight, existing in the mind of a person at the time of his making a declaration, will render it inadmissible as a declaration in articulo mortis; but where a person knew that he must die, and the magistrate, previously to his making the declaration, desired him, as a dying man, to tell the truth, and he replied that he would:—Held, that his declaration was admissible. *Rex* v. *Hayward*, 6 Car. & P. 157. Contra, *Reg.* v. *Pym*, 1 Cox, C. C. 339.

If the deceased thought she would recover at the time the declarations were made, they ought not to be received. *Rex* v. *Wellbourn*, 1 East, P. C. 358; 1 Leach, C. C. 503, n.

In murder, the declarations of the deceased, after the mortal wound is given, may be received, though the party did not express any apprehension of approaching dissolution; but the examination of such a person taken by a magistrate, extrajudicially, cannot be received. *Rex* v. *Woodcock*, 1 Leach, C. C. 500; 1 East, P. C. 354. S. P., *Rex* v. *Dingler*, 1 Leach, C. C. 504, n.; 1 East, P. C. 357.

Statements showing Consciousness of Im-

pending Dissolution.] — The deceased, shortly after the occurrence which resulted in her death, was seen standing at the door of a neighbour's house in a fainting condition, and apparently dying. She said, "I am dying, look to my children," and she then made a statement as to the cause of her injuries:—Held, that the statement then made was admissible in evidence as a dying declaration. *Reg.* v. *Goddard*, 15 Cox, C. C. 7.

Statements made behind the back of the prisoner are not admissible in evidence as dying declarations unless the person making them entertains at the time a settled hopeless expectation of immediate death. Answers in the affirmative to the following questions:—"Do you think you are in bodily danger, and in fear of death?" "You are not expecting to recover, are you aware that you will die?" "Do you fully and clearly understand what I am saying to you?" and the use of the expression, "I am sure I am going to die," do not indicate such a state of mind. *Reg.* v. *Osman*, 15 Cox, C. C. 1.

The deceased, shortly after the wound had been given which caused her death, made a statement, in the prisoner's absence, as to the cause of her injuries. She was in fact dying at the time she made the statement. Two witnesses swore she was conscious at the time. The doctor, who arrived before she made the statement, swore that she was unconscious from the moment of his arrival, but that there might have been intervals of consciousness before death. The statement was made during the doctor's absence from the room:—Held, that the statement was not admissible in evidence as a dying declaration, as it was uncertain whether the deceased was conscious of impending death, or in fact conscious at all, at the time she made the statement. *Reg.* v. *Smith*, 16 Cox, C. C. 170.

The declarations of a deceased person are evidence, though at the time they were made the deceased thought herself better, where she had uniformly said, both before and after they were made, and up to the time of her death, that she knew she should die. *Rex* v. *Tinkler*, 1 East, P. C. 354.

Where the deceased said he was "a murdered man, and it would have been better if they had killed him on the spot than left him to linger, and that he thought he should never get over it," but he lived several weeks afterwards:—Held, that there was a primâ facie case for the admissibility of declarations made at the time of those statements. But where the person to whom the declarations were made stated that he believed the words "murdered man" were not used in their literal sense, and that the deceased did not appear to have any immediate fear of death on his mind:—Held, that the case was taken out of the principle on which such declarations are receivable. *Reg.* v. *Qualter*, 6 Cox, C. C. 357.

If a person whose death is the subject of a charge of manslaughter expresses an opinion that she will not recover, and makes a declaration, and at a subsequent part of the same day asks a person whether he thinks she will "rise again":—Held, that this showed such a hope of recovery as rendered the previous declaration inadmissible. *Rex* v. *Fagent*, 7 Car. & P. 238.

The deceased said, "I think myself in great danger":—Held, that these words did not, necessarily, exclude all hope, and therefore that they were not admissible as a dying declaration. *Rex* v. *Errington*, 2 Lewin, C. C. 148.

In a case of murder it appeared that two days before the death of the deceased the surgeon told her that she was in a very precarious state, and that on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement:—Held, that this statement was not receivable in evidence as a declaration in articulo mortis, as it did not sufficiently appear that at the time of the making of it, the deceased was without hope of recovery. *Reg.* v. *Megson*, 9 Car. & P. 418.

Upon the trial of an indictment for murder it appeared that the deceased was told by a doctor that there was little or no hope of recovery, and being asked if she understood her position, replied that she did:—Held, that there was no proof of a hopeless expectation of immediate death sufficient to make a subsequent declaration admissible in evidence as a dying declaration. *Reg.* v. *Mitchell*, 17 Cox, C. C. 503.

A strong sense of danger founded on a sense of pain, and not arising from any knowledge of the complaint, does not constitute such a conviction of impending dissolution as to render the declaration of the deceased admissible. *Reg.* v. *Thomas*, 1 Cox, C. C. 52.

Great anxiety for the arrival of the surgeon is not decisive, but religious expressions and making a will accompanied by statements that if the solicitor did not arrive quickly it would be too late, are strong evidence of the abandonment of all hope. *Reg.* v. *Thomas*, 1 Cox, C. C. 52.

The deceased had told a surgeon that she did not think she would recover, having previously requested that she might be taken home to die:—Held, that a statement then made by her was admissible as a dying declaration. *Reg.* v. *Brooks*, 1 Cox, C. C. 6.

Where the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied," and after this he made a statement:—Held, that it was not admissible as a declaration in articulo mortis, as it did not appear that the deceased thought himself at the point of death, for, being told that the wound was not necessarily mortal, he might still have a hope of recovery. *Rex* v. *Christie*, Car. C. L. 232.

A person who was told by the surgeon that she would never recover, said, that she "hoped he would do what he could for her, for the sake of her family." He again told her that there was no chance of her recovery:—Held, that this showed such a degree of hope in her mind, as to render a statement she then made inadmissible as a declaration in articulo mortis. *Rex* v. *Crockett*, 4 Car. & P. 544.

The deceased asked, "Shall I recover?" The surgeon said, "No." The patient grew better, but relapsed, and then repeated the question. The surgeon said, "I think you will not recover." The deceased said, "I think so too." It was after this conversation, but not immediately, that the declaration which was proposed to be given in evidence was made:—Held, admissible. *Rex* v. *Ashton*, 2 Lewin, C. C. 147.

On the question whether a declaration of a

deceased person is admissible as a declaration in articulo mortis, the judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used, as to whether he thought he should or should not recover. *Rex* v. *Spilsbury*, 7 Car. & P. 187.

Upon a trial for manslaughter, it was proved that the deceased, then being in such a state from the injuries he had received that it was impossible he could recover, and in fact death ensued eleven days afterwards, made a declaration, concluding with these words: "I have made this statement believing I shall not recover." On the same day, and shortly before making the declaration, he had stated, "I have seen the surgeon, and he has given me some little hope that I am better; but I do not myself think I shall ultimately recover." It was also proved, that on the occasion of this conversation he had said that he could not recover:—Held, that the statement being made under a belief of impending death, was properly received as a dying declaration. *Reg.* v. *Reany*, Dears. & B. 151; 26 L. J., M. C. 43; 3 Jur. (N.S.) 191: 5 W. R. 252; 7 Cox, C. C. 209.

A statement made by a deceased person, inculpating one who was on his trial for the murder of the deceased, if made under circumstances and after expressions which indicated a sense of impending danger of death, is admissible as a dying declaration. *Reg.* v. *Whitworth*, 1 F. & F. 382.

A magistrate's clerk administered an oath to a dying person, and she made a statement. He asked her if she felt she was likely to die? She said, "I think so." He said, "Why?" She replied, "From the shortness of my breath." He said, "It is with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None." He then proceeded to write out the deposition, and when finished read it to her, and asked her to correct any mistake that he might have made. She said, "No hope, at present, of my recovery," and he then inserted those words:—Held, that the declaration was inadmissible, as the words "at present," introduced by the deceased, were a qualification of her previous statement that she had no hope of recovery. *Reg.* v. *Jenkins*, 38 L. J., M. C. 82; L. R. 1 C. C. 187; 20 L. T. 372; 17 W. R. 621; 11 Cox, C. C. 250.

What Facts show Consciousness of Impending Death.]—In order to render a declaration in articulo mortis admissible in a case of manslaughter, it is not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death; but the judge will consider, from all the circumstances, whether the deceased had or had not any hope of recovery. *Rex* v. *Bonner*, 6 Car. & P. 386.

The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound, or illness, or other circumstances indicating the same. *Rex* v. *John*, 1 East, P. C. 357.

A boy between ten and eleven years of age was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was untrue:—Held, that a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis. *Reg.* v. *Perkins*, 9 Car. & P. 395; 2 M. C. C. 135.

A dying declaration of a deceased cannot be admitted by the judge merely from his own notion of the nature of the wound as described (without any evidence that the deceased, at the time, believed himself about to die), unless, at all events, it is shown to have been such as must necessarily have caused death in a short time, and such as all men reasonably would suppose to be so. *Reg.* v. *Cleary*, 2 F. & F. 850.

On a trial of murder, the death having been caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately afterwards, a declaration having been made by deceased in writing (he having no power to speak), about five minutes before death, when he was actually dying:—Held, admissible. *Reg.* v. *Morgan*, 14 Cox, C. C. 337.

On an indictment for murder, it appearing that the deceased, with her throat cut through, came suddenly out of a room, in which she left the prisoner, who also had his throat cut, and was speechless, and that she said something immediately after coming out of the room, and a few minutes before she died—the question being whether murder or suicide:—Held, that her statement was not admissible, either as a dying declaration or as part of the res gestæ. Sed quære, whether in such a case the act is complete until death takes place, and whether, as a dying declaration, it is not a question of fact, upon the surgical evidence, whether, from the nature of the wound, the person must not have been conscious of almost immediate death. *Reg.* v. *Bedingfield*, 14 Cox, C. C. 341.

Subsequent Hope of Recovery.]—A declaration made under the belief of impending death was held admissible in evidence, even though the declarant at a later period of the day took a more cheerful view of her position, and thought that she would recover. *Reg.* v. *Hubbard*, 14 Cox, C. C. 565.

Where the deceased having said that he thought he should die, made a statement, and two or three days afterwards expressed his belief that he should recover, and he lived some days after that:—Held, that the statement was inadmissible. *Reg.* v. *Taylor*, 3 Cox, C. C. 84.

Length of Time between Declaration and Death.]—A considerable length of time between the making a statement and the time of death does not render the statement inadmissible. *Reg.* v. *Bernadotti*, 11 Cox, C. C. 316.

On a trial of murder, a written declaration of the deceased was put in evidence by the prosecution; the declaration was made before a magistrate. The deceased said, "Be quick, or I shall die," but did not die for nearly three weeks. The deceased was not sworn before making the declaration:—Held, that the declaration was admissible, for the deceased thought he was going to die, and the fact that he did not die for nearly three weeks would not render it inadmissible. *Ib.*

The declarations of a deceased made on the day

he was wounded, and when he believed he should not recover, are admissible, though he did not die until eleven days afterwards: and though the surgeon did not think his case hopeless, and continued to tell him so until the day of his death. *Rex* v. *Mosley*, 1 M. C. C. 97; 1 Lewin. C. C. 79.

Form of Taking.]—A deposition made before a magistrate by a dying man, as to the cause of his death, need not, on the face of it, show that it was made under circumstances which would render it admissible in evidence as a dying declaration; but that is a fact dehors the statement, and may be proved by parol testimony. *Reg.* v. *Hunt*, 2 Cox, C. C. 239.

If a declaration in articulo mortis is taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. *Rex* v. *Gay*, 7 Car. & P. 230.

Parol evidence of dying declarations which have been reduced into writing cannot be received. *Rex* v. *Trowter*, 1 East, P. C. 356.

It is not absolutely necessary that the deceased should have been sworn. *Reg.* v. *Bernadotti*, 11 Cox, C. C. 316.

Upon an indictment for murder or manslaughter a statement giving the substance of questions put to and answers given by the deceased person is not admissible in evidence as a dying declaration. Such a declaration must, in order that it may be admissible in evidence, be in the actual words of the deceased, and if questions are put, the questions and answers must both be given, in order that it may appear how much was suggested by the examiner, and how much produced by the person making the declaration. *Reg.* v. *Mitchell*, 17 Cox, C. C. 503.

An examination of a man touching injuries which he received from the prisoner, if subsequently, on the death of the injured man from the injuries he has received, appended to a caption charging the prisoner with his murder, is inadmissible in evidence on that charge, although it may be admissible as a dying declaration. *Reg.* v. *Clarke*, 2 F. & F. 2.

6. TRIAL, SENTENCE, AND PUNISHMENT.

Jurisdiction—Offence Abroad by Alien Enemy.]—A manslaughter committed in China by an alien enemy who had been a prisoner of war, and was then acting as a mariner on board an English merchant ship, could not be tried here under a commission issued in pursuance of 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 36. *Rex* v. *Depardo*, 1 Taunt. 26; R. & R. 134.

—— **By British Subject of British Subject Abroad.**]—A British subject was indictable under 33 Hen. 8, c. 23, for the murder of another British subject, though the murder was committed within the dominion of a foreign independent state. *Rex* v. *Sawyer*, R. & R. 294; 2 C. & K 101. S. P., *Rex* v. *Ealing*, Car. C. L. 105.

—— **By Foreigner of British Subject—Blow Abroad—Death on Ship.**]—A Spaniard, being in England, signed articles to serve in a ship "bound on a voyage to the Indian seas and elsewhere, on a seeking and trading voyage (not exceeding three years' duration), and back to the United Kingdom." On the ship's arrival at Zanzibar, an island in the Indian seas, which was under the dominion of an Arab king, the captain left the vessel (in pursuance of an understanding in England), and set up in trade, and, without the consent of the rest of the crew, engaged the Spaniard as an interpreter, the new captain of the ship not requiring him to serve on board. The ship went two or three short voyages without him, and returned to anchor a few hundred yards from the shore, in a roadstead of seven fathoms water, between Zanzibar and several other islands. The crew being on shore, a quarrel arose between the Spaniard and one of them, which led to blows by the Spaniard, which killed the other. The death took place on board ship. The Spaniard was brought to England, and indicted and tried in London under a special commission issued in pursuance of 9 Geo. 4, c. 31, s. 7:—Held, that he could not be convicted—first, as he was not a subject of his Majesty within the meaning of that section; and secondly, that as the death was on shipboard, although the blows were given on shore, the offence could not be said to have been committed according to the words of the statute, "on land out of the United Kingdom." *Rex* v. *Mattos*, 7 Car. & P. 458.

—— **By British Subject of Foreigner Abroad.**]—A British subject, who committed a murder in a foreign country upon a person who was not a British subject, was triable in England under 9 Geo. 4, c. 31, s. 7. *Reg.* v. *Azzopardi*, 1 Car. & K. 203; 2 M. C. C. 289; 1 Cox, C. C. 28.

—— **Ship taken by British Ship.**]—On the trial of Brazilians for the murder of P., it appeared, that a British cruiser, engaged in the prevention of the slave-trade, manned two boats, and sent them, commanded by a lieutenant, to board the Brazilian ship F. He did so, and finding her fitted up for slaves, but with no slaves on board, took her. After this, the lieutenant in the ship F. chased the ship E., also Brazilian, and sent a boat with P., who was a midshipman, to board her. She had slaves on board, and was captured, and part of her crew put on board the F., and left there, with the captain and cook of the F., as prisoners in charge of P. and British seamen. Neither the boats nor the F., after she was taken, had any instructions on board, but the cruiser had. Such of the crew of the E. as were thus put on board the F., and the cook of the F., all Brazilians, rose on P. and the British seamen and killed them all; but the captain of the F. would not join in the transaction. It was contended for the prosecution, that the F. and E. were legally taken under 5 Geo. 3, c. 113, and 7 & 8 Geo. 4, c. 74, and the Portuguese and Brazilian treaties as to slave-trading; and that the prisoners were in lawful custody, and the ship F. in the lawful custody of the Queen's officers. The prisoners were convicted of the murder, but a majority of the judges held the conviction wrong, on the ground of want of jurisdiction in an English court to try an offence committed on board the F.; and that, if the lawful possession of that vessel by the British Crown through its officers would be sufficient to give jurisdiction, there was no evidence brought before the court at the trial to show that the possession was lawful. *Reg.* v. *Serva*, 2 Car. & K. 53; 1 Den. C. C. 104; 1 Cox, C. C. 292.

—— **Whether Ship is British.**]—Upon an in-

dictment for murder, it was proved that the offence was committed upon the high seas, in a ship sailing under the British flag, which was foreign built, and all the crew of which, both officers and men, including the prisoner and the deceased, were foreigners. A certified copy of the register as put in evidence, in which one Rehder was described as the sole owner, and as being of London, and a merchant. Rehder was not a born Englishman, and there was no evidence of his having letters of denization, or that he had been naturalized:—Held, that the ship was not a British ship so as to give jurisdiction in this country to try the offence. *Reg.* v. *Bjornsen*, L. & C. 545; 34 L. J., M. C. 180; 11 Jur. (N.S.) 589; 12 L. T. 473; 13 W. R. 664; 10 Cox, C. C. 74.

—— **By Foreigner of Foreigner Abroad—Death in England.**]—If one foreigner inflicts a blow on another foreigner in a foreign vessel on the high seas, and the person so struck in a few days afterwards lands in England and dies there, the homicide is not cognizable by the courts of this country by virtue of 9 Geo. 4, c. 31, s. 8, or of 2 Geo. 2, c. 21, s. 1. *Reg.* v. *Lewis*, Dears. & B. 182; 26 L. J., M. C. 104; 3 Jur. (N.S.) 525; 5 W. R. 572; 7 Cox, C. C. 277.

—— **By Foreigner on board British Ship.**]—A foreigner on board a British ship on the high seas owes allegiance to the law of England, and if he commits an offence against that law, he is triable under 18 & 19 Vict. c. 91, s. 21, by any court of justice in her Majesty's dominions, within the jurisdiction of which he may, at the time of the indictment, happen to be, provided that such court would have had cognizance of the crime if committed within the limits of its ordinary jurisdiction. *Reg.* v. *Sattler*, Dears. & B. 525; 27 L. J., M. C. 48; 4 Jur. (N.S.) 98; 6 W. R. 227; 7 Cox, C. C. 431.

Where a foreigner, having committed larceny in England, was followed to Hamburgh by an English police-officer, who arrested him without a warrant, and brought him against his will on board an English steamer trading between Hamburgh and London, and there kept him in custody in order that he might be tried for the larceny in England: the foreigner having shot the officer during the voyage, and whilst the steamer was on the high seas, under such circumstances that if the killing had been by an Englishman in an English county, the offence would have been murder:—Held, that the Central Criminal Court had jurisdiction under 18 & 19 Vict. c. 91, s. 21, to try the foreigner for the murder of the police-officer. *Ib.*

—— **Indictment.**]—In an indictment on 9 Geo. 4, c. 31, s. 7, for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his Majesty. To prove the allegation that the prisoner was a subject of his Majesty, his own declaration is evidence to go to the jury, and it will be for them to say, whether they are satisfied that he is in fact a British-born subject. *Rex* v. *Helsham*, 4 Car. & P. 394.

Trial—When separate Trials of different Prisoners.]—Where two persons charged with murder by the same indictment had made statements implicating one another, and those statements were evidence for the prosecution, the court, upon the application of the counsel appearing for one prisoner, allowed them to have separate trials. *Reg.* v. *Jackson*, 7 Cox, C. C. 357.

—— **Unsatisfactory Verdict.**] — Indictment for murder. Defence, that the deceased committed suicide. Verdict guilty, the jury adding that they believed the act was committed without premeditation. The judge refused to receive such a verdict, and directed the jury to say guilty or not guilty. *Reg.* v. *Maloney*, 9 Cox, C. C. 6.

Indictment for Murder—Verdict of Manslaughter.]—On an indictment for murder the power of the jury to return a verdict of manslaughter for criminal negligence by the accused depends upon the circumstances of the particular case. *Reg.* v. *French*, 14 Cox, C. C. 328.

—— **Verdict of Assault.**]—On an indictment for murder against several, one cannot be convicted of an assault committed on the deceased in a previous scuffle, such assault not being in any way connected with the cause of death. *Reg.* v. *Phelps*, 2 M. C. C. 240; Car. & M. 180.

On an indictment for murder, evidence was given of long continued violence and ill treatment of the deceased by the prisoner, but the medical evidence was to the effect that death was due to inflammation of the lungs quite unconnected with the prisoner's conduct:—Held, that the prisoner might be convicted of a common assault. *Reg.* v. *Rook*, 4 Cox, C. C. 402.

On a trial for manslaughter where the assault is proved to have no connection with the death, the jury may find the prisoner guilty of an assault under 1 Vict. c. 85. *Reg.* v. *King*, 2 Cox, C. C. 95. S. P., *Reg.* v. *Auty*, 2 Cox, C. C. 282. Contra, *Reg.* v. *Connor*, 2 Car. & K. 518.

—— **For Concealing Birth.**]—On an indictment for child murder, a conviction for concealing the birth cannot be supported. *Reg.* v. *Hicks*, 2 M. & Rob. 302.

Sentence of Death—Sentence for another Offence.]—A man upon whom sentence of death has passed ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. *Rex* v. *Brady*, R. & R. 268.

Sentence—Form of.]—The time and place of the execution of a convicted felon form no part of the sentence. *Rex* v. *Doyle*, 1 Leach, C. C. 67.

A judge might, if he saw fit, have ordered a person convicted of murder to be executed immediately, or at any time within 48 hours after the conviction, as he might have done in any other capital felony. *Rex* v. *Wyatt*, R. & R. 230.

It was not essential to award the day of execution in the sentence, the 25 Geo. 2, c. 37, being in that respect only directory; and if a wrong day was awarded, it would not vitiate the sentence, if the mistake was discovered and set right during the assizes. *Ib.*

The bodies of executed murderers were by the common law at the king's disposal, and there the court could not direct them to

be hung in chains. *Rex* v. *Hall*, 1 Leach, C. C. 21.

Quære, whether on passing sentence of death on a conviction for murder, the award of dissection and anatomising, in pursuance of 25 Geo. 3, c. 37, was an essential part of the sentence to be pronounced by the judge. *Rex* v. *Fletcher*, R. & R. 58.

The omission of it might be remedied by the judge going again into court after adjournment, from his lodgings, and ordering the prisoner to be again brought up, and then passing the proper judgment, as the sentence might be corrected or altered at any time during the assizes. *Ib.*

—— **Recorded.**]—Sentence of death might under 6 & 7 Will. 4, c. 30, be recorded against a person convicted of murder. *Reg* v. *Hogg*, 2 M. & Rob. 381.

Habeas Corpus—Certiorari—Time.]—On a conviction for murder, in which the prisoners were brought up by habeas corpus, and the record by certiorari, the court gave the prisoners three days' time to examine the record and instruct counsel to show cause why execution should not be awarded against them. *Rex* v. *Garside*, 4 N. & M. 33; 2 A. & E. 266; 4 L. J., M. C. 1.

The attorney-general is entitled, as of course, to a habeas corpus and certiorari, to bring up a prisoner and the record of his conviction in case of felony. *Ib.*

Pleas why Sentence should not pass.]—A proclamation promising a pardon cannot be pleaded as a pardon. *Ib.*

But where such proclamation had been made, the court, in their discretion, deferred the awarding of execution upon the sentence, until the prisoner should have had time to apply to the secretary of state for a pardon, according to the terms of the proclamation. *Ib.*

Semble, that a pardon after judgment may be pleaded ore tenus, and in bar of execution; and there may be a demurrer to such a plea ore tenus. *Ib.*

Where a woman who had been condemned to death did not, when called upon to say why execution should not be done upon her, plead her pregnancy, the court would not permit that question to be formally inquired into, at the suggestion of her counsel that she was in fact pregnant. *Reg.* v. *Hunt*, 2 Cox, C. C. 261.

Sheriff—Jurisdiction of Queen's Bench over.]—The court of King's Bench has authority to order the sheriff of any county, or the marshal of the court, to carry into execution a sentence of death, pronounced by a judge under a commission of oyer and terminer and general gaol delivery. *Reg.* v. *Garside*, 4 N. & M. 33; 2 A. & E. 266.

—— **Duty of.**]—A sheriff is not bound, upon service of a copy of the calendar of prisoners signed by a justice of gaol delivery at the assizes, to execute prisoners against whom sentence of death has been passed, unless such prisoners are in his legal custody. *Rex* v. *Antrobus*, 4 N. & M. 565; 2 A. & E. 798; 1 H. & W. 96; 6 Car. & P. 784; 4 L. J., K. B. 91.

Where the sheriff has the custody of a prisoner, the judgment of the court passing sentence of death upon him is, without any warrant or copy of the calendar, sufficient to authorise and require the sheriff to do execution; the copy of the calendar signed by the judge is a mere memorial. *Ib.*

7. Conspiring or Soliciting to Commit Murder.

What is—Publication in Newspaper.]—M. was indicted under 24 & 25 Vict. c. 100, s. 4. The encouragement and endeavour to persuade to murder, proved at the trial, were the publication and circulation by him of an article, written in German, in a newspaper published in that language in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty:—Held, that such a direction was correct, and that the publication and circulation of a newspaper article might be an encouragement, or endeavour to persuade to murder, within s. 4 of 24 & 25 Vict. c. 100, although not addressed to any person in particular. *Reg.* v. *Most*, 50 L. J., M. C. 113; 7 Q. B. D. 244; 44 L. T. 823; 29 W. R. 758; 14 Cox, C. C. 583; 45 J. P. 696.

—— **By Letter not received by Addressee.**]—The prisoner was indicted under 24 & 25 Vict. c. 100, s. 4, for that he "did solicit H. to murder K.," and in a second count for that he "did endeavour to persuade H. to murder K." The prisoner wrote and posted a letter addressed to H., in which he requested H. to murder K. The letter fell by accident into the hands of a third person, and never reached H.:—Held, that the evidence would not sustain a conviction on either of the counts. *Reg.* v. *Fox*, 19 W. R. 109; Cp. *Reg.* v. *Ransford*, 31 L. T. 488; 13 Cox, C. C. 9.

Evidence—Attempt to Murder another Person.]—Evidence that A. was privy to a plot to murder B. by explosive machines, is sufficient to go to the jury on counts charging A. with the murder of C. (accidentally killed by the explosion), and with conspiring to murder him. *Reg.* v. *Bernard*, 1 F. & F. 240.

—— **Admissibility of Letters found on Prisoner.**]—At a period of the trial when it had been proved that the grenades by which the death in question had been caused had been ordered by A.; but when there was no evidence to connect A. with the prisoner, it was proved that a letter in A.'s handwriting, bearing a memorandum in the hand of the prisoner, was found at his residence after his arrest upon the present charge:—Held, that such letter was admissible against him, not upon the ground that A. was a co-conspirator, but upon the ground that it was found in the possession of the prisoner, and was relevant to this inquiry. *Ib.*

Conspiracy to Commit Murder.] — *See* post, CONSPIRACY, cols. 1564, et seq.

8. ATTEMPTS TO MURDER.

a. By administering Poison.

What is an Administering.]—It is not an administering of poison unless the poison is taken into the stomach. Therefore, where A. was indicted for administering poison to a woman, with intent to murder her; and the proof was that he gave her a piece of cake which contained arsenic and sulphate of copper, which she put into her mouth, but which she spit out again without having swallowed any part of it:—Held, that it was not sufficient to convict. *Rex* v. *Cadman*, Car. C. L. 237; 1 M. C. C. 114.

If a servant put poison into a coffee-pot which contained coffee, and when her mistress came down to breakfast, the servant told the mistress that she had put the coffee-pot there for her (the mistress's) breakfast, and the mistress drank the poisoned coffee—this was a causing the poison to be taken, within 9 Geo. 4, c. 31, s. 11. *Rex* v. *Harley*, 4 Car. & P. 369.

If A. sent poison intending it for B., and with intent to kill B., and it came into the possession of C., who took it, A. might be indicted on 9 Geo. 4, c. 31, s. 11, for administering it to C. *Rex* v. *Lewis*, 6 Car. & P. 161.

The delivery of poison to an agent, with directions to him to cause it to be administered to another under such circumstances that, if administered, the agent would be the sole principal felon, was not an attempt to administer poison within the 7 Will. 4 & 1 Vict. c. 85, s. 3. *Reg.* v. *Williams*, 1 Car. & K. 589; 1 Den. C. C. 39.

A person who at the same time administers a poison and its antidote, does not administer poison (per Alderson). *Reg.* v. *Cluderay*, 1 Den. C. C. 515; 2 Car. & K. 907; T. & M. 219; 19 L. J., M. C. 119; 14 Jur. 71; 4 Cox, C. C. 84.

Putting poison in a place where it is likely to be found and taken, if done with an intent to murder, was an attempt to administer poison within 7 Will. 4 & 1 Vict. c. 85, s. 3. *Reg.* v. *Dale*, 6 Cox, C. C. 14.

Poison—What is.]—Administering unbroken cocculus indicus berries to an infant was administering poison within 7 Will. 4 & 1 Vict. c. 85, s. 2, although it was proved that the berries were not poisonous till the exterior or pod was broken, and that by reason of the weakness of the infant's digestive organs, the berries were innocuous. *Reg.* v. *Cluderay*, 1 Den. C. C. 515; 2 Car. & K. 907; T. & M. 219; 19 L. J., M. C. 119; 14 Jur. 71; 4 Cox, C. C. 84.

Indictment.]—A prisoner was indicted for mixing sponge with milk, and administering it with intent to poison. The indictment was insufficient, because it did not aver that the sponge was of a deleterious or a poisonous nature. *Rex* v. *Powles*, 4 Car. & P. 571.

Evidence.]—An indictment for causing poison to be taken by A. with intent to murder A., is not sustained by evidence showing that the poison, although taken by A., was intended for another person. *Reg.* v. *Ryan*, 2 M. & Rob. 213.

On an indictment for administering poison with intent to murder, the police having, in consequence of certain information, found the bottle containing the poison in a place used by the prisoner, are bound to disclose from whom they had the information. *Reg.* v. *Richardson*, 3 F. & F. 693.

b. By Shooting or Wounding.

Attempt to Discharge Firearms.]—B. drew a loaded pistol from his pocket for the purpose of murdering S., but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand, and he was at once arrested:—Held, that the offence was not within s. 15 of 24 & 25 Vict. c. 100, under which section the prisoner had been tried and convicted. *Reg.* v. *Brown*, 52 L. J., M. C. 49; 10 Q. B. D. 381; 48 L. T. 270; 31 W. R. 460; 15 Cox, C. C. 199; 47 J. P. 327.

Semble, that the offence was within s. 14 of 24 & 25 Vict. c. 100. *Reg.* v. *St. George* (9 Car. & P. 483) and *Reg.* v. *Lewis* (9 Car. & P. 523) doubted. *Ib.*

If a person, intending to shoot another, put his finger on the trigger of a loaded pistol, but was prevented from pulling the trigger, this was not an attempt to discharge loaded arms by drawing a trigger, or in any other manner, within 7 Will. 4 & 1 Vict. c. 85, ss. 3, 4, as the words, "in any other manner," in that statute, meant something analogous to drawing the trigger, which was the proximate cause of the loaded arms going off. *Reg.* v. *St. George*, 9 Car. & P. 483.

The applying a lighted match to a loaded match-lock gun, or the striking the percussion cap of a percussion gun, was a sufficient attempt within these enactments. *Ib.*

An indictment on 7 Will. 4 & 1 Vict. c. 85, ss. 3 & 4, charged the prisoner with attempting to discharge at the prosecutor a certain blunderbuss, loaded with gunpowder and divers leaden shots. The prisoner on a refusal by the prosecutor to give up some title deeds, addressed him in these words, "Then you are a dead man," and immediately unfolded a greatcoat which he had on his arm, and took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint had dropped out, and was discovered between the lining of the great coat:—Held, that the evidence was not sufficient to sustain the charge in the indictment. *Reg.* v. *Lewis*, 9 Car. & P. 523.

What are Loaded Arms.]—Upon an indictment for attempting to discharge a loaded arm with intent to murder, the evidence of the prosecution was that the prisoner had pointed at the prosecutor a revolver loaded in some but not all of its chambers with ball cartridges, saying that he would shoot him; the prisoner then pulled the trigger of the revolver, but the hammer fell upon a chamber which contained an empty cartridge-case:—Held, that the revolver was a loaded arm within the meaning of s. 14 of 24 & 25 Vict. c. 100; and that the prisoner could upon the evidence be convicted of attempting to discharge a loaded arm with intent to murder the prosecutor. *Reg.* v. *Jackson*, 17 Cox, C. C. 104.

G. was charged with a felonious attempt to shoot. He was proved to have presented a pistol

at a man, and to have pulled the trigger, but the pistol did not go off. On examining the pistol, it was found that, if it ever had been primed, it would have been impossible for the priming to have fallen out, and the pistol must have gone off:—Held, that there was no case to go to the jury. *Reg.* v. *Gamble*, 10 Cox, C. C. 545.

——**Before 24 & 25 Vict. c. 100.**]—A rifle which was loaded, but which for want of proper priming would not go off, was not a loaded arm within the 7 Will. 4 & 1 Vict. c. 85, s. 3; and the pointing a rifle thus circumstanced at a person, and pulling the trigger of it, whereby the cock and hammer were thrown, and the pan opened, did not warrant a conviction of felony under s. 3. *Reg.* v. *James*, 1 Car. & K. 530; 1 Cox, C. C. 78.

In order to constitute the offence of attempting to discharge loaded fire-arms, within 43 Geo. 3, c. 58, they must have been so loaded as to be capable of doing the mischief intended. *Rex* v. *Carr*, R. & R. 337. S. P., *Rex* v. *Whitley*, 1 Lewin, C. C. 123.

If a pistol was loaded with gunpowder and ball, but its touch-hole was plugged, so that it could not by possibility be fired, this was not loaded arms, within 9 Geo. 4, c. 31, ss. 11, 12. *Rex* v. *Harris*, 5 Car. & P. 159.

Where on an indictment on 43 Geo. 3, c. 58, for maliciously shooting at a person, it appeared that the instrument was fired so near, and in such a direction, as to be likely to kill or do other grievous bodily harm to such person, and with an intent that it should do so, the case was within that act, although it was loaded with powder and paper only. *Rex* v. *Kitchen*, R. & R. 95.

A. sent a tin box to B., containing three pounds of gunpowder, and two detonators, which were intended to ignite the gunpowder when any person opened the box, and so destroy the person who opened it:—Held, that this was not an attempt to discharge loaded arms at B. within 9 Geo. 4, c. 31, ss. 11, 12. *Rex* v. *Mountford*, 7 Car. & P. 242; 1 M. C. C. 141.

Evidence as to Person shot at.]—The fact of firing a gun into a room of A.'s house, with intent to shoot A., the prisoner supposing him to be in the room, will not support a charge of shooting at A., if he is not shown to be in the room, or within reach of the shot. *Rex* v. *Lovel*, 2 M. & Rob. 39.

Semble, that where guns are fired by one vessel at another vessel, and those on board her generally, those guns are to be considered as shot at each individual on board her. *Rex* v. *Bailey*, R. & R. 1.

Intention to Shoot different Person.]—A person intending to shoot at and kill L., shot at H., mistaking him for L., but did not kill H. On an indictment for shooting at H., with intent to murder H., the judge left it to the jury to say whether there was an intent to murder H.; but he laid it down, that the law infers that a party intends to do that which is the immediate and necessary effect of the act which he commits. The jury found that the prisoner did not intend to do any harm to H., and the judge directed an acquittal to be recorded. *Rex* v. *Holt*, 7 Car. & P. 519.

An indictment under 9 Geo. 4, c. 31, s. 12, for maliciously shooting at A., was supported, if he was struck with the shot, though the gun was aimed at a different person. *Rex* v. *Jarvis*, 2 M. & Rob. 40.

If intending to murder A., and supposing B. to be A., a person shoots at and wounds B., he may be convicted of wounding B., with intent to murder him. *Reg* v. *Smith*, Dears. C. C. 559; 25 L. J., M. C. 29; 1 Jur. (N.S.) 1116; 4 W. R. 128; 7 Cox, C. C. 51.

Intention to Murder must be Present.]—On an indictment on 7 Will. 4 & 1 Vict. c. 85, s. 2, for the offence of inflicting an injury dangerous to life, with intent to murder, the jury ought not to convict unless satisfied that the prisoner had in his mind a positive intention to murder; and it is not sufficient that it would have been a case of murder if death had ensued. *Reg.* v. *Cruse*, 8 Car. & P. 541. See *Reg.* v. *Jones*, 9 Car. & P. 258.

What is a Shooting.]—A. had the barrels of a double-barrelled percussion gun detached from the stock and lock, and by striking the percussion cap which was on the nipple of one of the barrels, he fired it and shot B.:—Held, to be within 9 Geo. 4, c. 31, ss. 11, 12. *Rex* v. *Coates*, 6 Car. & P. 394.

Gamekeepers being in a preserve between twelve and one at night, heard the firing of two guns, and proceeding in the direction of the sound, met with two persons who neither had guns nor game upon them, nor were either found near them. The gamekeepers immediately seized them without calling on them to surrender, or in any way notifying to them who they were. The keepers were wounded, one of them seriously:—Held, that the prisoner who wounded them might under the circumstances, and taking into consideration the situation and the time of the night, be properly convicted under 9 Geo. 4, c. 31, ss. 11, 12. *Rex* v. *Taylor*, 7 Car. & P. 266.

Wounding.]—To constitute the offence of cutting with intent to murder, it is not necessary that the wound should be near a vital part or of such a nature as likely to cause death. *Rex* v. *Griffith*, 1 Car. & P. 298.

Indictment.]—Upon the trial of an indictment for shooting, with intent to murder a person unknown, it must be proved that there was an intent on the part of the prisoner to murder some particular person. *Reg.* v. *Lallement*, 6 Cox, C. C. 204.

In an indictment for maliciously shooting, under 7 Will. 4 & 1 Vict. c. 85, s. 4, it was sufficient to say, "with a certain loaded gun," without going on to state with what it was loaded. *Reg.* v. *Cox*, 3 Cox, C. C. 58.

If an indictment for shooting another, with intent to murder, in all the counts avers that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal. *Rex* v. *Hughes*, 5 Car. & P. 126. See *Reg.* v. *Oxford*, 9 Car. & P. 525.

On an indictment for maliciously shooting, one act of shooting may be laid in one set of counts, as being with intent to murder H.; and in another set of counts as with intent to murder L. *Rex* v. *Holt*, 7 Car. & P. 519.

An indictment which charges that the prisoner feloniously assaulted J. H., and, by feloniously "drawing the trigger of a pistol, loaded with

gunpowder and a leaden bullet, then and there feloniously and maliciously did attempt to discharge the said pistol at J. H.," with intent to murder him, is good, without stating that "the said pistol" was "so loaded as aforesaid." *Reg.* v. *Baker*, 1 Car. & K. 254; 1 Cox, C. C. 45.

Evidence.]—Upon an indictment for maliciously shooting, it appeared that there were two shootings: but it being questionable whether the first shooting was by accident or design:—Held, that proof of the prisoner having intentionally shot at the person the second time, was evidence to show that the first was wilful. *Rex* v. *Voke*, R. & R. 531.

Evidence of a wound having been made by the contents of a pistol, although no ball was found, and of its having made a loud report, with reference to its size, is sufficient to go to a jury of its having been loaded with ball. *Rex* v. *Weston*, 1 Leach, C. C. 247.

c. By other Means.

Suicide is not.]—An attempt to commit suicide is not an attempt to commit murder within 24 & 25 Vict. c. 100, and is not merged in any of the felonious attempts to commit murder made punishable by that act, but remains a misdemeanor at common law triable by the court of quarter sessions. *Reg.* v. *Burgess*, L. & C. 258; 32 L. J., M. C. 55; 7 L. T. 472; 11 W. R. 96; 9 Cox, C. C. 247.

Abandonment of Child.]—A female abandoned her infant child, having first deposited it in the bottom of a dry ditch among some nettles, by which it was not hurt; and, in consequence of being shortly afterwards found by other persons, had not experienced any inconvenience from the exposure:—Held, that she could not be convicted of an assault with intent to murder the child. *Reg.* v. *Renshaw*, 2 Cox, C. C. 285; 11 Jur. 615.

Wife Jumping out of Window to avoid Violence.]—Where a woman jumps out of window for the purpose of avoiding the violence of her husband, and sustains dangerous bodily injury, the husband cannot be convicted of an attempt to murder, unless he intended by his conduct to make her jump out of the window. *Reg.* v. *Donovan*, 4 Cox, C. C. 401.

9. Threats to Murder.

Indictment.]—A letter signed, "I am your cut-throat," and stating that if the person to whom it was sent had his deserts, he would not live the week out; and that the writer would be with him shortly, and if he made light of it, the writer would make light of him and his, so plainly conveys a threat to kill and murder, as to render it unnecessary to insert either innuendoes or prefatory allegations in the indictment to explain its meaning. *Rex* v. *Boucher*, 4 Car. & P. 562.

Uttering—What is.]—The intentionally putting a threatening letter in a place where it is likely to be seen and read by the party to whom it is directed, or to be found by some other person, and which is in fact so found and conveyed to the party, was an uttering of the letter within 10 & 11 Vict. c. 66, s. 1. *Reg.* v. *Jones*, 5 Cox, C. C. 226.

H. Railways, Endangering Safety of Persons on.

Throwing Stones at Engines or Carriages.]—A person throwing a stone at engines or carriages using a railway, might be indicted under 3 & 4 Vict. c. 97, s. 15, for doing an act to endanger the safety of persons conveyed on the railway; and the indictment might contain a count at common law for throwing the stone at the carriages. *Reg.* v. *Bowray*, 10 Jur. 211.

To constitute a felony under 14 & 15 Vict. c. 19, s. 7, it was necessary that the stone or other thing used should be thrown against and strike an engine, tender, carriage or truck, having a person or persons in or upon it; and, therefore, although a stone may be thrown at a train with intent to injure persons being therein, yet, if it strikes a carriage or tender not having any person in or upon it at the time, the felony is not proved. *Reg.* v. *Court*, 6 Cox, C. C. 202.

On an indictment under 14 & 15 Vict. c. 19, s. 7, for maliciously throwing stones into a railway carriage, with intent to endanger the safety of any person in it, there must be evidence of an intent to do some grievous bodily harm, such as would support an indictment for wounding a particular person with that intent; and, if it appears that the prisoner's intention was only to commit a common assault on some person in the carriage, he must be acquitted. *Reg.* v. *Rooke*, 1 F. & F. 107.

On an indictment for wilfully and maliciously casting anything upon a railway carriage or truck, either with intent to injure it or to endanger the safety of persons in the train; there may be a case for the jury, although the train is a goods train, and there was no person on the particular truck, but there must be proof of the intent to endanger the safety of persons in it. *Reg.* v. *Sanderson*, 1 F. & F. 37.

Evidence.]—On an indictment under 3 & 4 Vict. c. 97, s. 15, for unlawfully and wilfully doing anything to endanger the safety of persons conveyed in or upon any railway, it was unnecessary to allege or prove that the railway was constructed or worked under the powers of an act of parliament. *Reg.* v. *Bowray*, 10 Jur. 211.

By Unlawful Act, Omission or Neglect.]—Two boys went upon premises of a railway company and began playing with a heavy cart, which was near the line. Having started the cart, it ran down the embankment by its own impetus. One boy tried to divert its course; the other cried to him, "Let it go." The cart ran on without pushing, until it passed through a hedge and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it:—Held, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge, and so on to the railway, the boys might be properly convicted under 24 & 25 Vict. c. 100, s. 34. *Reg.* v. *Monaghan*, 23 L. T. 168; 11 Cox, C. C. 608.

The neglect of the driver and stoker of a railway engine to keep a good look out for signals, according to the rules and regulations of the railway company, the consequence of which

neglect is, that a collision occurs, and the safety of passengers is endangered, was not an offence within 3 & 4 Vict. c. 97, s. 15. *Reg.* v. *Purdenton*, 6 Cox, C. C. 247.

Malicious Injury to Property.]—*See* ante. col. 1438.

I. RAPE AND ASSAULT ON WOMEN AND CHILDREN.

1. *Rape.*
   - *a.* Who Capable of Committing, 1547.
   - *b.* Upon whom Committed, 1547.
   - *c.* The Offence, 1548.
   - *d.* Indictment, 1551.
   - *e.* Trial, 1552.
   - *f.* Evidence, 1553.
2. *Carnally Abusing Children*, 1556.
3. *Indecent Assaults on Females*, 1562.
4. *Procuring Defilement of Girls*, 1563.

1. RAPE.

a. Who Capable of Committing.

Boy under Fourteen.]—A boy under fourteen cannot be convicted of an assault with intent to commit a rape. *Rex* v. *Eldershaw*, 3 Car. & P. 396.

And if he is under that age, no evidence is admissible to show that, in point of fact, he could commit the offence of rape. *Reg.* v. *Phillips*, 8 Car. & P. 736. S. P., *Reg.* v. *Jordan*, 9 Car. & P. 118; *Rex* v. *Groombridge*, 7 Car. & P. 582; *Reg.* v. *Brimilow*, 9 Car. & P. 366; 2 M. C. C. 12 2.

Woman—Principal in Second Degree.]—A woman may be indicted for rape as a principal in the second degree. *Reg.* v. *Rom.* 17 Cox, C. C. 609.

b. Upon whom Committed.

Idiot.]—The prisoner had carnal knowledge of a girl of thirteen by force. She was incapable of giving consent from defect of understanding, and it was not shown that the act was done against her will:—Held, that he was properly convicted of rape. *Reg.* v. *Fletcher*, Bell, C. C. 63; 28 L. J., M. C. 85; 5 Jur. (N.S.) 179; 7 W. R. 204; 8 Cox, C. C. 131.

The mere fact of connection with an idiot girl capable of recognising and describing the prisoner, but incapable, so far as her idiotcy rendered her so, of expressing dissent or consent, and therefore without her consent, is not sufficient evidence of the commission of a rape upon her to be left to a jury. *Reg.* v. *Fletcher*, 35 L. J., M. C. 172; L. R. 1 C. C. 39; 12 Jur. (N.S.) 505; 14 L. T. 573; 14 W. R. 774; 10 Cox, C. C. 248.

Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiotcy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty. *Reg.* v. *Barratt*, 43 L. J., M. C. 7; L. R. 2 C. C. 81; 29 L. T. 409; 22 W. R. 136; 12 Cox, C. C. 498.

The cases of *Reg.* v. *Fletcher* (Bell, C. C. 63), and of *Reg.* v. *Fletcher* (L. R. 1 C. C. 39), are not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision to the effect that there was not that requisite testimony of want of assent to justify leaving the case to the jury. *Ib.*

Girl Unconscious.]—Where a girl is in a state of utter unconsciousness, whether occasioned by the act of the prisoner or otherwise, a person having connection with her during that time is guilty of rape. *Reg.* v. *Ryan*, 2 Cox, C. C. 115.

Infant.]—Though a child under ten years of age cannot legally consent to a rape upon her, yet she may consent to the attempt to commit it; and such an attempt, with her consent, would not be an assault. Where, therefore, a child is too young to know the nature of an oath, her evidence as to a rape upon her cannot be taken, and marks of violence on her private parts cannot be presumed to have been done against her consent. *Reg.* v. *Cockburn*, 3 Cox, C. C. 543. *See now* Criminal Law Amendment Act, 1885, s. 4.

c. The Offence.

Consent—What is—Non-resistance owing to Mistake.]—To constitute a rape on a woman conscious and capable of giving consent at the time of connection, there must be an actual resistance of the will. Non-resistance to connection, permitted under a misapprehension induced by the conduct of the man, by a woman conscious and capable of consenting, amounts to consent, though unintentional, and prevents the offence amounting to a rape. *Reg.* v. *Barrow*, 38 L. J., M. C. 20; L. R. 1 C. C. 156; 19 L. T. 293; 17 W. R. 102; 11 Cox, C. C. 191. *See* 48 & 49 Vict. c. 69, s. 4.

A woman, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened she found that the man was not her husband and awoke her husband:—Held, that a conviction for rape upon these facts could not be sustained. *Ib.*

Where a married woman consented to the prisoner having connection with her under the impression that he was her husband:—Held, that the prisoner was guilty of rape. *Reg.* v. *Barrow* (L. R. 1 C. C. 156) not followed. *Reg.* v. *Dee*, 14 L. R. Ir. 468; 15 Cox, C. C. 579—C. C. R. And see now 48 & 49 Vict. c. 69, s. 4.

Having carnal knowledge of a married woman, under circumstances which induced her to suppose it is her husband, does not amount to a rape. *Rex* v. *Jackson*, R. & R. 47.

If a man has connection with a woman, she consenting under the belief that it is her husband, this is not a rape, though it is a fraud on the part of the man; but it is an assault; and the fact that there was no resistance on her part makes no difference, as the fraud is sufficient to make it an assault. *Reg.* v. *Williams*, 8 Car. & P. 286. S. P., *Reg.* v. *Saunders*, 8 Car. & P. 265.

A. got into the bed of a married woman, intending if he could to have connection with her by passing for her husband, but not by force. She supposing him to be her husband allowed him to have connection with her:—Held, that he was not guilty of rape. *Reg.* v. *Clarke*, Dears. C. C. 397; 3 C. L. R. 86; 24 L. J., M. C. 25; 18 Jur. 1059; 3 W. R. 20; 6 Cox, C. C. 412. S. P., *Reg.* v. *Sweenie*, 8 Cox, C. C. 223.

To constitute rape, it is not necessary that the

connection with the woman should be had against her will; it is sufficient if it is without her consent. *Reg.* v. *Fletcher*, Bell, C. C. 63; 28 L. J., M. C. 85; 5 Jur. (N.S.) 179; 7 W. R. 204; 8 Cox, C. C. 131.

Upon an indictment for rape, there must be some evidence that the act was without the consent of the woman, even where she is an idiot. In such a case, where there were no appearances of force having been used to the woman, and the only evidence of the connection was the prisoner's own admission, coupled with the statement that it was done with her consent:—Held, that there was no evidence for the jury. *Reg.* v. *Fletcher*, 35 L. J., M. C. 172; L. R., 1 C. C. 39; 12 Jur. (N.S.) 505; 14 L. T. 573; 14 W. R. 774; 10 Cox, C. C. 248.

The rule is, that the connection must be without the consent of the person alleged to have been ravished. *Reg.* v. *Jones*, 4 L. T. 154.

Three boys, under fourteen years of age, were indicted for assaulting a girl nine years of age. It was proved that each of the boys had had connection with her. The jury returned as their verdict, "that the prisoners were guilty, the child being an assenting party; but that from her tender years, she did not know what she was about":—Held, upon this finding, a verdict of acquittal must be entered. *Reg.* v. *Read*, 2 Car. & K. 957; 1 Den. C. C. 377; T. & M. 52; 3 New Sess. Cas. 405; 18 L. J., M. C. 88; 13 Jur. 68; 3 Cox, C. C. 266. See 43 & 44 Vict. c. 45, s. 2.

Force Used—Consent in some degree given.]—If in a case of rape the jury is satisfied that non-resistance on the part of the prosecutrix proceeded merely from her being overpowered by actual force, or from her not being able, from want of strength, to resist any longer, or that, from the number of persons attacking her, she considered resistance dangerous and absolutely useless, the jury ought to convict the prisoner of the capital charge: but if they think, from the whole of the circumstances, that although, when the prosecutrix was first laid hold of, it was against her will, yet that she did not resist afterwards, because she in some degree consented to what was afterwards done to her, they ought to acquit the prisoners of the capital charge, and convict them of an assault only. *Reg.* v. *Hallett*, 9 Car. & P. 748.

The jury should be satisfied, not merely that the act was in some degree against the will of the woman, but that she was, by physical violence or terror, fairly overcome, and forced against her will, she resisting as much as she could, and so as to make the prisoner see and know that she was really resisting to the utmost. *Reg.* v. *Rudland*, 4 F. & F. 495.

Rape by Fraud.]—If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is incapable of resisting. The man can, therefore, be found guilty of a rape, or of an attempt to commit a rape. *Reg.* v. *Mayers*, 12 Cox, C. C. 311.

While a married woman was asleep in bed with her husband, the prisoner got into the bed and proceeded to have connection with her, she being then asleep. When she awoke, she at first thought he was her husband, but on hearing him speak, and seeing her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away:—Held, he was guilty of the crime of rape. *Reg.* v. *Young*, 38 L. T. 540; 14 Cox, C. C. 114. *See also cases* supra.

Consent given through Ignorance or Surprise]—A man, who by fraudulently and falsely pretending to give medical advice to a female patient, and in pursuance of such advice to perform a surgical operation upon her, procures her submission to his medical treatment of her, under colour of which he has carnal connection with her, she believing all the while that she was undergoing medical treatment, is guilty of a rape. *Reg.* v. *Flattery*, 46 L. J., M. C. 130; 2 Q. B. D. 410; 36 L. T. 32; 25 W. R. 398; 13 Cox, C. C. 388.

If a surgeon professing to take steps to cure a girl of a complaint has carnal connection with her, and she is ignorant of the nature of this act, and makes no resistance, solely from a bonâ fide belief that he is, as he represents, treating her medically, with a view to her cure, his conduct in point of law amounts to an assault. *Reg.* v. *Case*, 1 Den. C. C. 580; T. & M. 318; 4 New Sess. Cas. 347; 19 L. J., M. C. 174; 14 Jur. 489; 4 Cox, C. C. 220.

On an indictment for an assault with intent to commit a rape, the prosecutrix stated, that the defendant, her medical man, being in her bedroom, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the defendant was proceeding to have connection with her, upon which she instantly raised herself, and ran out of the room. She stated that the defendant had penetrated her person a little:—Held, that if it had appeared that the defendant had intended to have had connection with the prosecutrix by force, the complete offence of rape would, upon this evidence, have been proved, but that the thus getting possession of the person of the woman by surprise, was not an assault with intent to commit a rape, but was an assault. *Reg.* v. *Stanton*, 1 Car. & K. 415.

Making Woman Drunk.]—On a trial for a rape, it was proved that the prisoner made the prosecutrix drunk, and then when she was in a state of insensibility he took advantage of it and violated her. The jury convicted the prisoner, and found that he gave her liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having sexual intercourse with her:—Held, that he was properly convicted of rape. *Reg.* v. *Camplin*, 1 Car. & K. 746; 1 Den. C. C. 89; 1 Cox, C. C. 220.

Submission because of Fear.]—Where a father has established a kind of reign of terror in his family, and his daughter, under the influence of dread and terror, remains passive while he has connection with her, he may be found guilty of rape. *Reg.* v. *Jones*, 4 L. T. 154.

Penetration — What sufficient.]—Since 9 Geo. 4, c. 31, s. 18, the only question for the jury is, whether the private parts of the man did or not enter into the person of the woman. Therefore, though it appears from the evidence, beyond all possibility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape. *Reg.* v. *Allen*, 9 Car. & P. 31.

The slightest penetration is sufficient, even though it does not break the hymen. *Reg.* v. *Russen*, 1 East, P. C. 438.

Penetration, short of rupturing the hymen, is sufficient to constitute the crime of rape. *Reg.* v. *Hughes*, 2 M. C. C. 190 : 9 Car. & P. 752.

Though it is not necessary, in order to complete the offence of rape, that the hymen should be ruptured, provided that it is clearly proved that there was penetration: yet where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain the charge. *Reg.* v. *M'Rue*, 8 Car. & P. 641.

To constitute penetration on a charge of this offence, the parts of the male must be inserted in those of the female; but, as matter of law, it is not essential that the hymen should be ruptured. *Reg.* v. *Jordan*, 9 Car. & P. 118.

Emission Unnecessary.]—Proof of injectio seminis, as well as penetration, was essential in an indictment for rape, before 9 Geo. 4. c. 31. *Rex* v. *Hill*, 1 East, P. C. 439. S. P., *Rex* v. *Cave*, 1 East, P. C. 438; *Rex* v. *Burrows*, R. & R. 519; *Rex* v. *Cozins*, 6 Car. & P. 351.

Since 9 Geo. 4. c. 31, the offence of rape is made out by proof of penetration only: and in such case a prisoner must be found guilty, although there was no emission, and although he did not withdraw himself merely because he was satisfied. *Rex* v. *Jennings*, 4 Car. & P. 249; 1 Lewin, C. C. 93. S. P., *Rex* v. *Reekspear*, 1 M. C. C. 342. *And see* 24 & 25 Vict. c. 100, s. 63.

Attempt to Commit—Intention to Overcome Resistance.]—In order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied not only that the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Rex* v. *Lloyd*, 7 Car. & P. 318.

On a charge of rape, there having been to some extent assent, and it being doubtful whether the act had been completed, it is necessary that the jury should be satisfied, before convicting either of a rape or of an assault with intent to commit a rape, that the prisoner intended to commit the offence notwithstanding any resistance on the part of the woman. *Reg.* v. *Wright*, 4 F. & F. 967.

—— **Evidence of previous Connection.**]—On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, in answer to cross-examination, denies having voluntarily had connection with the prisoner prior to the alleged assault, evidence to contradict her by proving such prior connection is admissible on his behalf. *Reg.* v. *Riley*, 56 L. J., M. C. 52; 18 Q. B. D. 481; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191—C. C. R.

d. Indictment.

Form and Evidence of.]—An indictment need not contain an express allegation of an assault. *Reg.* v. *Allen*, 2 M. C. C. 179; 9 Car. & P. 521.

A. was convicted on an indictment, which charged that he "in and upon E. F.," "feloniously and violently did make (omitting the words 'an assault,')" and her, then and there, and against her will, violently and feloniously did ravish and carnally know:—Held, that the omission of the words "an assault" was no ground for arresting the judgment. *Ib.*

After an acquittal upon an indictment for rape, and for an assault with intent to commit a rape, the prisoner may be indicted for a common assault, upon which the prosecutrix can only in chief be asked so much as to elicit what would amount to a common assault; but the prisoner's counsel may, on cross-examination, enter into the original charge. *Reg.* v. *Dungey*, 4 F. & F. 99.

On an indictment charging a misdemeanour for an assault in attempting to commit a rape on A. B., with a count for an assault of the same nature on a different day on C. D., it is competent to the prosecutor, not only in law, but by ordinary practice, to give evidence of both assaults. *Reg.* v. *Davies*, 5 Cox, C. C. 328.

What Parties Indictable.]—A count charging A. with a rape as a principal in the first degree, and B. as a principal in the second degree, may be joined with another count, charging B. as principal in the first degree, and A. as principal in the second degree. *Rex* v. *Gray*, 7 Car. & P. 164.

A general conviction of a prisoner charged both as principal in the first degree, and as an aider and abettor of other men in rape, is valid on the count charging him as principal. *Rex* v. *Folkes*, 1 M. C. C. 354.

An indictment is good which charges that A. committed a rape, and that B. was present, aiding and assisting him in the commission of the felony. *Reg.* v. *Crisham*, Car. & M. 187.

In such a case the party aiding may be charged either, as he was in law, a principal in the first degree, or as he was in fact, a principal in the second degree. *Ib.*

e. Trial.

Election.]—On an indictment for rape charging the prisoner both as principal in the first degree, and as an aider and an abettor of other men in the rape, evidence may be given of several rapes on the same woman, at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutrix to elect on which count to proceed. *Rex* v. *Folkes*, 1 M. C. C. 354.

Finding of Jury, on what Counts.] — A first count charged an assault with intent to ravish; the second, a common assault. The record went on to state, that the jury found the defendant guilty of the misdemeanour and offence in the indictment specified, in manner and form as by the indictment is alleged against him, and the judgment was, imprisonment and hard labour:—Held, that the word "misdemeanor" was nomen collectivum, and that the finding of the jury was in effect, that the defendant was guilty of the whole matter charged, and that the judgment was therefore warranted by the verdict. *Rex* v. *Powell*, 2 B. & Ad. 75; 9 L. J. (O.S.) M. C. 71.

Verdict—Attempt to Commit.]—An indictment charged H. with rape, and W. with aiding and abetting in the rape. The jury found H. and W. guilty of misdemeanour; H. of attempting to commit a rape, and W. of aiding H. in the attempt. It was contended that this verdict

amounted to an acquittal of W., as the case did not fall within 14 & 15 Vict. c. 100, s. 9, by which a person indicted for a crime may be found guilty of an attempt to commit the crime. The objection was overruled:—Held, that the conviction ought to be affirmed. *Reg.* v. *Hapgood*, 39 L. J., M. C. 82; L. R. 1 C. C. 221; 21 L. T. 678; 18 W. R. 356; 11 Cox, C. C. 471.

—— **Assault—Evidence of Rape.**]—Before 14 & 15 Vict. c. 100, s. 12, a defendant would be acquitted on an indictment for an assault with intent to ravish, if the evidence amounted to proof of an actual rape. *Rex* v. *Harmwood*, 1 East, P. C. 411.

f. Evidence.

Sufficiency—No Corroboration of Prosecutrix.]—A prisoner may be convicted of rape upon the unsupported evidence of an infant under years of discretion, if the jury is satisfied that the evidence is such as to leave no reasonable doubt of his guilt. *Awon*, 3 Russ. C. & M. 654.

Admissibility of Complaints made in Prisoner's Absence.]—The particulars of the complaint made by a female on whom a rape has been committed are not receivable in evidence, nor even her statement as to the place of the commission of the crime; all that can be asked on examination in chief being the fact of her having made such complaint, and the nature of it. *Reg.* v. *Mercer*, 6 Jur. 243.

On the trial of an indictment for a rape, it appeared that the person alleged to have been ravished, but who was since dead, had come home evidently suffering from recent violence: it was proved that on her return home she made a statement as to the injury she had received, and named the persons who had committed it:—Held, that the particulars of this statement could not be given in evidence as independent evidence to show who were the persons who committed the offence; and that statements of this kind were only admissible to confirm the evidence of the prosecutrix, by showing that she made a recent complaint of the injury she had received. *Reg.* v. *Megson*, 9 Car. & P. 420.

Where the deposition of the prosecutrix taken before the magistrate was not proved, and she was not at the trial, evidence of complaints made by her recently after the outrage was rejected; no such evidence is receivable as confirmatory evidence only. *Reg.* v. *Guttridge*, 9 C. & P. 471.

A person to whom the prosecutrix made a complaint very recently after the offence, as she was on her way home, may be asked whether she named a person as having committed the offence, but not whose name she mentioned. *Reg.* v. *Osborne*, Car. & M. 622.

The fact of the prosecutrix making complaint of the outrage, and the state in which she was at the time of making the complaint, are evidence. *Rex* v. *Clarke*, 2 Stark. 241.

On a trial for rape, or for an attempt to commit a rape, the female assaulted may be confirmed by proof that she recently, after the alleged outrage, made a complaint, but the particulars of what she said cannot be asked in chief of the confirming witness, but may in cross-examination. *Reg.* v. *Walker*, 2 M. & Rob. 212.

Not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, is evidence. *Reg.* v. *Eyre*, 2 F. & F. 579.

Where a man is charged with committing a rape, the full particulars of the complaint the woman made against him to other persons in his absence some time after the alleged offence may be given in evidence. *Reg.* v. *Wood*, 14 Cox, C. C. 46.

—— **Duty of Prosecution.**]—On a trial for a rape, the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood. Neither the mistress nor the washerwoman was under recognisances to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner. The judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but allowed the counsel for the prosecution every latitude in their examination. *Reg.* v. *Stroner*, 1 Car. & K. 650.

To Impeach Character of the Prosecutrix.]—On the trial of an indictment for a rape, the prosecutrix may be asked whether previously to the commission of the alleged offence, the prisoner had not had intercourse with her by her own consent. *Rex* v. *Martin*, 6 Car. & P. 562.

Under an indictment for an assault to commit a rape, the defendant may impeach the prosecutrix's character for chastity by general, but not by particular, evidence. *Rex* v. *Clarke*, 2 Stark, 241.

But the character of the prosecutrix as to general chastity may be impeached by general evidence. *Ib.*

The prisoner may give evidence that the woman bore a notoriously bad character for want of chastity and common decency, or that she had before been criminally connected with the prisoner; but he cannot show that she had a criminal connection with other persons. *Rex.* v. *Hodgson*, R. & R. 211.

Nor is the woman obliged to answer as to the latter fact. *Ib.*

On the trial of an indictment for a rape, held, that the prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her: "Were you not, on ——, (since the time of the alleged offence,) walking in the High-street at Oxford to look out for men?" "Were you not, on ——, (since the time of the alleged offence,) walking in the High-street with a woman reported to be a common prostitute?" *Rex* v. *Barker*, 3 Car. & P. 589.

Held, also, that evidence might be adduced by the prisoner to show the general light character of the prosecutrix, and that general evidence might be given of her being a street-walker. *Ib.*

The prosecutrix may be asked, on cross-examination, whether she had not allowed another man than the prisoner to take liberties with her, in the interval between the commission of the alleged offence and the first complaint of it. *Reg.* v. *Mercer*, 6 Jur. 243.

On a trial for rape, evidence of the general character of the prosecutrix, as that she had been a reputed prostitute, is admissible. *Reg.* v. *Clay*, 5 Cox, C. C. 146.

On a trial for rape, witnesses may be called on

the prisoner's behalf to prove general indecency of the prosecutrix, and witnesses for the prosecution may be then called to rebut their evidence. *Reg.* v. *Tissington*, 1 Cox, C. C. 48.

Contradiction of the Prosecutrix.]—A prosecutrix, on a charge of rape, having, on cross-examination, said that she had herself been charged with stealing money, and on that occasion had accounted to a police constable for the possession of the money by stating that it was given her for not complaining of a person who had insulted her by solicitations against her chastity, but denied that she had said the money was given her for having connection with him:—Held, that the prisoner could not call the constable as a witness, to contradict the prosecutrix, by proving that she had said that the money was given her for that purpose. *Reg.* v. *Dean*, 6 Cox, C. C. 23.

If upon the trial of an indictment for rape, attempt to rape, or indecent assault, the prosecutrix is asked whether previously to the alleged offence she has had connection with a particular person named; her answer is final, and evidence cannot be adduced to contradict her if she replies in the negative. *Reg.* v. *Holmes*, 41 L. J., M. C. 12; L. R. 1 C. C. 334; 25 L. T. 669: 20 W. R. 122; 12 Cox, C. C. 137. S. P., *Reg.* v. *Cockcroft*, 11 Cox, C. C. 410.

But the prosecutrix having, on cross-examination, denied that she had connection with other men than the prisoner, those men may be called to contradict her. *Reg.* v. *Robins*, 2 M. & Rob. 512; 1 Cox, C. C. 55.

On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, in answer to cross-examination, denies having voluntarily had connection with the prisoner prior to the alleged assault, evidence to contradict her by proving such prior connection is admissible on his behalf. *Reg.* v. *Riley*, 56 L. J., M. C. 52; 18 Q. B. D. 481; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191.

Proof of Other Cases.]—On an indictment for rape on a child under ten, evidence was admitted of subsequent perpetrations of the same offence on different days previously to complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion:—Held, that, virtually, it was in such a case all one continuous offence. *Reg.* v. *Rearden*, 4 F. & F. 76.

On an indictment for an assault with intent to commit a rape, evidence that the prisoner on a prior occasion had taken liberties with the prosecutrix, is not receivable to show the prisoner's intent. *Rex* v. *Lloyd*, 7 Car. & P. 318.

On an indictment for an assault with intent to commit a rape on A., with a count for an assault of the same nature on a different day on B., evidence of both assaults is admissible. *Reg.* v. *Davies*, 5 Cox, C. C. 328.

Proof of Age.]—Family discussion as to birthday, and acts done on the reputed day, are evidence for the jury as to the age of an infant prosecutrix, on whom a rape is charged to have been committed. *Reg.* v. *Hayes*, 2 Cox, C. C. 226. *See also* cases post. col. 1561.

Identity of Accused.]—In a case of rape against five, the prosecutrix, when before the grand jury, did not know the names of the different prisoners, but could identify the persons:—Held, that the grand jury might call in another witness, who was before the examining magistrate, and there saw the prisoners, and let the prosecutrix describe the different prisoners, and the other witness give their names; and that, if the prisoners could not be identified by this mode, they might be brought before the grand jury. *Reg.* v. *Jenkins*, 1 Car. & K. 536.

Depositions of Prosecutrix—When admissible.]—If it is proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoners, the judge will allow her deposition before the magistrate to be given in evidence. *Reg.* v. *Guttridge*, 9 Car. & P. 471.

In an indictment for a rape, the deposition of a girl taken before the committing magistrate, and signed by him, may, after her death, be read in evidence at the trial of the prisoner, although it was not signed by her, and she was under twelve years of age, provided she was sworn, and appeared competent to take an oath; and all the facts necessary to complete the crime may be collected from her testimony so given in evidence. *Rex* v. *Flemming*, 2 Leach, C. C. 854; 1 East, P. C. 440.

It appeared that the prisoner had been taken before the mayor of N., charged with rape; and that the prosecutrix was sworn, and her statement taken down by the mayor, who asked her some further questions, the answers to which were taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates:—Held, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N., without the production of that which was taken down on that examination. *Reg.* v. *Griffiths*, 9 Car. & P. 746.

On her cross-examination a prosecutrix cannot be contradicted from the depositions unless they are put in. *Reg.* v. *Wright*, 4 F. & F. 967.

Sufficiency of Confession.]—The prisoner was convicted of a rape upon the prosecutrix, who was an apparent idiot. She proved the act done, and said that it was wrong, but that she said nothing to the prisoner, and that she did not do anything to him, and that she did not like to hurt nobody. The constable told the prisoner that he was charged with committing a rape upon the prosecutrix and against her will. The prisoner, in answer to that, said, "Yes, I did; and I'm very sorry for it":—Held, that there was evidence to sustain the conviction. *Reg.* v. *Pressy*, 17 L. T. 295; 16 W. R. 142; 10 Cox, C. C. 635.

2. Carnally abusing Children.

Who Capable of Committing—Male under Fourteen.]—A boy under fourteen cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten, even though it was proved that he had arrived at the full state of puberty. *Reg.* v. *Jordan*, 9 Car. & P. 118.

A male under the age of fourteen years cannot be convicted under s. 4 of the Criminal Law Amendment Act, 1885, of the offence of carnal knowledge of a girl under the age of thirteen years. *Reg.* v. *Waite*, 61 L. J., M. C. 187;

[1892] 2 Q. B. 600; 67 L. T. 300; 41 W. R. 80; 17 Cox, C. C. 554—C. C. R.

Conviction for Indecent Assault.]—A boy under the age of fourteen years, who has been put on his trial under s. 4 of the Criminal Law Amendment Act, 1885, for carnally knowing a girl under the age of thirteen years, although, by reason of his age, he is entitled to be acquitted of that offence, may yet, under s. 9 of the same act, be convicted of an indecent assault. *Reg.* v. *Williams*, 62 L. J., M. C. 69; [1893] 1 Q. B. 320; 5 R. 186; 41 W. R. 332—C. C. R.

—— Girl inciting to commit Offence.]—It is not a criminal offence for a girl between the ages of thirteen and sixteen years to aid and abet a male person in the commission of the misdemeanour of having unlawful carnal connection with her, or to solicit and incite a male person to commit that misdemeanour. *Reg.* v. *Tyrrell*, 63 L. J., M. C. 58; [1894] 1 Q. B. 710; 10 R. 82; 70 L. T. 41; 42 W. R. 255; 17 Cox, C. C. 716—C. C. R.

Penetration.]—If, on the trial of an indictment for carnally knowing and abusing a female child under ten, the jury is satisfied that, at any time, any part of the virile member of the prisoner was within the labia of the pudenda, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict. *Reg.* v. *Lines*, 1 Car. & K. 393.

Emission.]—To prove the offence of unlawfully and carnally knowing a girl under the age of thirteen years, under s. 4 of the Criminal Law Amendment Act, 1885, it is not necessary to prove emission. *Reg.* v. *Marsden*, 60 L. J., M. C. 171; [1891] 2 Q. B. 149; 39 W. R. 703; 17 Cox, C. C. 297—C. C. R.

Effect of Consent of Girl.]—Attempting to carnally know and abuse a girl between the ages of ten and twelve is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Reg.* v. *Martin*, 9 Car. & P. 213; 2 M. C. C. 123. *See now* 43 & 44 Vict. c. 45.

The person making such attempt, with the consent of the girl, is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ib.*

An indecent assault committed upon a girl between the age of ten and twelve, with her consent is not indictable. *Reg.* v. *Johnson*, L. & C. 632; 34 L. J., M. C. 192; 11 Jur. (N.S.) 532; 12 L. T. 503; 13 W. R. 815; 10 Cox, C. C. 114. S. P., *Reg.* v. *Meheyan*, 7 Cox, C. C. 145.

But on an indictment for attempting to have carnal knowledge of a girl under ten years, being a misdemeanor, consent by the girl is no defence and is immaterial. *Reg.* v. *Beale*, 35 L. J., M. C. 60; L. R. 1 C. C. 10; 12 Jur. (N.S.) 12; 13 L. T. 335; 14 W. R. 57; 10 Cox, C. C. 157.

A prisoner was indicted at quarter sessions for an indecent assault on a girl seven years of age. The chairman refused to allow the prisoner's counsel to address the jury on the question of the girl's consent to the prisoner's act, ruling that a child of seven years old might submit, but was incapable of giving consent in such a case:—Held, that such ruling was wrong. *Reg.* v. *Roadley*, 49 L. J., M. C. 88; 42 L. T. 515; 14 Cox, C. C. 463.

Consent through Terror.]—On an indictment for attempting to carnally know and abuse a girl under ten, with a count for a common assault, the attempt was proved, but it could not be shown that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl:—Held, that although consent on the part of the girl would put an end to the charge of assault, yet that there was a great difference between consent and submission, and that, although, in the case of an adult, submitting quietly to an outrage of this kind would go far to show consent, yet that, in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed. *Reg.* v. *Day*, 9 Car. & P. 722.

On an indictment for the carnal knowledge of a girl above ten years of age, and under twelve, and also for an assault:—Held, on the latter count, that although consent would be a defence, consent extorted by terror, or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect. *Reg.* v. *Woodhurst*, 12 Cox, C. C. 443.

Consent through Fraud.]—Where a medical practitioner had sexual connection with a female patient of the age of fourteen, who had for some time been receiving medical treatment from him:—Held, that he was guilty of an assault, the jury having found that she was ignorant of the nature of his act, and made no resistance, solely from a bonâ fide belief that he was (as he represented) treating her medically, with a view to her cure. *Reg.* v. *Case*, T. & M. 318; 1 Den. C. C. 580; 4 New Sess. Cas. 347; 19 L. J., M. C. 174; 14 Jur. 489; 4 Cox, C. C. 220.

Whether old Law of Rape impliedly repealed.]—Section 4 of the Offences against the Person Act, 1875, which enacts that "whoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanor," &c., does not operate to prevent a conviction for felony, under 24 & 25 Vict. c. 100, s. 48, of a person committing a rape upon a girl between those ages. *Reg.* v. *Dickon* (14 Cox, C. C. 8) followed. *Reg.* v. *Ratcliffe*, 52 L. J., M. C. 40; 10 Q. B. D. 74; 47 L. T. 388; 15 Cox, C. C. 127.

An indictment for the felony of rape still lies against one who ravishes a female between the age of twelve and thirteen, notwithstanding the provisions of the 38 & 39 Vict. c. 94, s. 4. *Reg.* v. *Dickon*, 14 Cox, C. C. 8.

Effected by Force.]—If, on the trial of an indictment for a misdemeanor in carnally knowing and abusing a girl between the age of ten and twelve, it appears that the prisoner effected his purpose by force, and against the girl's will, this is no ground of acquittal. *Reg.* v. *Neale*, 1 Car. & K. 591; 1 Den. C. C. 36.

Indictment.]—An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten and under the age of twelve," with intent to carnally know and abuse her; and in the second count charged that the defendant "unlawfully did put

and place the private parts of him, the said T M, against the private parts of her the said E R, and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E R —Held that the second count was bad as it did not allege that E R was between the ages of ten and twelve *Reg* v *Martin*, 9 Car & P 215

Held, also that the words the said E R merely meant that she was the same person as was mentioned in the first count but that those words did not import into the second count the description of E R with respect to her age *Ib*

A count in an indictment charging that a defendant did attempt to assault a girl by soliciting and inducing her to place herself in an indecent attitude he doing the like is bad *R* v *Butler*, 6 Car & P 638

An indictment (whether for the felony or for an attempt to commit it) founded on 24 & 25 Vict c 100 s 50, which makes it a felony to "carnally know and abuse any girl under the age of ten years" is sufficient if it uses the words 'carnally know' only and omits the word abuse *Reg* v *Holland* 16 L T 536 15 W R 879, 10 Cox, C C 478

—— **Girl under Ten**]—A prisoner was indicted for the misdemeanour of carnally knowing a girl between the age of ten and twelve The case was proved but the girl was under ten —Held that he must be acquitted and that the 14 & 15 Vict c 100, s 12, did not apply *Reg* v *Shott* 3 Car & K 206

Evidence—When Infant an Admissible Witness]—In cases of carnal knowledge of children the infant witness though under seven years of age if apprised of the nature of an oath must be sworn *Rex* v *Brasier*, 1 Leach, C C 199, 1 East, P C 443

—— **Postponement of Trial**]—In a case of carnally knowing and abusing a girl under ten years old it appeared on an application on the part of the prosecution to postpone the trial that the girl was only six years old and by reason of her age, quite incompetent to take an oath —Held that the trial ought not to be postponed in order that the child might be instructed as to the nature of an oath but that there might be cases of children of more matured intellect e g of ten or twelve years old who might be from neglected education incapable of being sworn in which such a postponement might be proper *Reg* v *Nicholas*, 2 Car & K 246 S P *Rex* v *Williams*, 7 Car & P 320

—— **Statement of Child when Prisoner Absent**] —Where in such a case the child from her tender age, was incompetent to be sworn the judge would not receive evidence of what the child stated to her mother shortly after the alleged offence took place, nor allow the mother to prove that the child mentioned to her the name of any particular person *Ib*

—— **Criminal Law Amendment Act, 1885—Unsworn Evidence—Conviction for Indecent Assault**]—The prisoner was indicted under the Criminal Law Amendment Act 1885 (48 & 49 Vict c 69), s 4, for unlawfully and carnally knowing a girl under the age of thirteen years The child, not understanding the nature of an oath, gave her evidence under the above section without being sworn The jury acquitted the prisoner of the charge under s 4 but by virtue of the power given to them in s 9 found him guilty of an indecent assault Apart from the girl's testimony the evidence was insufficient to support the conviction The act contains no provision rendering unsworn evidence admissible on an indictment for indecent assault —Held, that the conviction was right *Reg* v *Wealand*, 57 L J M C 44 20 Q B D 827 58 L T 782, 36 W R 576, 16 Cox C C 402 52 J P 582

On an indictment in two counts the first charging the prisoner under s 4 of the Criminal Law Amendment Act 1885 with an attempt to have carnal knowledge of a girl under thirteen the second charging him with indecent assault, the evidence of the girl though not given on oath was received in accordance with s 4 of the Criminal Law Amendment Act 1885 and was corroborated by other material evidence as therein required The judge held that there was no evidence of the offence charged in the first count but that with respect to the charge of indecent assault though the sworn evidence was in itself insufficient the unsworn evidence if admissible and the sworn evidence taken together constituted sufficient evidence to be left to the jury and he directed the jury to take into consideration both the unsworn and the sworn evidence The jury convicted the prisoner —Held that the unsworn evidence of the girl received as above stated was not admissible in support of the charge of indecent assault, and that the conviction must be quashed *Reg* v *Wealand* (20 Q B D 827) considered. *Reg* v *Paul* 59 L J M C 1 S 2 Q B D. 202 62 L T 845, 38 W R 704, 17 Cox C C. 111, 54 J P 677—C C R

—— **Evidence of Prisoner on Oath—Criminal Law Amendment Act, 1885**]—A prisoner was charged under 48 & 49 Vict c 69 s 5 with having had unlawful intercourse with a girl under the age of fourteen When before the justices he gave evidence on oath —Held, that at the trial his statement as made on oath, might be put in without his consent and might be used for or against him and that on the charge above mentioned the prisoner might be found guilty of an attempt to commit the offence, the case being within the provisions of the 14 & 15 Vict c 100, s 9 *Reg* v *Adams* 50 J P. 136

The Criminal Law Amendment Act 1885 (48 & 49 Vict c 69) s 20 renders a person charged with an indecent assault a competent witness on the hearing of such charge, but does not apply to a charge of common assault The prisoner was tried on an indictment containing two counts one for an indecent assault, and another for a common assault, and, on the hearing gave evidence on oath in his defence. He was acquitted of the charge of indecent assault but convicted of the common assault — Held, that his evidence being legally admissible, the conviction was right *Reg* v *Owen*, 57 L J, M C 46, 20 Q B D 829 58 L T 780, 36 W R 575, 16 Cox, C C 397, 52 J P. 582—C C R

—— **Particulars of Complaint—Admissibility in Evidence**]—In support of a charge of rape, attempt to rape, indecent assault, or other charge in which proof of non-consent is a material ele-

ment in the charge under investigation the whole of the statement by the prosecutrix containing an alleged complaint made as speedily after the acts complained of as can reasonably be expected is so far as it relates to the charge against the accused admissible in evidence as part of the case for the prosecution but for the purpose only of enabling the jury to judge whether her conduct was consistent with her testimony offered to negative consent and affirm that the acts complained of were against her will *Reg* v *Lillyman* 65 L J M C 105 [1896] 2 Q B 167 74 L T 730 44 W R 654, 18 Cox C C 346 60 J P 536—C C R See *Reg* v *Lolley* 60 J P 56)

Such statement however is not admissible nor can it be treated as any evidence of the acts complained of and evidence of such acts ought strictly speaking to be given before evidence of the complaint is admitted *Ib*

The lapse of time between the committing of an offence and the making of a statement with regard to it, not in the prisoner's presence is important and when counsel for the prosecution proposed to open and put in evidence such statements the judge's attention should first be called to the time that has elapsed since the offence was committed and the making of the statement *Reg* v *Rush* 60 J P 777

—— **Of Age of Girl**]—A prisoner was charged with carnally abusing a child under ten on February 5 1832 To prove the child under ten years an examined copy of the register of her baptism on February 9, 1822 was put in and her father stated that he left his house about a week before the 9th of February 1822 his wife not being then confined and that on his return on that day he found this child and was told by his wife's mother that it had been born on the day before —Held that this was not sufficient evidence of the child's being under ten years *Rex* v *Wedge* 5 Car & P 298

A mother stated that a child was ten years old last March but on cross examination her evidence as to the knowledge of her children's ages was moved by no counsel for The evidence though objected to is to be considered by the jury on a charge of carnally knowing and abusing a girl under the age of twelve was submitted to the jury who found that the girl was under twelve and convicted the prisoner of the charge —Held that the conviction must be affirmed *Reg* v *Nicholls* 16 L T 466 15 W R 795 10 Cox C C 476 See *R* v *Hayes*, ante col 1555

An extract from a register of births purporting to be signed and certified by a deputy superintendent registrar is the person in whose custody the register book is is admissible in evidence on its mere production *Reg* v *Weaver* 43 L J M C 13, L R 2 C C 85, 29 L T 544, 22 W R 190, 12 Cox, C C 527.

Trial—When Jury may find Assault or Attempt to Commit]—An indictment contained one count charging that the prisoner in and upon a girl between the ages of ten and twelve "unlawfully did make an assault and her did then unlawfully and carnally know and abuse against the form of the statute" The offence of carnally knowing and abusing was disproved, but there was evidence of an indecent assault, which was left to the jury, who found the prisoner guilty of a common assault —Held, that the indictment charged an assault as a distinct and separable offence and that the conviction was good *Reg* v *Guthrie* 39 L J M C 93 L R 1 C C 241 22 L T 485 18 W R 792, 11 Cox C C 522

When a man is indicted under 38 & 39 Vict c 94, s 3 for rape upon a child under twelve years of age he cannot upon that indictment be found guilty of an assault, indecent or otherwise *Reg* v *Cuthbert*, 13 Cox C C 109

On an indictment for carnally knowing and abusing a girl under ten, the prisoner may be acquitted of the felony, and convicted of an assault *Reg* v *Folles* 2 M & Rob 460

Under an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence *Reg* v *Ryland*, 18 L T 538, 16 W R 941, 11 Cox C C 101

Where an indictment charged the defendant with an assault and an intent to abuse and carnally know a female child —Held that he might be convicted of an assault to abuse her simply as the element of such intention is divisible *Rex* v *Dawson* 3 Stark 62

On an indictment for an assault, &c if penetration is proved the prisoner cannot be convicted of the attempt *Reg* v *Nicholls* 2 Cox C C 182

Semble on an indictment for carnally knowing and abusing a female child under ten which does not charge any assault, the prisoner cannot be convicted of an assault under 1 Vict c 85, s 11 *Reg* v *Holroyd* 2 Car & K 341

Upon an indictment the first count of which charged the prisoner under s 5 of the Criminal Law Amendment Act 1885 with unlawfully and carnally knowing a girl between the ages of thirteen and sixteen years and the second count of which charged him with an indecent assault upon the girl —Held that the prisoner could be convicted of a common assault *Reg* v *Bostock* 17 Cox, C C 700

—— **Power to find Verdict of Indecent Assault** —A person charged with rape cannot under section 9 of the Criminal Law Amendment Act 1885 be convicted of the misdemeanour created by s 5 sub s 1 of the same act if more than three months have elapsed since the commission of the offence *Reg* v *Cotton*, 60 J P 824

3 Indecent Assaults on Females

What is]—A schoolmaster, who places his hands indecently on the person of a female pupil, is guilty of an indecent assault, although the pupil is thirteen years of age, and does not make any actual resistance *Reg* v. *M Gurran*, 6 Cox, C C 64

Evidence — Admissibility]—Letters relating to the charge written by one of the scholars who is examined as a witness for the prosecution, may on her denial of the handwriting, be proved and given in evidence on the part of the defendant for the purpose of affecting the witness's credit, and showing the capacity of the scholars to conspire to make a false charge against him, although the prosecutrix is not proved to have received the letters, or had any knowledge of their contents *Ib*

—— **Contradicting Prosecutrix**]—A prosecutrix of an indictment of an indecent assault, on which the facts alleged amounted, in substance,

to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it:—Held, that she could not be contradicted. *Reg.* v. *Holmes*, 41 L. J., M. C. 12; L. R. 1 C. C. 334; 25 L. T. 669; 20 W. R. 122; 12 Cox, C. C. 137. *And see* cases, ante, col. 1555.

Effect of Consent.]—*See* cases, ante, col. 1464.

4. PROCURING DEFILEMENT OF GIRLS.

At Common Law.]—A conspiracy to procure by false pretences, false representations, and other fraudulent means, a young girl to have illicit carnal connection with a man, is a misdemeanour at common law. *Reg.* v. *Mears*, 2 Den. C. C. 79; T. & M. 414; 20 L. J., M. C. 59; 15 Jur. 66; 4 Cox, C. C. 425.

Abduction of Girls under Eighteen—"Taking or causing to be taken."]—Where a girl, under the age of eighteen, has not been taken against her will out of the possession of her father or mother, or of the person having the lawful care or charge of her, it is necessary, in order to convict a person charged with an offence under s. 7 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), in respect of such girl, to prove that the girl left such possession in consequence of persuasions, inducements, or blandishments held out to her by the prisoner. *Reg.* v. *Henkers*, 16 Cox, C. C. 257.

—— **Knowledge of Prisoner.**]—Where a person is charged with abducting a girl under eighteen, it is a sufficient defence if at the moment of taking her out of lawful custody he had reasonable cause to believe that she was of the age of eighteen, though he did not inquire as to her age until after he had taken her out of such lawful custody, but before abduction was complete. *Reg.* v. *Packer*, 16 Cox, C. C. 57.

—— **Possession of Father.**]—It is a question for the jury whether at the time of the alleged abduction the girl was in the possession of her father. *Reg.* v. *Mace*, 50 J. P. 776.

Upon an indictment under 48 & 49 Vict. c. 69, s. 7, for taking or causing to be taken a girl out of the possession of her father, it was proved that at the time the alleged offence was committed the girl was employed as a barmaid at a distance from her father's house:—Held, that she was under the lawful charge of her employer, and not in the possession of her father, and that, therefore, the prisoner could not be convicted of the offence with which he was charged. *Reg.* v. *Henkers*, supra.

Suffering Girl under Sixteen to be on Premises for Purpose of being carnally known.] The prisoner was convicted under the 6th section of the Criminal Law Amendment Act, 1885, of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in that section. The girl in question was the prisoner's daughter, and the premises in respect of which the charge was made were her home where she resided with the prisoner:—Held, that, notwithstanding the above-mentioned circumstances, the conviction was good. *Reg.* v. *Webster*, 55 L. J., M. C. 63; 16 Q. B. D. 134; 53 L. T. 824; 34 W. R. 324; 15 Cox, C. C. 775; 50 J. P. 456—C. C. R.

Occupier of House permitting Immorality therein.]—It is not necessarily an offence, under section 6 of the Criminal Law Amendment Act, 1885, for the occupier of a house to permit a man who has seduced her daughter to come on the premises to repeat the immoral intercourse, in order to obtain evidence to ensure his conviction for carnally knowing her daughter. *Reg.* v. *Merthyr Tydvil JJ.*, 10 R. 189.

Indictment—False Pretences set out, not negatived.]—In an indictment under s. 3, sub-s. 2, of the Criminal Law Amendment Act, 1885, the false pretences if set out need not be specifically negatived. *Reg.* v. *Clarke*, 59 J. P. 248.

J. SUICIDES AND SELF-MAIMING.

Attempt to Commit Suicide.]—An attempt to commit suicide is a misdemeanour at common law. *Reg.* v. *Doody*, 6 Cox, C. C. 463.

—— **Effect of Drunkenness.**]—The question for the jury is, whether the prisoner had a mind capable of contemplating the act charged, and whether he did, in fact, intend to take away his life. *Ib.*

The mere fact of drunkenness is no excuse for the crime; but it is a material fact for the jury to consider, before coming to the conclusion that the prisoner really intended to destroy his life. *Ib.*

—— **Where Triable.**]—Suicide is not murder within 24 & 25 Vict. c. 100, ss. 11—15, and therefore attempting to commit suicide is a misdemeanour triable at quarter sessions. *Reg.* v. *Burgess*, L. & C. 258; 32 L. J., M. C. 55; 7 L. T. 472; 11 W. R. 96; 9 Cox, C. C. 247.

Agreement to Commit Suicide.]—If two persons enter into an agreement to commit suicide together, and the means employed to produce death prove fatal to one only, the survivor is guilty of murder. *Reg.* v. *Jessop*, 16 Cox, C. C. 204. S. P. *Reg.* v. *Alison*, 8 Car. & P. 418.

Maiming.]—A party who maims himself, or procures another to do it for him, so that he may be better enabled to beg, or to prevent himself from being pressed for a soldier, is liable to fine or imprisonment at common law. *Rex* v. *Wright*, 1 East, P. C. 396.

So is the party by whom it is effected at the other's desire. *Ib.*

III. *CONSPIRACY.*

1. *What is*, 1565.
2. *For what Indictment lies.*
   a. Generally, 1565.
   b. Trade Combinations, 1571.
3. *Indictment.*
   a. Who Indictable, 1576.
   b. Form of, 1576.
4. *Particulars of Overt Acts*, 1580.
5. *Evidence*, 1581.

6. *Trial and Verdict*, 1587.
7. *New Trial*, 1589.

1. WHAT IS.

Definition — Injury to an Individual not amounting to a Crime.]—The term conspiracy is divisible into three heads:—1st, where the end to be attained is in itself a crime; 2nd, where the object is lawful, but the means to be resorted to are unlawful; 3rd, where the object is to do an injury to a third party or a class, though if the wrong were inflicted by a single individual, it would be a wrong and not a crime. *Reg.* v. *Parnell*, 14 Cox, C. C. 508.

Consent—Intention prior to Agreement.]—A conspiracy cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306. *S. C.*, Ir. R. 1 C. L. 13.

No Overt Act necessary.] — The offence of conspiracy is rendered complete by the bare engagement and association of two or more persons to break the law, without any act being done in pursuance thereof by the conspirators. *O'Connell* v. *Reg.*, 11 Cl. & F. 15; 9 Jur. 25; 1 Cox, C. C. 413.

2. FOR WHAT INDICTMENT LIES.

a. Generally.

To induce Person to become Prostitute.]—An indictment for conspiracy at common law will lie for enticing a young woman under age to leave her father's house and live in fornication with one of the defendants; and concerting measures, with her own approbation, to carry her off and conceal her for that purpose. *Rex* v. *Grey (Lord)*, 1 East, P. C. 460.

Prisoners were found guilty upon an indictment charging them with conspiring to solicit, persuade, and procure an unmarried girl, of the age of seventeen, to become a common prostitute, and with having in pursuance of that conspiracy, solicited, incited and endeavoured to procure her to become a common prostitute:—Held, that although common prostitution was not an indictable offence, it was unlawful, and the indictment therefore good, without averring that the prosecutrix was a chaste woman at the time of the conspiracy. *Reg.* v. *Howell*, 4 F. & F. 160.

Two women induced a girl of fifteen, who had left her place as a servant, to go to their house, one of them pretending that she had known her deceased parents, and saying that she would keep her until she got a place, and that they both would assist her in getting one. They were both women of bad character, and the place where they resided was a house of ill-fame. It was false that they or either of them had known the parents of the prosecutrix, and they took no steps whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money, to induce her to consent to illicit connection with him. She refused to consent, and declared her intention of quitting the house; the prisoners refused to give her up her clothes, and she left without them:—Held, that they were rightly convicted of conspiracy, and that they might have been indicted for the offence at common law. *Reg.* v. *Mears*, 2 Den. C. C. 79; T. & M. 414; 20 L. J., M. C. 59; 15 Jur. 66; 4 Cox, C. C. 425.

An information will be granted for a conspiracy by a master, an attorney, and a gentleman, to assign over a female apprentice, by her own consent for the purpose of prostitution. *Rex* v. *Delaval*, 3 Burr. 1434; 1 W. Bl. 410; 439.

To Murder by different Means.]—A design by two persons, by different means, to murder a child of which a woman is pregnant, and expects soon to be delivered, is sufficiently proximate to be the subject of a conspiracy. *Reg.* v. *Banks*, 12 Cox, C. C. 393.

To violate Provisions of Statute.]—An indictment for conspiracy to violate the provisions of a statute will lie after the repeal of such statute, for an offence committed before the repeal. *Reg.* v. *Thompson*, 16 Q. B. 832; Dears. C. C. 3; 20 L. J., M. C. 183; 51 Jur. 453.

Where special Provision in Statute.]—An indictment for a conspiracy at common law will lie against two or more persons for conspiring to commit an offence for which special provision is made by statute. *Reg.* v. *Bunn*, 12 Cox, C. C. 316.

To enforce by Legal Process Payment of Pretended Debt.]—Where a money-lender and an attorney combine together to enforce by legal process payment of sums they know not to be due, and falsely represent them to be due, in order to obtain payment, they were liable to be convicted for conspiracy to defraud the borrower. *Reg.* v. *Taylor*, 15 Cox, C. C. 265, 268.

To induce a Person to forego Legal Claim.]—An indictment will lie for conspiring by false representations of fact to induce a person to forego a claim, although the result of such conspiracy is not to deprive him of his right to enforce payment thereof by action. *Reg.* v. *Carlisle*, Dears. C. C. 337; 2 C. L. R. 479; 23 L. J., M. C. 109; 18 Jur. 386; 2 W. R. 412; 6 Cox, C. C. 366.

To cause Horse to be Purchased—Contract.]—A. and B., in concert with each other, falsely pretended to C. that a horse which they had for sale had been the property of a lady deceased, and was then the property of her sister, and was not then the property of any horse-dealer, and that the horse was quiet to ride and drive, and by these misrepresentations induced C. to purchase the horse:—Held, that they were indictable for conspiracy, although the money was to be obtained through the medium of a contract. *Reg.* v. *Kenrick*, D. & M. 208; 5 Q. B. 49; 12 L. J., M. C. 135; 7 Jur. 848.

To obtain Reward for Appointment to Office.]—An indictment will lie for a conspiracy to obtain money as a reward for an appointment to an office under government. *Rex* v. *Pollman*, 2 Camp. 229; 11 R. R. 689.

For Sale and Transfer of Railway Ticket.]—On an indictment for conspiracy for the sale

and transferring of a railway excursion ticket, not transferable:—Held, that the prisoners must be acquitted, unless there was a previous concert between them to obtain the ticket for the purpose of its being fraudulently used. *Reg.* v. *Absolon*, 1 F. & F. 498.

To Procure a Marriage.]—A conspiracy to procure a marriage between poor persons of different parishes, for the purpose of exonerating the parish of the woman and charging the other parish, is not an indictable offence, unless the parties were unwilling to marry, or some forcible or fraudulent means of bringing about the marriage were resorted to. *Rex* v. *Seward*, 3 N. & M. 557; 1 A. & E. 706; 3 L. J., M. C. 103. *See also Rex* v. *Compton*, Cald. 246; *Rex* v. *Herbert*, 2 Ld. Ken. 466; *Rex* v. *Turrant*, 4 Burr. 2106; *Rex* v. *Watson*, 1 Wils. 41.

To Exonerate from Maintaining Pauper.]—A conspiracy to exonerate from the prospective burthen of maintaining a pauper, not at the time actually chargeable, and to throw the burthen upon another parish, by means not in themselves unlawful, is not indictable. *Ib.*

To obtain Title to Estate.]—A conspiracy by a female servant and a man whom she induced to personate her master and marry her, in order to defraud her master's relations of a part of his property after his death, is a conspiracy. *Rex* v. *Robinson*, 1 Leach, C. C. 37; 2 East P. C. 1010.

To charge False Fact.]—Getting money out of a man by conspiring to charge him with a false fact is indictable as a conspiracy, whether the fact charged is criminal or not in itself. *Rex* v. *Ripsal*, 1 W. Bl. 368; 3 Burr. 1320.

Agreement between Brokers at Auction.]—If brokers agree together, before a sale by auction, that one only of them should bid for each article sold, and that all articles thus bought by any of them should be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among them; this is a conspiracy for which they are indictable. *Levi* v. *Levi*, 6 Car. & P. 239.

Mock Auctions.]—A mock auction with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offence at common law, and persons aiding and abetting such a proceeding may be indicted for a conspiracy with intent to defraud. *Reg.* v. *Lewis*, 11 Cox, C. C. 404.

To extort Money.]—A conspiracy to extort money is per se an offence at common law, and need not be charged to be attempted by unlawful means. *Rex* v. *Hollingberry*, 6 D. & R. 345; 4 B. & C. 329; 3 L. J. (O.S.) K. B. 226.

To obtain Goods without intention of paying for them.]—A. obtained goods on credit at B.'s suggestion, in order that A. might sell them to B. below their value, B. aiding A. as a referee, and giving him a character. The evidence was such that B. must have known that A. was getting the goods without any intention of paying for them:—Held, that B. was guilty of conspiring with A. to defraud. *Reg.* v. *Orman*, 14 Cox, C. C. 381.

Sale of Goods by Servant at less than Authorised Price—Bribe to Servant.]—A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the sum which represents the difference between the value of the goods and the price at which the servant has sold them. Where therefore a person was indicted for soliciting a servant to conspire to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value:—Held, that he might properly be convicted of such conspiracy. *Reg.* v. *De Kromme*, 66 L. T. 301; 17 Cox, C. C. 492; 56 J. P. 682—C. C. R.

To Obstruct Course of Justice.]—An agreement with other persons by a witness who has been bound over to prosecute and give evidence on an indictable misdemeanour, not to appear on the trial, is an indictable offence, as being an agreement to obstruct the due course of law and justice. The indictment may allege that to have been the defendants' object, although their immediate intention had no reference to the obstruction of justice, but was simply to extricate themselves from a difficulty, and the defeat of justice was merely the effect of the conspiracy. *Reg.* v. *Hamp*, 6 Cox, C. C. 167.

Sale of Goods—Bankruptcy.]—A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud the creditors, is an indictable offence at common law. *Reg.* v. *Hall*, 1 F. & F. 33.

To Commit Trespass.]—But an indictment will not lie for a conspiracy to commit a mere civil trespass. *Rex* v. *Turner*, 13 East, 228.

Deprivation of Office.]—Nor for a conspiracy to deprive a man of an office under an illegal trading company. *Rex* v. *Stratton*, 1 Camp. 549, n.

To Fix Price of Goods.]—An information will be granted for a combination to fix the price of salt. *Rex* v. *Norris*, 2 Ld. Ken. 300.

Fraudulent Fabrication of Shares.]—If persons conspire to fabricate shares in addition to the limited number of which a company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the company. *Rex* v. *Mott*, 2 Car. & P. 521.

To raise Price of Stocks.]—It is an indictable offence to conspire on a particular day by false rumours, to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day. *Rex* v. *De Berenger*, 3 M. & S. 68; 15 R. R. 415.

To make Market for Shares.]—An agreement between two or more persons to induce would-be buyers of shares in a company, contrary to the fact, to believe that there was a market for the shares, and that the shares were of greater value than they really were, is an illegal transaction, and can be made the subject of an indictment for conspiracy. *Scott* v. *Brown*, 61 L. J., Q. B. 738; [1892] 2 Q. B. 724;

4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213—C. A.

To cause Shares to be quoted.]—Directors and promoters of a company called the Eupion Fuel and Gas Company, Limited, were indicted for conspiring to induce the committee of the Stock Exchange, contrary to the true intent of the rules of the Stock Exchange, to order a quotation of the shares of the company in their official list; "and thereby to induce and persuade divers huge subjects of our lady the Queen, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had, in all respects, complied with the rules and regulations" of the Stock Exchange "so as to entitle the company to have their shares quoted on the official list of the Stock Exchange":—Held, that the indictment was good after verdict; as the court would take judicial notice of the fact that the shares were intended to be bought and sold on the Stock Exchange, and it was a necessary inference from the indictment and verdict that the intention of the conspirators was to induce the public to act on the belief that the company had been duly constituted, and to deal in the shares of the company; and consequently that the intention of the conspirators was to defraud and cheat the buyers and sellers of shares. *Reg.* v. *Aspinall*, 46 L. J., M. C. 145; 2 Q. B. D. 48; 36 L. T. 297; 25 W. R. 283; 13 Cox, C. C. 563—C. A.

To issue False Balance-Sheet or Prospectus.]—The directors of a joint-stock bank, knowing it to be in a state of insolvency, issued a balance-sheet showing a profit, and thereupon declared a dividend of six per cent. They also issued advertisements inviting the public to take shares upon the faith of their representations that the bank was in a flourishing condition. On an ex officio information filed by the attorney-general, they were found guilty of a conspiracy to defraud. *Reg.* v. *Brown*, 7 Cox, C. C. 442. *S. C.*, sub nom. *Reg.* v. *Esdaile*, 1 F. & F. 213.

Though some of the directors were aware of the insolvent state of the bank, and concurred in the balance-sheet and the dividend with a view to induce persons to retain or to purchase shares in the bank in the hope or even belief that they might thereby rescue the bank from its difficulties, they were in point of law guilty of the offence charged in the information. *Ib.*

With regard to the manager, who was also included in the information, held, that it was no excuse that he was the mere servant of the directors, for though under certain circumstances the servant may not be criminally liable for what he does under his master's orders, in this case, he, from the beginning, exercised the chief control over all the affairs and transactions of the bank. *Ib.*

Semble, that it would have been sufficient to sustain the charge against all the defendants to show that the bank was insolvent to their knowledge, and that they knowing it to be so, concurred in putting forth a false balance-sheet, representing it to be in a prosperous condition in order to lead the public to continue to confide in it. *Ib.*

The declaration of a dividend and issue of new shares in an insolvent state was fraudulent, if they knew of the insolvency, but the purchase of shares in the bank with the money of the bank, in order to keep up its credit, was fraudulent, whether or not they knew of the insolvency. *Ib.*

If they knew that debts, hopelessly bad, were include in the balance-sheet as assets, and the reserve fund set apart for bad debts was insufficient to meet them, this was evidence that the balance-sheet was fraudulent, even although it was usual to enter bad debts as assets, it being also usual to write them off when found to be hopeless. *Ib.*

Evidence that the defendants knew the true state of affairs sufficed to show that the books representing otherwise were false to their knowledge, and although the balance-sheet truly represented the books, it was fraudulent. *Ib.*

Any evidence tending to show that they knew the true state of affairs, whether or not they were implicated in particular transactions, was admissible against them. *Ib.*

On an indictment against a manager and secretary of a bank, containing counts charging them with making and publishing false statements of the affairs of the bank, and conspiring together to do so, the prosecutors were put to elect on which counts they would rely, and having elected to rely on the counts for conspiracy:—Held, that it was not enough to prove that the defendants made and put forth false statements intended and calculated to deceive, unless they had entered into a precedent and fraudulent conspiracy to do so. *Reg.* v. *Burch*, 4 F. & F. 407.

The principal count relied upon not stating an intent to defraud any particular parties:—Held, that, though there were auditors whose duty it would be to discover any frauds, that was no answer to the prosecution, if the defendants were parties to such a conspiracy to deceive them and the directors. But, on the other hand, the jury were told that evidence that the directors were privy to all that was done was very material, with a view to negotiate such conspiracy on the part of the defendants, to deceive. *Ib.*

On an indictment for conspiracy to cheat and defraud the public by means of the circulation of a false prospectus, to induce them to take shares in a worthless company, the doctrine laid down by Lord Ellenborough as to conspiracy in *Rex* v. *De Berenger* (3 M. & S. 67), upheld and applied. *Reg.* v. *Gurney*, 11 Cox, C. C. 414.

To defraud Partner.]—A fraudulent agreement by a member of a partnership with third persons, wrongfully to deprive his partner by false entries and by false documents of all interest in some of the partnership property on taking accounts for the division of the property on the dissolution of the partnership, is a conspiracy, although the offence was completed before the passing of 31 & 32 Vict. c. 116, by which a partner can be criminally convicted for feloniously stealing partnership property. *Reg.* v. *Warburton*, 40 L. J., M. C. 22; L. R. 1 C. C. 274; 23 L. T. 473; 19 W. R. 165; 11 Cox, C. C. 584.

Effect of Intention of Prosecutor to defraud.]—Three persons being in a public-house with the prosecutor, one of them, in concert with the other two, placed a pen case on the table and left the room. Whilst he was absent, one of the two remaining took the pen out of the case, and put a pin in its place, and the two induced the

prosecutor to bet with the other, when he returned into the room, that there was no pen in the case, and the prosecutor staked 50*s*. On the pencil case being turned up, another pen fell into the prosecutor's hand, and the three took the money:—Held, that the evidence supported a conviction upon a count charging the three with conspiring by false pretences and fraudulent devices to cheat the prosecutor of his money, although it appeared that he had the intention of cheating one of the three if he could. *Reg.* v. *Hudson*, Bell, C. C. 263; 29 L. J., M. C. 145; 6 Jur. (N S.) 566; 2 L. T. 263; 8 W. R. 421; 8 Cox, C. C. 305.

b Trade Combinations.

Mere Persuasion not to Work insufficient.]—On an indictment under 6 Geo. 4, c. 129, s. 3, for conspiracy to force workmen to leave their employment, the evidence being that the defendants merely waited outside the place where the workmen were employed and tried to induce them not to work there, and that their conduct was civil and peaceable:—Held, that the question was, whether they had endeavoured to control the free action or overcome the free will of the workmen by force or intimidation. If there had been merely persuasion, no matter what the consequence of it was, peaceable and unaccompanied by menace or violence, this would not render the defendants amenable to criminal justice on such charge, they being then protected by 22 Vict. c. 34. *Reg.* v. *Shepherd*, 11 Cox, C. C. 325.

A conspiracy to obstruct a manufacturer in carrying on his business, by inducing and persuading workmen who had been hired by him to leave his service, in order to force him to raise his rate of wages, or to make an alteration in the mode of conducting and carrying on his trade, is an indictable offence; and an agreement to induce and persuade workmen, under contracts of servitude for a time certain, to absent themselves from such service, is an indictable offence, although no threats or intimidation are proved, or any ulterior object averred. *Reg.* v. *Duffield*, 5 Cox, C. C. 404.

Workmen who agree that none of those who make the agreement will go into employ unless for a certain rate of wages have no right to agree to molest, or intimidate, or annoy other workmen in the same line of business, who refuse to enter into the agreement, and who choose to work for employers at a lower rate of wages. *Ib.*

In these cases the essence of the offence is the combination to carry out an unlawful purpose, and the unlawful combination or conspiracy is to be inferred from the conduct of the parties. *Ib.*

If persons conspire together to take away the workmen of a manufacturer, that constitutes such an obstruction and molestation of him as to support that part of a count which alleges a conspiracy by molesting and obstructing him. *Ib.*

Picketing.]—Picketing is an offence within the Employer and Workmen Act, 1875. *Reg.* v. *Bauld*, 13 Cox, C. C. 282.

Preventing Workman from obtaining Work.]—The Philanthropic Society of Coopers was formed in order to relieve its members when sick, and to provide for their funerals. One of their members was fined by them for working in a yard where steam machinery was used, and upon non-payment of the fine they acted in such a way as to prevent him from obtaining work:—Held, an illegal combination and conspiracy. *Reg.* v. *Hewitt*, 5 Cox, C. C. 162.

Dictating whom Masters shall employ.]—A combination of workmen, for the purpose of dictating to masters whom they shall employ, was indictable. *Rex* v. *Bykerdyke*, 1 M. & Rob. 179.

Threats and Intimidation—Cases decided before 34 & 35 Vict. c. 31.]—A threat by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out, that all the workmen so combining will immediately leave work, unless the employer discharges other workmen who are then in the same service, renders such workmen liable to conviction for the offence under 6 Geo. 4, c. 129, s. 3. *Walsby* v. *Anley*, 3 El. & El. 516; 30 L. J., M. C. 121; 7 Jur. (N.S.) 465; 3 L. T. 666; 9 W. R. 271.

L., a workman, and member of a workingman's society, being in the employ of a master who employed men not qualified by the rules thereof, O., the president, said he would use his influence to have him turned out of the society. L. continuing to work for his master, a meeting was called, to which he was summoned, the object of which was to discover whether he would leave his employ or be turned out of the society. G., another of the members, made a report of the proceedings, of a previous deputation to the master of L. upon the subject, and O. then asked L "whether he intended to remain an honourable member of the club and leave the shop (his work), or continue it, be despised by the club, and have his name sent all over the country in the report, and be put to all sorts of unpleasantness?":—Held, that this was evidence on which O. might be convicted of unlawfully, by threats and intimidation, endeavouring to force L. to depart from his hiring, within the 6 Geo. 4, c. 129, s. 3, but was not sufficient as against G. *O'Neil* v. *Longman*, 4 B. & S. 376; 8 L. T. 657; 11 W. R. 947; 9 Cox, C. C. 360.

O. and G. were convicted upon an information for endeavouring by threats and intimidation to force K. to make an alteration in his mode of conducting his business, contrary to the 6 Geo. 4, c. 129, s. 3. The evidence was as stated in the preceding case:—Held, first that there was no evidence against O. *O'Neil* v. *Kruger*, 4 B. & S. 389; 32 L. J., M. C. 259; 8 L. T. 657; 12 W. R. 47.

Held, secondly (Wightman, J., dissentiente), that the object of G. was to discuss with K. the terms of arranging the dispute between him and the club-men in his employ rather than to intimidate him, and therefore there was not sufficient evidence against G. *Ib.*

A resolution was passed by a society of bricklayers, that no society bricklayer would work for B. until such time as he parted with some of his apprentices. The men in B.'s employment were accordingly withdrawn. In reply to a letter from B., requiring to be informed why the men were taken away, the resolution was communicated to him in a letter from the secretary. The secretary and the president of the meeting at which the letter was written having been convicted under 6 Geo. 4, c. 129, s. 3, of using threats to compel B. to limit the number of his

apprentices :—Held, that in the absence of any evidence to show that the letter communicating the resolution, though apparently an explanation, was, in fact, meant as a threat, the conviction could not be sustained. *Wood* v. *Bowran*, 7 B. & S. 931 ; 36 L. J., M. C. 5 ; L. R. 2 Q. B. 21 ; 15 L. T. 207 ; 15 W. R. 58.

A master builder had in his employ several carpenters who were members of a carpenters' union, and also J., who was not a member. The secretary to a branch lodge served the master with the following notice in the middle of a week : "I am requested by the committee of carpenters to give the men in your employ notice to come out on strike against J., unless he becomes a member of the society. This notice will be carried out after the end of this week, unless settled in accordance with the society's laws" : —Held, that the secretary was rightly convicted, under 6 Geo. 4, c. 129, s. 3, of having by threats endeavoured to force the master builder to limit the description of his workmen. *Skinner* v. *Kitch*, 36 L. J., M. C. 116 ; L. R. 2 Q. B. 393 ; 16 L. T. 413 ; 15 W. R. 830 ; 10 Cox, C. C. 493.

The defendants were members of a trade union of tailors. The workmen having, at the instigation of the union, struck for wages, and the masters having employed workpeople, men and women, not being members of the union, the defendants, who were members of the managing committee of the union, caused pickets to be stationed about the doors of such employers to note workpeople who went in and out, for the purpose of deterring them from continuing in such employ and inducing them to join the union. Proof was given of the use of insulting expressions and gestures used by the pickets to the non-union workpeople :—Held, to be an intimidation, molestation, and obstruction, within 6 Geo. 4, c. 129, s. 3, and 22 Vict. c. 34, s. 1. *Reg.* v. *Druitt*, 16 L. T. 855 ; 10 Cox, C. C. 593.

—— **Effect of 34 & 35 Vict. c. 31.**]—The servants of a gas company, under a contract of service, being offended at the dismissal of a fellow servant, agreed together to quit the service of their employers, without notice and in breach of their contracts of service, by reason of which the company was seriously impeded in the conduct of their business, Being indicted for a conspiracy, it was contended that 34 & 35 Vict. c. 31, having determined that no act shall be illegal merely by reason of its being in restraint of trade, and having also defined the offence of obstructing or molesting, and otherwise determined what shall be deemed to be offences as between masters and servants, had virtually declared all other acts not to be punishable :—Held, that the provisions of the statute had not affected the common law of conspiracy, for which an indictment would lie. *Reg.* v. *Bunn*, 12 Cox, C. C. 316. But see *Connor* v. *Kent*, infra.

—— **Form and Validity of Convictions.**]—The 6 Geo. 4, c. 129, s. 3, makes it an offence to endeavour, by threat, to force any workman hired for any work to leave his hiring ; and the 2 & 3 Vict. c. 71, provides that a conviction in the words of any statute declaring the offence shall be sufficient. A conviction by a metropolitan police magistrate stated that the defendant did by threats endeavour to force W. J. to leave his hiring :—Held, that the conviction was sufficient ; that the nature of the threats need not be shown, nor the threats set out, the essence of the offence being the endeavour to force a workman to depart from his employ, and that the threats were matter of evidence only. *Perham, Ex parte*, 5 H. & N. 30 ; 29 L. J., M. C. 33 ; 5 Jur. (N.S.) 1221 ; 12 L. T. 106. S. P. and *S. C.*, 2 El. & El. 383 ; 29 L. J., M. C. 31 ; 5 Jur. (N.S.) 1212 ; 1 L. T. 91 ; 8 W. R. 44.

Held, also, for the same reason, that neither the conviction nor the information need allege that the threats were to any particular person. *Ib.*

Intimidation—What is—Conspiracy and Protection of Property Act.]—By s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority : —(1.) Uses violence to or intimidates such other person or his wife or children or injures his property . . . . shall on conviction thereof be liable, &c."—The appellant and the respondent were workmen in the same yard, members of different trade unions. The trade union to which the respondent belonged having resolved to strike if the appellant did not leave his society and join theirs, the respondent informed the appellant of this without threatening him with violence to person or property in case of his refusal. The appellant refused to join the respondent's society, and was dismissed in consequence by his employer in order to avoid a strike. He stated in evidence that "he was afraid, because of what the respondent had said, that he would lose his work, and could not obtain employment anywhere where the respondent's society predominated numerically over his own society" :—Held, that there was no evidence of intimidation by the respondent within the meaning of the section. *Connor* v. *Kent*, 61 L. J., M. C. 9 ; [1891] 2 Q. B. 545 ; 65 L. T. 573 ; 17 Cox, C. C. 354 ; 55 J. P. 485.

The appellant and two other secretaries of trade unions, in order to prevent the respondent employing non-union men, informed him that if he did not cease to do so they would call off from their employment by him all the members of their respective unions. After a meeting of the unions, at which it was resolved that this course should be adopted, the appellant and the other secretaries, in the presence of the respondent, whom they asked to attend, made the following statement to the respondent's workmen and others who were assembled : "Inasmuch as Mr. T." (i.e. the respondent) "still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work, and go home." The union men in consequence ceased to work :—Held, that there was no evidence of intimidation by the appellant within the meaning of the section. *Reg.* v. *Druitt* (10 Cox, C. C. 592) and *Reg.* v. *Bunn* (12 Cox, C. C. 316) dissented from. *Ib.*

An intimation conveyed in a letter to an employer that his shop would be picketed, in language so threatening as "to make such employer afraid," amounts to "intimidation" within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875 ; whether the picketing amounts to an unlawful watching or besetting within sub-s. 4 or not. *Judge* v. *Bennett*, 36 W. R. 103 ; 52 J. P. 257.

Watching and besetting.]—On an indictment for conspiracy to molest and obstruct workmen with a view to coerce them to quit their employment, and to molest and obstruct employers with a view to coerce them to alter their mode of business (under the Criminal Law Amendment Act, 1871), the question is whether the watching and besetting was carried on in such a manner and to such an extent as to operate on the will by giving rise to apprehension or annoyance, and whether it had been done with intent to coerce. *Reg.* v. *Hibbert*, 13 Cox, C. C. 82.

—— **Interlocutory Injunction.**]—Picketing—that is, watching or besetting the house or place of business, or the approach thereto, of any person within the meaning of s. 7, sub-s. 4, of the Conspiracy and Protection of Property Act, 1875—excepting when such picketing is for the limited purpose of obtaining or communicating information according to the proviso to that section, is illegal, and will be restrained by interlocutory injunction. *Lyons* v. *Wilkins*, 65 L. J., Ch. 601; [1896] 1 Ch. 811; 74 L. T. 358; 45 W. R. 19; 60 J. P. 325—C. A.

"Persistent following."] — The appellant, who was on strike, was posted outside works at which he had been engaged as a picket, and when the workmen who had taken the place of the strikers came out of the works silently followed the respondent at a short distance down two streets. A crowd which had been waiting outside the works also followed the respondent with hostile words and gestures:—Held, that appellant was rightly convicted under s. 7 of the Conspiracy and Protection of Property Act, 1875. *Smith* v. *Thomasson*, 62 L. T. 68; 16 Cox, C. C. 740; 54 J. P. 596.

"Following"—Statement of Offence—Conviction.]—A summons and conviction under s. 7 of the Conspiracy and Protection of Property Act, 1875, for following a person with a view to compel him to abstain from doing any act which he has a legal right to do, ought to state what was the act which the defendant, by following the informant, endeavoured to compel him to abstain from doing. *Reg.* v. *Mackenzie*, 61 L. J., M. C. 181; [1892] 2 Q. B. 519; 5 R. 10; 67 L. T. 201; 41 W. R. 144; 17 Cox, C. C. 542; 56 J. P. 712.

A commitment under s. 7 of the Conspiracy and Protection of Property Act, 1875, for "following in a disorderly manner with a view to compel one A. B. to abstain from working as a shoe-finisher in the employment of one C. D., a shoe manufacturer, carrying on business in the parish of E.," is a good one, inasmuch as it contains a sufficient description of a specified act from which the complainant was compelled to abstain. *Wilkins, Ex parte*, 64 L. J., M. C. 221; 72 L. T. 567; 18 Cox, C. C. 161; 59 J. P. 294.

Conspiracy and Protection of Property Act—Offence against Seaman.]—Section 16 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), which enacts that the Act shall not apply to seamen, means only that the punishment prescribed by the act are not to fall on seamen. The case of an offence against a seaman by a person who is not a seaman is therefore not excluded from the act by this section. *Kennedy* v. *Cowie*, 60 L. J., M. C. 170; [1891] 1 Q. B. 771; 64 L. T. 598; 39 W. R. 686; 17 Cox, C. C. 320; 55 J. P. 680.

Indictment.]—Three counts of an indictment charged a prisoner under the Conspiracy and Protection of Property Act, 1875, s. 7, sub-s. 1, with having "with a view to compel the said A. K. to abstain from that for which he had a legal right to do—that is to say, to work as a fitter for the Taff Vale Railway Company—used violence or intimidated the said A. K.":—Held, bad for duplicity. *Reg.* v. *Edmondes*, 59 J. P. 776.

3. Indictment.

a. Who Indictable.

Who should be included.]—On an indictment for conspiracy, it is not proper to include persons who have not been privy to the acts relied upon as proof of the conspiracy, and whose offences, whatever they may have been, are wholly separate and distinct. To include in the indictment persons whose offence, if any, came under the latter head, was unfair and unjust, as tending to involve them in the odium of acts to which they were not parties. *Reg.* v. *Boulton*, 12 Cox, C. C. 87.

Person joining after Conspiracy formed.]—If a conspiracy is formed, and a person joins afterwards, he is equally guilty with the original conspirators. *Reg.* v. *Murphy*, 8 Car. & P. 297.

One Conspirator dying.]—Where two conspire, and one dies, the other may still be indicted for the conspiracy. *Rex* v. *Nicholls*, 13 East, 412, n.

b. Form of.

Specifying Goods to be taken away.]—A count stated that the defendants conspired to cause goods, wares, and merchandise, which had been imported into the port of London, whereof duties of customs where then and there due and payable, to be taken and carried away from the port, and to be delivered to the owners thereof, without payment of a great part of the duties of customs so then and there due and payable thereon:—Held, that the gist of the offence being the conspiracy, it was not necessary to specify the goods, wares and merchandises, or the duties payable thereon. *Reg.* v. *Blake*, 6 Q. B. 126; 13 L. J., M. C. 131; 8 Jur. 145.

To obtain Goods—Owner must be stated.]—An indictment for a conspiracy to obtain goods by false pretences was bad, before 14 & 15 Vict. c. 100, s. 8, if it did not state to whom the goods belonged. *Reg.* v. *Parker*, 2 G. & D. 709; 3 Q. B. 292; 11 L. J., M. C. 102; 6 Jur. 822. See *Reg.* v. *Bullock*, Dears. C. C. 653; 25 L. J., M. C. 92.

Names of Parties defrauded.]—It is no objection that the count does not name the parties who were to have been defrauded. *Peck* v. *Reg.*, 9 A. & E. 686; 1 P. & D. 508; 8 L. J., M. C. 22.

An indictment to conspire to raise the price of funds with intent to injure the persons who should purchase is well enough, without specifying the particular persons who purchased as the persons intended to be injured. *Rex* v. *De Berenger*, 3 M. & S. 68; 15 R. R. 415. See also *King* v. *Reg.*, infra, col. 1578.

Specific Pretences.]—An indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof:—Held, that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. *Rex* v. *Gill*, 2 B. & Ald. 204: 20 R. R. 407.

Falsity of Document.]—In an indictment for a conspiracy, in producing a false certificate in evidence, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. *Rex* v. *Mawbey*, 6 Term Rep. 619; 3 R. R. 282.

A count, charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale, and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emoluments to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent. *Peck* v. *Reg.*, 9 A. & E. 686; 1 P. & D. 508; 8 L. J., M. C. 22.

Means by which Conspiracy to be carried out.]—An indictment charged the defendants with conspiring to force workmen hired and employed by P. in his business of a japanner to depart from their employment, by unlawfully molesting them; by unlawfully using threats to them; by unlawfully intimidating them; by unlawfully molesting P., and by unlawfully obstructing P. so carrying on his business, and the workmen so hired:—Held, that these counts were sufficiently full and certain, and that the means by which the conspiracy was to be carried on were well stated in the words of the 6 Geo. 4, c. 129, s. 3. *Reg.* v. *Rowlands*, 2 Den. C. C. 364; 17 Q. B. 671; 21 L. J., M. C. 81; 16 Jur. 268; 5 Cox, C. C. 466. See *Hilton* v. *Eckersley*, 6 El. & Bl. 47; 25 L. J., Q. B. 199; 2 Jur. (N.S.) 587; 4 W. R. 326; and *Farrer* v. *Close*, 10 B. & S. 533; 38 L. J., M. C. 132; L. R. 4 Q. B. 602; 20 L. T. 802; 17 W. R. 1129.

To Cheat and Defraud—Sufficiency.]—Semble, that an indictment charging the defendants with conspiring to cheat and defraud the lawful creditors of W. F. (without any further statement of the conspiracy or of any overt act) is bad, as being too general. *Rex* v. *Fowle*, 4 Car. & P. 592.

An indictment charging that the defendants unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together, to cheat and defraud the prosecutor of his goods and chattels, is good. *Sydserf* v. *Reg.*, 11 Q. B. 245; 12 Jur. 418.

An indictment charged that the defendants conspired to cheat and defraud certain liege subjects of the Queen, being tradesmen, of quantities of their goods; that in pursuance of the conspiracy, the defendant B. fraudulently ordered and obtained upon credit from W. W. and C. W., upholsterers, divers goods of W. W. and C. W. (the count stated a like obtaining on credit from other tradesmen named, and from others whose names were unknown); and that, in further pursuance of their conspiracy, and in order that the goods might be taken in execution and sold, as after mentioned, the defendants ordered the same to be delivered by W. W. and C. W. at the house of B., and they were so delivered and never paid for; and in further pursuance, &c., and in order, &c., B. allowed them to continue in his house till they were taken in execution as after mentioned. That the defendants, in further pursuance, &c., did falsely and fraudulently pretend that certain debts were due from B. to K. and P., two others of the defendants, and K. and P. did, to obtain payment of such fictitious debts, by collusion with B., commence actions against B.; that K. and P. collusively signed judgment against B. in the actions, and issued execution thereon, by virtue of which the goods, before the expiration of the times of credit, were taken in execution, and sold to satisfy the fictitious debts: and so the jurors found the defendants in manner and means aforesaid did cheat and defraud W. W. and C. W. of the goods:—Held, that the indictment was good. *Reg.* v. *King*, D. & M. 741; 7 Q. B. 782; 13 L. J., M. C. 118; 8 Jur. 662.

Error being brought on the judgment:—Held, that the indictment was bad, for that the words alleging conspiracy showed a design to injure, not tradesmen indefinitely, but individuals, and therefore either the persons should have been named, or an excuse stated for not naming them, and that the allegation of conspiracy was not aided by the overt acts; and that the overt acts themselves did not, either in connection with the allegation of conspiracy, or independently, amount to indictable misdemeanors. *King* v. *Reg.*, 7 Q. B. 795; 14 L. J., M. C. 172; 9 Jur. 883—Ex. Ch.

The defendants were tried at a quarter sessions upon an indictment, one of the counts of which charged a conspiracy, "by divers false pretences against the statute in that case made and provided, the said R. B. of his moneys to defraud, against the form of the statute":—Held, that the count sufficiently charged a conspiracy to obtain money by false pretences, and that it must be taken, after verdict, that the conspiracy was one of which a court of quarter sessions had cognisance, under 5 & 6 Vict. c. 38, s. 1. *Latham* v. *Reg.*, 5 B. & S. 635; 33 L. J., M. C. 197; 10 Jur. (N.S.) 1145; 10 L. T. 571; 12 W. R. 908; 9 Cox, C. C. 516.

A count is good which simply charges that the defendants, unlawfully, &c., did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud R. of his moneys. *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B. 121; 11 Jur. 204; 2 Cox, C. C. 145.

An indictment to cheat and defraud a party of the fruits and advantages of a verdict obtained, is too general, and bad in point of law. *Rex* v. *Richardson*, 1 M. & Rob. 402.

Where the overt acts were charged to have been done with intent to defraud L. G., who was entitled to receive the sum of money in question, and the jury found that L. G. was not so entitled:—Held, that a verdict of guilty could not be supported. *Reg.* v. *Dean*, 4 Jur. 364.

A count for conspiring to deceive and defraud divers of her Majesty's subjects who should bargain with the defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration or satisfaction

for the same, with intent to obtain profit and emolument to the defendants (not stating with particularity what the defendants conspired to do), is bad, as not showing that the conspiracy was for a purpose necessarily criminal. *Reg.* v. *Peck*, 9 A. & E. 686; 1 P. & D. 508; 8 L. J., M. C. 22.

To do Illegal Act.]—An indictment that certain persons "unlawfully, maliciously and seditiously did conspire and agree with each other, and with divers other persons unknown, to raise and create discontent and disaffection amongst the liege subjects of her Majesty, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the government and constitution; and also to stir up jealousies, hatred and ill-will between different classes of her Majesty's subjects, and especially amongst her Majesty's subjects in Ireland, and feelings of ill-will and hostility towards and against her Majesty's subjects in other parts of the United Kingdom called England":—Held, that this statement, with or without the additional charge, "and to assume and usurp the prerogative of the crown in the establishment of courts for the administration of law," constituted a definite charge against the several defendants of an agreement between them to do an illegal act. *O'Connell* v. *Reg.*, 11 Cl. & F. 15; 9 Jur. 25; 1 Cox, C. C. 413.

A count, setting forth an agreement between persons "to cause and procure, and aid and assist in causing and procuring, divers subjects of her Majesty, unlawfully, maliciously and seditiously, to meet and assemble together in large numbers, at various times and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidations to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution of the realm by law established," whether or not comprehending the additional words, "and especially, by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland," and whether or not omitting the words "unlawfully, maliciously, and seditiously," does not sufficiently state the illegal purpose of such agreement, and is, therefore, bad for uncertainty. *Ib.*

—— **Intimidation.**]—The word "intimidation," not being vocabulum artis, has not, necessarily, a meaning in a bad sense; and, in order to give it legal efficacy, it should at least appear, from the context of the indictment, what species of fear was intended, and upon whom such fear was meant to operate. *Ib.*

Objects Prohibited by Statute.]—In an indictment for conspiracy at common law to effect objects prohibited by a statute, it is enough to follow the words of the act of parliament. *Reg.* v. *Rowlands*, 2 Den. C. C. 364; 17 Q. B. 671; 21 L. J., M. C. 81; 16 Jur. 268; 5 Cox, C. C. 466.

Overt Acts, whether Necessary to be stated.]—An indictment for a conspiracy to impoverish a man, by preventing him from working at his trade, need not state the overt acts used to effect the intended mischief. *Rex* v. *Eccles*, 1 Leach, C. C. 274.

An indictment that C. died possessed of East India stock, leaving a widow; that the defendants conspired, by false pretences and false swearing, to obtain the means and power of obtaining such stock; that in pursuance of such conspiracy, they caused to be exhibited in the prerogative court of Canterbury a false affidavit made by one of them, in which the deponent stated that C.'s widow had died without taking out administration to C., and that deponent was one of her children; and that the defendants fraudulently obtained to deponent, as one of the children of C., a grant of administration to his estate. On motion to arrest the judgment, on the ground that a charge of conspiracy to obtain the means and power of obtaining the stock, did not describe any offence:—Semble, that the statement of the overt act done in furtherance of the objects of conspiracy was so interwoven with the charge of conspiracy itself, as to show an unlawful conspiracy. *Wright* v. *Reg.*, 14 Q. B. 148.

But held, that at all events the overt acts in themselves constituted a misdemeanor, on which the court could legally pronounce judgment. *Ib.*

A count merely charging conspiracy in the same manner, without alleging the overt acts, is bad. *Ib.* And compare *King* v. *Reg.*, supra.

Surplusage and Immateriality.]—A count charged the defendants with a conspiracy, by false pretences and subtle means and devices, to extort from T. E. one sovereign, his moneys, and to cheat and defraud him thereof; the evidence failed to prove that the defendants employed any false pretence in the attempt to obtain the money:—Held, that so much of the count might be rejected as surplusage, and the defendants convicted of the conspiracy to extort and defraud. *Reg.* v. *Yates*, 6 Cox, C. C. 441.

In an indictment for a conspiracy to extort money, one count averred that the defendants, in pursuance of a conspiracy to extort money from the prosecutor, falsely exhibited certain indictments against him; another count averred that the defendants, in pursuance of the like conspiracy, offered to suppress an indictment pending against the prosecutor, if he would give them money for so doing. The jury found the defendants guilty, but found specially that the indictments preferred by them against the prosecutor were not false:—Held, that the averment in the former count was immaterial, and that the latter count would support the conviction. *Rex* v. *Hollingbery*, 6 D. & R. 345; 4 B. & C. 329; 3 L. J. (o s.) K. B. 226.

4. Particulars of Overt Acts.

When ordered.]—On a general count for conspiracy the defendants are entitled to particulars of the acts relied upon in support of the charge. But on a special count alleging overt acts, particulars will not be ordered unless the defendants show by affidavit that they have no knowledge of the overt acts charged, and do not possess sufficient information to enable them to meet those charges. *Reg.* v. *Stapylton*, 6 W. R. 60; 8 Cox, C. C. 69.

If the counts for a conspiracy are framed in

general form, a judge will order that the prosecutor should furnish the defendants with a particular of the charges; and that particular should give the same information to the defendants that would be given by a special count. But the judge will not compel the prosecutor to state in his particular the specific acts with which the defendants are charged, and the times and places at which those acts are alleged to have occurred. *Rex* v. *Hamilton*, 7 Car. & P. 448.

Where an indictment for conspiracy charges the offence in general terms, the defendant is entitled to particulars of the charge, although there has been a previous committal by a magistrate. Therefore, where an indictment contained counts charging a conspiracy to cheat tradesmen of goods, without mentioning any specific case or name, time or place:—Held, that the defendant was entitled to such particulars. *Reg.* v. *Rycroft*, 6 Cox, C. C. 76.

Effect of.]—Particulars in an indictment for conspiracy having been ordered of overt acts, the counsel for the Crown were confined within them; but particulars pending the trial having been ordered of bad debts incurred to the bank by one of the defendants, the Crown was not restrained next day—the particulars not having been delivered—from giving evidence on that head. *Reg.* v. *Esdaile*, 1 F. & F. 213.

5. EVIDENCE.

Acts, &c., of Co-defendant when Evidence against others.]—On an indictment for conspiracy, where there is evidence of several persons having engaged therein, what is said by any of them at another time and place respecting the object of the conspiracy is evidence against the others. *Rex* v. *Salter*, 5 Esp. 225. And see *Rex* v. *Hammond*, 2 Esp. 719.

On an indictment against directors of a bank for conspiring to defraud, letters or statements by individual defendants as directors to officers of the bank, were admitted as evidence against all of them. *Reg.* v. *Brown*, 7 Cox, C. C. 442; *S. C.*, sub nom. *Reg.* v. *Esdaile*, 1 F. & F. 213.

So, in an indictment for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, the prosecutor may give various instances of their giving a false representation of their circumstances, as overt acts of the conspiracy. *Rex* v. *Roberts*, 1 Camp. 399; 2 Leach, C. C. 987, n.

On an indictment for a conspiracy, the letters of one of the defendants to the other are, under certain circumstances, admissible in evidence in his favour, to show that he was the dupe of the other, and was not himself a participator in the fraud. *Rex* v. *Whitehead*, 1 Car. & P. 67.

Where an indictment charges an ordinary conspiracy, it is not necessary to prove a common design between the defendants before proving the acts of each defendant; for the acts of each defendant are only evidence against himself, and may be the only means of establishing the conspiracy. *Reg.* v. *Brittain*, 3 Cox, C. C. 76.

Information for a conspiracy to cause and procure goods to be imported without payment of part of the duties of customs, by entering the goods as less in quantity and quality than they really were. One of the defendants, B., was a landing-waiter; the other, T., who did not appear to take his trial, was a custom-house agent. According to the course of business at the custom-house, certain goods consigned to T. were placed in the custody of B., and, upon the examination of them, entries of the quantity and quality were made by B. and T. respectively in separate books, and the amount of duty was calculated thereupon:—Held, first, that evidence of an entry made by T. in his ledger, purporting to be an entry of the same goods, but varying from the preceding entries in respect to the quantity, was admissible for the purpose of proving the conspiracy, as an act tending towards the object of the conspiracy. *Reg.* v. *Blake*, 6 Q. B. 126; 13 L. J., M. C. 131; 8 Jur. 666.

Held, secondly, that evidence of a memorandum made by T. on the counterfoil of a cheque drawn by him, that part of the money arising from the fraud was received by B., was inadmissible, it being a declaration of T. after the principal transaction was complete. *Ib.*

A number of persons were charged with murder, committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognisant:—Held, that acts of that prisoner, within the prison, and articles found upon him, were admissible against the persons so charged. *Reg.* v. *Desmond*, 11 Cox, C. C. 146.

If a handbill says that certain things will be done by certain persons, and that handbill is circulated where it is probable those persons would see it, and they do the very thing that the handbill indicates they would do, the contents of the handbill are admissible against them. *Reg.* v. *Duffield*, 5 Cox, C. C. 404.

In order to render the speech of a third person at a meeting admissible on an indictment for conspiring against third parties, not present at that meeting, it must be shown either that such third person was co-operating at that time with the defendants as a conspirator, and engaged with them in one common purpose, or that he was acting as the agent of the defendant. *Ib.*

On an indictment in which four were charged with conspiracy to incite the public to crime, and also in separate counts, were charged each with conspiracy with some other to commit the substantive crime:—Held, that the evidence under the two heads of offence was in its nature entirely distinct; that under the former head only such acts as were done in public were admissible, and under the latter head only such acts as were inter se. And if the proof of the conspiracy consists of proof that the substantive crime has been committed, however legal such a course may be, it is not satisfactory. *Reg.* v. *Boulton*, 12 Cox, C. C. 87.

As to two, the only evidence was of letters to a third, not shown to have been answered:—Held, to be no evidence of conspiracy. *Ib.*

Acts done without the Jurisdiction.]—Acts done in Scotland were tendered in evidence:—Held, that not being within the jurisdiction of arrest, these were not admissible. *Ib.*

Who can give Evidence—Husband of one Prisoner.]—A prisoner was indicted in one count for obtaining money from the trustees of a savings bank by pretending that a document produced by the wife of T. had been filled up by his authority, and in another count for a conspiracy with the wife of T. to cheat the bank. The wife was not indicted. The evidence of T. having been received in support of the indictment, the prisoner was acquitted on the count for conspiracy, and

convicted on the other :—Held, that T.'s evidence was properly received, and that there was no inconsistency in the finding of the jury on the two counts. *Reg.* v. *Halliday*, Bell, C. C. 257 ; 29 L. J., M. C. 148 ; 6 Jur. (N.S.) 514 ; 2 L. T. 254 ; 8 W. R. 423 ; 8 Cox, C. C. 298.

—— **Wife of one Prisoner.**]—But the wife of one defendant cannot be called on behalf of a co-defendant, though the parties appear and defend separately. *Rex* v. *Locker*, 5 Esp. 107.

—— **One Defendant.**]—Nor one defendant who suffers judgment by default. *Rex* v. *Lafone*, 5 Esp. 155.

Two were jointly indicted for obtaining money by conspiracy and false pretences. On being arraigned, one pleaded guilty and the other not guilty. On the trial of the latter, the former was admitted as a witness, although it was objected that the evidence of a co-conspirator could not be received under the count for conspiracy. The jury found him guilty on the false pretences counts, but not on the conspiracy counts :—Held, that the co-conspirator was admissible as a witness and that the conviction should stand. *Reg.* v. *Gallagher*, 32 L. T. 406 ; 13 Cox, C. C. 61.

Answers in Chancery made by Defendants.]—On the trial of an indictment for conspiracy, the answers in chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, are receivable in evidence on the part of the prosecution. *Reg.* v. *Goldshede*, 1 Car. & K. 657.

Unstamped Document.]—In the course of proving a conspiracy to defraud, carried into effect by prevailing upon the prosecutor to accept bills, a warrant of attorney, given to him for the purpose of inducing him to accept, reciting the acceptance, may be given in evidence, though unstamped. *Reg.* v. *Gompertz*, 9 Q. B. 824 ; 16 L. J., Q. B. 121 ; 11 Jur. 204. *See* 54 & 55 Vict. c. 39, s. 14.

Production of Original Resolutions.]—On an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection, resolutions passed at a former meeting are admissible. A copy of these resolutions delivered by such defendant to a witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness had heard read from a written paper, is admissible without producing the original. *Rex* v. *Hunt*, 3 B. & Ald. 566 ; 22 R. R. 485.

Evidence of Same Transaction.]—A. was charged with having conspired with J. and others unknown to raise insurrections and obstruct the laws. It was proved that A and J. were members of a Chartist lodge, and that A. and J. were at the house of the latter on a certain day, on the evening of which A. directed the people assembled at the house of J. to go to the racecourse at P., whither J. and other persons had gone :—Held, that, on the trial of A., evidence was receivable that J. had, at an earlier part of the day, directed other persons to go to the racecourse ; and it being proved that J. and an armed party of the persons assembled went from the New Inn :—Held, that evidence might be given of what J. said at the New Inn, it being all one transaction. *Reg.* v. *Shellard*, 9 Car. & P. 277.

S. and H. were jointly indicted for false pretences, and for a conspiracy. The evidence was, that they were ostensibly carrying on business as B. & Co., and that H. was the author of a book published by them. To force the sale of the book, S. got M. to write letters purporting to come from a lady of title ordering a copy of the book, and to address them to country booksellers :—Held, that evidence of attempts to defraud other booksellers than those named in the indictment was admissible under the count for conspiracy. *Reg.* v. *Stenson*, 25 L. T. 666 ; 12 Cox, C. C. 111.

On an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection, resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the professed object of which meeting was to fix the meeting mentioned in the indictment, are admissible to show the intention of such defendant in assembling and attending the meeting in question, at which he also presided. *Rex* v. *Hunt*, 3 B. & Ald. 566 ; 22 R. R. 485.

And large bodies of men having come to the latter meeting from a distance, marching in regular order, it was admissible to show the character and intention of the meeting, that within two days of the same great numbers of men were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting, and on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again ; and it was admissible, for the same purpose, to show that another body of men, in their progress to the meeting, on passing the house of one of the persons who had been so ill-treated, expressed their disapprobation at his conduct by hissing. *Ib.*

Object of Conspiracy—Itself Felonious.]—Where the evidence in support of a conspiracy shows the object of the conspiracy to be in itself felonious, and that a felony was committed in carrying it out, the defendants are not entitled to an acquittal on the ground that the misdemeanor is merged in the felony ; nor is it any ground for arresting the judgment, that on the face of the indictment itself the object of the conspiracy amounts to a felony, the gist of the offence charged being the conspiracy. *Reg.* v. *Button*, 11 Q. B. 929 ; 18 L. J., M. C. 19 ; 12 Jur. 1017 ; 3 Cox, C. C. 229.

Complaints to Police—Whether Complainants must be called.]—On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble for the purpose of exciting terror in the minds of her Majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was superintendent of police, whether persons complained to him of being alarmed by these meetings :—Held, that the evidence was receivable, and that it was not necessary to call the persons who made the complaints. *Reg.* v. *Vincent*, 9 Car. & P. 275.

Representation as to Another's Solvency—Writing unnecessary.]—A party may be convicted of a conspiracy to cheat and defraud, by means of a false and fraudulent representation

as to the solvency or trade of another, although the representation was oral, and one for which, per se, he would not be civilly liable under 9 Geo. 4, c. 16, s. 14; but the question will be not merely whether the representation was false and fraudulent, but whether it was made in collusion with the co-defendant, for the purpose of cheating the prosecutor. *Reg.* v. *Timothy*, 1 F. & F. 559.

—— **No Benefit to Defendants accruing.**]—On an indictment for a conspiracy to defraud by false representations of solvency, the defendants may be convicted who had no knowledge of the transactions which resulted in solvency, provided they were aware of the result, and concurred in the representations in furtherance of the common design, even although they did so with no motive of particular benefit to themselves. *Reg.* v. *Esdaile*, 1 F. & F. 213. *S. C.* nom. *Reg.* v. *Brown*, 7 Cox, C. C. 442.

General Evidence—Admissibility of.]—In an indictment for a conspiracy, the prosecution may go into general evidence of its nature before it is brought home to the defendants. *Rex* v. *Hammond*, 2 Esp. 719.

General evidence of the conspiracy charged may be received in the first instance, although it cannot affect the defendant unless afterwards brought home to him, or to an agent employed by him. And the same rule applies where a defendant seeks by such general evidence in the first instance to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence, provided the proposed evidence is previously opened to the court, as in the case of a prosecution to be proved by conspiracy. *The Queen's case*, 2 Br. & B. 302; 22 R. R. 662.

Overt Acts supporting Indictment.]—A count charging the defendants with conspiring, by divers subtle means and false pretences, to obtain goods and chattels from a tradesman, without paying for them, with intent to defraud him thereof, is supported by proof of overt acts, from which a conspiracy may be inferred, without proof of any such false pretence as is required in an indictment for obtaining goods by false pretences. *Reg.* v. *Whitehouse*, 6 Cox, C. C. 38.

Overt acts in conspiracy, though not necessarily laid, and if laid not proved as against all the defendants, may be looked at as showing the object of the conspiracy. *Reg.* v. *Esdaile*, 1 F. & F. 213. *S. C.* sub nom. *Reg.* v. *Brown*, 7 Cox, C. C. 442.

Indictment to Defraud—Proof of obtaining Acceptances.]—An indictment for conspiring to defraud the prosecutor may be supported by proof of a conspiracy to obtain his acceptances, though the prosecutor parts with no money, and though he never has intended to take up the acceptances, and though the bills were never in his hands, except for the purpose of his accepting. *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B. 121; 11 Jur. 204; 2 Cox, C. C. 145.

—— **General Statements—No Proof that Goods obtained.**]—An indictment alleging that I. W., C. W. and J. W., being persons in indigent circumstances, and intending to defraud tradesmen who should supply them with goods upon credit, conspired to cause J. W. to be reputed and believed to be a person of considerable property, and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers persons being tradesmen, who should bargain with them for the sale to the said I. W. of goods, the property of such last-mentioned persons, of great quantities of such goods, without paying for the same, with intent to obtain to themselves money and other profits, is not supported by proof that C. W. and J. W., being the wife and daughter of I. W., represented that they were in independent circumstances, their income being interest of money received monthly; at another time, when engaging lodgings, that they were not in the habit of living in lodgings, and that they obtained various goods from tradesmen on credit, under circumstances that showed an intent to defraud, but no proof being adduced that those goods were obtained by reason of any of those general statements. *Reg.* v. *Whitehouse*, 6 Cox, C. C. 38.

—— **Possession of Prosecutor—How proved.**]—In support of an indictment charging a conspiracy to defraud and deprive B. of certain leasehold messuages, whereof B. was lawfully possessed, and to cheat and defraud her of the rents and profits of the messuages; the evidence as to B.'s title was, that F., before her death, directed S., her next-of-kin, to convey the messuages to B. on account of a supposed equitable claim of B. to money received by F. S., after the death of F., and before administration, executed an agreement to assign to B., and went with her to the houses, and pointed out the property, and said B. was landlady, and he hoped the tenants would not shuffle with her as they had with F. B. afterwards received a small sum as rent. There was no proof that F. or S. was ever in possession, and no other evidence of B.'s title:—Held, that there was some evidence of a possession by B. to support the averment in the indictment. *Reg.* v. *Whitehouse*, 6 Cox, C. C. 129.

Preventing Persons carrying on Trade.]—An indictment for conspiring "to prevent the workmen of J. G. from continuing to work, &c.," is supported by evidence of a conspiracy to prevent any from continuing, &c. *Rex* v. *Bykerdyke*, 1 M. & Rob. 179.

An indictment against journeymen for a conspiracy against their employers, to prevent them from taking any apprentices, is proved by evidence of their having quitted their employment with an intention to compel such employers to dismiss any person as an apprentice. *Rex* v. *Ferguson*, 2 Stark. 489.

To murder.]—An indictment alleging a conspiracy to murder a living infant will not be supported by evidence of a conspiracy existing previously to the birth of such infant, unless the agreement and intention continue subsequently to the birth. *Reg.* v. *Banks*, 12 Cox, C. C. 393.

To defraud A. and others—What admissible.]—In an indictment charging a conspiracy to cheat and defraud J. D. and others of goods, and laying as an overt act the obtaining goods of J. D. and others, the word "others" must mean "others his partners" throughout, and evidence of conspiring to defraud other persons than J. D. and his partners is not admissible. *Reg.* v. *Steel*, 2 M. C. C. 246; Car. & M. 337.

Dates in Indictment differing from Evidence.]—An indictment for a conspiracy contained several counts, alleging several misdemeanors on the same day:—Held, that the prosecutor might give evidence of several misdemeanors on different days. *Rex* v. *Levy*, 2 Stark. 458.

What Evidence of Conspiracy sufficient.]—If, on a charge of conspiracy, it appears that two persons, by their acts, are pursuing the same object often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy. *Reg.* v. *Murphy*, 8 Car. & P. 297.

On an indictment against A., B., C., D., E., F., G. and H., for conspiracy to cheat M. by selling a glandered horse as a sound horse, the evidence was, that A., having previously cheated M. by selling him a kicking horse, B., C., D. and E. obtained that horse from M. in exchange for a glandered horse, which he subsequently sold. A., accompanied by G., afterwards sold M. another horse, in which transaction the latter was again defrauded. Some evidence was given to show that A. was frequently in company with some of the other defendants, and that he was aware of a previous sale of the glandered horse by them, but there was no other evidence to connect him with its sale to M.:—Held, that, in the absence of any evidence clearly leading to the conclusion that A. was a party to that sale, there was no evidence of a conspiracy to go to the jury against him. *Reg.* v. *Read*, 6 Cox, C. C. 134.

Certain wharfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire:—Held, that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterwards the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood, and knew of the devices used to conceal it, was no evidence to sustain the charge of a fraudulent conspiracy between the employers and servants. *Reg.* v. *Barry*, 4 F. & F. 389.

Prisoners were indicted for conspiring to commit larceny. A second count charged an attempt to commit a larceny. The evidence was that they, with another boy, were seen by a policeman to sit together on some doorsteps near a crowd, and when a well-dressed person came up to see what was going on, one made a sign to the others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, and to place a hand against the dress of a woman, but no actual attempt to insert the hand into the pocket was observed. Then they returned to the doorstep, and resumed their seats. They repeated this two or three times. There was no proof of any preconcert, other than this proceeding:—Held, not to be sufficient evidence of a conspiracy. *Reg.* v. *Taylor*, 25 L. T. 75. See *Reg.* v. *Deasy*, 15 Cox, C. C. 334.

6. Trial and Verdict.

Venue.]—An information at common law for a conspiracy between the captain and purser of a man-of-war, for planning and fabricating false vouchers to cheat the crown (which planning and fabrication were done upon the high seas), is well triable in Middlesex, upon proof there of the receipts by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he there received. *Rex* v. *Brisac*, 4 East, 164; 7 R. R. 551.

Party in this Country to Conspiracy—Principal Offence not triable here.]—On an indictment against a foreigner, who was ship's carpenter on board a foreign merchant ship, for conspiring in this country, with the foreign owner and master, to destroy or cast away the vessel, with intent to prejudice the owners of goods on board, or the insurers of the ship or cargo, it being admitted that the prisoner was party to the scuttling of the ship on the high seas, the jury was directed to consider whether the prisoner was a party in this country to a previous plan or conspiracy to destroy the ship, not limited to its destination on the high seas, the principal offence not being triable in this country. *Reg.* v. *Kohn*, 4 F. & F. 68.

Where triable.]—An indictment for a conspiracy to defraud is triable at quarter sessions. *Latham* v. *Reg.*, 5 B. & S. 635; 33 L. J., M. C. 197; 10 Jur. (N.S.) 1145; 10 L. T. 751; 12 W. R. 908; 9 Cox, C. C. 516.

Verdict that Prisoner guilty of Conspiracy with Y. or Z.]—A. was indicted for conspiring with Y. and Z., and other persons to the jurors unknown. The evidence was confined to A., Y. and Z., and the jury was of opinion that A. conspired with either Y. or Z., but said that they did not know with which. Y. and Z. were thereupon both acquitted:—Held, that A. was entitled to be acquitted also. *Reg.* v. *Thompson*, 16 Q. B. 832; Dears. C. C. 3; 20 L. J., M. C. 183; 17 Jur. 453; 5 Cox, C. C. 166.

Indictment against Two—Acquittal or Conviction of Both.]—Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted. *Reg.* v. *Manning*, 53 L. J., M. C. 85; 12 Q. B. D. 241; 51 L. T. 121; 32 W. R. 720; 48 J. P. 536.

Verdict — Several Objects — Several Defendants.]—Upon a count charging one conspiracy, and one only, against all the defendants therein named, to effect several illegal objects, the jury may find all or some guilty of conspiring to effect one or more of the objects specified. *O'Connell* v. *Reg.*, 11 Cl. & F. 15; 9 Jur. 25; 1 Cox, C. C. 413.

—— On how many Counts—Single Conspiracy.]—Where an indictment for conspiracy contains several counts, if only a single conspiracy is proved, the verdict may nevertheless be taken on so many of the counts as describe the conspiracy consistently with the proof. *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B. 121; 11 Jur. 204; 2 Cox, C. C. 145.

Death of Co-defendant between Indictment and Trial.]—Where one defendant in conspiracy dies between the indictment and trial, it is no

ground of a venire de novo for a mis-trial, if the trial proceeds against both, no suggestion of the death being entered on the record. *Reg.* v. *Kenrick*, 5 Q. B. 49; D. & M. 208; 12 L. J., M. C. 135; 7 Jur. 818.

One may be tried separately.]—One of several prisoners indicted for conspiracy may be tried separately, and, upon conviction, judgment may be passed on him, although the others, who have appeared and pleaded, have not been tried. *Reg.* v. *Thearne*, 6 Cox, C. C. 6.

—— **Sentence.**]—Where three prisoners have been jointly indicted for a conspiracy to murder, and severally pleaded not guilty, but have severed in three challenges, and the crown has, consequently, proceeded to try one of such prisoners:—Held, that, upon conviction of such prisoner, judgment must follow, although the others have not been tried, and that the possibility of the other prisoners being found not guilty (although such a verdict would be a ground for reversing the judgment) is not a sufficient reason for holding such judgment, and all the legal consequences of such conviction of such prisoner, irregular. *Ib.*

7. New Trial.

When granted.]—Where all of several defendants in an indictment for conspiracy are found guilty, if one of them shows himself entitled to a new trial on grounds not affecting the others, the new trial will nevertheless be granted as to all. *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B. 121; 11 Jur. 204; 2 Cox, C. C. 145.

IV. *AGAINST QUEEN AND GOVERNMENT.*

A. COINING.

1. *Counterfeiting and Uttering*, 1589.
2. *Sale of Counterfeit Coin*, 1593.
3. *Exchanging Coin at Higher than its Value*, 1594.
4. *Colouring*, 1594.
5. *Possession, &c., of Implements for*, 1594.
6. *Unlawful Possession of Base Coin*, 1596.
7. *Previous Conviction*, 1597.
8. *Notice of Action*, 1598.

1. Counterfeiting and Uttering.

Counterfeit Coin—What is.]—A genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin:—Held, that the coin was false and counterfeit within 24 & 25 Vict. c. 99, s. 9. *Reg.* v. *Hermann*, 48 L. J., M. C. 106; 4 Q. B. D. 284; 40 L. T. 263; 27 W. R. 475; 14 Cox, C. C. 279.

—— **To be made Abroad.**]—Some apparatus for manufacturing counterfeit coin was found in the prisoner's possession, but the jury found that he intended to make only a few counterfeit coins in England, with a view merely of testing the completeness of the apparatus before he sent it out to Peru:—Held, that even to make a few coins in England with that object would be to commit the offence of making counterfeit coins within the statute. *Reg.* v. *Roberts*, Dears. C. C. 539; 25 L. J., M. C. 17; 1 Jur. (N.S.) 1094; 7 Cox, C. C. 39.

—— **When Offence complete.**]—Forging the impression of money on an irregular piece of metal, without finishing it, so as to make it current, was an incomplete crime, and not high treason. *Rex* v. *Varley*, 2 W. Bl. 682; 1 Leach, C. C. 71, 253; 1 East, P. C. 164. S. P., *Rex* v. *Harris*, 1 Leach, C. C. 165.

—— **Impression not necessary.**]—It is not necessary, to constitute the offence of coining, that there should be an impression on the counterfeit, if it resembles the common worn coin. *Rex* v. *Welch*, 1 East, P. C. 87, 164; 1 Leach, C. C. 364.

A counterfeit shilling produced in evidence, although it is quite smooth, and there is no impression of any sort discernible on it, will support an indictment for counterfeiting to the similitude of the legal coin. *Ib.*

To make a round blank like the smooth shillings in circulation, the original impression on which has been effaced by wear, is counterfeiting to the likeness and similitude of the good legal and current coin of the realm called a shilling. *Rex* v. *Wilson*, 1 Leach, C. C. 285.

—— **To resemble Real Coin—Question for Jury.**]—It is a question of fact whether or not counterfeit coin was made to resemble the real coin. *Rex* v. *Welch*, 1 East, P. C. 87, 164; 1 Leach, C. C. 364.

Uttering—What amounts to.]—A prisoner went into a shop, asked for some coffee and sugar, and in payment put down on the counter a counterfeit shilling; the prosecutor said that the shilling was a bad one; whereupon the prisoner quitted the shop, leaving the shilling and also the coffee and sugar:—Held, that this was an uttering and putting off within the statute. *Reg.* v. *Welch*, T. & M. 409; 2 Den. C. C. 78; 20 L. J., M. C. 101; 15 Jur. 136; 4 Cox, C. C. 432.

The giving of a piece of counterfeit money in charity is not an uttering, although the person may know it to be counterfeit; as in cases of this kind there must be some intention to defraud. *Reg.* v. *Page*, 8 Car. & P. 122.

But where a person gave a counterfeit coin to a woman with whom he had shortly before had intercourse:—Held, an uttering. *Reg.* v. ——, 1 Cox, C. C. 250.

Uttering or tendering in payment counterfeit copper money was not an indictable offence. *Rex* v. *Ciruan*, 1 East, P. C. 182.

Compare cases sub-tit. Forgery, ante. col. 1298.

—— **Joint uttering.**]—If two utterers of counterfeit coin, with a general community of purpose, go different ways, and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. *Rex* v. *Manners*, 7 Car. & P. 801.

If two jointly prepare counterfeit coin, and utter it in different shops, apart from each other, but in concert, and intending to share the proceeds, the utterings of each are the joint utter-

ings of both, and they may be convicted jointly. *Reg.* v. *Hurse*, 2 M. & Rob. 360.

On an indictment for a joint uttering of counterfeit coin, where both are not present at the time of the uttering, the true question seems to be, whether the one was no near the other as to help the other to get rid of the counterfeit coin. *Reg.* v. *Jones*, 9 Car. & P. 761; 2 M. C. C. 85; 2 Lewin, C. C. 119, 297.

Prisoners together uttered a bad half-crown. Shortly afterwards they separated, and one of them went to a shop and uttered another bad half-crown, and then the other went to the same shop and uttered a third bad half-crown; but at these second and third utterings neither was proved to have been near the other:—Held, that the proof of previous concert would not sustain a count for a joint uttering in either of the second or third utterings. *Reg.* v. *West*, 2 Cox, C. C. 237.

Persons privy to the uttering of a forged note, by previous concert with the utterer, but who were not present at the time of uttering or so near as to be able to afford any aid or assistance:—Held, not to be principals but accessories before the fact. *Rex* v. *Soares*, R. & R. 25; 2 East, P. C. 974.

—— **Joint Uttering and Possession of other Counterfeit Money.**]—If two prisoners are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of the money are proved to be counterfeit. And if it appears that two prisoners went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, both may be convicted, the uttering and the possession being both joint. *Rex* v. *Skerritt*, 2 Car. & P. 427.

Where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence under 2 & 3 Will. 4, c. 34, s. 7, if acting in concert, and both knowing of the possession. *Reg.* v. *Gerrish*, 2 M. & Rob. 219.

Where a man and woman were indicted for uttering a bad shilling to B, and having in their possession another bad shilling at the time, and the uttering was by the woman alone in the absence of the man:—Held, that the man was not liable to be convicted with the actual utterer, although proved to be the associate of the woman on the day of uttering, and to have had other bad money about him for the purpose of uttering; and, secondly, that the woman could not be convicted of the second offence of having other bad money in her possession, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering. *Rex* v. *Else*, R. & R. 142. But see *Reg.* v. *Greenwood*, 2 Den. C. C. 453; 5 Cox, C. C. 521.

Indictment—Form of.]—In an indictment on 15 Geo. 2, c. 28, s. 3, it was not necessary to aver that the defendant was a common utterer of false money. *Rex* v. *Smith*, 2 Bos. & P. 127.

An indictment for knowingly uttering counterfeit coin, twice on the same day, charged an uttering of a counterfeit half-crown, and that the defendant, on the same day, "one other piece of false and counterfeit (omitting the word "coin"), resembling, and apparently intended to resemble, and pass for a piece of the Queen's current silver coin, called a half-crown, unlawfully, &c., did utter and put off to one S. A., the wife of W. G, knowing the same to be false and counterfeit":—Held, that the omission of the word "coin" did not render the indictment bad, as the words "false and counterfeit" might be rejected as surplusage, and the indictment would then be, "one other piece resembling, and apparently intended to resemble, and pass for a piece of the Queen's current silver coin, called a half-crown." *Reg.* v. *Jones*, 9 Car. & P. 761.

An indictment, charging that the prisoner, one piece of counterfeit coin, &c., "did utter and put off to A., knowing the same to be false and counterfeit," is good, whether the objection of uncertainty as to the time, &c, and in knowing, is taken before or after verdict. *Reg.* v. *Page*, 2 M. C. C. 219; 9 Car. & P. 756.

A count charging the prisoner with having counterfeit money in his possession at the time he uttered other counterfeit money, must contain a distinct averment of the fact of uttering. *Rex* v. *Kelly*, 3 Esp. 28.

An indictment on 15 Geo. 2, c. 28, for uttering bad money by the common trick called "ringing the changes," was good, although it did not state that it was uttered in payment as and for good and lawful money; for the words of the statute were in the disjunctive, utter or tender in payment. *Rex* v. *Franks*, 2 Leach, C. C. 644.

The charge of uttering false money twice within ten days must be contained in one count to justify the period of imprisonment inflicted by 15 Geo. 2, c. 28, s. 3. *Rex* v. *Tandy*, 2 Leach, C. C. 833; 1 East, P. C. 182. See *Rex* v. *Martin*, 2 Leach, C. C. 923; 1 East, P. C. Ad. xviii.

—— **Allegation of Scienter.**]—An indictment for knowingly uttering counterfeit coin, charged that the prisoner "did utter and put off to one S. A., the wife of W. G., knowing the same to be false and counterfeit":—Held, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner, and not to "S. A., the wife of W. G.," who was the last antecedent; and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." *Reg.* v. *Jones*, 9 Car & P. 761.

An indictment for uttering counterfeit coin, knowing it to be counterfeit (after a previous conviction), charged, that the prisoner did utter a counterfeit half-crown to E. H., knowing the same to be false and counterfeit:—Held, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner, and not to E. H., who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." *Reg.* v. *Page*, 9 Car. & P. 756; 2 M.C. C. 219.

Question for Jury—Whether Intention to pass as Good Coin.]—On an indictment under 2 & 3 Will. 4, c. 34, s. 7, for uttering a piece of false and counterfeit coin, apparently intended to resemble and pass for a piece of the Queen's good and legal current coin, it is a question for the jury whether the coin produced supported the

indictment, and if they should be of opinion that the coin was not intended by the maker to pass as a good coin, they should acquit. *Reg.* v. *Byrne*, 6 Cox, C. C. 475.

Evidence of Current Coin.]—A person was indicted for uttering a counterfeit coin, intended to resemble and pass for a groat. All the witnesses for the prosecution, except the inspector of coin for the mint, called it a fourpenny-piece. The inspector called it a groat, and said he believed that it had had that name from the earliest period. He added, that the original groat of Edward the Third's reign was larger and heavier than the coin in question; and that, in the Queen's proclamation, these coins were called both groats and fourpenny-pieces. The proclamation was not produced, and the inscription on the coin itself was fourpence:—Held, that if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion that a groat and fourpenny-piece were the same, the prisoner was rightly indicted, and might be convicted. *Reg.* v. *Connell*, 1 Car. & K. 190.

A person was indicted for uttering a medal resembling in size, figure, and colour one of the Queen's current gold coins, called a half-sovereign. At the trial the medal was produced by a witness, who stated that it was the same in diameter as a half-sovereign, and somewhat similar in colour; that on the obverse was the head of the Queen similar to that on a half-sovereign, but that the legend was different; when about to describe the reverse, the coin accidentally dropped and was lost. The medal had not been shown to the jury, and secondary evidence was not given of what was on the reverse:—Held, that there was evidence to go to the jury that the medal resembled in figure a current coin. *Reg.* v. *Robinson*, L. & C. 604; 34 L. J., M. C. 176; 11 Jur. (N.S.) 452; 12 L. T. 501; 13 W. R. 727; 10 Cox, C. C. 107.

Evidence of Guilty Knowledge.]—On an indictment for uttering counterfeit coin, to prove a guilty knowledge, evidence may be given of a subsequent uttering by the prisoner of counterfeit coin of a different denomination to that mentioned in the indictment. The difference in the denomination of the coin goes to the weight of evidence but not to its admissibility. *Reg.* v. *Foster*, Dears. C. C. 456; 3 C. L. R. 681; 24 L. J., M. C. 134; 1 Jur. (N.S.) 407; 6 Cox, C. C. 521.

Sentence.]—On a conviction of two separate offences of uttering counterfeit coin, in two counts, one judgment for two years' imprisonment, under 2 & 3 Will. 4, c. 34, s. 7, was bad. *Rex* v. *Robinson*, 1 M. C. C. 413.

2. Sale of Counterfeit Coin.

Putting off—What is.]—An indictment on 8 & 9 Will. 3, c. 26, s. 6, stated that five counterfeit shillings were paid and put off for two shillings; the proof was that five bad shillings were sold for half-a-crown:—Held, that the variance was fatal, as it was a contract which must be correctly proved as laid. *Rex* v. *Joyce*, Car. C. L. 184.

In an indictment for putting off counterfeit money at a lower rate than its denomination imports, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings for the sum of five shillings; the proof was, that the prisoner said he would let the witness have a bad sovereign at four shillings, and three bad shillings at one shilling, and the witness paid for them with two good half-crowns:—Held, that this proof supported the allegation. *Rex* v. *Hodges*, 3 Car. & P. 410.

Where, on a bargain for the sale of counterfeit money, the price had been agreed upon and the prisoner had produced the coin, but the complete transfer was prevented by the appearance of the police officers:—Held, that it did not amount to a putting off within 8 & 9 Will. 3, c. 26. *Rex* v. *Wooldridge*, 1 Leach, C. C. 307; 1 East, P. C. 169.

—— **Indictment.**]—An indictment on 8 & 9 Will. 3, c. 26, s. 6, for putting off bad money, must have stated that it was "not cut in pieces." *Rex* v. *Palmer*, 1 Leach, C. C. 102.

In an indictment for putting off counterfeit money, the names of the persons to whom it was put off ought to be set out. *Anon.*, 1 East, P. C. 180.

3. Exchanging Coin at Higher than its Value.

The exchanging guineas for bank-notes, taking the guineas in such exchange at a higher value than they were current for by the King's proclamation, was not an offence against 5 & 6 Edw. 6, c. 19 (repealed by 56 Geo. 3, c. 68). *Rex* v. *De Yonge*, 14 East, 402.

4. Colouring.

When Offence committed.]—An indictment charging the gilding sixpences with materials capable of producing the colour of gold, is good, and supported by proof of colouring sixpences with gold. *Reg.* v. *Turner*, 2 M. C. C. 42.

Preparing blanks with such materials as when rubbed would make them resemble the real coin, was a colouring within 8 & 9 Will. 3, c. 26, before the resemblance has been produced by such friction. *Rex* v. *Case*, 1 East, P. C. 165; 1 Leach, C. C. 154, n.

So, bringing to the surface the latent silver in a blank of mixed metal, by dipping it in aqua-fortis, which corrodes the base metal, was a colouring within that statute. *Rex* v. *Lavey*, 1 East, P. C. 166; 1 Leach, C. C. 153.

5. Possession, &c., of Implements for.

Machine, what is.]—A galvanic battery is a machine within the meaning of the 24 & 25 Vict. c. 99, s. 24. *Reg.* v. *Grover*, 9 Cox, C. C. 282.

Press.]—A press for coinage was a tool or an instrument within that branch of the 8 & 9 Will. 3, c. 26, which made it treason to have the same knowingly in the party's custody. *Rex* v. *Bell*, 1 East, P. C. 169.

Puncheon.]—So having knowingly in possession a puncheon for the purpose of coining, though that alone, without the counter puncheon, would not make the figure. *Rex* v. *Ridgeley*, 1 East, P. C. 171; 1 Leach, C. C. 189.

Collar.]—So a collar of iron, for graining the

edges of counterfeit money, was an instrument, although it was to be used in a coining press. *Rex* v. *Moore*, 2 Car. & P. 235 ; 1 M. C. C. 122.

Mould.]—So a mould of lead, having the stamp of one side of a shilling, was a tool or an instrument. *Rex* v. *Lennard*, 2 W. Bl. 807 ; 1 Leach, C. C. 90 ; 1 East, P. C. 170.

Misdemeanor at Common Law.]—It is a misdemeanor at common law to have tools for coining in possession with intent to use them. *Rex* v. *Sutton*, 1 East, P. C. 172.

Being in possession of Dies.]—A., with the intent of coining counterfeit half dollars of Peru, procured dies in this country for stamping and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coin :—Held, that the procuring of dies was an act in furtherance of the criminal purpose, sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin. *Reg.* v. *Roberts*, Dears. C. C. 539 ; 25 L. J., M. C. 17 ; 1 Jur. (N.S.) 1094 ; 4 W. R. 128 ; 7 Cox, C. C. 39.

Custody or Possession.]—The following are instances of "custody or possession" within s. 1 of 24 & 25 Vict. c. 99 :—A person may be found guilty of possession (*a*) who acts in association with another who has pleaded guilty to having the "matter" in his possession ; (*b*) or who, being the tenant and occupier of a house, knowingly sublets a room to another who has the "matter" in his possession ; or (*c*) who knows that a lodger in his house has in his possession and makes use of the "matter" in the room which he (the lodger) occupies. *Reg.* v. *Owen*, 53 J. P. 822.

Indictment—Form of.]—An indictment that the prisoner feloniously had in his possession a mould, "upon which mould were made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, is bad, as not sufficiently showing that the impression was on the mould *at the time* when the prisoner had it in his possession ; but a fresh indictment, with the words "then and there" before the words "made and impressed" is good. *Reg.* v. *Richmond*, 1 Car. & K. 240 ; 1 Cox, C. C. 9.

Where a coining mould is made and impressed to resemble the obverse of a coin, which is partly defaced by wear, the indictment should be in the form above mentioned, as the words of the 2 & 3 Will. 4, c. 34, s. 10, as to moulds to resemble *part* of the obverse of a coin, relate to cases where several moulds put together would make the obverse of the coin. *Ib.*

On an indictment on 2 & 3 Will. 4, c. 34, s. 10, for the felony of making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it was sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. *Rex* v. *Foster*, 7 Car. & P. 495.

To convict a prisoner under the 2 & 3 Will. 4, c. 34, s. 10, of the felony of having in his possession a mould, upon which was impressed the resemblance or the obverse side of a shilling, the jury must be satisfied that, at the time he had it in his possession, the whole of the obverse side of the shilling was impressed on the mould : a part is not sufficient. *Ib.*

On an indictment for having in possession a die made of iron and steel, proof of a die made of other material, or of both, will be sufficient ; for it is immaterial to the offence of what the die is made. *Rex* v. *Oxford*, R. & R. 382.

Upon an indictment against a party under 2 & 3 Will. 4, c. 34, s. 10, for having in his possession a mould, upon which was made and impressed the figure, on one of the sides, of a shilling, it was not sufficient to show that the prisoner had in his possession a mould, on one side of which there was a perfect impression, but without a channel through which the metal ran, unless it could also be shown that coin could be made by it. *Reg.* v. *MacMillan*, 1 Cox, C. C. 41.

An indictment under 24 & 25 Vict. c. 99, s. 24, alleged that the prisoner "knowingly and without lawful excuse feloniously" had in his possession dies impressed with the resemblance of the sides of a sovereign. The prisoner ordered dies, impressed with the resemblance of the sides of a sovereign, of the maker. The maker gave information to the police, who communicated with the authorities of the Mint. The latter authorities, through the police, gave the maker permission to give them to the prisoner. He did so, and they were found in his possession :—Held, first, that it was necessary in the indictment to negative lawful authority or excuse, notwithstanding that the burden of proof lay upon the accused. *Reg.* v. *Harvey*, 40 L. J., M. C. 63 ; L. R. 1 C. C. 284 ; 23 L. T. 856 ; 19 W. R. 446 ; 11 Cox, C. C. 662.

Held, secondly, that the word "excuse" includes "authority," and therefore the indictment was good. *Ib.*

Held, thirdly, that there was no evidence of lawful authority or excuse. *Ib.*

Guilty Knowledge.]—Held, fourthly, that the prisoner, being knowingly in possession of the dies, had a sufficient guilty knowledge to constitute a felony, whatever his intention as to their use might be. *Ib.*

Evidence to connect Mould with Coin passed.]—The prisoner was indicted for knowingly and without lawful excuse having in his custody and possession a mould on which were impressed the figure and apparent resemblance of the obverse side of a half-crown. The mould was found in the house of the prisoner, who had previously passed a bad half-crown ; but there was no evidence to show that the half-crown had been in the mould :—Held, that there was sufficient evidence to go to the jury. *Reg.* v. *Weeks*, L. & C. 18 ; 30 L. J., M. C., 141 ; 7 Jur. (N.S.) 472 ; 4 L. T. 373 ; 9 W. R. 553 ; 8 Cox, C. C. 455.

6. Unlawful Possession of Base Coin.

Possession by Agent.]—In order to convict a person charged on 2 & 3 Will. 4, c. 34, s. 8, with having in his possession more than three pieces of counterfeit coin, with intent to utter them, it was not necessary that the possession should be an individual possession, but it was enough if the coin was in the possession of the person so charged, or his immediate agent. *Reg.* v. *Wil-*

liams, Car. & M. 259. *See also* 24 & 25 Vict. c. 99, s. 1.

Joint Possession.]—When pieces of counterfeit coin are found on one of two persons, acting in guilty concert, and both knowing of the possession, both are guilty. *Reg.* v. *Rogers*, 2 M. C. C. 85; 2 Lewin, C. C. 119, 297.

Evidence of Guilty Knowledge.]—Having a large quantity of counterfeit coin in possession, many of each sort being of the same date, and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit, and intended to utter it. *Reg.* v. *Jarris*, Dears. C. C. 552; 25 L. J., M. C. 30; 1 Jur. (N.S.) 1114; 4 W. R. 85; 7 Cox, C. C. 53.

Possession of bad money five days after, may be given in evidence to show guilty knowledge. *Rex* v. *Harrison*, 2 Lewin, C. C. 118.

Having in possession a large quantity of base coin is evidence of having procured it with intent to utter it, unless there are other circumstances to induce a belief that the defendant was the maker. *Rex* v. *Fuller*, R. & R. 308.

Offences under Old Statutes and Common Law.]—Having counterfeit silver in possession, with intent to utter it as good, was no offence before 2 & 3 Will. 4, c. 34, s. 8. *Rex* v. *Heath*, R. & R. 184. S. P., *Rex* v. *Stewart*, R. & R. 288.

Procuring base coin with intent to utter it as good, is a misdemeanor. *Rex* v. *Fuller*, R. & R. 308.

Having the possession of counterfeit money, with intention to pay it away as for good money, was an indictable offence at common law. *Rex* v. *Parker*, 1 Leach, C. C. 41.

7. Previous Conviction.

What is—Release upon Recognisances.]—A person found guilty of a misdemeanor under s. 9 of the Coinage Act, and ordered to find a surety for his appearance to hear judgment when called upon, has been "convicted" of that offence, and a subsequent similar offence is felony under s. 112. *Reg.* v. *Blaby*, 63 L. J., M. C. 133; [1894] 2 Q. B. 170; 10 R. 227; 70 L. T. 879; 42 W. R. 511; 18 Cox, C. C. 5; 58 J. P. 576—C. C. R.

Proof of Guilty Knowledge.]—On an indictment for uttering a counterfeit coin after a previous conviction, such previous conviction for uttering false coin cannot be put in evidence for the purpose of proving guilty knowledge. *Reg.* v. *Goodwin*, 10 Cox, C. C. 534.

Must not be inquired into until after Verdict.]—Upon the trial of an indictment for the felony of having committed a misdemeanor within either of ss. 9, 10 or 11 of 24 & 25 Vict. c. 99, relating to the unlawful possession and uttering of counterfeit coin after a previous conviction for a misdemeanor within those sections: the prisoner must be arraigned upon the subsequent offence, and evidence respecting it must first be submitted to the jury, and the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence. *Reg.* v. *Martin*, 39 L. J., M. C. 31; L. R. 1 C. C. 214; 21 L. T. 469; 18 W. R. 72; 11 Cox, C. C. 343.

When negatived—Effect of.]—A man was indicted under 24 & 25 Vict. c. 99, s. 12, for the felony of uttering counterfeit coin after a previous conviction for a like offence. The jury found him guilty of the uttering, but negatived the previous conviction:—Held, that he could not be convicted of the misdemeanor of uttering. *Reg.* v. *Thomas*, 44 L. J., M. C. 42; L. R. 2 C. C. 141; 31 L. T. 849; 23 W. R. 344; 13 Cox, C. C. 52.

8. Notice of Action.

In order to entitle a party to a notice of action under s. 33 of 24 & 25 Vict. c. 99, for a thing done in pursuance of this statute, it is enough that he honestly and bonâ fide believes he is acting in pursuance of the act, whether there is reasonable ground for such belief or not. *Herman* v. *Seneschal*, 13 C. B. (N.S.) 392; 32 L. J., C. P. 43; 6 L. T. 646; 11 W. R. 184. *See further*, Practice (Notice of Action),

B. Foreign Enlistment Act.—*See* War.

C. Government Stores.

Possession of, without Fraud.]—One became possessed, on the death of her husband, of canvas stores, which had been purchased by him in his lifetime, at a public sale, and had been many years made up into household furniture, but no evidence was given of any certificate of such sale being lawful, as required by 9 & 10 Will. 3, c. 41, or of any excuse allowed by the act; yet the possession being, by act of law, without fraud:—Held, not within the penalty of the statute. *Anon.*, 2 East, P. C. 765.

Indictment.]—An indictment under 39 & 40 Geo. 3, c. 89, alleged that A., on the 19th day of May, 1842, not being a contractor, had in his possession naval stores:—Held, that the date given applied to the allegation that A. was not a contractor, as well as to the allegation that he had possession of the stores, and therefore that it was sufficiently averred that he was not a contractor at the time of such possession. *Silversides* v. *Reg.*, 2 G. & D. 617; 3 Q. B. 406; 11 L. J., M. C. 82; 6 Jur. 805.

Evidence to support Conviction.]—Bags marked M. were forwarded from Portsmouth to London by railway, and were deposited in the goods department of the railway company in London. The prisoner, a marine store dealer at Portsmouth, wrote and telegraphed to G., an officer of the company, to deliver the bags to E. The bags, on being opened, were found to contain naval stores marked with the broad arrow. The bags had been delivered at the Portsmouth station by two women, but there was no evidence to connect them with the prisoner. Bags marked E. had previously been forwarded by the company to their goods department in London, and delivered to E., in accordance with directions received from the prisoner. He was indicted, under 9 & 10 Will. 3, c. 41, s. 2, for having naval stores in his custody, possession and keeping, and convicted:—Held, that the evidence was sufficient to support the conviction. *Reg.* v.

Sunley, Bell, C. C. 145; 5 Jur. (N.S.) 551; 7 W. R. 418; 8 Cox, C. C. 179.

A. was indicted, under 9 & 10 Will. 3, c. 41, s. 2, for having been found in possession of naval stores marked with the broad arrow. It was proved that he delivered to the captain of a coasting vessel a cask containing copper bolts, a portion of which was marked with the broad arrow. The cask was seized by the police before the vessel sailed. In answer to questions put to the jury, they found that A. was in the possession of the copper bolts; that they had not sufficient evidence before them to show that he knew that the copper, or any part of it, was marked with the broad arrow; and that he had reasonable means of knowing that it was so marked:—Held, that upon this finding of the jury he was entitled to an acquittal, as it must be taken that he did not know that the copper was marked. *Reg.* v. *Sleep*, L. & C. 44; 30 L. J., M. C. 170; 7 Jur. (N.S.) 979; 4 L. T. 525; 9 W. R. 709; 8 Cox, C. C. 472.

Held, that the conviction was also wrong upon the ground that the copper was not found in his possession. *Ib.*

—— **Knowledge that Mark on Stores.**]—An indictment framed under 9 & 10 Will. 3, c. 41, and 55 Geo. 3, c. 127, and charging that the prisoners received, and had in their possession, certain government stores, will not be supported by evidence which merely shows that they were dealing with the cases in which the stores were placed—in the absence of evidence to show that they knew the government mark was on the stores. *Reg.* v. *O'Brien*, 15 L. T. 419.

On an indictment charging the defendant with being in possession of naval stores marked with the broad arrow, it is necessary to show not only that he was possessed of the articles, but also that he knew they were marked with the broad arrow. *Reg.* v. *Cohen*, 8 Cox, C. C. 41.

The bare possession of marked naval stores does not render a person liable to be convicted under 9 & 10 Will. 3, c. 41, if he was ignorant that the stores are so marked. *Reg.* v. *Willmott*, 3 Cox, C. C. 281.

A defendant charged with the possession of two lots of marked naval stores produced at his trial two certificates in respect of the different lots, signed respectively by the commodore superintendent of the Woolwich Dockyard, and the secretary of the board of ordnance, the former having been granted to the person of whom the defendant purchased, the latter to the defendant himself:—Held, that these certificates, though not strictly in accordance with 9 & 10 Will. 3, c. 41, ss. 2, 4, were nevertheless an answer to the charge. *Ib.*

False Entries in Books to conceal Fraudulent Charges.]—The fraudulently charging, by a purser, of stores which were never issued, and the making of false entries in the ship's books to cover such charges, is an offence punishable "according to the laws and customs in such cases used at sea," as amounting under 22 Geo. 2, c. 33, s. 36, to "a crime not capital, committed by a person in the fleet not before mentioned in this act, and for which no punishment is thereby directed to be inflicted." *Mann* v. *Owen*, 4 M. & Ry. 449; 9 B. & C. 595; 7 L. J. (O.S.) K. B. 255.

Summary Conviction.]—On a summary conviction under 39 & 40 Geo. 3, c. 89, s. 18, for unlawful possession of naval stores, the commissioner (or superintendent since 2 & 3 Will. 4, c. 40, ss. 10, 11), or a justice of the peace, has power, in the alternative, either to inflict a fine, or to imprison with hard labour without imposing a fine. *Reg.* v. *Willmott*, 1 B. & S. 27; 30 L. J., M. C. 161; 7 Jur. (N.S.) 1053; 4 L. T. 208; 9 W. R. 633.

The pendency of an appeal under s. 21 has not the effect of suspending the operation of the sentence. *Ib.*

Summary convictions under that act are not affected by 11 & 12 Vict. c. 43. *Ib.*

D. SEDITIOUS LIBEL. *See* post, col. 1656.

E. TREASON AND TREASON-FELONY.

1. *Treason.*
   - *a.* The Offence, 1600.
   - *b.* Indictment, Practice, and Evidence, 1601.
2. *Treason-Felony*, 1605.

1. TREASON.

a. The Offence.

Overt Acts—Discharging Pistol at Sovereign.]—If in an indictment for treason it is stated as an overt act, that the prisoner discharged at the sovereign a pistol, loaded with powder and a certain bullet, and thereby made a direct attempt upon the life of the sovereign; the jury must be satisfied that the pistol was a loaded pistol: that is, there was something in it beyond the powder and wadding; but it seems it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet. *Reg.* v. *Oxford*, 9 Car. & P. 525. *See* 5 & 6 Vict. c. 51, s. 2.

—— **Levying War.**]—To constitute the treason of levying war against her Majesty within the realm, there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; and if a person acts as a leader of an armed body, who enters a town, and their object is neither to take the town nor attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offences, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanor, is not high treason. *Reg.* v. *Frost*, 9 Car. & P. 129. See *O'Brien* v. *Reg.*, 2 H. L. Cas. 465.

—— **Joining or continuing with Rebels.**]—An apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse for joining or continuing with rebels. *Rex* v. *M'Growther*, 1 East, P. C. 71.

But it is otherwise if the party joins from fear of death or by compulsion. *Rex* v. *Gordon*, 1 East, P. C. 71.

—— **Piracy.**]—An overt act of piracy only may show a traitorous intent against the king, in treason for adhering to the king's enemies, if the indictment alleges the intent to be to seize the ships of the king as well as his subjects. *Rex* v. *Evans*, 1 East, P. C. 80; 2 East, P. C. 798.

—— **Adhering to King's Enemies.**]—Indictment for high treason in compassing the king's death and adhering to his enemies. Overt act, conspiring with others to send intelligence to the enemy concerning the disposition of the king's subjects in case of an invasion. Any intelligence sent to the enemy in order to serve them in shaping their attack or defence, though the purport of it may be to dissuade them from an invasion, is high treason. *Rex* v. *Stone*, 6 Term Rep. 527; 1 East, P. C. 79, 99.

Though the intelligence is intercepted. *Rex* v. *Henscy*, 2 Ld. Ken. 366; 1 Burr. 642.

—— **To compel Repeal of Law.**]—It is high treason to attempt, by intimidation and violence, to compel the repeal of a law. *Rex* v. *Gordon* (*Lord George*), 2 Dougl. 590.

By whom committed—Foreigner resident in England.]—It will be treason in a foreigner resident here, or who is himself abroad, if his family resides here, to aid even his own countrymen in acts or purposes of hostility, whether his own sovereign is at enmity or peace with ours, for it is a breach of the local allegiance due from him. *Rex* v. *Delamotte*, 1 East, P. C. 53.

b. Indictment, Practice, and Evidence.

Indictment.]—Semble, that counts charging a party with high treason in "compassing, &c., the maiming and wounding" of his majesty, and with "compassing, &c., the wounding" of his Majesty, are bad. *Rex* v. *Collins*, 5 Car. & P. 305.

Copy of Indictment.]—An allegation that the prisoner indicted for high treason has not had a true copy of the indictment is not matter for a plea, but only a ground for an application for a postponement of the trial. *Reg.* v. *Burke*, 10 Cox, C. C. 519.

The copy of the indictment furnished to the prisoner need not contain a copy of the indorsement of the finding of the grand jury in order to satisfy the statute. *Ib.*

A person indicted for high treason is entitled, under 7 Anne, c. 21, s. 14, to a copy of the indictment ten days before his arraignment. *Rex* v. *Gordon* (*Lord George*), 2 Dougl. 591.

List of Witnesses.]—A person indicted for high treason is entitled, under 7 Anne, c. 21, s. 14, to a list of the witnesses for the crown ten days before his arraignment. *Rex* v. *Gordon* (*Lord George*), 2 Dougl. 591.

On a trial for high treason, it was objected, after the jury had been charged with the prisoner, but before the first witness was examined, that the prisoner had no list of witnesses delivered to him. The indictment was found on the 11th of December; on the 12th of December a copy of it and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner; and on the 17th of December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of December. The objection to the delivery of the list of witnesses was, that the copy of the indictment and the list of jurors and witnesses should have been all delivered at the same time simul et semel:—Held, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to the delivery of the list of witnesses was not made in due time; and that, if the objection had been made in due time, the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list. *Reg.* v. *Frost*, 9 Car. & P. 163; 2 M. C. C. 140; 4 Jur. 53.

Description of Witnesses in Lists.]—Any objection to the description of the witness in the list of witnesses must be taken on the voir dire, and comes too late after the witness is sworn in chief. *Reg.* v. *Frost*, 9 Car. & P. 183; 2 M. C. C. 140; 4 Jur. 53.

The list may properly describe a party as lately of such a place. *Rex* v. *Watson*, 2 Stark. 116.

But if, upon the examination of the witness upon the voir dire, it appears that he has had a different and later place of residence, the description will not be sufficient. *Ib.*

A witness was described in the list of witnesses as "S. S., of the parish of S. W., in the borough of N., in the county of M., labourer." N. was a place with 6,000 inhabitants, and formed only a part of the parish of S. W., which was a large parish, extending beyond the borough of N.:—Held, sufficient, and that it was neither a misdescription nor too general. *Reg.* v. *Frost*, 9 Car. & P. 147.

A witness was described in the list of witnesses as "of Cross-y-Cyloy, in the parish of L." The witness stated, that he lived near Cross-y-Clog (which means Cross of the Cock), and that there were two public-houses, each so called; and that his house was between them, and sixty yards from each. It was also proved, that there was a cluster of houses at this place, and that a witness had directed invoices to one of them, as Cross-y-Clog:—Held, that the witness was not properly described. *Reg.* v. *Frost*, 9 Car. & P. 150.

A witness was described in the list of witnesses as "M. J., of P., in the parish of St. W., in the county of M., sometimes abiding at the house of his son, J. J., in the parish of B., in the said county." The witness occupied a house at P., in the parish of St. W., in which his wife resided, he going to work with his son, and returning to his house at P. about three days in every two months. The son's house was in the parish of M., and not in the parish of B.:—Held, that if the witness had been described as of P., in the parish of St. W., that would have been sufficient; but that, as the latter part of the description was incorrect, it vitiated the whole. *Reg.* v. *Frost*, 9 Car. & P. 152.

Juries and Challenges.]—If a true bill is found against a person for high treason, the judge will, on the application of the counsel for the crown, order the sheriff to furnish the solicitor to the treasury with a list of the persons to be summoned on the jury, that a copy of it may be delivered to the prisoner. *Rex* v. *Collins*, 5 Car. & P. 305.

A person indicted for high treason is entitled under 7 Anne, c. 21, s. 14, to a list of the jurymen who are to be returned on the panel ten days before his arraignment. *Rex* v. *Gordon*, (*Lord George*), 2 Dougl. 591.

Where the prisoner's counsel asked that the names of the jurors should be taken from a ballot-box, instead of being called over in the order in which they stood in the panel, which was alphabetical, and this proposition was acquiesced in by the attorney-general, the court allowed the names of the jurors to be taken from a ballot-

box; but if the attorney-general had objected, the court would not have granted the application. *Reg.* v. *Frost*, 9 Car. & P. 136.

Amendment of Panels.]—The jury panel, in cases of treason, may be amended by correcting mistakes and inserting a description of the professions of the jurors. *Rex* v. *Hardy*, 1 East, P. C. 113.

Evidence.]—As to evidence of treason, see *Rex* v. *Horne Tooke*, 1 East, P. C. 60, 69; 2 Leach, C. C. 823.

—— **To prove Conspiracy.**]—In a case of high treason or conspiracy, the prosecutor may either prove the conspiracy which renders the acts of the co-conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy; therefore, in a case of high treason, where it appeared that a party had met, which was joined by the prisoner on the next day, the counsel for the prosecution was allowed to ask what directions one of the party gave on the day of their meeting, as to where they were to go and for what purpose. *Reg.* v. *Frost*, 9 Car. & P. 149.

In high treason, the overt act of one is the overt act of all; and therefore a common design must, in such cases, precede the proof of individual acts. *Reg.* v. *Brittain*, 3 Cox, C. C. 76.

—— **Onus of Proof.**]—The prisoner is not bound of necessity to shew what was the object or meaning of the acts done by him. The offence must be made out by those who make the charge. *Reg.* v. *Frost*, 9 Car. & P. 129.

—— **What admissible.**]—A letter sent by one of the conspirators, in pursuance of the common design, with a view of reaching the enemy is evidence against all engaged in the same conspiracy. *Rex* v. *Stone*, 6 Term Rep. 527; 1 East, P. C. 79, 99.

A paper found in the possession of one of the conspirators, containing intelligence proved to have been collected by the prisoner, which paper was in the handwriting of the prisoner's clerk, is evidence against the prisoner. Aliter, of a paper in the same handwriting not appearing to have any connection with the prisoner. *Ib.*

An alien was indicted for high treason, in compassing to depose the Queen, and in levying war against the Queen. The material overt acts of compassing to depose the Queen were—1st, conspiring at Dublin, to raise rebellion and levy war within the realm, and 2ndly, levying war within the realm at various places. There was evidence that he was a member of the directing body of a treasonable conspiracy, having for its object the overthrow of the Queen's government, and the establishment of a republic in Ireland. There was also evidence that he had planned an attack upon the castle of Chester, in England, for the purpose of seizing arms there, and conveying them to Ireland, with the view of raising an insurrection there. Evidence was also given that the directing body had, in February, 1867, given orders for a rising in Ireland. On the 23rd February, 1867, he was arrested while attempting to land in Dublin. On the 5th March, 1867, he being in custody, an insurrectionary movement, the result of the commands of the directing body of the conspiracy, broke out in several places in Ireland, and various acts of war were committed:—Held, that those acts of war were receivable against him on the indictment in England. *Reg.* v. *M'Cafferty*, Ir. R. 1 C. L. 363; 10 Cox, C. C. 603; 15 W. R. 1022.

—— **Number of Witnesses.**]—The rule as to the necessity of having two witnesses, in cases of high treason, considered and discussed. *Ib.*

If one overt act is proved by one witness in the county in which the trial is had, which gives the grand jury jurisdiction to inquire, another overt act of the same species of treason, proved by another witness in a different county, will make two witnesses within 7 & 8 Will. 3, c. 3. *Rex* v. *Jellias*, 1 East, P. C. 130.

A conviction of high treason may be upon the evidence of one witness only, in all cases where there is no corruption of blood. *Rex* v. *Gahagan*, 1 Leach, C. C. 42; 1 East, P. C. 129.

—— **In Reply.**]—Evidence had been given for the prosecution, that an armed party had attacked the W. hotel, in which the magistrates and troops were stationed. To shew that the intention of the party was not treasonable, but was merely to procure the release of certain prisoners, a witness was called to prove, that, on the party arriving at the hotel gate, they were asked by a special constable what they wanted, when one of them answered, "Surrender up your prisoners." It was proposed to call evidence in reply, that that was not said at the hotel gate:—Held, that this was properly evidence in reply. *Reg.* v. *Frost*, 9 Car. &. P. 159.

Trial—Reading over Indictment.]—In charging a jury with a prisoner, it is not necessary to read the whole of the indictment at length to the jury, unless the prisoner or his counsel wish it; it is sufficient for the clerk of the crown to state the subject of it. *Reg.* v. *Frost*, 9 Car. & P. 138.

—— **Prisoner addressing Jury.**]—The prisoner has a right to address the jury, in addition to the speeches of his counsel. *Rex* v. *Collins*, 5 Car. & P. 305.

—— **Reply when Evidence in Reply allowed.**]—Where the crown gave evidence in reply, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented on the evidence in reply, also before the second counsel for the prisoner addressed the jury. *Reg.* v. *Frost*, 9 Car. & P. 160.

—— **Restoration of Money and Documents.**]—The court will not order that money taken from a prisoner charged with high treason be restored to him, unless it is made to appear to the court that the money forms no part of the proof against him. *Reg.* v. *Frost*, 9 Car. & P. 132.

The court will not order that papers taken from his house shall be restored to him; neither will they order that he shall be furnished with copies of them *Reg.* v. *Frost*, 9 Car. & P. 133.

—— **Counsel.**]—The only counsel who are recognised by the court, are the two counsel who are assigned by the court, and the court will not take notice of any assistant counsel. *Reg.* v. *Frost*, 9 Car. & P. 135.

Counsel may be assigned for a prisoner charged with high treason, upon an application

made to the clerk of the crown, during an adjournment of the commissioners, between the finding of the indictment and the arraignment, or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried. *Ib.*

—— **Copies of Depositions.**]—Prisoners will be allowed copies of the depositions against them, on the terms prescribed by 6 & 7 Will. 4, c. 114, s. 3. *Ib.*

—— **Solicitors.**]—A person charged with high treason cannot be allowed by the court before which he is tried to have two attorneys, unless they are partners. *Ib.*

During a trial for high treason, which was expected to last several days, the court ordered that the prisoner's attorney should have access to him every day, after the rising of the court, till 10 p.m., and before the sitting of the court, from 7 a.m., although it was stated by the governor of the prison that the prison was not open for any other purpose till half-past 7 a.m., and was shut for the night at 9 p.m. *Ib.*

2. Treason-Felony.

The prisoners were indicted under s. 3 of 11 & 12 Vict. c. 12 (Treason-Felony Act), for compassing, devising, and intending to deprive and depose the Queen from the style, honour, or royal name of the Imperial Crown, of the United Kingdom, for levying war against her to compel her to change her counsels, and to intimidate and overawe the Houses of Parliament. The jury were directed (1) that if they thought that one or more of the prisoners did compass, devise, or intend to force the Queen to change her counsels and to overawe the Houses of Parliament by violent measures, directed either against the property of the Queen, the public property, or the lives of the Queen's subjects, and not with the view of repaying any private spite or enmity against any particular subjects of the Queen, it would be a levying of war against the Queen within the meaning of the first count of the indictment; that it was not the less compassing and intending levying war, because by the progress of science two or three men could do now what could not have been done years ago except by a large number of persons; that the question was, was there proof that the prisoners did what they did with the intention of depriving and deposing the Queen from the style of the Imperial Crown of the United Kingdom, or with the intention of separating Ireland from the Crown of England and establishing an independent republic. (2) That if what the prisoners did was done to compel her Majesty, or her Ministers, by force to change the present constitution, and to alter the relations between England and Ireland, or even to set up a separate parliament in Ireland, it would be within the second count of the indictment. (3) That if what the prisoners did was done for the purpose of intimidating and overawing both or either Houses of Parliament so as to frighten them into doing what otherwise they would not have done, it would be within the third count. *Reg.* v. *Gallagher*, 15 Cox, C. C. 291.

Overt Act within Jurisdiction.]—Sending or supplying arms (even if the arms are sold) to be used in aid of a treasonable confederacy is a sufficient overt act, provided the prisoner knows they are to be used for that purpose. Bringing such arms to London with a view of transmitting them for that purpose is a sufficient overt act within the jurisdiction of the Central Criminal Court. *Reg.* v. *Daritt*, 11 Cox, C. C. 676.

Under 11 & 12 Vict. c. 12, s. 3, it is sufficient evidence to support a conviction to show that the prisoner was a member of a foreign society having for its object the several treasonable objects set out in the several counts of the indictment, and also the existence of a domestic association of similar denomination, and connected with that abroad; and then to prove overt acts done within the venue, in promotion of these objects, by members of the association, and it is not necessary to prove any act of the prisoner himself done in Ireland, or even that he was in Ireland during any part of the period that the associations were shown to exist either at home or abroad. *Reg.* v. *Meany*, Ir. R. 1 C. L. 500; 15 W. R. 1082; 10 Cox, C. C. 506.

Evidence—Purpose of Instrument—Burden of Proof.]—D. and others were charged under the Treason-Felony Act (11 & 12 Vict. c. 12, s. 3) with being in the possession of certain instruments and explosive materials, with intent to use them for the purpose of carrying out the objects of certain treasonable combinations existing in the United Kingdom and abroad:—Held, that, for the purpose of showing such intent, evidence might be given showing that the only known use hitherto made of such instruments and explosive compounds had been in causing destructive explosions to property; and that the fact of some of those explosions having happened out of the jurisdiction of the court did not affect the admissibility of the evidence. *Reg.* v. *Deasy*, 15 Cox, C. C. 334.

Held, also, that for the purpose of showing a treasonable object, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts in the country from which the explosives and instruments were brought, of a treasonable conspiracy having for its object the alteration of the existing form of government by violent means, although such evidence did not establish that the prisoners were members of, or directly connected with, such conspiracy. Though the general rule is that the prosecution must make out intent, there may be circumstances under which the burden of proof is shifted to the other side. *Ib.*

Indictment.]—The 11 & 12 Vict. c. 12, declares it to be felony to "compass, imagine, invent, devise and intend to deprive and depose our lady the Queen," &c., &c. In support of the charge of this offence under the statute, it is sufficient to allege as overt acts that the defendants conspired, combined, confederated and agreed to commit the offence. *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306.

The allegation, in one count, of several different overt acts of felony is not objectionable under 11 & 12 Vict. c. 12. *Ib.*

—— **Pleading to, after Demurrer.**]—Whether a prisoner indicted under 11 & 12 Vict. c. 12, may, after demurring to the indictment, if his demurrer is overruled, plead over to the felony. Quære. *Reg.* v. *Duffy*, 4 Cox, C. C. 24.

General Verdict.]—Where there are several overt acts charged in a count, and judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient and are sufficiently alleged. *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306.

F. TREASURE TROVE.

Indictment.]—An indictment for concealing treasure trove, averring that the Queen is entitled to the treasure, is good without any averment of any inquisition before the coroner, or office found as to the title of the Queen; and a conviction upon such an indictment is good without any evidence as to such matters. *Reg.* v. *Toole*, Ir. R. 2 C. L. 36; 16 W. R. 439; 11 Cox, C. C. 75.

In an indictment for concealing treasure trove from the crown, it is not necessary to aver that the person concealed it fraudulently. The words "unlawfully, wilfully, and knowingly," are sufficient. *Reg.* v. *Thomas*, L. & C. 313; 33 L. J., M. C. 22; 9 L. T. 488; 12 W. R. 108; 9 Cox, C. C. 376.

Evidence.] — A., in ploughing, found large rings of old gold of considerable value, and sold them for brass to B. for 5*s.* 6*d.*, saying where he found them. B. afterwards found out that they were gold, and offered them to a jeweller for sale as gold. Then B. said he had sold them to C. for brass. Then B. and C. were at a bank together, depositing part of the proceeds for which C. had sold the gold rings:—Held, that there was evidence to support a conviction of both B. and C. for knowingly concealing treasure trove from the crown. *Ib.*

Jurisdiction of Coroner.]—*See* CORONER.

V. *AGAINST PUBLIC JUSTICE.*

A. COMPOUNDING FELONIES.

Not permissible.]—The law does not authorise a private person to forego a prosecution upon any terms; and even if a promise is given and broken in such a manner as a jury would consider scandalous, yet, in point of law, that will not make any difference. *Reg.* v. *Daly*, 9 Car. & P. 342.

By whom committed.]—The offence of compounding a larceny may be committed by a person other than the owner of the goods stolen or a material witness for the prosecution. *Reg.* v. *Burgess*, 55 L. J., M. C. 97; 16 Q. B. D. 141; 53 L. T. 918; 34 W. R. 306; 15 Cox, C. C. 779; 50 J. P. 520.

Indictment.]—If, in an indictment for compounding felony, it is averred that the defendant did desist, and from that time hitherto had desisted, from all further prosecution; and it appears, that, after the alleged compounding, he prosecuted the offender to conviction, the judge will direct an acquittal. *Rex* v. *Stone*, 4 Car. & P. 379.

An indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon. *Reg.* v. *Burgess*, supra.

To what Cases applicable.]—The 18 Eliz. c. 5, which prohibits the compounding of any offence upon colour or pretence of process, or without process upon colour of any offence, against any penal law, does not apply to offences cognisable only before magistrates; and an indictment for compounding such an offence will be bad in arrest of judgment. *Rex* v. *Crisp*, 1 B. & Ald. 282.

After Conviction.] — A popular indictment must not be compounded after conviction. *Bury* v. *Levy*, 1 W. Bl. 443.

Taking Penalty without Leave.] — On an indictment on 51 Eliz. c. 5, s. 4, for compounding an offence against 13 Geo. 3, c. 84, s. 13, and taking money without process to prevent an action being brought:—Held, that the party so doing was liable to the punishment prescribed by the former act for taking such penalty without leave of a court at Westminster, or without judgment or conviction. *Rex* v. *Gotley*, R. & R. 84.

No Offence committed.]—A. threatened B. that he would inform against him for selling spirits without a licence, unless B. would give him a sum of money. B. had not, in fact, sold any spirits, but he gave A. the money to prevent an information:— Held, that A. was indictable under 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred, nor any process sued out. *Reg.* v. *Best*, 9 Car. & P. 368; 2 M. C. C. 125.

Rendering Contracts unenforceable.] — *See* CONTRACT.

B. ESCAPE, RESCUE, AND PRISON BREACH.

Escape—Aiding Prisoner.]—The offence of aiding a prisoner at war to escape is not complete, if such prisoner is acting in concert with those under whose charge he is merely to detect the defendant and has no intention to escape. *Rex* v. *Martin*, R. & R. 196.

An indictment at common law for aiding a prisoner's escape should state that the party knew of his offence. *Rex* v. *Young*, 1 Russ. C. & M. 911.

It is a misdemeanor, indictable at common law, to aid a person to escape from custody, though he was confined under the remand of the commissioners for the relief of insolvent debtors, and not on any criminal charge. *Reg.* v. *Allan*, Car. & M. 295; 5 Jur. 296.

The statute 16 Geo. 2, c. 31, which makes it felony to aid or assist any prisoner in an attempt to make his escape, does not apply to a case of such aiding when an actual escape ensues. *Rex* v. *Tilley*, 2 Leach, C. C. 662.

—— **Delivery of Articles to facilitate.**]—A delivery of instruments to a prisoner to facilitate his escape from gaol was within 16 Geo. 2, c. 31. although he had been pardoned of the offence of which he was convicted on condition of transportation. *Rex* v. *Shaw*, R. & R. 526.

By 4 Geo. 4, c. 64, s. 43, if any person shall deliver to a prisoner in any prison any instrument proper to facilitate his escape, such person shall be deemed to have delivered it with intent

to aid and assist such prisoner to escape; and if any person shall by any means whatever aid and assist any prisoner to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony:—Held, that, in an indictment under this section, it was not necessary to set out the means which had been used by the defendant to assist the prisoner to escape. *Holloway* v. *Reg.*, 2 Den. C. C. 287; 17 Q. B. 319; 15 Jur. 825.

The 28 & 29 Vict. c. 126, s. 37, enacts that any person who, with intent to facilitate the escape of any prisoner, conveys into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony:—Held, that a crowbar came within the words "any other article or thing" as used in this section. *Reg.* v. *Payne*, 35 L. J., M. C. 170; L. R. 1 C. C. 27; 12 Jur. (N.S.) 476; 14 L. T. 416; 14 W. R. 661; 10 Cox, C. C. 231.

Prison-Breach or Rescue.]—A prison-breach, or rescue, is a common-law felony, if the person breaking out of prison, or rescued, is a convicted felon; and it is punishable as a common law felony by imprisonment. *Rex* v. *Haswell*, R. & R. 458.

Throwing down, in attempting to escape, loose bricks at the top of a prison wall, placed there to impede escape and give alarm, is a prison-breach, though they are thrown down by accident. *Ib.*

A man was given into custody without a warrant, on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. He was removed to a lock-up, from which he escaped, the charge of felony made against him was dismissed by the magistrates:—Held, that the dismissal was not equivalent to an acquittal by a jury, that he was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defence to an indictment for breaking prison. *Reg.* v. *Waters*, 12 Cox, C. C. 390.

A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanour had been found against such party, is good, and therefore if upon such a warrant the party is arrested and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanour. *Rex* v. *Stokes*, 5 Car. & P. 148.

The forcible rescue of a person from unlawful custody is illegal. *Reg.* v. *Almey*, 3 Jur. (N.S.) 750.

The taking of gunpowder seized under 12 Geo. 3, c. 61, out of the custody of those who made the seizure, although there is no actual breach of the peace committed, is sufficient to sustain an indictment for a rescue. *Rex* v. *Beauchamp*, 5 L. J. (O.S.) M. C. 66.

C. FALSE EVIDENCE.

Attempt to pervert Course of Justice.]—An attempt to mislead a judicial tribunal, which might be called into existence, by the manufacture of false evidence is a misdemeanour, although such tribunal was never called into existence and consequently the manufactured evidence never used. *Reg.* v. *Vreones*, 60 L. J., M. C. 62; [1891] 1 Q. B. 360; 64 L. T. 389; 39 W. R. 365; 17 Cox, C. C. 267; 55 J. P. 536—C. C. R.

D. PERJURY, FALSE OATHS, AND FALSE DECLARATIONS.

1. *Perjury.*
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2. *False Declarations.*
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3. *Unlawful Oaths*, 1647.

1. PERJURY.

a. The Offence.

i. *General Principles.*

What requisite to found Indictment.]—To found an indictment for perjury, the requisite circumstances are these: the oath must be taken in a judicial proceeding before a competent jurisdiction; and it must be material to the question depending and false. *Rex* v. *Aylett*, 1 Term Rep. 63. S. P., *Rex* v. *Dunn*, 1 D. & Ry. 10.

Corporation.]—Where a corporation aggregate are defendants, they are not liable to prosecution for perjury though their answer be never so false. *Wych* v. *Meal*, 3 P. W. 310.

On Foreign Affidavit.]—No perjury can be assigned upon a foreign affidavit. *Musgrave* v. *Medex*, 19 Ves. 562.

But any person making, or knowingly using a false affidavit made abroad, is guilty of a misdemeanour in attempting to pervert public justice, and is punishable by indictment. *Omealy* v. *Newell*, 8 East, 364.

Falsehood not Indictable.]—Falsehood, not strictly amounting to perjury, is an indictable offence as a misdemeanour. *Overton, Ex parte*, 2 Rose, 257.

Inciting to give Particular Evidence.]—Inciting a witness to give particular evidence, when the inciter does not know whether it is true or false, is a high misdemeanour, especially if he, being an attorney on one side, gets himself employed for that purpose on the other side: at least, if the evidence is given accordingly. *Ib.*

What sworn to in Affidavit.]—Quære, whether in an affidavit, the description of the deponent at the commencement of it is a part of what he swears. *Reg.* v. *Chapman*, 1 Den. C. C. 432; 2

Car. & K. 846 ; T. & M. 90 ; 18 L. J., M. C. 152 ; 13 Jur. 885.

ii. *Judicial Proceedings.*

For Purpose of filing Bill of Sale.]—H. was indicted for perjury in an affidavit made under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). for the purpose of getting a bill of sale filed. The affidavit was sworn before a commissioner for taking affidavits in the court of Queen's Bench :—Held, that his offence did not constitute perjury, but that he was guilty of taking a false oath, which offence was under the circumstances a common law misdemeanour. *Reg.* v. *Hodgkiss*, 39 L. J., M. C. 14 ; L. R. 1 C. C. 212 ; 21 L. T. 564 ; 18 W. R. 150 ; 11 Cox, C. C. 365. *See* 52 & 53 Vict. c. 10, s. 7.

Before Surrogates to procure Marriage Licence.]—The taking of a false oath before a surrogate to procure a marriage licence, will not support a prosecution for perjury. *Rex* v. *Foster*, R. & R. 459.

A. was indicted for making a false oath before a surrogate, for the purpose of obtaining a marriage licence :—Held, first, that a surrogate has a general power to administer an oath in that behalf, so as to make a false oath a misdemeanour. *Reg.* v. *Chapman*, 1 Den. C. C. 432 ; T. & M. 90 ; 2 Car. & K. 846 ; 18 L. J., M. C. 152 ; 13 Jur. 885 ; 3 Cox, C. C. 467.

Held, secondly, that such false oath is a misdemeanour, as being made with a fraudulent intention, in a matter of public concern. *Ib.*

Held, thirdly, that it was immaterial whether the marriage actually took place or not.

What Affidavits.]—A party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion was ever made for the injunction. *Rex* v. *White*, M. & M. 271.

The amended description of the plaintiff in the supplemental bill could not affect the liability of a witness examined in the original suit to be indicted for perjury, if he swore falsely. *Giles* v. *Giles*. 1 Keen, 685.

Semble, where, under an act of parliament, an affidavit in a petition matter required by the act may be sworn before the petition is filed, any indictment for perjury in such an affidavit can be sustained. *Clendinning* v. *O'Malley*, 1 Con. & L. 363 ; 2 Dr. & War. 210.

Explanation by a second answer does not take away the opportunity of indicting upon the former answer. *Edwards* v. *M'Leay*, 2 Ves. & B. 258.

Semble, that a person may be convicted of perjury contained in an affidavit intitled, in a cause, "A. B. against C. D. and others," although by the rules of the courts, all affidavits should in their title name all the plaintiffs and all the defendants. *Reg.* v. *Christian*, Car. & M. 388.

An indictment may be supported against a marksman, for swearing falsely in an affidavit, though it would not be receivable in the court it was sworn in, because the jurat did not state that it had been read over to the party swearing it ; but the person administering the oath must prove that the party swearing it in fact understood its contents, and the perjury is complete at the time of the swearing of the affidavit ; and whether it is receivable in the court or not is immaterial, if the reason why it is not receivable is, that some formal regulation is not complied with. *Rex* v. *Hailey*, 1 Car. & P. 258 ; R. & M. 94.

Local Marine Board.]—Wilful and corrupt false swearing before a local marine board, duly and lawfully appointed and constituted, upon a matter material to an inquiry then being lawfully investigated by them, in pursuance of the 17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63, is perjury. *Reg.* v. *Tomlinson*, 36 L. J., M. C. 41 ; L. R. 1 C. C. 49 ; 12 Jur. (N.S.) 945 ; 15 L. T. 188 ; 15 W. R. 46 ; 10 Cox, C. C. 323.

Inquest before Deputy-Coroner.]—By 6 & 7 Vict. c. 83, s. 1, coroners are empowered to appoint deputies, provided that no deputy shall act "except during the illness of the coroner, or his absence from any lawful or reasonable cause." By s. 2, no inquisition shall be quashed by reason of such inquisition having been taken before any deputy instead of the coroner himself. A person being indicted for perjury committed upon an inquest held before a deputy-coroner, and the objection having been taken that there was no lawful or reasonable cause for the absence of the coroner :—Held, that whatever the cause of absence, by s. 2 a valid inquisition might have been founded upon the inquest, and therefore the deputy had jurisdiction and perjury was committed. *Reg.* v. *Johnson*, 42 L. J., M. C. 41 ; L. R. 2 C. C. 15 ; 27 L. T. 801 ; 12 Cox, C. C. 264.

iii. *Court of Competent Jurisdiction.*

Master Extraordinary in Chancery.]—Before 17 & 18 Vict. c. 78, a master extraordinary in chancery had no authority to administer oaths in matters before the Court of Admiralty ; and a conviction for perjury in an affidavit used in the Court of Admiralty, but sworn before a master extraordinary in chancery, could not be supported. *Reg.* v. *Stone*, Dears. C. C. 251 ; 2 C. L. R. 123 ; 23 L. J., M. C. 14 ; 17 Jur. 1106 ; 2 W. R. 63 ; 6 Cox, C. C. 235.

Bankruptcy—Affidavit—Registrar.]—The 1 & 2 Vict. c. 110, s. 8, contained provisions for filing affidavits of debt against a trader, and his being deemed to have committed an act of bankruptcy on not doing certain things. The 5 & 6 Vict. c. 122, contained other provisions relating to the same matter ; and s. 67 enacts that affidavits to be made in matters of bankruptcy, or under any statute relating to bankrupts or this act, shall be sworn before a registrar of the Court of Bankruptcy. On an indictment for perjury, upon an affidavit made under 1 & 2 Vict. c. 110, s. 8, and sworn before the registrar of the Court of Bankruptcy :—Held, that 1 & 2 Vict. c. 110, so far as regarded s. 8, was a statute relating to bankrupts within 5 & 6 Vict. c. 122, s. 67, and that the affidavit related to matters of bankruptcy, and, therefore, was sworn before competent authority. *Dunn* v. *Reg.*, 12 Q. B. 1026 ; 18 L. J., M. C. 41 ; 11 Jur. 908.

—— **Examination — Presence of Judge or Registrar.**]—The prisoner was convicted of perjury alleged to have been committed in an examination by "the court" under s. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under s. 27 before a county court

having jurisdiction in bankruptcy. The oath was administered to the prisoner in court by the registrar. The registrar remained in court. The examination of the prisoner, in the course of which the answers in question were given, took place in a room used for examinations in the absence of the registrar:—Held, that there had been no valid examination by "the court" within s. 27, and that the conviction must be quashed. *Reg.* v. *Lloyd*, 56 L. J., M. C. 119; 19 Q. B. D. 213; 56 L. T. 750; 35 W. R. 653; 16 Cox, C. C. 235; 52 J. P. 86—C. C. R.

Commissioners of Bankruptcy.]—Perjury cannot be committed in evidence given before commissioners of bankruptcy, when there was no good petitioning creditor's debt to support the fiat. *Reg.* v. *Ewington*, 2 M. C. C. 223; Car. & M. 319.

Before Arbitrators.]—A., a defendant in a suit tried before a county court judge, gave false evidence before an arbitrator, to whom the suit was referred, and by whom A. was sworn:—Held, before 14 & 15 Vict. c. 99, s. 16, that under 9 & 10 Vict. c. 95, s. 77, the arbitrator had no authority to administer an oath, and therefore A. was not liable to be indicted for perjury. *Reg.* v. *Hallett*, 2 Den. C. C. 237; T. & M. 563; 20 L. J., M. C. 197; 15 Jur. 433; 5 Cox, C. C. 238. *See* 52 & 53 Vict. c. 49, s. 22.

A cause was referred by a judge's order to C. D.; and by the order it was directed that the witnesses should be sworn before a judge, "or before a commissioner duly authorised." A witness was sworn before a commissioner for taking affidavits, and examined viva voce by the arbitrator:—Held, that a witness so sworn was not indictable for perjury. *Rex* v. *Hanks*, 3 Car. & P. 419.

Charge against Solicitor in summary Way.]—Perjury may be assigned upon an affidavit of an attorney of the court, made in answer to a charge exhibited against him in a summary way. *Rex* v. *Crossley*, 7 Term Rep. 315; 4 R. R. 445.

Banker's Return.]—An affidavit verifying the return of the issue by a banker of unstamped bills and notes may be sworn either before a justice of the peace or before a commissioner to administer oaths in chancery. The manager of a bank is a chief clerk within 9 Geo. 4, c. 24, s. 7, which requires such affidavit to be made by a cashier, accountant or chief clerk. *Reg.* v. *Greenland*, 36 L. J., M. C. 37; L. R. 1 C. C. 65; 15 L. T. 589; 15 W. R. 460; 10 Cox, C. C. 377.

Proceedings before Grand Jury.]—A person may be indicted for perjury committed by him when a witness before the grand jury, and another witness on the same indictment and a police officer stationed in the grand jury room are competent to prove the offence. *Reg.* v. *Hughes*, 1 Car. & K. 519.

Sheriff's Court—Amendment unauthorised.]—An unmarried woman having recovered judgment in a county-court against A., obtained a judgment summons against him from the Sheriffs' Court, London. At the hearing it having been ascertained that the plaintiff had married in the meantime, the judge amended the title of the cause by inserting the husband's name:—Held, that he had the power to do so, and consequently, that an indictment for perjury could not be maintained against the defendant for false evidence given at that hearing. *Reg.* v. *Pearce*, 3 B. & S. 531; 32 L. J., M. C. 75; 9 Jur. (N.S.) 647; 7 L. T. 597; 11 W. R. 235; 9 Cox, C. C. 258.

Court-martial.]—Semble, that taking a false oath before a court-martial is perjury at common law. *Reg.* v. *Heane*, 4 B. & S. 947; 33 L. J., M. C. 115; 10 Jur. (N.S.) 724; 9 L. T. 719; 12 W. R. 417; 9 Cox, C. C. 433.

Before Justices—No Deposition or Information on Oath.]—H., a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S., upon a charge of "assaulting and obstructing him, H., in the discharge of his duty." Upon such warrant S. was arrested and brought before justices, and was, without objection, tried by them and convicted. H. was afterwards indicted for perjury committed on the said trial of S., and convicted:—Held, that H. was rightly convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal. *Reg.* v. *Hughes*, 48 L. J., M. C. 151; 4 Q. B. D. 614; 40 L. T. 685; 14 Cox, C. C. 284.

An information founded on 1 & 2 Will. 4, c. 32, after stating an appearance and information by O. M. against R. R., proceeded thus:—"And the information having been also verified upon the oath of W. A., of &c., another credible witness, before me the said justice, hereupon O. M. prays that R. R. may be forthwith summoned, &c.

"Exhibited by O. M., and sworn before me the day and year first above written. } O. M. W. A.

"W. F. C."

The party informed against having appeared before two justices, evidence was given by a witness for him. An indictment for perjury having been preferred against this witness, upon which he was found guilty:—Held, that the proceeding before the two justices was informal for want of a deposition on oath of the charge contained in the information, in pursuance of 6 & 7 Will. 4, c. 65; and that, therefore, the indictment could not be sustained. *Reg.* v. *Scotton*, 5 Q. B. 493; D. & M. 501; 13 L. J., M. C. 58; 8 Jur. 409.

But where an information, not upon oath, was laid before a justice of the peace under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 24, who thereupon issued a summons to the party charged; and at the hearing the prisoners were examined as witnesses, and upon the evidence which they gave perjury was subsequently assigned:—Held, that the hearing before the magistrates was a judicial proceeding, and that jurisdiction was given by the 24th section, although the information was not upon oath. *Reg.* v. *Millard*, Dears. C. C. 166; 22 L. J., M. C. 108; 17 Jur. 400; 1 W. R. 314; 6 Cox, C. C. 150.

—— **On Hearing of Bastardy Summons.**]—By 7 & 8 Vict. c. 101, s. 2, where application for a bastardy summons is made before the birth of the child, "the woman shall make a deposition upon oath." A man was convicted of perjury, alleged to have been committed on the hearing of a bastardy summons. The summons had been

issued against him before the birth of the child. Upon the application for it no written deposition was made, but only a verbal statement upon oath by the woman. He appeared to the summons, and made no objection to its validity or to the jurisdiction of the court:—Held, that the court had jurisdiction to hear the summons, and that the conviction for perjury was right. *Reg.* v. *Fletcher*, 40 L. J., M. C. 123; L. R. 1 C. C. 320; 24 L. T. 742; 19 W. R. 781; 12 Cox, C. C. 77.

The mother of a bastard child, born on the 20th March, 1868, applied to a justice on the 18th April, 1868, for a summons against the putative father. A summons was issued on the same day, but never served, as he could not be found by the process server to whom the summons was given. On the 14th January, 1870, about a fortnight after the mother had found out his address, she applied for and obtained another summons, which was served on him, and he appeared thereto, and being examined on oath, committed the perjury assigned:—Held, that the justices had jurisdiction to hear the complaint, although at the time of service of the summons more than twelve months had elapsed from the birth of the child. *Reg.* v. *Chugg*, 22 L. T. 556; 11 Cox, C. C. 558. See *Potts* v. *Cumbridge*, 8 E. & B. 847; 27 L. J., M. C. 62; 4 Jur. (N.S.) 72; 6 W. R. 214.

Perjury was committed before magistrates, upon the second application for a bastardy order, a former application having been dismissed on the merits:—Held, that the magistrates had jurisdiction, and that the prisoners were properly convicted. *Reg.* v. *Cook*, 2 Den. C. C. 462; 21 L. J., M. C. 136; 16 Jur. 434.

A summons, after the birth of a child, under 7 & 8 Vict. c. 101, s. 2, against the putative father, was issued on the personal application of the mother of the bastard child, not upon oath. The putative father appeared to the summons and defended the case on the merits, without objecting that the summons had issued on the statement of the woman, not on oath:—Held, that the putative father could not afterwards raise the objection; and that he was liable to be indicted for perjury committed by him on the hearing of the summons. *Reg.* v. *Berry*, Bell, C. C. 46; 28 L. J., M. C. 86; 5 Jur. (N.S.) 320: 7 W. R. 229; 8 Cox, C. C. 121.

A summons was issued more than twelve months after the birth of the child, and no proof was given to the summoning justice that the defendant had paid any money for maintenance of the child within twelve months next after its birth:—Held, a mere matter of process that might be waived, and that as the defendant had waived it, the petty sessions had jurisdiction. *Reg.* v. *Simmons*, Bell, C. C. 168; 28 L. J., M. C. 183; 5 Jur. (N.S.) 578; 7 W. R. 439; 8 Cox, C. C. 190.

The mother of a bastard, having been resident with her parents in one petty sessional division, went to lodge at D. in another division, for the purpose of affiliating her child, D. being nearer and more convenient for her than the place where the magistrates acting for the other division met. She lodged at D. three weeks before she obtained the summons, having in the interval made one unsuccessful application; and after obtaining the order went into service in the division in which her parents resided, but without returning to them; and she stated that she could not go back to them as they had nothing for her to do. Whilst at D. she had no other home:—Held, that the jury was warranted in finding that at the time of her application to the magistrates at D. she was residing within that petty sessional division; that consequently the magistrates had jurisdiction, and a conviction for perjury committed by her on that occasion was right. *Reg.* v. *Hughes*, Dears. & B. 188; 26 L. J., M. C. 133; 3 Jur. (N.S.) 448; 5 W. R. 526; 7 Cox, C. C. 286.

—— **Information for furious Riding.**]—A person was indicted for perjury committed by him as a witness on an information before justices against A. for furious riding, contrary to 5 & 6 Will. 4, c. 50 (Highway Act), s. 78:—Held, that, as that section gives the justices no jurisdiction to impose any penalty for furious riding, he did not commit the offence of perjury. *Reg.* v. *Bacon*, 22 L. T. 627; 11 Cox, C. C. 540.

—— **By Person not a competent Witness.**]—C. was indicted for perjury committed on the hearing of a summons which had been taken out against himself, for permitting gambling in his house contrary to the tenor of his licence, under 9 Geo. 4, c. 61. The defendant had tendered himself as a witness, representing himself as the son of C., and had thereupon been sworn and given evidence on behalf of C., who was really himself, and that evidence formed the subject of the indictment:—Held, that as he was not a competent witness and could not give evidence in his own behalf, the magistrates had no power to swear him or receive his evidence, and that he could not therefore be guilty of perjury. *Reg.* v. *Clegg*, 19 L. T. 47.

—— **Complaint by Apprentice against Master.**]—After the expiration of his term of apprenticeship, an apprentice summoned his master before a magistrate for neglecting to pay his wages, and upon the hearing of the complaint under 4 Geo. 4, c. 34, s. 2, the apprentice gave false evidence:—Held, that whether the 4 Geo. 4, c. 34, s. 2, did or did not require the complaint to be made before the expiration of the apprenticeship, the magistrate having general jurisdiction over the subject of complaint, perjury could be assigned on the false evidence given before him. *Reg.* v. *Proud*, 36 L. J., M. C. 62; L. R. 1 C. C. 71; 16 L. T. 364; 15 W. R. 796; 10 Cox, C. C. 455.

iv. *Matter must be Material.*

Oath before Surrogate.]—An illegitimate child being filius nullius, an indictment charging a defendant with taking a false oath before a surrogate, and that E. was the natural and lawful father of E. E., and that his consent was necessary as such father, under 4 Geo. 4, c. 76, cannot be sustained. *Reg.* v. *Fairlie*, 9 Cox, C. C. 209.

Before Arbitrators.]—Where perjury is assigned upon evidence given before an arbitrator, upon a reference at nisi prius, of a cause and all matters in difference between the parties, it must be distinctly shown whether the evidence was material in respect of the matters in issue in the cause, or of the other matters in difference between the parties. *Reg.* v. *Ball*, 6 Cox, C. C. 360.

Action of Trover—Signature to Delivery Note.]—At the trial of an action of trover by P. against the prisoner for some steel, the defence

was that P., while the steel was lying at a railway station, sent for it, and signed a delivery note on receiving it, and then sold it to the prisoner. The prisoner, a witness, swore that the name, P., on the delivery note was P.'s handwriting, and that he saw him write it. The prisoner was indicted for perjury upon this evidence and found guilty:—Held, that the signature to the delivery note was material evidence in the action, upon which perjury could be assigned. *Reg.* v. *Naylor*, 17 L. T. 582; 16 W. R. 374; 11 Cox, C. C. 13.

On Indictment for Perjury in Affidavit.]—Upon the trial of C. for perjury, committed in an affidavit, proof was given that the signature to the affidavit was in his handwriting, and there was no other proof that he was the person who made the affidavit. The prisoner was then called, and swore that the affidavit was used before the taxing master, that C. was then present, and that it was publicly mentioned, so that everybody present must have heard it, that the affidavit was C.'s:—Held, that the matters sworn were material upon the trial of C. *Reg.* v. *Alsop*, 20 L. T. 403; 17 W. R. 621; 11 Cox, C. C. 264.

In proving an Aliti on Criminal Charge.]—S. was indicted for robbery on April 13, at 8.45 p.m., and the prisoner swore that S. was in a house at a distant place at that time, and that S. had lodged at that house nearly two years, and had never been away for more than two or three nights at a time during the period. The prisoner was indicted for perjury on that evidence, and convicted on the assignments of perjury, as to S. having lodged at the house for two years, and never having been away more than two or three nights at the time:—Held, that the evidence on these points was material, as tending to induce the jury to give greater credit to the substantial fact of his being there on the 13th of April at the time in question. *Reg.* v. *Tyson*, 37 L. J., M. C. 7; L. R. 1 C. C. 107; 17 L. T. 292; 16 W. R. 317; 11 Cox, C. C. 1.

Bastardy Proceedings.]—The prisoner was charged with perjury for having falsely sworn before magistrates at petty sessions that D. R. was the father of her illegitimate child. One assignment of perjury was, that at the trial the prisoner had falsely sworn that her master, who was uncle of D. R., had promised her that he would raise her wages, and allow her to lie in at his house, if she would swear the child to a person other than his nephew, D. R.:—Held, that such statement was not material to the issue so as to constitute the crime of perjury. *Reg.* v. *Owen*, 6 Cox, C. C. 105.

A summons was issued after the birth of a child, under 7 & 8 Vict. c. 101, s. 2, against the putative father:—Held, that evidence of payment of money by the putative father within twelve months of the birth of the child, being evidence of the paternity, was a material fact on the hearing of the summons. *Reg.* v. *Berry*, Bell, C. C. 46; 28 L. J., M. C. 86; 5 Jur. (N.S.) 320; 8 Cox, C. C. 121.

On Charge of Assault.]—On an indictment for perjury committed on the hearing of a charge of assault by a man on his wife, an assignment in a statement by the accused, as a witness for the husband, that he had seen the wife committing adultery (of which he told the husband) is bad for immateriality, as the supposed statemen would not be legally relevant to the charge of assault as affording no ground of legal justification. *Reg.* v. *Tate*, 12 Cox, C. C. 7.

Inadmissible Evidence given but withdrawn.]—On a trial where it was material to prove whether J. had died before M., the defendant produced a document purporting to be a copy of J.'s will, and falsely swore that he had examined it with the original will in the registry: and also, that he had examined a memorandum at the foot of the copy of the will, with the entry in a book called the Act Book in the same registry. The judge offered to admit the evidence, but it was withdrawn; it was, in point of law, inadmissible:—Held, that the circumstances that the evidence was inadmissible, and was withdrawn, did not affect the question of perjury, as it could not purge the false swearing; and that, as it was material whether probate of J.'s will was granted in the lifetime of M., if the evidence of the prisoner had been received it would have been material to the issue, and, consequently, that the false oath of the prisoner amounted to perjury. *Reg.* v. *Phillpotts*, 2 Den. C. C. 302; 3 Car. & K. 135; T. & M. 607; 21 L. J., M. C. 18; 16 Jur. 67; 5 Cox, C. C. 363.

Inadmissible Evidence given and admitted.]—G. was indicted for perjury, in having falsely sworn that in September, 1860, he had carnal knowledge of A. A. had obtained an affiliation summons against H., and in her cross-examination denied having had connection with the defendant in September, 1860 (a time which could not have made him the father of the child). The defendant was called as a witness on behalf of H., and swore that he had connection with A. in the month named:—Held, that although his evidence was legally inadmissible, yet, being admitted, it became material, and perjury might be assigned upon it. *Reg.* v. *Gibbons*, L. & C. 109; 31 L. J., M. C. 98; 8 Jur. (N.S.) 159; 5 L. T. 805; 10 W. R. 350; 9 Cox, C. C. 105.

Date of Sale of Animal.]—Upon an indictment for perjury in proceedings to ascertain the property in a certain animal which the prisoner swore he had sold before a particular day, the actual day on which he sold it may become a material question. *Reg.* v. *Altass*, 1 Cox, C. C. 17.

Collateral Matters.]—On a charge of robbery the prosecutor denied having met the prisoner the night before the offence, and having proposed to the prisoner and M. to commit a burglary, the prisoner then called M. as a witness and contradicted the prosecutor's evidence:—Held, that M. could not be indicted for perjury as his evidence was not material. *Reg.* v. *Murray*, 1 F. & F. 80.

The prisoner was indicted for perjury committed by him on the hearing of a summons that he had taken out against the prosecutor for using language calculated to incite him to commit a breach of the peace. The prosecutor and several witnesses proved that the language was used in consequence of the prisoner having kicked and struck a horse; but the prisoner denied that he had done so:—Held, that this denial by the prisoner was a collateral matter

and perjury would not lie. *Reg.* v. *Holden*, 12 Cox, C. C. 166.

Action in County Court—Name of Defendant.]—A defendant was sued in a county court by the name of Bernard Edward M. The judge decided that the plaintiff was entitled to recover, and whilst determining how the defendant should pay the debt, asked him his name; when he swore that it was Edward, not Bernard, only Edward; and thereupon the judge refused to amend, and struck out the cause. The defendant was indicted for perjury; and at the trial it was proved that he had wilfully and corruptly sworn falsely in the above answers, and the jury convicted him:—Held, that the conviction was right; the answers being sufficiently material to the matter under inquiry. *Reg.* v. *Mullany*, L. & C. 593; 34 L. J., M. C. 111; 11 Jur. (N.S.) 492; 12 L. T. 549; 13 W. R. 726; 10 Cox. C. C. 97.

Denial in Answer to Bill in Equity.]—A. brought an action against B. and his partners for the price of wheat, and recovered a verdict on the bought and sold notes. B. and his partners filed a bill in equity against A., which stated that the bought and sold notes did not contain all the terms of the contract, as it had been also agreed by parol between A. and B. that the wheat should be paid for by a draft at three months; and the prayer of the bill was, that A. should be restrained from suing out execution. A., by his answer, denied the statement in the bill; and the bill was dismissed:—Held, that if this denial by A. was wilfully false, it amounted to perjury. *Reg.* v. *Yates*, Car. & M. 132; 5 Jur. 636.

In an answer in chancery to a bill in equity against the defendant for specific performance of an agreement relating to the purchase of land, he relied on the Statute of Frauds (the agreement not being in writing), and also denied having entered into any such agreement. Upon this denial in his answer, he was indicted for perjury:—Held, that the denial of an agreement which, by the Statute of Frauds, was not binding on the parties was immaterial and irrelevant, and that the defendant was entitled to an acquittal. *Rex* v. *Dunstan*, R. & M. 109.

Perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the Statute of Frauds. *Rex* v. *Benesech*, Peake's Add. Cas. 93.

Construction of Deed.]—Perjury cannot form the subject of an indictment where the supposed perjury depends upon the construction of a deed. *Rex* v. *Crespigny*, 1 Esp. 280. And see *Rex* v. *Pepys*, Peake, 138.

Record of Cause Erroneous.]—If the record of a cause is erroneous, no perjury can be assigned for false testimony given in the course of the trial. *Rex* v. *Cohen*, 1 Stark. 511.

Reversal of Judgment on Writ of Error.]—A., was indicted for perjury, alleged to have been committed on the trial of B. for perjury. The indictment against A. averred, that the evidence he gave on the trial of B. was material, and that B. was convicted. B. was convicted and sentenced, but the judgment against B. was afterwards reversed on writ of error:—Held, that the reversal of the judgment against B. was no ground of defence for A., as shewing that his evidence could not have been material, and that it did not negative the allegation that B. had been convicted. *Reg.* v. *Meek*, 9 Car. & P. 513.

Evidence going to Witness's Credit.]—Perjury may be assigned upon evidence going to the credit of a material witness in a cause, although such evidence, being legally inadmissible, ought not to have been received. *Reg.* v. *Gibbons*, L. & C. 109; 31 L. J., M. C. 98; 8 Jur. (N.S.) 139; 5 L. T. 805; 10 W. R. 350; 9 Cox, C. C. 105.

A person was charged with selling beer without a licence contrary to s. 3 of the Licensing Act, 1872. When before the magistrate he stated on oath that he had been previously convicted, but that his solicitor had pleaded guilty without his authority. On a trial for perjury:—Held, that the statements were made in answer to questions affecting his credit as a witness, and were, therefore, material to the issue; and that the magistrate was right in taking cognisance of the circumstances under which the previous conviction was obtained. *Reg.* v. *Baker*, 64 L. J., M. C. 177; [1895] 1 Q. B. 797; 15 R. 346; 72 L. T. 631; 43 W. R. 654—C. C. R.

Every question on cross-examination of a witness which goes to his credit is material. *Reg.* v. *Overton*, Car. & M. 655; 2 M. C. C. 263.

A question having no general bearing on the matters in issue may be made material by its relation to the witness's credit, and false swearing thereon will be perjury. *Ib.*

In an action in a county court by an executrix for goods sold, she falsely swore on cross-examination that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station:—Held, on the trial of an indictment for perjury, that this evidence was material. *Reg.* v. *Levey*, 3 Car. & K. 26.

Materiality for Judge or Jury.]—Semble, that whether the evidence is material or not is a question to be left to the jury. *Ib.* See *Reg.* v. *Courtney*, 7 Cox, C. C. 111; *Rex* v. *Dunstan*, Ry. & M. 109, contra.

On an assignment of perjury by a defendant in a bastardy case, that he had never kissed the prosecutrix, the question of materiality is for the jury. *Reg.* v. *Goddard*, 2 F. & F. 361.

The question of materiality is for the judge. *Reg.* v. *Southwood*, 1 F. & F. 356.

v. *Falsity of Statement.*

What Sufficient.]—With respect to the falsity of an oath, it has been considered to be immaterial whether the fact which is sworn to, be in itself true or false. *Rex* v. *Edwards*, 1 Russ. C. & M. 293.

A man may be indicted for swearing that he believes a fact to be true which he must know to be false, although he does not swear positively. *Rex* v. *Pedley*, 1 Leach, C. C. 325.

Perjury may be assigned as to what a man has sworn that he thought or believed; the difficulty, if any, being in the proof of the assignment. *Reg.* v. *Schlesinger*, 10 Q. B. 670; 17 L. J., M. C. 29; 12 Jur. 283; 2 Cox, C. C. 200.

vi. *Deliberate Intention.*

Attention of Prisoner called to Subject.]—An indictment alleged that the prisoner swore on a plaint in the county court for the price of coals

obtained on credit at different times, in which it was a material question whether or not he had received any coals on credit from P., either on account of himself or of A. At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or on that of A., have any coals on credit from P., to which he always answered, "I did not":—Held, that his attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transaction on credit was suggested to him during his examination. *Reg.* v. *London*, 21 L. T. 232; 12 Cox, C. C. 50.

b. Indictment.

i. *Averments. Form of.*

Judicial Proceeding.]—An affidavit to hold to bail may be sworn before the issuing of the writ of summons in the action; and, therefore, an indictment for perjury committed in such an affidavit need not state that any action was pending. *King* v. *Rey*, 14 Q. B. 31; 18 L. J., Q. B. 253; 3 Cox, C. C. 561—Ex. Ch.

Where perjury was charged to have been committed in that which was in effect the affidavit on an interpleader rule, and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the fieri facias, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the Interpleader Act (1 & 2 Will. 4, c. 58):—Held, that the indictment was bad, as the affidavit did not appear to have been made in a judicial proceeding. *Reg.* v. *Bishop*, Car. & M. 302.

In a case of perjury committed before magistrates, the indictment merely stated that the defendant, intending to subject W. M. to the penalties for felony, went before two magistrates and "did depose and swear," &c., setting out a deposition, which stated, that W. B. had put his hand into the defendant's pocket and taken out a 5*l.* note, and assigning perjury upon it:—Held, that this was bad, as it did not show that any charge of felony had been previously made, or that the defendant then made any charge of felony, or that any judicial proceeding was pending before the magistrate. *Reg.* v. *Pearson*, 8 Car. & P. 119.

An indictment for perjury, assigned on an affidavit sworn before the court, need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. *Rex* v. *Crossley*, 7 Term Rep. 315; 4 R. R. 445.

—— **That Issue tried before Sheriff.**]—In an indictment for perjury, on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken before the sheriffs, though, in fact, the cause was tried before the secondary. *Reg.* v. *Schlesinger*, 10 Q. B. 670; 17 L. J., M. C. 29; 12 Jur. 283; 2 Cox, C. C. 200.

An indictment for perjury alleged the trial of an issue before E. S., esq., sheriff of D., by virtue of a writ directed to the sheriff; the writ of trial put in evidence was directed to the sheriff, and the return was of a trial before him; but it was proved, that, in fact, the trial took place before a deputy, not the under-sheriff:—Held, no variance. *Reg* v. *Dunn*, 2 M. C. C. 297; 7 Car. & P. 730.

As to what Cause or Matter.]—An indictment alleged that a petition was presented to the House of Commons against the return of B., on the ground of bribery; that, shortly before his election, to wit, on the 6th July, B. and C. went to the house of the defendant to solicit his vote; that, at the time of the petition, it was a material question whether at the time when B. and C. went to the defendant's house, a certain act of bribery took place, that the defendant was a witness sworn to speak the truth of and concerning the premises, and he deposed touching the election and the matter of the petition, that shortly before B.'s election B. and C. came on a canvassing visit to the defendant's house, and that the act of bribery then took place (innuendo), thereby meaning that at the time when B. and C. went to the defendant's house as aforesaid, the act of bribery was committed:—Held, on motion in arrest of judgment: first, that the allegation that the defendant deposed "touching the election," &c., sufficiently pointed to the matter whereupon the defendant was sworn as a witness: secondly, that the innuendo did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shown to refer to that particular time and no other. *Reg.* v. *Virrier*, 1 P. & D. 161; 12 A. & E. 317; 9 L. J., M. C. 120.

An indictment alleging that a cause "came on to be heard and was duly tried by a jury," is sufficient, although no verdict was given, the trial ending in a nonsuit. *Reg.* v. *Bray*, 9 Cox, C. C. 218.

Stating that at such a court K. was in due form of law tried upon a certain indictment then and there depending against him for murder is a sufficient averment that the perjury was committed on the trial of K. for murder. *Rex* v. *Dowlin*, 5 Term Rep. 311. *S. C.* (at nisi prius), Peake, 170.

As to Jurisdiction of Court or Judge.]—Justices cannot inquire into the truth of a charge of libel, and therefore an indictment for perjury cannot be maintained for false answers on cross-examination of a witness directed to show the truth of the libel. *Reg.* v. *Townsend*, 4 F. & F. 1089; 10 Cox, C. C. 356.

In an indictment for perjury committed at an admiralty session, where the commission was directed to A., B. and C., and others not named, of whom A., B. and C. were amongst others to be one: the court will take it to mean, that, if either of the persons named of the quorum was present, it would be sufficient. *Rex* v. *Dowlin*, 5 Term Rep. 311. *S. C.* (at nisi prius), Peake, 170.

In an indictment for perjury, the necessity for showing distinctly that the false oath is in a judicial proceeding is not dispensed with by 23 Geo. 2, c. 11, s. 1. *Overton* v. *Reg.*, 4 Q B. 83; 3 G. & D. 133; 12 L. J., M. C. 61; 7 Jur. 196.

An indictment averring that "in the Whitechapel County Court of Middlesex, holden before J. M., judge of the court, an action, then pending in the court, came on to be tried, that the defendant was sworn as a witness before J. M., being judge of the said county court, and having sufficient and competent authority to administer

the said oath"; and then perjury was assigned, sufficiently shows on the face of the indictment that the court was properly constituted under 9 & 10 Vict. c. 95, and that the judge had jurisdiction over the cause in which the perjury was alleged to have been committed. *Lavey* v. *Reg.* 17 Q. B. 496; 2 Den. C. C. 504; 21 L. J., M. C. 10; 16 Jur. 36; 5 Cox, C. C. 269—Ex. Ch. S. P., *Reg.* v. *Lawlor*, 6 Cox, C. C. 187.

An indictment stated that V. had done business as an attorney for the defendant on his retainer; that V. delivered his bill, and, after the expiration of one month from such delivery, took out a summons before a judge, under 6 & 7 Vict. c. 73, to show cause why the bill should not be referred for taxation: that it then and there became and was material in showing cause to ascertain whether the defendant did retain V.; and that he, before showing cause, made an affidavit, denying that he had retained V., and assigned perjury on such affidavit:—Held, that the jurisdiction was sufficiently shown on the indictment, without negativing a prior application to have the costs taxed by the party chargeable, in which case only the act authorises an application to the judge by the attorney. *Ryalls* v. *Reg.*, 11 Q. B. 781; 18 L. J., M. C. 69; 13 Jur. 259; 3 Cox, C. C. 254—Ex. Ch.

Where, to give magistrates jurisdiction to hear a case punishable on summary conviction, it is essential that they should have an information on oath made before them, it is not sufficient in an indictment for perjury, alleged to have been committed on the hearing of such information, to allege that before M. G., esq., and T. H. H., clerk, two of the justices, &c., the magistrates who heard the case, J. O. came and exhibited a certain information upon oath, because it does not sufficiently show that J. O. was sworn before M. G. and T. H. H. *Reg.* v. *Goodfellow*, Car. & M. 569.

An indictment charged that a petition for protection from process was under 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102 (Insolvent Debtors Acts), filed and presented at the county court of S., at W., by the defendant; that he afterwards obtained an order of protection; but afterwards, while the proceedings were pending in the county court, to wit, at the time of filing the petition and schedule, he came before K., a commissioner to administer oaths in chancery, duly appointed and empowered to act in the matter of the insolvent, and take the defendant's oath then and there at the county court, and within the jurisdiction aforesaid, for the purpose of making an affidavit, and verifying his petition on oath, and was duly sworn before K., and swore and took his oath that the affidavit then made was true, K. having competent power and authority to administer the oath. The indictment then alleged that certain matter was material in the matter of the insolvency, and that the affidavit was false in respect thereof. The defendant was convicted, and judgment passed:—Held, that the jurisdiction of the court sufficiently appeared, though there was no express allegation that the defendant had resided for six calendar months before the filing of the petition within the district of the county court, as required by 11 & 12 Vict. c. 102, s. 6. *Walker* v. *Reg.*, 8 El. & Bl. 439; 27 L. J., M. C. 43; 3 Jur. (N.S.) 1259.

In an indictment for making a false affidavit, it is sufficient to state that the defendant came before A., and took his corporal oath (A. having power to administer an oath), without setting out the nature of A.'s authority. *Rex* v. *Callanan*, 6 B. & C. 102; 9 D. & R. 97; 5 L. J. (O.S.) M. C. 39.

In an indictment for perjury, alleged to have been committed on the hearing of an information under the Beer Act (11 Geo. 4 & 1 Will. 4, c. 64), s. 15. it is necessary to aver that the justices were acting in and for the division or place in which the house is situated; but it is not necessary to aver that they were acting in petty sessions, as every meeting of two justices in one place for business is itself a petty sessions. *Reg.* v. *Rawlins*, 8 Car. & P. 439.

An indictment alleged that after 18 & 19 Vict. c. 118, K. was duly summoned to appear before certain justices, being and acting as two justices of the peace in and for a county, to answer before such justices a certain information and complaint against him, of having opened his house (a beer-house) on a Sunday, for the sale of beer, after three and before five in the afternoon; that K. duly appeared before the justices at the petty sessions of a petty sessional division in the county, and that at the hearing, the defendant being called as a witness for K., falsely swore that he had not been in the house of K. at all that day; that he had never seen a certain policeman, and had not been in B. that day, or for a fortnight before. At the trial it appeared that no information had been laid in support of the summons, but that a superintendent of police had stated certain facts to the magistrate's clerk, who had filled up a blank summons against K., which a magistrate had signed without making any inquiry. The summons was not produced. A policeman swore to the fact of the defendant having been in K.'s house between the prohibited hours, and to confirm him one witness swore he had seen the defendant in B. at two o'clock in the afternoon of the same day; and another swore that she had seen him there between three and four on the same day, on the road leading and close to K.'s beerhouse:—Held, that it was sufficiently alleged in the indictment that the offence was one over which the justices had jurisdiction, and that it was committed in a place where they had jurisdiction; that the production of an information at the trial was not necessary, and that the corroborative evidence was sufficient. *Reg.* v. *Shaw*, L. & C. 579; 34 L. J., M. C. 169; 11 Jur. (N.S.) 415; 12 L. T. 470; 13 W. R. 692; 10 Cox, C. C. 66.

An indictment for perjury stated the offence to have been committed on the trial of "a certain indictment for misdemeanour" at the quarter sessions for a county; but did not state what the misdemeanour was, nor that the quarter sessions had jurisdiction to try it:—Held, that the indictment was good. *Reg.* v. *Dunning*, 40 L. J., M. C. 58; L. R. 1 C. C. 290; 24 L. T. 58; 19 W. R. 357; 11 Cox, C. C. 651.

As to Falsity of Statement.]—An indictment which charges that the prisoner "feloniously, corruptly, knowingly, wilfully, and maliciously swore," omitting the word "falsely," but concluding, "and so the defendant in manner and form aforesaid did commit wilful and corrupt perjury," is bad. *Reg.* v. *Oxley*, 3 Car. & K. 317.

An information for perjury, charging that the defendant, before a committee of the House of Commons, being duly sworn, "knowingly and deliberately, and of his own act and consent, did depose and swear" to certain facts set forth in

the information; and that he afterwards, at the bar of the House of Lords, being duly sworn, "knowingly, &c., did swear" to certain facts contradicting what he had previously sworn before the committee of the House of Commons; with a conclusion, "and so the defendant, in manner and form aforesaid, did commit wilful and corrupt perjury"; cannot be sustained, and is bad in arrest of judgment. *Rex* v. *Harris*, 1 D. & R. 578; 5 B. & Ald. 926.

Evidence true as to one Occasion attributed to another Occasion.]—H., an inspector of nuisances for the borough of S., was convicted of perjury on an indictment which alleged that, upon the hearing of an information against G. for exposing for sale a number of rabbits which were unfit for the food of man, contrary to the Public Health Act, 1875, it was a material question whether H. had duly inspected and examined the carcases of the rabbits, and whether such carcases had appeared to him to be unfit for the food of man before and at the time when he seized the same under the provisions of the Public Health Act. The indictment then alleged that H. falsely swore (amongst other things) that he had examined critically every rabbit, and set out the evidence giving the details of such examination; and further alleged that H. did not in truth examine the rabbits in the manner sworn. It appeared that upon two occasions subsequently to the time of seizure, when he had merely made a cursory examination, sufficient, however, to entitle him to seize the rabbits, he had examined them as he had sworn he had. It also appeared that, at the time of the seizure, the rabbits were, in fact, unfit for the food of man:—Held, that, as the indictment did not allege that the evidence was given with reference to the time of seizure, and since the evidence, if taken with reference to the other occasions upon which examinations were made, was perfectly true, all the allegations might be true without H. having sworn falsely, and that, therefore, no offence was disclosed upon the indictment. *Reg.* v. *Hudfield*, 55 L. T. 783; 16 Cox, C. C. 118; 51 J. P. 344—C. C. R.

That Offence committed wilfully.]—The word "wilful" is not necessary in an indictment for perjury at common law. *Rex* v. *Cox*, 1 Leach, C. C. 71.

But it is otherwise in an indictment for perjury on 5 Eliz. c. 9. *Ib.*

An indictment charging that the defendant falsely and maliciously gave false testimony, without averring that the offence was wilfully or that it was corruptly committed, is bad in arrest of judgment. *Rex* v. *Richards*, 7 D. & R. 655; 4 L. J. (O.S.) K. B. 155. *S. C.*, nom. *Rex* v. *Stevens*, 5 B. & C. 346.

It is not a sufficiently precise allegation upon which to found an indictment for perjury, that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. *Reg.* v. *Stolady*, 1 F. & F. 518.

That Defendant was sworn.]—A count alleging that at the trial of the prosecutor he was found guilty by means of the false and malicious testimony of the defendant in the first count mentioned; and that, on a rule nisi for a new trial, the defendant knowingly, falsely, wilfully, and corruptly made an affidavit that the evidence given by him at the trial was true, "whereas it was false in the particulars in the first count assigned and set forth," is bad, for it should have averred distinctly that the defendant was sworn as a witness, and deposed to certain facts at the trial, instead of leaving it to be taken by intendment. *Rex* v. *Richards*, 7 D. & R. 655; 4 L. J. (O.S.) K. B. 155. *S. C.*, sub nom. *Rex* v. *Stevens*, 5 B. & C. 346.

It is sufficiently certain if it is stated that the defendant was in due manner sworn. *Rex* v. *McArthur*, Peake, 155.

Time and Place when and where Offence committed.]—In an indictment there must be an allegation of time and place, which are sometimes material, and necessary to be laid with precision, and sometimes not. *Rex* v. *Aylett*, 1 Term Rep. 63; 1 R. R. 152.

Where an indictment alleged that R. W. falsely swore that "he was in the bar of the house of J. B., on the 15th day of February last, from between the hours of six o'clock and seven o'clock in the evening of the said last-mentioned day, until nine o'clock in the evening of the said last-mentioned day, and that he, R. W., did not then and there play at any game of cards at all":—Held, that perjury was not sufficiently assigned by an averment that "the said R. W. did then and there (to wit) in the said bar of the said house and premises of the said J. B. on the said 15th day of February last, and between the hours of six o'clock in the evening of the said last-mentioned day, and eight o'clock in the evening of the said last-mentioned day, play at a certain game of cards." *Reg.* v. *Whitehouse*, 3 Cox, C. C. 86.

An indictment alleged that a cause was pending in a county court, and that at the hearing it became a material question whether the plaintiff in the cause had, in the presence of the prisoner, signed at the foot of a bill of account, purporting to be a bill of account between a firm called B. & Co. and W., a receipt for payment of the amount of the bill; and that the prisoner falsely swore that the plaintiff did, on a certain day, in the presence of the prisoner, sign the receipt (meaning a receipt at the foot of the first-mentioned bill of account) for the payment of the amount of the bill. The plaintiff in the county court had on other occasions signed similar receipts in the presence of the prisoner:—Held, that the bill of account was stated and set forth in the indictment with sufficient certainty. *Reg.* v. *Webster*, Bell, C. C. 154; 28 L. J., M. C. 200; 5 Jur. (N.S.) 604; 7 W. R. 449; 8 Cox, C. C. 187.

An indictment stating that the defendant swore that a particular fact occurred on the day on which a certain memorandum bore date, and at the time of making a certain bill of exchange, without averring that they were the same days; and the assignment of perjury alleging that the fact did not occur on the day on which the memorandum bore date, is uncertain, and therefore bad. *Reg.* v. *Burraston*, 4 Jur. 697.

An indictment charged that the prisoner swore on a plaint in a county court for the price of coals obtained on credit at different times, in which it was a material question whether or not he had received any coals on credit from P., either on account of himself or A., "that he had never received any coals on credit from P. either on account of himself or A.":—Held,

that the allegation was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P. *Reg.* v. *London*, 24 L. T. 232; 12 Cox, C. C. 50.

It is not a sufficiently precise allegation upon which to found an indictment for perjury, that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. *Reg.* v. *Stolady*, 1 F. & F. 518.

Averment of Materiality—What sufficient.]—It is not necessary expressly to aver materiality in any indictment for perjury. It will be sufficient if materiality is clearly disclosed by the facts as stated on the face of the indictment. If materiality is not sufficiently averred, or apparent, the defect is not cured by 14 & 15 Vict. c. 100, s. 20. Nor is it such a defect as the judge will amend under s. 25. *Reg.* v. *Harvey*, 8 Cox, C. C. 99.

An indictment stated, that L. stood charged by F. W., before T. S., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on land in pursuit of game, on the 12th August, 1843; and that T. S. proceeded to the hearing of the charge; and that, upon the hearing of the charge, the defendant falsely swore that he did not see L. during the whole of the 12th August, meaning that he did not see L. at all on the 12th day of August, in the year aforesaid; and that, at the time he swore as aforesaid, it was material or necessary for T. S., so being such justice, to inquire of, and be informed by the defendant, whether he did see L. at all during the 12th day of August, in the year aforesaid:—Held, that this averment of materiality was insufficient, because, consistently with this averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question and received this answer. *Reg.* v. *Bartholomew*, 1 Car. & K. 366.

In an indictment it was alleged to be a material question whether or not the prisoner ever got one Milo Williams to write a letter for her; and in the averments, negativing the truth of what was sworn, the indictment alleged, that, in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams, and that when on her cross-examination at the trial, when the alleged perjury was committed, she was asked whether she had ever got a Mr. Milo Williams (who was then pointed out to her in court) to write a letter for her:—Held, that the averments were sufficient, without any allegation connecting the "one Milo Williams" named in the allegations of materiality, and the averments negativing the truth of what was sworn, with the "Mr. Milo Williams" named in the subsequent part of the indictment. *Reg.* v. *Bennett*, 3 Car. & K. 124; 2 Den. C. C. 241; T. & M. 567; 20 L. J., M. C. 217; 15 Jur. 496; 5 Cox, C. C. 207.

An indictment alleging that one E. S. had filed a bill in chancery against the defendant J. C. and others, wherein he prayed that the defendant J. C. might answer the premises; and that a purchase by J. C. of certain property belonging to the other defendants might be declared fraudulent and void; and that it then and there became a material question whether the said J. C. did advise the said other defendants that the said property should be sold: and that the said J. C. falsely and corruptly swore, and in and by his answer denied, that he had so advised, is bad in arrest of judgment, for want of a sufficient averment of materiality. *Reg.* v. *Cutts*, 4 Cox, C. C. 437.

An indictment stated that it became a material question, whether, on the occasion of a certain alleged arrest, L. touched K.; and the defendant's evidence as set out was—L. put his arms round him and embraced him; innuendo that L. had, on the occasion to which the said evidence applied, touched the person of K.:—Held, that the materiality of the evidence did not sufficiently appear. *Rex* v. *Nichole*, 1 B. & Ad. 21; 8 L. J. (O.S.) M. C. 112.

In an indictment, the assignment was that the defendant upon his oath did swear "that he then thought that the words written in red ink were not his writing, and that he had not in the presence of W. D. written the words so written in red ink, whereas in truth and in fact the words so written in red ink were the defendant's writing, and whereas also, in truth and in fact, he then and there, when he so deposed as aforesaid, thought that the words so written in red ink as aforesaid were his writing":—Held, that perjury might be assigned upon the deposition of the defendant. *Reg.* v. *Schlesinger*, 10 Q. B. 670; 17 L. J., M. C. 29; 12 Jur. 283; 2 Cox, C. C. 200.

Held, also, that the materiality of the allegation that the defendant wrote the words in the presence of W. D. being averred, the court would not inquire into it. *Ib.*

On an indictment for perjury alleged to have been committed in answer to a certain interrogatory exhibited in a suit in the ecclesiastical court, it appeared that a suit for divorce, on the ground of adultery, had been instituted against the prosecutor by his wife; that the defendant was a witness examined on behalf of the wife to prove her case; that cross interrogatories were exhibited to him by the prosecutor by way of cross-examination, one of which, put for the purpose of impeaching his character, was the following:—"Have you not passed by the name of Abbott, and also of Johnson?" His answer was, "I have never passed by the assumed name of Abbott or Johnson." It was clearly proved that he had:—Held, that the question and answer were not sufficiently material to the issue to warrant the case going to the jury. *Reg.* v. *Worley*, 3 Cox, C. C. 535.

A variance between the form of oath proved and that stated in the indictment is immaterial. The circumstance that the statement may probably influence the person to decide will not make it material, if not legally material, to the matter under consideration. *Reg.* v. *Southwood*, 1 F. & F. 356.

An indictment for perjury alleged as committed on the trial of an issue in a cause, with averments of materiality to such issue, is sustained, although it appears that there were several issues in the cause. *Reg.* v. *Smith*, 1 F. & F. 98.

An indictment, in which it is intended to assign perjury upon several statements in the defendant's evidence relating to several different matters, should allege that there were several material questions, and certain distinct and separate assignments of falsehood upon each. *Reg.* v. *Burraston*, 4 Jur. 697.

Where, upon an indictment for perjury, on a

trial for felony, it neither appeared that the matter sworn was material, nor was it alleged to be so :—Held, that if the original indictment had been set out, and the materiality could plainly have been collected, it would have been sufficient without any special averment, but that one or the other was absolutely necessary. *Rex* v. *Dunn*, 1 D. & R. 10.

Stating that at such a court (a court of admiralty session), K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the trial it then and there became and was made a material question, whether, &c., are sufficient averments that the perjury was committed on the trial of K. for the murder, and that the question on which the perjury was assigned was material on that trial. *Rex* v. *Dowlin*, 5 Term Rep. 311. *S. C.* (at nisi prius), Peake, 227.

It is not necessary to set forth so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became material. *Ib.*

An averment, that it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by J. G. upon his oath, is not a good averment of materiality. *Reg.* v. *Goodfellow*, Car. & M. 569.

An indictment for perjury committed before a magistrate, stating that the defendant went before the magistrate and was sworn, and that he did falsely, &c., "say, depose, swear, charge and give the justice to be informed," that he saw the prosecutor commit bestiality, sufficiently shows that the oath was taken in a judicial proceeding; and it being also stated in the indictment that it was material "to know the state of the said A. B.'s dress at the time the offence was so charged to be committed as aforesaid," is a sufficient averment of materiality to allow the prosecutor to show that the flap of his trousers was not unbuttoned (as sworn by the defendant), and that his trousers had no flap. *Reg.* v. *Gardiner*, 8 Car. & P. 737; 2 M. C. C. 95.

If it appear sufficiently from the oath itself, that it was material to the matter then before the court, it is unnecessary to aver that fact; but if it do not appear, then the materiality of that part of the oath upon which perjury is assigned must be averred. *Rex* v. *McKeron*, 5 Term Rep. 316.

An indictment contained four counts, each of which stated that V. had done business as attorney for the defendant on his retainer; that V. delivered his bill and took out a summons to show cause why the bill should not be referred to taxation; that it then and there became and was material in showing cause to ascertain whether the defendant did retain V.; and that he, before showing cause, made an affidavit, denying that he had retained V.; and assigned perjury on the affidavit :—Held, that the fact of the retainer by the defendant was a material ingredient in the inquiry and was sufficiently averred. *Ryalls* v. *Reg.*, 11 Q. B. 781; 18 L. J., M. C. 69; 13 Jur. 259; 3 Cox, C. C. 254—Ex. Ch.

An indictment for perjury stated that an action was brought in the chancery division, in which the prisoner was the plaintiff and W. the defendant, that it came on for hearing before the vice-chancellor, that the prisoner did appear as a witness, and did falsely swear that he never did employ O. and H. as his solicitors, and that he never executed any mortgage or deed relating to the property claimed in the action, and that the allegation in the statement of defence in the action that he executed the deeds in the statement of defence mentioned was untrue, "and the said false statements so upon oath made by the prisoner were material to the matters then in issue before the court" :—Held, upon motion in arrest of judgment, that the indictment was good, and that the averment of the materiality of the perjury assigned was sufficient. *Reg.* v. *Scott*, 46 L. J., M. C. 259; 2 Q. B. D. 415; 36 L. T. 476; 25 W. R. 697; 13 Cox, C. C. 594.

Construction—Month, what is.]—An indictment contained four counts, each of which stated, that for the defendant on his retainer V. had done business as attorney; that V. delivered his bill, and after the expiration of one month from such delivery took out a summons before a judge, under 6 & 7 Vict. c. 73, to show cause why the bill should not be referred for taxation; that it then and there became and was material in showing cause to ascertain whether the defendant did retain V.; and that he, before showing cause, made an affidavit, denying that he had retained V.; and assigned perjury on such affidavit :—Held, that as all the counts referred to the statute, the word "month" was to be construed according to the interpretation clause, and meant calendar month. *Ryalls* v. *Reg.*, 11 Q. B. 781; 18 L. J., M. C. 69; 13 Jur. 259; 3 Cox, C. C. 254—Ex. Ch.

On Charge of Larceny.]—On an indictment for perjury on a charge against C. of stealing suet, the assignment was that the defendant falsely swore that he saw C. take the suet :—Held, that as the indictment did not aver that C. took the suet feloniously, it was bad. *Reg.* v. *Crawley*, 12 Cox, C. C. 162.

For what Purpose Offence committed.]—If an indictment for taking a false oath before a surrogate, to procure a marriage licence, only charges the taking of the false oath, without stating it was for the purpose of procuring a licence, or that a licence was procured thereby, the party cannot be punished thereon as for a misdemeanour. *Rex* v. *Foster*, R. & R. 459.

What may be included in.]—An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two different occasions, one in the progress of a trial, the other in an affidavit in chancery. Both acts of perjury had the same object in view :—Held, that though the offences were in this way distinct, they might both be included in the same indictment, and that a general finding of guilty on the charges contained in both counts was good. *Castro* v. *Reg.*, 50 L. J., Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox, C. C. 546; 45 J. P. 452—H. L. (E.)

What Parts must be set out.]—Where perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter. *Rex* v. *Callanan*, 6 B. & C. 102; 9 D. & R. 97; 5 L. J. (o.s.) M. C. 39.

On an indictment for perjury alleged to have been committed in a civil action, it appeared

that the evidence given on that trial contained all the matter charged as perjury, but other statements not varying the sense intervened between the matters set out :—Held, no variance, though in the indictment the evidence appeared to have been given continuously. *Rex* v. *Solomon*, Ry. & M. 252.

Rejecting as Surplusage.]—A person was indicted for wilful and corrupt perjury in making a false affidavit before a commissioner for taking oaths in the Court of Queen's Bench, for the purpose of getting a bill of sale filed under the Bills of Sale Act, 1854 :—Held, a misdemeanour, though not wilful and corrupt perjury, and that the conclusion of an indictment for perjury, "that so the defendant did commit wilful and corrupt perjury," might be rejected as surplusage, and a conviction for the misdemeanour was right upon such an indictment. *Reg.* v. *Hodgkiss*, 39 L. J., M. C. 14 ; L. R. 1 C. C. 212 ; 21 L. T. 564 ; 18 W. R. 150 ; 11 Cox, C. C. 365.

An indictment contained four counts, each of which stated that V. had done business as an attorney for the defendant on his retainer, and concluded as follows : "and so the jurors aforesaid did say, that the defendant did commit perjury" :—Held, that such averment was immaterial and might be struck out as surplusage. *Ryalls* v. *Reg.*, 11 Q. B. 781 ; 18 L. J., M. C. 69 ; 13 Jur. 259 ; 3 Cox, C. C. 254 — Ex. Ch.

ii. *Amendment of Variances.*

In what Cases permissible.]—If materiality is not sufficiently averred, or apparent, the defect is not cured by 14 & 15 Vict. c. 100, s. 20. Nor is it such a defect as the judge will amend under s. 25. *Reg.* v. *Harvey*, 8 Cox, C. C. 99.

The judge at the trial of an indictment for perjury has power to amend an inaccurate description of the time of passing a statute referred to in the indictment. *Reg.* v. *Westley*, Bell, C. C. 193 ; 29 L. J., M. C. 35 ; 5 Jur. (N.S.) 1362 ; 8 W. R. 63 ; 8 Cox, C. C. 344.

Where the title of an act of parliament is not accurately stated, but still so stated as to enable the judges to know that there can be but one act referred to, such misstatement is immaterial. *Ib.*

On a charge of perjury alleged to have been committed before commissioners to examine witnesses in a chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, or any three or two of them, were commanded to examine the witnesses :—Held, a fatal variance, and the judge would not allow it to be amended under 9 Geo. 4, c. 15. *Reg.* v. *Hewins*, 9 Car. & P. 786.

An indictment for perjury, alleged to have been committed on the trial of S. S., averred that the trial took place at the Assizes and General Sessions of the Delivery of the Gaol of Our Lady the Queen for the county of S., before John Lord Campbell, C. J. of our Lady the Queen, assigned to hold pleas before the Queen herself, and Sir E. V. Williams, Knt., one of the justices of our Lady the Queen, of her Court of Common Pleas, assigned to deliver the gaol of the prisoners therein being. It being objected that this was a defective description, as alleging a court with an impossible combination of civil and criminal jurisdiction :—Held, that the word "assizes" might be struck out as surplusage. *Reg.* v. *Child*, 5 Cox, C. C. 197.

It being also objected that the words "assigned to deliver the gaol of the prisoners therein being," referred only to the last-named judge : —Held, that the indictment might be amended by the record of the conviction of S. S., by inserting after the words "Common Pleas," "and others their fellows, justices," assigned to deliver the gaol. *Ib.*

The record of the conviction of S. S. described the court as a general session of oyer and terminer and gaol delivery. It also described the charge against S. S. as for cutting and wounding ; the indictment describing it as for wounding :—Held, that these variances might also be amended. *Ib.*

In an indictment for perjury, the perjury was alleged to have been committed on the trial of an indictment against B., for setting fire to a certain barn of P. In support of the averment, a certificate of the trial and conviction of B. was produced, but the offence there mentioned was setting fire to "one stack of barley." The offence was, in fact, the same, the barn and the stack having been destroyed by one fire :—Held, that the indictment might be amended under 14 & 15 Vict. c. 100, s. 1. *Reg.* v. *Neville*, 6 Cox. C. C. 69.

In an indictment, perjury was alleged to have been committed on the hearing of a complaint for entering land for the purpose of taking game, contrary to 9 Geo. 4, c. 69, "before L. and J., being justices in and for the county of D., and acting in and for the borough of T., in the said county." In fact, L. and J. were justices for the borough only, and not for the county :—Held, that the variance was amendable. *Reg.* v. *Western*, 37 L. J., M. C. 81 ; L. R. 1 C. C. 122 ; 18 L. T. 299 ; 16 W. R. 730 ; 11 Cox, C. C 93.

c. Evidence.

i. *Generally.*

What must be proved.]—If the perjury is committed at the trial of a cause, the prosecutor must prove the whole of the defendant's testimony. *Rex* v. *Jones*, Peake, 37.

Unless the point upon which the perjury is assigned arose upon the defendant's cross-examination. *Rex* v. *Dowlin*, Peake, 170.

In an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. *Rex* v. *Rowley*, R. & M. 299.

If an indictment undertakes to set out continuously the substance and effect of what the defendant swore when examined as a witness, it is necessary to prove that in substance and effect he swore the whole of that which is thus set out, though the indictment contains several distinct assignments of perjury. *Rex* v. *Leefe*, 2 Camp. 134 ; 11 R. R. 683.

If in an indictment for swearing falsely before a surrogate to obtain a marriage licence, the description of the deponent and other things material are alleged to be falsely sworn (but not alleging the false swearing to be in an affidavit), proof of the false swearing as to any one of the other things will sustain the count. *Reg.* v. *Chapman*, 1 Den. C. C. 432 ; 2 Car. & K. 846 ; T. & M. 90 ; 18 L. J., M. C. 152 ; 13 Jur. 885 ; 3 Cox, C. C. 467.

In support of Ambiguous Averment.]—In an

indictment for perjury the averment stated that the prisoner swore he saw W. "about 15 minutes after the hour of eleven o'clock in the forenoon" on a particular day, whereas it was proved that he had sworn that he saw W. about a quarter past eleven on the day in question, but had not sworn as to whether it was in the forenoon or in the afternoon:—Held, that as the averment in indictments for perjury must be proved precisely, the evidence was ambiguous and the averment not proved. *Reg.* v. *Bird*, 17 Cox, C. C. 387.

That Court had Jurisdiction.]—An indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the county court of W. Proof was given that the perjury took place in the presence of J. U., at the county court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, entitled "Minute of judgments, orders, and other proceedings, at a court holden at, &c., before J. U., deputy judge of the court":—Held, that there was sufficient proof of his acting as deputy judge, and therefore primâ facie evidence of his appointment as such. *Reg.* v. *Roberts*, 38 L. T. 690; 14 Cox, C. C. 101.

Held also, that by the County Courts Act, 9 & 10 Vict. c. 95, s. 111, the minute of the proceedings being made evidence of the proceedings and their regularity, was evidence of the regularity of J. U.'s appointment. *Ib.*

An affidavit purporting to be sworn before a public commissioner is admissible on the trial of an indictment for perjury without proof of the commission; proof of the commissioner's acting as such is sufficient. *Rex* v. *Howard*, 1 M. & Rob. 187. S. P., *Rex* v. *Verelst*, 3 Camp. 432; 14 R. R. 775.

An indictment for perjury in an affidavit stated the affidavit to have been sworn "before R. G. W., then and there being a commissioner, duly authorised and empowered to take affidavits in the county of Gloucester, in or concerning any cause depending in the Court of Exchequer at Westminster." It was proved by R. G. W. that he had acted as a commissioner for taking affidavits in the Exchequer for ten years, but had never seen his commission; and that ten years ago, he applied to his agent to procure for him a commission to take affidavits in the Exchequer, and that his agent had told him that he had done so:—Held, that the proof of R. G. W.'s acting as a commissioner was primâ facie evidence that he was so. *Reg.* v. *Newton*, 1 Car. & K. 469.

That Action is pending or that Cause tried.]—To prove that the action was pending, the copy of the writ of summons filed under the rules of the Judicature Act, and a copy of the pleadings in the action, and the order dismissing the action, were produced:—Held, sufficient without the original writ of summons. *Reg.* v. *Scott*, 46 L. J., M. C. 259; 2 Q. B. D. 415; 36 L. T. 476; 25 W. R. 697; 13 Cox, C. C. 594.

If, in an indictment for perjury against C. D., it is averred that a cause was depending between A. B. and C. D., a notice of set-off intitled in a cause *A. B.* v. *C. D.*, and signed by the attorney of C. D., is not sufficient evidence to support the allegation. *Rex* v. *Stoveld*, 6 Car. & P. 489.

In an indictment for perjury committed on the trial of a former cause, the postea alone is sufficient evidence to prove that there was a trial, without showing a copy of the final judgment. *Anon.*, Bull. N. P. 243.

An allegation in an indictment for perjury, that judgment was entered up in an action, is proved by the production of the book from the judgment office in which the incipitur is entered. *Reg.* v. *Gordon*, Car. & M. 410.

An indictment tried before the Lord Chief Justice at Westminster, charged the perjury to have been committed on a trial at nisi prius, although at the King's Bench sittings at Westminster. The prosecutor, to prove the trial at nisi prius, put in the nisi prius record with the minute of the verdict endorsed on it by the associate. There was no postea drawn up, and the associate stated that none would be drawn up, as a rule for a new trial was pending:—Held, to be sufficient proof of the trial at nisi prius. *Rex* v. *Browne*, 3 Car. & P. 572; M. & M. 315.

In an indictment for perjury, it was averred that a suit was instituted in the Prerogative Court by C. against B., to dispute the validity of a codicil to a will:—Held, that the production of the original allegations of both parties in the suit, signed by their advocates, and proof of their advocates' signatures, and that they acted as advocates in that court, such allegations being produced from the registrar of the court, was sufficient proof of the averment, and that the caveat need not be produced. *Reg.* v. *Turner*, 2 Car. & K. 732.

Appeal to Quarter Sessions.]—On an indictment for perjury committed on the hearing of a parish appeal at the quarter sessions, the production of the sessions book is not sufficient proof that the appeal came on to be heard; and a regular record ought to be made upon a writ of recordari, the same as on a return to a certiorari, and that record, or an examined copy must be produced. *Rex* v. *Ward*, 6 Car. & P. 366.

Indictment and Trial for Felony or Misdemeanor.]—An allegation, that "on &c., at &c., a certain indictment was preferred at the quarter sessions of the peace then and there holden in and for the county of W., against the defendant and one T. E., which indictment was then and there found a true bill," is not supported by the production of the original indictment with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up and proved, ether by its production or by an examined copy of it. *Porter* v. *Cooper*, 6 Car. & P. 354.

On the trial of an indictment for perjury at the Central Criminal Court, to prove the fact of a former trial in the same court:—Held, that the production, by the officer of the court, of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the court upon it, together with the minutes of the trial made by the officer in court, was sufficient evidence of it; and that the production of neither the record nor a certificate, under 14 & 15 Vict. c. 99, s. 13, and 14 & 15 Vict. c. 100, s. 22, was necessary. *Reg.* v. *Newman*, 3 Car. & K. 240; 2 Den. C. C. 390; 21 L. J., M. C. 75; 16 Jur. 111; 5 Cox, C. C. 547.

On the trial of a prisoner for perjury, the indictment preferred at the trial at which the alleged perjury was committed is not sufficient proof of the proceedings in that court; there must be either the record of the trial, or a cer-

tificate of it under 14 & 15 Vict. c. 100, s. 22. *Reg.* v. *Coles*, 16 Cox. C. C. 165.

Summonses before Justices or Police Magistrates.]—A defendant was indicted for perjury alleged to have been committed by him on the hearing before justices of a summons charging him with being the father of an illegitimate child:—Held, that, to support the indictment, it was necessary to give evidence of the charge made by the mother, either by production of the original order made thereon, or by giving secondary evidence of the summons after notice to the defendant to produce it; and that, in the absence of such notice, it was not sufficient to produce the minutes of the proceedings by the clerk to the justices, those minutes being of no greater authority than the notes of a shorthand writer. *Reg.* v. *Newall*, 6 Cox, C. C. 21.

On the trial of an indictment for perjury, alleged to have been committed before magistrates, on the hearing of a case punishable on summary conviction, the conviction by the magistrates is not receivable in evidence, because it is irrelevant. *Reg.* v. *Goodfellow*, Car. & M. 569.

In an indictment for perjury before justices of the peace, there must be formal proof of the commencement of the proceedings by production of the summons, information, or the like. *Reg.* v. *Hurrell*, 3 F. & F. 271.

A. was indicted for wilful and corrupt perjury committed at the Westminster Police Court. A summons was granted upon an information, and upon the hearing of the summons the perjury assigned was committed. At the trial the information was produced, but not the summons:—Held, not sufficient; the summons should have been produced. *Reg.* v. *Whybrow*, 8 Cox, C. C. 438.

On the trial of an indictment for perjury, committed on the hearing of an affiliation summons, under 7 & 8 Vict. c. 101, s. 2, it was proved that an information was duly made, which was put in evidence and read, and that the putative father appeared at the petty sessions, and that upon the hearing of the information the perjury assigned was committed. The summons was not produced, nor service of it proved, but in all other respects the proceedings on the hearing of the information were proved and appeared to have been regular:—Held, that it was not necessary that the summons should have been produced to sustain a conviction for perjury on the above evidence. *Reg.* v. *Smith*, 37 L. J., M. C. 6; L. R. 1 C. C. 110; 17 L. T. 263; 16 W. R. 140; 11 Cox, C. C. 10.

On the trial of an indictment for perjury, it should be proved distinctly what the charge was on the hearing of which the false evidence was given. *Reg.* v. *Carr*, 17 L. T. 217; 16 W. R. 137; 10 Cox, C. C. 564.

—— **Offence on Licensed Premises—Proof of Licence.**]—On a trial for perjury alleged to have been committed before justices on an information against a publichouse-keeper, for an offence against the licensing acts, the licence must be produced to show the jurisdiction of the justices. *Reg.* v. *Lewis*, 12 Cox, C. C. 163.

On the trial of a charge of perjury alleged to have been committed before justices on the hearing of an information under s. 18 of the Licensing Act, 1872, against the prisoner for being disorderly on and refusing to quit licensed premises, the licence itself must be produced in order to show that the premises were licensed and therefore that the justices had jurisdiction. *Reg.* v. *Evans*, 17 Cox, C. C. 37.

Bill in Chancery—Examined Copy.]—An office copy of a bill in Chancery, which a witness examined with the original, but which office copy contained abbreviations, such as "pnl. este." for the words "personal estate" in the original bill, is not such an examined copy as will be evidence to support an allegation of a bill in chancery on an indictment for perjury, committed in an affidavit in that suit in Chancery. *Reg.* v. *Christian*, Car. & M. 388.

—— **Amendments.**]—When perjury is assigned on an answer to a bill in Chancery before amendment, it is sufficient to put in the amended bill and prove that the amendments are in the handwriting of a clerk without calling the clerk himself. *Rex* v. *Laycock*, 4 Car. & P. 326.

That Defendant was examined.]—In an indictment, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness. The indictment did not state his acquittal, nor did the minute of the verdict show it:—Held, that this was immaterial, parol evidence being given that he was in fact examined. *Rex* v. *Browne*, 3 Car. & P. 572; M. & M. 315.

That Defendant was sworn.]—Proof that the defendant was "sworn and examined as a witness," supports an averment that he was sworn on the Holy Gospel, that being the ordinary mode of swearing. *Rex* v. *Rowley*, R. & M. 302. But see *Rex* v. *McArther*, Peake, 211.

Assizes or Gaol Delivery.]—If in the indictment the oath is stated to have been at the assizes, before justices assigned to take the said assizes, before A. B. one of the said justices, the said justices then and there having power, &c., it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. *Rex* v. *Lincoln*, R. & R. 421.

Signature denied—Signature written at Trial.]—The defendant was indicted for perjury alleged to have been committed by him on a trial of an action by swearing that the signature to a document was not in his handwriting. The judge made the defendant write his name in court and impounded the two documents; semble the jury might compare the two signatures. *Reg.* v. *Taylor*, 6 Cox, C. C. 58.

Warrant of Attorney.]—An allegation in an indictment for perjury, that the defendant made his warrant of attorney directed to R. W. and F. B., "then and *still* being attorneys" of K. B., is proved by putting in the warrant of attorney. *Rex* v. *Cooke*, 7 Car. & P. 559.

Probate of Will or Original.]—In an indictment for perjury, it was alleged that A. made his will, and thereby appointed B. his executor: the production of the probate is the proper proof of this allegation; but if it had been necessary to prove that A. had devised real estates, the original will must have been produced, and one

of the attesting witnesses called. *Reg.* v. *Turner*, 2 Car. & K. 792.

Expressions of Malice.]—To show that perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence. *Rex* v. *Munton*, 3 Car. & P. 491.

Partnership.]—If A. is indicted for perjury, in swearing that he did not enter into a verbal agreement with B. & C. for them to become joint dealers and co-partners in the trade or business of druggists; and it appears that, in fact, B. was a druggist, keeping a shop with which A. had nothing to do; but that A. and C., being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name with his consent, he agreeing to divide profits and losses with A. and C.; this will not support the indictment, as this is not the sort of partnership denied by A. upon oath. *Rex* v. *Tucker*, 2 Car. & P. 500.

Proof that Averment was material.]—In an indictment for perjury, an express averment that a question was material lets in evidence to prove that it was so. *Reg.* v. *Bennett*, 3 Car. & K., 124; 2 Den. C. C., 241; T. & M. 567; 20 L. J., M. C. 217; 15 Jur. 496; 5 Cox, C. C. 207.

Prosecution, when confined to Certain Cases.]—A., in an affidavit, stated that he had paid all the debts proved under his bankruptcy, except two, as to which he explained. On an indictment for perjury on this affidavit, one of the assignments of perjury was, that A. had not paid all the debts proved under his bankruptcy except two; and another, that certain creditors, naming them, besides the excepted two, were not paid in full:—Held, that if the first assignment was too general, the defendant should have demurred to it; and that, although by the generality of its form the prosecutor was not precluded from proving the non-payment of other creditors besides those named, yet, as names were stated in the other assignment, it was reasonable to presume that the defendant would suppose that they were the persons, the non-payment of whose debts was to be relied on; and that in fairness the prosecutor ought not to go into evidence of the non-payment of any other creditors than those named. *Reg.* v. *Parker*, Car. & M. 639.

Identity of Person swearing Affidavit.]—B. was indicted for perjury committed in an affidavit, alleged to have been made by him in order to obtain a marriage licence. The evidence showed that some person went to the vicar-general's office, and gave certain instructions, in accordance with which an affidavit was filled up by one of the clerks, which, after having been read over to the applicant, was signed by him. B.'s father proved that the signature to the affidavit was in his son's handwriting. The custom of the vicar-general's office was for the clerk who filled up the affidavit to go with the applicant, and get him to swear to it before a surrogate. Neither the clerk in the vicar-general's office, nor the surrogate, could identify B. as having sworn to the affidavit, and, although the clergyman who married B. recognised him as being the person who was married under the licence granted on the strength of the affidavit signed by him, yet he did not receive it from him on the day of the marriage, but he received it on the previous day from the verger of his church:—Held, that further proof of the identity of the person who swore to the affidavit with the person who signed it was necessary before B. could be convicted of perjury assigned on a false statement contained in it. *Reg.* v. *Barnes*, 10 Cox, C. C. 539.

In Case of Affidavits.]—F. was indicted for perjury, committed by deposing to an affidavit in a cause wherein he was the plaintiff, and E., the defendant, that he owed him 50*l.*:—Held, that, in support of this indictment, evidence was not admissible, that the cause of F. against E. was, after the making of the affidavit, referred by consent, and an award made that E. owed nothing to F. *Reg.* v. *Moreau*, 11 Q. B. 1028; 17 L. J., Q. B. 187; 12 Jur. 626.

In perjury, the affidavit of service of notice or application for leave to issue execution against a shareholder in a joint stock company is insufficient evidence not having the notice annexed to it. *Reg.* v. *Hudson*, 1 F. & F. 56.

In perjury committed in an answer in Chancery, it is sufficient proof of the fact of swearing and the identity of the defendant, to prove the handwriting subscribed to the answer, and that the jurat was subscribed by the master as being sworn before him. *Rex* v. *Morris*, 1 Leach, C. C. 50. S. P., *Rex* v. *Benson*, 2 Camp. 508; *Rex* v. *Morris*, 2 Burr. 1189.

On an indictment for perjury, in an answer to a bill in Chancery, the proving the handwriting of the signature of the person who administered the oath, is sufficient proof that it was sworn; and if the place at which such answer purported to have been sworn is in the jurat, it is sufficient evidence that the oath was administered at that place. *Rex* v. *Spencer*, 1 Car. & P. 260; R. & M. 97.

A person cannot be convicted of perjury on an affidavit, if it refers to a former affidavit, which the prosecutor is not in a condition to prove. *Rex* v. *Hailey*, 1 Car. & P. 258; R. & M. 94.

On an indictment for perjury, setting forth, with proper innuendos, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant, he may be convicted on proof of a verbal disposition in the Welsh language, of which the written deposition, signed by him, is the substance. *Reg.* v. *Thomas*, 2 Car. & K. 806.

—— **Taking off File.**]—An application to take an answer off the file, in order to prosecute the defendant for perjury, granted as a matter of right, being in furtherance of public justice. *Stratford* v. *Greene*, 1 Ball & B. 294.

On application to produce on trial a record of court, the court has no jurisdiction to inquire whether there be probable ground for the prosecution, or what may be the motives of the prosecutor, it being only interested to see that the record be not defaced. *Ib.*

A defendant's answer will be taken off the file for the purposes of an indictment for perjury, when the preparatory steps have been taken, and the time of trial is near at hand. *Curtis* v. ——, 1 Hog, 132.

An affidavit will be taken off the file for the purposes of an indictment for perjury, when the preparatory steps have been taken, and the time of trial is near at hand. The affidavit to support

the motion should not enter into the merits of the indictment. *Swift* v. *Quinlan*, 1 Hog, 132.

Who must prove False Statement.]—A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment; and another witness on the same indictment, who is in the grand jury-room while such person is under examination, is competent to prove that such witness swore before the grand jury; and so is a police-officer, who was stationed within the grand jury-room door, to receive the different bills at the door, and take them to the foreman of the grand jury; these persons not being sworn to secrecy, although the grand jury is so. *Reg.* v. *Hughes*, 1 Car. & K. 519.

On an indictment for perjury, alleged to have been committed at the quarter sessions, the chairman at the quarter sessions ought not to be called upon to give evidence as to what the defendant swore at the quarter sessions. *Reg.* v. *Gazard*, 8 Car. & P. 595.

In support of an indictment for perjury, committed on the trial of a plaint in a county court, it is not necessary to produce the judge's notes, if proof of the perjury can be established by witnesses who were present at the trial. *Reg.* v. *Morgan*, 6 Cox, C. C. 107.

The notes of evidence taken by a judge on a trial are not admissible in evidence to prove what was said on that trial. When, therefore, on a trial for perjury, alleged to have been committed by the defendant as a witness on a trial for felony before a queen's counsel assisting the judges, and his notes of the evidence given on that occasion were tendered (on proof of his handwriting) :—Held, that such notes were not admissible. *Reg.* v. *Child*, 5 Cox, C. C. 197.

Defendant cannot show that abandoned Count was true.]—If an indictment contains several assignments of perjury, on one of which no evidence is given on the part of the prosecution, the defendant cannot go into proof to show that the evidence charged by that assignment of perjury to be false, was in reality true. *Rex* v. *Hemp*, 5 C. & P. 468.

Questions to Witnesses to Character.]—On the trial of an indictment for perjury the witnesses to character were asked. "What is the character of the defendant for veracity and honour?"—and "Do you consider him a man likely to commit perjury?" *Ib.*

What Evidence admissible.]—On the trial of an indictment for perjury, alleged to have been committed on the trial of an indictment for an assault, all the evidence that was admissible on the trial of the indictment for the assault is admissible on the trial of the indictment for perjury. *Reg.* v. *Harrison*, 9 Cox, C. C. 503.

Declarations in articulo mortis are not admissible in evidence on the trial of an indictment for perjury. *Rex* v. *Mead*, 4 D. & R. 120; 2 B. & C. 605; 26 R. R. 484.

—— **Statements made by Judge in delivering Judgment in Action.**]—Statements made by a judge in giving judgment in an action are not admissible as evidence in the prosecution of a witness for perjury alleged to have been committed whilst giving evidence in such action. *Reg.* v. *Britton*, 17 Cox, C. C. 627.

—— **Admissions.**]—On the trial of an indictment for perjury on the crown side of the assizes, where it appeared that the attorneys on both sides had agreed that the formal proofs should be dispensed with, and that part of the prosecutor's case should be admitted, the judge would not allow this admission. *Reg.* v. *Thornhill*, 8 Car. & P. 574.

—— **Statements made at Trial of Election Petition.**]—By 26 Vict. c. 29, s. 7, witnesses before commissioners for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions on the ground that the answers thereto may criminate them, and "that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury, be admissible in evidence in any proceeding, civil or criminal:—Held, that "except in cases of indictment for perjury" applies only to perjury committed before the commissioners, and, therefore, on an indictment for perjury committed at the trial of an election petition, evidence of answers to commissioners appointed to inquire into the existence of corrupt practices at the election in question is not admissible. *Reg.* v. *Buttle*, 39 L. J., M. C. 115; L. R. 1 C. C. 248; 22 L. T. 728; 18 W. R. 956; 11 Cox, C. C. 566.

By s. 7 of the Corrupt Practices Prevention Act, 1863, no person summoned as a witness before any commissioners appointed under the Corrupt Practices Acts shall be excused from answering any question relating to corrupt practices forming the subject of inquiry on the ground that the answer would tend to criminate himself, "provided that no statement made by any person in answer to any question put by or before such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal":—Held, that the exception in the proviso did not apply to an ex-officio information by the attorney-general for perjury. *Reg.* v. *Slator*, 31 L. J., Q. B. 246; 8 Q. B. D. 267; 30 W. R. 410; 46 J. P. 694.

Documents—Secondary Evidence.]—A solicitor was indicted for perjury in having sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the solicitor, and upon his trial it was proved to have been last seen in his possession. Secondary evidence having been given of its contents:—Held, that, in the absence of such notice, secondary evidence was inadmissible. *Reg.* v. *Elworthy*, 37 L. J., M. C. 3; L. R. 1 C. C. 103; 17 L. T. 293; 16 W. R. 207; 10 Cox, C. C. 579.

Where perjury is assigned upon a written instrument, subsequently lost, secondary evidence is admissible. *Reg.* v. *Milnes*, 2 F. & F. 10.

When perjury is alleged as having been committed before justices at petty sessions on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction proved, before secondary evidence of its contents can be given on the trial of an indictment for perjury. *Reg.* v. *Dillon*, 14 Cox, C. C. 4.

ii. *Number of Witnesses and Corroboration.*

What required.]—The evidence of one witness is not sufficient to convict of perjury, as there

would be only one oath against another. *Rex* v. *Lee*, 1 Russ. C. & M. 368. S. P., *Rex* v. *Champney*, 2 Lewin, C. C. 258.

But two witnesses are not essentially necessary to disprove the fact sworn to; for, if any material circumstance is proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. *Ib.*

And the rule does not apply where the evidence consists of the contradictory oath of the party accused. *Rex* v. *Knill*, 5 B. & Ald. 929, n.

To prove perjury, it is sufficient if the matter alleged to be falsely sworn is disproved by one witness, if, in addition to the evidence of that witness, there is proof of an account, or a letter written by the defendant contradicting his statement on oath. *Rex* v. *Mayhew*, 6 Car. & P. 315.

A., in an affidavit, stated that he had paid all the debts proved under his bankruptcy, except two, as to which he explained; in support of an indictment for perjury upon that affidavit several creditors were called, who each proved the non-payment of his own debt:—Held, that this was not sufficient to warrant a conviction, and that as to the non-payment of each debt, it was necessary to have the evidence of two witnesses, or of one witness, and such corroborative testimony as is equal to the testimony of a second witness. *Reg.* v. *Parker*, Car. & M. 639.

The rule, that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only, is not sufficient to warrant a conviction. *Reg.* v. *Yates*, Car. & M. 132; 5 Jur. 636.

Although an assignment of perjury must be proved by two witnesses, it is not necessary to prove by two witnesses every fact which goes to make out the assignment of perjury. *Reg.* v. *Roberts*, 2 Car. & K. 607.

A., to prove an alibi for B., had sworn that B. was not out of his sight between the hours of 8 A.M. and 9 A.M. on a certain day, and on this perjury was assigned. Proof by one witness, that between those hours A. was at one place on foot, and by another witness, that between those hours B. was walking at another place six miles off:—Held, to be sufficient proof of the assignment of perjury. *Ib.*

Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to show that one party is more to be believed than the other. *Reg.* v. *Boulter*, 3 Car. & K. 236; 2 Den. C. C. 396; 21 L. J., M. C. 57; 16 Jur. 135; 5 Cox, C. C. 543.

Where perjury was assigned upon a statement made by the prisoner on oath, upon a trial at nisi prius, that in June, 1851, he owed no more than one quarter's rent to his landlord, and the prosecutor swore that the prisoner owed five quarters' rent at that date; and to corroborate the prosecutor's evidence, a witness was called, who proved that in August, 1850, the prisoner had admitted to him that he then owed his landlord three or four quarters' rent:—Held, that this was not such corroboration as is necessary to sustain an indictment for perjury. *Ib.*

Although it is not necessary that the alleged perjury should be proved by two witnesses in contradiction of the prisoner, it is requisite that the perjury should be proved by something more than the mere contradictory oath of the prosecutor. He must be corroborated by some independent testimony. *Reg.* v. *Braithwaite*, 1 F. & F. 638; 8 Cox, C. C. 254

The prisoner was charged with having committed perjury by stating that he was not in a certain house on a certain day, and was not in a certain place on that day; a witness swore to the falsity of these statements: another witness swore that he had seen the prisoner in the place named on that day, and another that she had seen him near the house named on that day:—Held, sufficient corroboration *Reg.* v. *Shaw*, L. & C. 579; 34 L. J., M. C. 169; 11 Jur. (N.S.) 415; 12 L. T. 470; 13 W. R. 692; 10 Cox, C. C. 66.

A party was charged with having falsely sworn that certain invoices bearing certain dates were produced by her to C. The only witness called was C., who swore that she had not produced those invoices, but that she had produced others of the dates of which he made a memorandum at the time:—Held, that the memorandum was a sufficient corroboration upon which to convict. *Reg.* v. *Webster*, 1 F. & F. 515.

The prisoner was convicted of perjury. He was a policeman, having laid an information against a publican for keeping open his house after lawful hours, and swore, on the hearing, that he knew nothing of the matter except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. The perjury was assigned on this last allegation, and the evidence to prove its falsehood was, that the prisoner when laying the information, said that "he had seen four men leave the house after eleven," and that he could swear to one as W. On two other occasions the prisoner made a similar statement to two other witnesses; and W. and others did, in fact, leave the house after eleven o'clock on the night in question; that on the hearing the prisoner acknowledged that he had offered to smash the case for 30*s.*; that he had talked, in the presence of another witness, of making the publican give him money to settle it; and he had, in fact, offered to the publican to settle it for 1*l.*, and had said that he had received 10*s.* to smash the case, and was to have 10*s.* more:—Held, that the evidence was sufficient to prove the perjury assigned, and that the conviction was right. *Reg.* v. *Hook*, Dears. & B. 606; 27 L. J., M. C. 222; 4 Jur. (N.S.) 1026; 6 W. R. 518; 8 Cox, C. C. 5.

In a case of perjury, on a charge of bestiality, the defendant swore that he saw the prosecutor committing the offence, and saw the flap of his trousers unbuttoned. To disprove this, the prosecutor deposed that he did not commit the offence, and that his trousers had no flap; and, to confirm him, his brother proved, that, at the time in question, the prosecutor was not out of his presence for more than three minutes, and his trousers had no flap:—Held, to be sufficient corroborative evidence to go to the jury. *Reg.* v. *Gardiner*, 8 Car. & P. 737.

An assignment of perjury that the prosecutor did not, at the time and place sworn to, or at any other time or place, commit bestiality with a donkey (as sworn to) or with any other animal whatsoever, is sufficiently proved by the evidence of two witnesses falsifying the deposition which had been sworn to by the defendant. *Ib.*

The prisoner was charged with perjury, for having falsely sworn before magistrates at petty

sessions, that D. R. was the father of her illegitimate child. At the trial of the prisoner the imputed father, D. R., swore that he never had intercourse with her. In corroboration of D. R., a witness was called who swore that the prisoner had told witness, at a time when she generally denied being with child, that "D. R. had never touched her clothes":—Held, that, as the negation was made by the prisoner at a time when she generally denied being with child, it was, so far a part of such general denial that, although it could not be altogether withdrawn from the jury, it was not a corroboration of D. R.'s testimony, on which alone they could convict her. *Reg.* v. *Owen*, 6 Cox, C. C. 105.

When an assignment of perjury was in the vague terms that the defendant falsely swore that he had not treated a certain person to brandy, &c., on a certain day, instead of in the definite terms, that he had not treated him at a particular public-house on a certain day:—Held, that proof of treating at two public-houses by two distinct witnesses was sufficient to support a conviction, because any witness of a treating at a separate time and place on the same day, was sufficient corroboration of the witness who spoke only to one act of treating. *Reg.* v. *Hare*, 13 Cox, C. C. 174.

A person in his deposition before a magistrate deposed to several material facts in a case of larceny. When called as a witness at the quarter sessions on the trial of the larceny, he contradicted every statement he had made before the magistrate. In an indictment for perjury, his evidence on the trial at the quarter sessions was charged to be false:—Held, that the deposition before the magistrate was not, by itself, sufficient proof that the evidence on the trial at the quarter sessions was false, but that other confirmatory evidence must be given, to satisfy the jury that the statements made by the party at the quarter sessions were, in point of fact, false, or that the statements in the deposition were, in point of fact, true. *Reg.* v. *Wheatland*, 8 Car. & P. 238.

To convict a person of perjury in swearing falsely before a grand jury, it is not sufficient to show that the person swore to the contrary before the examining magistrate, as non constat which of the contradictory statements was the true one. *Reg.* v. *Hughes*, 1 Car. & K. 519. S. P., *Rex* v. *Harris*, 5 B. & Ald. 926; 1 D. & R. 578.

d. Trial.

Jurisdiction.]—A judge at nisi prius has no jurisdiction to try an indictment for perjury at common law, found at the quarter sessions, and removed by certiorari into K. B.; an indictment so found being void. *Rex* v. *Haines*, R. & M. 298.

Venue on removal of Indictment from Central Criminal Court.]—By 9 & 10 Vict. c. 24, s. 3, every writ of certiorari for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction. An indictment was found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. The perjuries assigned in one count were in respect of an oath taken before a commissioner in chancery, in the city of London; and in the other count, in respect of an oath taken in the court of Common Pleas, in Middlesex. The indictment was removed by certiorari into the court of Queen's Bench, and Middlesex was specified as the county in which the indictment should be tried, and the jury was taken from that county:—Held, that the court of Queen's Bench had a discretion to name in the certiorari the county or jurisdiction in which the trial was to take place, and that by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Court had the indictment not been removed. *Reg.* v. *Castro*, 43 L. J., Q. B. 105; L. R. 9 Q. B. 350; 30 L. T. 320; 22 W. R. 187; 12 Cox, C. C. 454.

Practice where Suit undetermined.]—It is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit, while that suit is any way undetermined, except in cases where the court in which it is pending postpones the decision of it in order that the criminal charge may be first disposed of. *Rex* v. *Ashburn*, 8 Car. & P. 50. See *Peddell* v. *Rutter*, 8 Car. & P. 340.

Where justices refused to hear a charge of perjury alleged to have been committed in an action pending when the charge was made, on the ground that it was still pending, the court refused to grant a mandamus to hear the charge as they had taken the proper course. *Reg.* v. *Ingham*, 14 Q. B. 396; 19 L. J., M. C. 69.

Verdict — Several Counts.]—An indictment contained four counts, each of which stated practically the same offence. The record stated the writ of venire to try whether the defendant "be guilty of the perjury and misdemeanor aforesaid," and the verdict, that "he is guilty of the perjury and misdemeanor aforesaid," and a general judgment thereon:—Held, that the word "misdemeanor" was nomen collectivum and that, therefore, venire and verdict applied to all the counts; and the judgment, being for imprisonment only, was divisible. *Ryalls* v. *Reg.*, 11 Q. B. 781; 18 L. J., M. C. 69; 13 Jur. 259; 3 Cox, C. C. 354.

Punishment—Penal Servitude.]—The 2 Geo. 2, c. 25, s. 2, imposes the sentence of transportation (altered to penal servitude) on persons convicted of perjury according to the laws then in being. A person was convicted of perjury on an indictment, one count of which averred that the oath was taken in the Court of Chancery before a commissioner authorised to take oaths by 16 & 17 Vict. c. 78; he was sentenced to penal servitude upon that count:—Held, that the offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a court of common law, or acting under a statute, it is equally an oath taken in a judicial proceeding, and punishable by penal servitude. *Reg.* v. *Castro*, 43 L. J., Q. B. 105; L. R. 9 Q. B. 350; 30 L. T. 320; 22 W. R. 187; 12 Cox, C. C. 454.

—— **Sentence — Punishment before Penal Servitude need not be given.**]—The 2 Geo. 2, c. 25, s. 2, authorises the judge before whom a person shall be convicted of perjury, to order such person to be sent to a house of correction

for seven years, there to be kept to hard labour; "and thereupon judgment shall be given that the person convicted shall be committed accordingly, over and beside such punishment as shall be adjudged to be inflicted upon such person, agreeable to the laws now in being":—Held, that this statute did not impose on the court the necessity of awarding any punishment previous to that of penal servitude, so as to give the sentence of penal servitude the form of an additional punishment. *Castro* v. *Reg.*, 50 L. J., Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox, C. C. 546; 45 J. P. 452—H. L. (E.)

—— **Two Counts—Second Term of Imprisonment beginning at Expiration of First.**]—An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two different occasions, one in the progress of a trial, the other in an affidavit in chancery:—Held, that they were distinct offences, and a punishment might be inflicted in respect of each. *Ib.*

That the full punishment of seven years' penal servitude might be inflicted for each offence, and that the second term of penal servitude was properly made to begin at the termination of the first term. *Ib.*

2. False Declarations.

a. Before Magistrates.

Loss by Fire—Benefit Society.]—An indictment on 5 & 6 Will. 4, c. 62, s. 13, for making a false declaration before a magistrate, stated, that, by the rules of a benefit society, any full free member of it who sustained a loss by an accidental fire was to be indemnified to the extent of 15*l.*, on making a declaration before a magistrate verifying his loss; and that the defendant was a full free member of the society, and had made a false declaration before a magistrate, that he had sustained a loss by fire. On the trial, the rules of the society could not be proved; but held, that the allegation in the indictment respecting the rules might be rejected as surplusage, as the offence of the defendant, in making the false declaration as to the fire, would be an offence within the statute, if no such benefit society had ever existed. *Reg.* v. *Boynes*, 1 Car. & K. 65.

Voluntary Oaths—Powers to administer.]—A county magistrate complained to the bishop of the diocese of the conduct of two of his clergy; and to substantiate his charge he swore witnesses before himself, as magistrate, to the truth of the facts:—Held, that the matter before the bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the 5 & 6 Will. 4, c. 62, s. 13; and that he had unlawfully administered voluntary oaths, contrary to the enactment of the statute. *Reg.* v. *Nott*, Car. & M. 288; D. & M. 1; 4 Q. B. 768; 12 L. J., M. C. 143.

The 5 & 6 Will. 4, c. 62, s. 18, which enables magistrates to receive voluntary declarations instead of oaths, extends to declarations generally, and is not confined to declarations with respect to the confirmation of written instruments or allegations, or proofs of debts, or of the execution of deeds, or other matters ejusdem generis. *Reg.* v. *Boynes*, 1 Car. & K. 65.

Indictment.]—An indictment charging A. with having made a false declaration before a justice that he had lost a pawnbroker's ticket, whereas he had not lost the ticket, but "had sold, lent, or deposited it with one" C., is not bad for uncertainty, because the words "had sold, lent or deposited it" are mere surplusage, and therefore an error in them does not affect the indictment. *Reg.* v. *Parker*, 39 L. J., M. C. 60; L. R. 1 C. C. 225; 21 L. T. 724; 18 W. R. 353; 11 Cox, C. C. 478.

An indictment under 5 & 6 Will. 4, c. 62, s. 13, for administering an extra-judicial oath, is bad, if it does not so far set out the disposition, that the court may judge whether or not it is of the nature contemplated by the statute. *Reg.* v. *Nott*, D. & M. 1; 4 Q. B. 768; 12 L. J., M. C. 143; 7 Jur. 621.

Evidence.]—To prove the making of a false declaration under the Pawnbrokers' Act (39 & 40 Geo. 3, c. 99) it is not absolutely necessary to call the magistrate before whom it was made or some one present at the time. *Reg.* v. *Browning*, 3 Cox, C. C. 437.

To prove that such a declaration is false in fact, it is necessary to negative the defendant's statement by the oath of two witnesses in the same manner and to the same extent as on the proof of an assignment for perjury. *Ib.*

Upon an indictment for making a false declaration in lieu of an oath under 5 & 6 Will. 4, c. 62, s. 12, relating to pawnbrokers, it is not sufficient for the prosecution to prove the handwriting of the justice before whom the declaration is made, but it must be shown that, when it was made he was acting within the district of which he was such justice. *Reg.* v. *Morgan*, 1 Cox. C. C. 109.

Where a person is indicted for having made a false declaration as to a fire having taken place at his house, evidence may be given, that with the declaration he sent a certificate, which stated the fire to have occurred, and that the signatures to that certificate were all forgeries, as this evidence may go to show that the declaration was wilfully false. *Reg.* v. *Boynes*, 1 Car. & K. 65.

An indictment for perjury in making a false declaration under 5 & 6 Will. 4, c. 62, s. 18, cannot be sustained when the deed or written instrument of which the declaration is confirmatory is not duly proved. *Reg.* v. *Cox*, 4 F. & F. 42; 9 Cox, C. C. 301.

b. On Registration of Births, Deaths or Marriages.

False Statements and Entries.]—An indictment, under 6 & 7 Will. 4, c. 86, s. 41, charged, that a clergyman solemnised a marriage and was about to register in duplicate the particulars relating to the marriage, and that the prisoner did wilfully make to the clergyman, for the purpose of being inserted in the register of marriage, certain false statements. The proof was that the particulars were entered by the clerk of the church before the marriage; that, after the marriage, the clergyman asked the prisoner if they were correct, and that he answered in the affirmative, and the clergyman signed the register:—Held, that the prisoner was rightly convicted. *Reg.* v. *Brown*, 2 Car. & K. 504; 1 Den. C. C. 291; 17 L. J., M. C. 145; 3 Cox, C. C. 127.

Held, also, that it was not necessary, upon the indictment, to prove that the register books used

by the clergyman were furnished to him by the registrar-general. *Ib.*

The 6 & 7 Will. 4, c. 86, s. 41, makes it a misdemeanor to make a false statement of one or more of the particulars required to be registered for the purpose of being inserted in any register of births, deaths or marriages; and to constitute this offence, the purpose need not be effected. *Reg.* v. *Mason*, 2 Car. & K. 622.

But it is a felony, under s. 43, to cause the registrar to make an entire false entry of a birth, marriage or death. *Ib.*

A woman went to a registrar, and asked him to register the birth of a child; she stated to him the particulars necessary for the entry, and he made the entry accordingly, and she signed it as the person giving the information. Every particular which she stated was false:—Held, that this amounted to the felony of causing a false entry to be made within 6 & 7 Will. 4, c. 86, s. 43, and was not merely the misdemeanor of making a false statement under s. 41. *Reg.* v. *Dewitt*, 2 Car. & K. 905; 4 Cox, C. C. 49.

Wilfully made.]—To support an indictment on 6 & 7 Will. 4, c. 86, s. 41, for making a false statement touching the particulars required to be registered for the purpose of their being inserted in a register of marriages, it is essential that the false statement should have been made wilfully and intentionally, and not by mistake only. *Reg.* v. *Dunboyne* (*Lord*), 3 Car. & K. 1.

Use of New Name.]—A man may change his surname by use and reputation, and if by use and reputation he has acquired a new name, he is not indictable under 19 & 20 Vict. c. 19, s. 2, for using a new name in signing a notice for the purpose of procuring his marriage under 6 & 7 Will. 4, c. 85. *Reg.* v. *Smith*, 4 F. & F. 1099.

3. Unlawful Oaths.

Unlawful Oaths—What are.]—The provisions of 37 Geo. 3, c. 123, which make it a felony to administer an unlawful oath, are not confined to oaths administered with either a mutinous or a seditious object. *Rex* v. *Brodribb*, 6 Car. & P. 571.

A party of sixteen persons was going out armed for the purpose of night-poaching. Before they went out the prisoner swore them all to secrecy:—Held, a felony within that statute. *Ib.*

If the oath administered was intended to make the parties to whom it was administered believe themselves under an engagement, it is equally within the statute whether the book on which they were sworn was a testament or not. *Ib.*

Where an oath was administered, that the party taking it should not make buttons under certain stated prices and should keep all the secrets of the lodge:—Held, to be an administering of an unlawful oath within the statutes. *Rex* v. *Ball*, 6 Car. & P. 563.

The administering an oath or any agreement to any person not to reveal the secrets of any association, is an offence within those statutes. *Ib.*

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some act of parliament to be legal), for whatever purpose or object it may be formed; and the administering of an oath not to reveal anything done in such association is an offence within 37 Geo. 3, c. 123, s. 1. *Rex* v. *Lovelass*, 6 Car. & P. 596; 1 M. & Rob. 349.

The precise form in which the oath is administered is not material; it is an oath within the meaning of the act, if it was understood by the party tendering, and the party taking it, as having the force and obligation of an oath. *Ib.*

Every person who engages in an association, the members of which, in consequence of being so, take an oath not required by law, is guilty of an offence within 57 Geo. 3, c. 19, s. 25. *Rex* v. *Dixon*, 6 Car. & P. 601.

The unlawful administering, by any associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, is felony within the 37 Geo. 3, c. 123, though the object of such association was a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. *Rex* v. *Marks*, 3 East, 157.

Indictment.]—Where sixteen persons took the same unlawful oaths, two or three at a time, all being present:—Held, that the person who administered the oath might be convicted on an indictment for administering a certain oath to A., B., C., D., &c. (naming the whole sixteen persons). *Rex* v. *Brodribb*, 6 Car. & P. 571.

If the indictment states the oaths to have been, not to inform, or give evidence against any person belonging to a confederacy of persons associated together to do a certain illegal act, this is sufficient, without stating what the illegal act was. *Ib.*

By 37 Geo. 3, c. 123, s. 4, it shall not be necessary, in an indictment for any offence under this statute, to set forth the words of the oath, but it shall be sufficient to set forth the purport of it, or some material part thereof. An indictment charging that the defendants administered to J. H. an oath, intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or expression of his or theirs, is good, without alleging the tenor or purport of the oath to be set forth, and without showing in what manner the public peace was meant to be disturbed by such society. *Rex* v. *Moore*, 6 East, 419.

Evidence.]—Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said that he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words: yet held, that parol evidence of what he in fact said, was sufficient, without giving him notice to produce such paper. *Ib.*

E. Returning from Transportation.

Effect of Pardon.]—The king's sign manual may be given in evidence by the prisoner, on an indictment for returning from transportation: and if not revoked, and the condition is literally, though not substantially, complied with, it will discharge the prisoner from that indictment. *Rex* v. *Miller*, 2 W. Bl. 797; 1 Leach, C. C. 74.

Indictment.]—An indictment for being at large after an order of transportation, stated that the prisoner was capitally convicted at the assizes of 1818; and that mercy was extended to him on condition of his being transported for life to some parts beyond the seas; and that he was thereupon ordered to be transported to New South Wales, or to some of the islands adjacent; and it appeared that the condition on which mercy was granted was not general, but specific, that he should be transported to New South Wales, or some of the islands adjacent:—Held, a fatal variance. *Rex* v. *Fitzpatrick*, R. & R. 512.

An indictment on 56 Geo. 3, c. 27, s. 8, for being at large after sentence of transportation, should set forth the effect and substance of the former conviction; so likewise should the certificate of the former conviction. *Rex* v. *Watson*, R. & R. 468. S. P., *Rex* v. *Sutcliffe*, R. & R. 469, n.

In an indictment under 5 Geo. 4, c. 84, s. 22, it is necessary to aver that the prisoner was feloniously at large before the expiration of his sentence, and an indictment omitting the word "feloniously" is bad. *Reg.* v. *Horne*, 4 Cox, C. C. 263.

Original Sentence revives.]—A prisoner convicted of a capital crime, whose sentence is respited during the king's pleasure, and who, on having received pardon on condition of transportation for life, is afterwards found at large in Great Britain, without lawful cause, will be referred back to his original sentence. *Rex* v. *Madan*, 1 Leach, C. C. 223.

Payment of Reward to Prosecutor.]—The judge, before whom a prisoner is tried for returning from transportation, has power to order the county treasurer to pay the prosecutor the reward under 5 Geo. 4, c. 84, s. 22. *Reg.* v. *Emmons*, 2 M. & Rob. 279. S. P., *Reg.* v. *Ambury*, 6 Cox, C. C. 79.

Proof of Conviction and Sentence.]—On the trial of an indictment against a person for being at large without lawful cause before the expiration of his term of transportation, a certificate of his former conviction and sentence was put in: it purported to be that of J. G., deputy clerk of the peace for the county of L., and clerk of the courts of general quarter sessions of the peace holden in and for the said county, and having the custody of the records of the courts of general quarter sessions of the peace holden in and for the said county. It was proved that Mr. H. was clerk of the peace of L., and that he had three deputies, partners, of whom J. G., who had signed the certificate, was one; and that each of them acted as clerk of the peace; and that for forty years they had kept the sessions records at their office:—Held, sufficient proof of the conviction and sentence under 5 Geo. 4. c. 84, s. 24. *Reg.* v. *Jones*, 2 Car. & K. 524. S. P., *Reg.* v. *Parsons*. 35 L. J., M. C. 167; L. R. 1 C. C. 24; 12 Jur. (N.S.) 436; 14 L. T. 450; 14 W. R. 662; 10 Cox, C. C. 243.

Where a prisoner was indicted under 5 Geo. 4, c. 84, s. 22, for being found at large in England before the expiration of a term for which he had been sentenced to be transported:—Held, that the fact of such sentence being in force at the time he was so found at large, was sufficiently proved by the certificate of his conviction and sentence, the judgment remaining unreversed; although, on the face of such certificate, it appeared that the sentence was one which could not have been inflicted on him for the offence of which, according to such certificate, he had been committed. *Reg.* v. *Finney*, 2 Car. & K. 774.

A certificate of previous conviction for felony, prepared under 7 & 8 Geo. 4, c. 28, s. 11, is good evidence of his conviction and sentence, on an indictment for returning from transportation before the expiration of a sentence under 5 Geo. 4, c. 84. *Reg.* v. *Ambury*, 6 Cox, C. C. 79.

—— **Punishment.**]—Under 9 Vict. c. 24, s. 1, the judge had the power of reducing the punishment of transportation for life under 4 & 5 Will. 4, c. 76, for the offence of being at large before the expiration of the term for which the prisoner had been ordered to be transported, and might under the latter statute sentence the prisoner to be transported for any term less than seven years after the imprisonment directed by the earlier statute. *Reg.* v. *Lamb*. 3 Car. & K. 96.

VI. *AGAINST PUBLIC PEACE.*

A. CHALLENGES TO FIGHT.

Inciting to fight Duel.]—An endeavour to provoke another to commit the misdemeanor of sending a challenge to fight, is itself an indictable misdemeanor, particularly where such provocation was given by a writing containing libellous matter, and alleged in the prefatory part of the indictment to have been done with intent to do the party bodily harm, and to break the king's peace; the sending such writing being an act done towards procuring the commission of the misdemeanor meant to be accomplished. *Rex* v. *Phillips*, 6 East, 464; 2 Smith, 550.

Venue.]—If a man writes a letter with intent to provoke a challenge, seals it up and puts it into the post-office in Westminster, addressed to a person in the city of London, who receives it there, the writer may be indicted for this offence in the county of Middlesex. *Rex* v. *Williams*, 2 Camp. 505.

B. FORCIBLE ENTRY AND DETAINER.

Title to sue.]—A person using land as a garden for more than twenty years, under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land and giving directions as to cutting the trees:—Held, that he had not got a title so as to enable him to sue a claimant under the owner for a forcible entry. *Allen* v. *England*, 3 F. & F. 49.

Proof of possession of land and pernancy of the rents is primâ facie evidence of a seisin in fee of the person possessed. *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68; 15 R. R. 518.

What constitutes.]—When a person having the legal title to land is in actual possession of it, the attempt to eject him by force brings the person who makes it within the provisions of the statute against forcible entry. *Lows* v. *Telford*, 45 L. J., Ex. 613; 1 App. Cas. 414; 35 L. T. 69; 13 Cox, C. C. 226—H. L. (E.)

It will do so though the possession of the person having such legal title has only just

commenced, though he may himself have obtained it by forcing open a lock, though his ejection has not been made by a "multitude" of men, nor attended with any great use of violence, and though the person who attempts to eject him may even set up a claim to the possession of the land. *Ib.*

If a person, who has a legal right of entry upon land which is in the possession of a wrongdoer, is allowed to enter peaceably through the outer door, it is still illegal for him to turn out the wrongdoer with violence. *Elwick* v. *Hawkes*, or *Eldridge* v. *Hawker*, 50 L. J., Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 913.

To constitute a forcible entry, or a forcible detainer, it is not necessary that anyone should be assaulted, but only that the entry or the detainer should be with such numbers of persons, and show of force, as is calculated to deter the rightful owner from sending the persons away, and resuming his own possession. *Milner* v. *Maclean*, 2 Car. & P. 17.

An indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least such show of force, as is calculated to prevent any resistance. *Rex* v. *Smyth*, 5 Car. & P. 201; 1 M. & Rob. 156.

A person having no possession or title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not thereby acquire possession, but may be forcibly expelled by him on discovery of the fraud: and if in such a case assaults are committed in consequence, the question for the jury will be, whether there has been an excess of violence. A subsequent attempt by force to re-enter, and so causing an affray:—Held, an indictable offence, for which the party might be given in charge. *Collins* v. *Thomas*, 1 F. & F. 416.

If a tenant of a house, after regular notice to quit, abandons it, and locks it up, leaving some articles of furniture in it, and the landlord breaks it open and takes possession, the tenant cannot maintain trespass: his remedy, if any, is by indictment for forcible entry. *Turner* v. *Meymott*, 7 Moore, 574; 1 Bing. 158; 1 L. J. (o.s.) C. P. 13; 25 R. R. 612. See *Hilary* v. *Gay*, 6 Car. & P. 284; *Newton* v. *Harland*, 2 Scott (N.R.), 474; 1 Man. & G. 644; *Burling* v. *Read*, 11 Q. B. 904; 19 L. J., Q. B. 291; *Pollen* v. *Brewer*, 7 C. B. (N.S.) 371; 1 L. T. 9; 6 Jur. (N.S.) 509.

V. having been in possession of a house from May to October, the defendants called there, and, insisting that V. had no title, proceeded to take the keys out of the room doors. Upon their doing so, V. gave them into custody for stealing the keys; but the magistrate refused to detain them. They then returned to the house, and having procured a sledge-hammer, forced the inner door of the hall, and some having entered that way, and some by a staircase window, overpowering the prosecutor's opposition, and furnished with a hatchet and other weapons, after a struggle which caused a disorderly crowd to assemble, they ejected the prosecutor and his servants. From the commencement of the proceedings till the conclusion, a female servant of the prosecutor's was in the kitchen:—Held, assuming the title of the prosecutor to have been bad, and that the defendants had acted by the orders of those who had a good title to the premises, that the evidence was sufficient to support a conviction of the defendants for a forcible entry and riot. *Reg.* v. *Studd*, 14 L. T. 633; 14 W. R. 806.

The plaintiff occupied a cottage belonging to the defendant F. under a tenancy determinable upon three months' notice. On the 24th of March, 1890, notice to quit the premises at Midsummer was given by F., but the plaintiff refused to give up possession on the termination of the tenancy, though informed that the owner had entered into a contract with B. (a co-defendant) to pull down and rebuild the plaintiff's cottage, and also one adjoining. On the 3rd of September, F., being still unable to get possession of the cottage occupied by the plaintiff, applied for and obtained from justices an order requiring possession to be given up within twenty-one days under the provisions of 1 & 2 Vict. c. 74. The same day that the order was obtained some tiles were removed by one of the defendants from the roof of the plaintiff's cottage and fell into a bed-room, thereby injuring some of his furniture; and before the twenty-one days had expired the foundations of the new cottages were dug in the garden, and some garden produce destroyed. There was also, within the time specified by the justices order, some further interference with the roof and consequent damage to the furniture:—Held, that an action for trespass and damage to the plaintiff's goods was not maintainable, inasmuch as there was no evidence of a forcible entry or of any cause of action, and that the defendants were justified in acting as they did, notwithstanding the justices' order obtained pursuant to the provisions contained in 1 & 2 Vict. c. 74. *Jones* v. *Foley*, 60 L. J., Q. B. 464; [1891] 1 Q. B. 730; 64 L. T. 538; 39 W. R. 510; 55 J. P. 521.

Indictment.]—An indictment at common law, charging the defendants with having unlawfully, and with a strong hand, entered the prosecutor's mill, and expelled him from the possession, is good. *Rex* v. *Wilson*, 8 Term Rep. 357; 4 R. R. 694.

Semble, in an indictment for a forcible entry, it is not necessary to allege the prosecutor's title to the property, it is sufficient to state the possession; but if the title is stated it need not be proved. *Reg.* v. *Child*, 2 Cox, C. C. 102.

A wife separated from her husband took a house, of which the husband, with the landlord's consent, obtained possession. Semble, that if the wife came with others, and made a forcible entry into this house, she might be convicted on an indictment for forcible entry, stating it to be the house of the husband. *Rex* v. *Smyth*, 5 Car. & P. 201; 1 M. & Rob. 156.

Evidence.]—A constable entered a house with a warrant in his hand, and searched the house; and for such entering and searching was indicted for a forcible entry:—Held, that his counsel might ask the witnesses for the prosecution what the constable said, at the time, as to whom he was searching for. *Rex* v. *Smyth*, 5 Car. & P. 201; 1 M. & Rob. 156.

Upon the trial of an indictment for a forcible entry or a detainer, the party dispossessed was not a competent witness for the prosecution, before 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99. *Rex* v. *Williams*, 4 M. & Ry. 471; 9 B. & C. 549; 7 L. J. (o.s.) M. C. 92. S. P., *Rex* v. *Beavan*, R. & M. 342.

On the trial of such an indictment, the defen-

dant cannot impeach the title of the party dispossessed. *Ib.*

In an indictment at common law for forcible entry, it is necessary to prove such force as constitutes a public breach of the peace. *Rex* v. *Wilson*, 8 Term Rep. 357; 4 R. R. 694.

Hearing by Justices—Mandamus.]—The court refused to grant a mandamus to compel magistrates to hear a complaint and act summarily under the statutes relating to forcible entry and detainer. *Dary, Ex parte*, 2 D. (N.S.) 24.

—— **Conviction by—Sufficiency of.**]—The 8 Hen. 6, c. 9, was intended to give a summary jurisdiction in case of forcible detainer after an unlawful entry; and a conviction by justices on that statute, merely stating an entry and a forcible detainer, is insufficient. *Rex* v. *Oakley*, 4 B. & Ad. 307; 1 N. & M. 58; 2 L. J., M. C. 24.

The 15 R. 2, c. 2, gave justices a summary jurisdiction to convict, on their own view, for a forcible detainer after a forcible entry. *Ib.*

In a conviction under 8 Hen. 6, c. 9, for a forcible detainer, it must appear on the face of the conviction that there was an unlawful entry. *Rex* v. *Wilson*, 5 N. & M. 164; 3 A. & E. 817; 1 H. & W. 387; 4 L. J., M. C. 114.

A conviction under a forcible detainer, on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion are stated. *Ib.*

In a conviction for a forcible detainer, under 8 Hen. 6, c. 9, where the magistrates proceed upon view, it is not necessary to set out the particular facts presented to their view. *Rex* v. *Wilson*, 3 N. & M. 753; 1 A. & E. 627; 3 L. J., M. C. 96.

At the time of the conviction, the defendant tendered to the justices a traverse of the force complained of; and a few days after an inquisition was held before the magistrates, for the purpose of trying the alleged force by jury, who, after hearing evidence adduced by both parties, found the defendant guilty; and the magistrates then gave restitution. A return was made to the court, on certiorari, of the conviction and inquisition. The latter was entitled an inquisition, by the oaths of twelve, &c., before, &c., who say upon their oaths that, &c.; stating an unlawful entry and detainer, but not reciting any complaint made by the prosecutor: —Held, that the inquisition was founded on the conviction, and could not be sustained, the conviction being void; and that the inquisition, even if looked at alone, was bad, as it did not state any complaint, nor by what authority the jury was summoned. *Ib.*

In order to justify a conviction by justices, under 15 Ric. 2, c. 2, and 8 Hen. 6, c. 9, it must be proved before them that there was, as well an unlawful entry on the premises as a forcible detainer. *Attwood* v. *Joliffe*, 3 New Sess. Cas. 116.

Where a conviction stated that justices had convicted A. of forcible detainer upon their own view, and that afterwards a complaint was made to the justices that A. forcibly entered the premises, and that notice of such complaint was given to A., who received the notice, but said nothing, and then went on to allege that the justices received evidence on oath of the unlawful entry:—Held, that the conviction was bad, for not showing that A. had been summoned to answer the charge of the unlawful entry, or that he had an opportunity afforded him of defending himself against such charge. *Ib.*

Restitution—Application, Grounds for.]—An averment in an indictment for a forcible entry that the prosecutor was seised, is sufficient to found an application for a writ of restitution; and it need not be shown by the prosecutor that he still continued to be seised. *Rex* v. *Dillon*, 2 Chit. 314.

An indictment charged that the defendants into one messuage, then and there being in the possession of W. P., he W. P. then and there being also seised thereof, with force of arms, did enter, and W. P., from the peaceable possession with force and arms, did put out. After a conviction of the defendants:—Held, that this was a sufficient averment of the present seisin of W. P. to warrant the court in awarding a writ of restitution. *Rex* v. *Hoare*, 6 M. & S. 266; 18 R. R. 368.

—— **Judge has Discretion.**]—A judge at the assizes may, in his discretion, refuse to award restitution, after an indictment for forcible entry and detainer has been found by the grand jury, and the court has no power to review his decision. *Reg.* v. *Harland*, 1 P. & D. 93; 8 A. & E. 826; 2 Lewin, C. C. 171; 2 M. & Rob. 141; 8 L. J., M. C. 60.

—— **Awarded by Justice—Inquisition.**]—In order to authorise a justice to award restitution pursuant to an inquisition taken under 8 Hen. 6, c. 9, for a forcible entry, the inquisition should set forth the estate possessed by the party in the property disputed. *Reg.* v. *Bowser*, 8 D. P. C. 128; 1 W., W. & H. 345.

—— **Certiorari.**]—Where the indictment is brought before the Queen's Bench by certiorari, that court is bound, upon conviction, to award restitution. *Rex* v. *Williams*, 4 M. & Ry. 471; 9 B. & C. 549; 7 L. J. (o.s.) M. C. 92.

So the court is bound to award a restitution, as a consequence of quashing a conviction for an unlawful detainer under 8 Hen. 6, c. 9, which is bad, without inquiring into the legal or equitable claim of the respective parties. *Rex* v. *Wilson*, 6 N. & M. 625; 3 A. & E. 817; 2 H. & W. 225; 6 L. J., M. C. 143.

—— **Before Trial.**]—For the mode of proceeding to obtain restitution on application to a judge, after indictment found, but before trial, see *Rex* v. *Hake*, 4 M. & Ry. 483.

Action when maintainable.]—An action cannot be maintained under 8 Hen. 6, c. 9, s. 6, to recover damages for a forcible entry, unless the plaintiff is entitled to the freehold of the premises. *Cole* v. *Eagle*, 8 B. & C. 409; 6 L. J. (o.s.) K. B. 369.

Damages—Recovery of, against true Owner of Land.]—An action may be maintained by a person who has been in possession of lands, without title, against the true owner of the lands, for with force and strong hand entering the lands, expelling the plaintiff from the possession, and taking goods the property of the defendant then being on the lands. *Newton* v. *Harland*

(1 Sc. (N.R.) 474), observed upon. 10 Car. 1, sess. 3, c. 13, is similar to 21 Jac. 1, c. 15. *Beattie* v. *Mair*, 10 L. R., Ir. 208.

Damages cannot be recovered against the rightful owner for a forcible entry on land, for the stat. 5 Ric. 2, st. 1. c. 8, only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry, damages could be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner. *Newton* v. *Harland* (1 Scott (N.R.) 474), *Pollen* v. *Brewer* (7 C. B. (N.S.) 371), and *Lows* v. *Telford* (1 App. Cas. 414), considered. *Beddall* v. *Maitland*, 50 L. J., Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484.

Licence to eject—Legality of.]—A licence by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorising the commission of an act which is made illegal by the act 5 Ric. 2, st. 1. c. 8. *Edwick* v. *Hawkes*, or *Edridge* v. *Hawkes*, 50 L. J., Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 913.

C. LIBEL.

1. *The Offence*, 1655.
2. *Procedure.*
   - *a.* Preliminary Steps, 1662.
   - *b.* Indictment, 1663.
   - *c.* Information, 1665.
   - *d.* Justification—Truth of Libel, 1668.
   - *e.* Trial, 1669.
   - *f.* Evidence, 1671.
   - *g.* Costs, 1674.

1. THE OFFENCE.

Blasphemous Libel.]—The 53 Geo 3, c. 160, does not alter the common law respecting a blasphemous libel, but only removes the penalties imposed upon persons denying the doctrine of the Trinity, by 9 & 10 Will. 3, c. 32, and extends to such persons the benefits conferred upon all other Protestant dissenters, by 1 Will. & M. sess. 1, c. 18. *Rex* v. *Waddington*, 1 B. & C. 26.

A publication stating Jesus Christ to be an impostor and a murderer in principle is a libel at common law, for which an information will lie. *Ib.*

A person may attack Judaism, or any sect of the Christian religion, except the form established by law. *Reg.* v. *Gathercole*, 2 Lewin, C. C. 237.

A general attack upon Christianity is unlawful, because Christianity is the established religion of the country. *Ib.*

It is an offence at common law to publish a blasphemous libel, as the 9 & 10 Will. 3, c. 32, has not altered such law as to the offence of blasphemy, but only given a cumulative punishment; and a defendant may be convicted on an information for such an offence. *Rex* v. *Carlile*, 3 B. & Ald. 161; 1 Chit. 451.

Every copy of a libel sold by a defendant is a separate publication, and subjects him to a distinct prosecution. *Ib.*

A correct account of the proceedings in a court of justice cannot be published, if such an account contains matter of a scandalous, a blasphemous, or an immoral tendency: and it is a ground for a criminal information. *Ib.*

It is an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament. *Reg.* v. *Hetherington*, 5 Jur. 295.

Lectures in support of the propositions that the character of Christ is defective, and his teachings misleading, and that the Bible is no more inspired than any other book, are blasphemous and illegal. *Cowan* v. *Milbourn*, 36 L. J., Ex. 124; L. R. 2 Ex. 230; 16 L. T. 290; 15 W. R. 750.

Publications discussing with gravity and decency, and in an argumentative way, questions as to Christian doctrine or statements in the Hebrew scriptures, and even questioning their truth, are not to be deemed blasphemous, so as to be fit subjects for criminal prosecution. But publications which, in an indecent and malicious spirit, assail and asperse the truth of Christianity, or of the scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, are properly to be regarded as blasphemous libels. *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 237.

The mere denial of the truth of the Christian religion, or of the scriptures, is not enough, per se, to constitute a writing a blasphemous libel, so as to render the writer or publisher indictable. But indecent and offensive attacks on Christianity or the scriptures, or sacred persons or objects, calculated to outrage the feelings of the general body of the community, do constitute the offence of blasphemy, and render writers or publishers liable at common law to criminal prosecution. *Reg.* v. *Ramsay*, 48 L. T. 733; 1 Cab. & E. 126; 15 Cox, C. C. 231.

Seditious Libel—Intent—Question for Jury.]—An intention to excite ill-will between different classes of her Majesty's subjects may be a seditious intention; whether or not it is so in any particular case, must be decided upon by the jury after taking into consideration all the circumstances of the case. *Reg.* v. *Burns*, 16 Cox, C. C. 355.

—— **Natural Consequences of Words spoken.**]—Every person must be taken to intend the natural consequence of his own deliberate act and therefore the law will not excuse a newspaper writer on the ground that he writes for hire merely, or that the commercial interests of his paper required the publication of the writings in question. *Reg.* v. *Sullivan*, 11 Cox, C. C. 44.

Where in a prosecution for uttering seditious words with intent to incite to riot, it is proved that previously to the happening of a riot seditious words were spoken, it is a question for the jury whether or not such rioting was directly or indirectly attributable to the seditious words proved to have been spoken. A meeting lawfully convened may become an unlawful meeting if during its course seditious words are spoken of such a nature as to produce a breach of the peace. And those who do anything to assist the speakers in producing upon the audience the natural effect of their words will be guilty of uttering seditious words as well as those who spoke the words. *Reg.* v. *Burns*, 16 Cox, C. C. 355.

—— **What are.**]—Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right

to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publishes a paper on any such matter, and it contains no more than a calm and a quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper goes beyond that, and is calculated to excite tumult, it is a libel. *Reg.* v. *Collins*, 9 Car. & P. 456.

If a paper published by a defendant has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and, with respect to the intent, everyone must be taken to intend the natural consequences of what he has done. *Reg.* v. *Lovett*, 9 Car. & P. 462.

Sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and the laws of the empire. *Reg.* v. *Burns*, 16 Cox, C. C. 355. S. P., *Reg.* v. *Sullivan*, 11 Cox, C. C. 44.

It is not a libel to express regret that the king has taken an erroneous and incorrect view of policy. *Rex* v. *Lambert*, 2 Camp. 398; 11 R. R. 748.

Liberty of the press means complete freedom to write and publish without censorship or restriction, save such as is absolutely necessary for the preservation of society. When any writing appears to the jury to exceed these limits, it is a seditious libel. *Reg.* v. *Sullivan*. 11 Cox, C. C. 44.

The law does not excuse the publication in newspapers of writings which are in themselves seditious libels, merely because they are copied from foreign newspapers as items of news. *Ib.*

Every person must be taken to intend the natural consequences of his own deliberate act, and therefore the law will not excuse a newspaper writer on the ground that he writes for hire merely, or that the commercial interests of his paper required the publication of the writings in question. *Ib.*

On an information for falsely and maliciously publishing a libel concerning the king, by stating in a newspaper that his majesty was afflicted with mental derangement, the jury found the defendants guilty of so doing:—Held, on a motion for a new trial, first, that to assert falsely of his majesty, or of any individual, that he labours under the affliction of mental derangement, is a criminal act, and a malicious intention may be inferred from the mere fact of publication, unless evidence is given by the defendant to rebut such inference; secondly, that such an assertion concerning the king, being in itself mischievous to the public, is an indictable offence, without any allegation or direct proof of a malicious intention; thirdly, that where the jury desired to know "whether, in order to convict a defendant for the publication of a libel, a malicious intention must not have existed in his mind," they were correctly answered by the judge presiding at the trial, who informed them, that "a person who publishes that which is calumnious concerning the character of another must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can show the contrary, and that the onus of proving the contrary lies upon him"; and, fourthly, that where the publisher of a libel states that the act which he communicates is, "from authority," and it appears that the fact is untrue, he is guilty of a false assertion, in the criminal sense of the word. *Rex* v. *Harvey*, 3 D. & R. 464; 2 B. & C. 257; 2 L. J. (O.S.) K. B. 4; 26 R. R. 337.

So, where an information alleged that a libel was published of and concerning the government, and the libel did not in express terms charge the acts to have been done by the government or its order, the whole of the libel must be looked at, in order that the court may interpret it in the way in which ordinary persons would understand it, and judge from the whole tenor of it whether it is written of and concerning the government. *Rex* v. *Burdett*, 4 B. & Ald. 314.

On Administration of Justice.]—An order made by a corporation and entered in their books, stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, (which verdict had been confirmed) was actuated by motives of public justice in preferring the indictment, is a libel reflecting on the administration of justice, for which the court will grant an information against the members making that order. *Rex* v. *Watson*, 2 Term Rep. 199; 1 R. R. 461.

A criminal information having been granted against a defendant, he, before the trial at nisi prius, distributed handbills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's; this matter being disclosed to the judge at nisi prius by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to the court, they granted another information on it against the defendant, considering the affidavit taken at nisi prius as taken under the authority of the court. *Rex* v. *Joliffe*, 4 Term Rep. 285.

The court will grant a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement is correct, and the party has no malicious motive in the publication. *Rex* v. *Fleet*, 1 B. & Ald. 379; 19 R. R. 344.

It is libellous and a misdemeanor to publish in a newspaper the depositions taken before a justice of the peace on a criminal charge, before the party is tried. *Rex* v. *Lee*, 5 Esp. 123. S. P., *Rex* v. *Fisher*, 2 Camp. 563; 11 R. R. 799. And see *Styles* v. *Nokes*, 7 East, 493; *Carr* v. *Jones*, 3 Smith, 491.

—— **Of Judges or Magistrates.**]—An information lies for a libel reflecting on the character of a justice of the peace. *Anon.*, Lofft, 462.

So, an information will lie for publishing a reflection on a judge and jury for acquitting a prisoner. *Rex* v. *White*, 1 Camp. 359, n.; 10 R. R. 705, n.

An indictment will not lie for words spoken of a justice of the peace in his absence. *Rex* v. *Weltje*, 2 Camp. 142; 11 R. R. 687.

Slanderous words spoken of and to a mayor in the discharge of his office as mayor and of him in the execution of his office, the mayor being also a magistrate in virtue of his office, are the subject of a criminal information—per Lefroy, C. J., and Hayes, J. *Reg.* v. *Ree*, 17 Ir. C. L. R. 584.

Such words are not the subject of an indictment, nor, consequently, of a criminal information—per O'Brien and Fitzgerald, JJ. *Ib.*

Reflections on Character of Individuals.]—A criminal information will be granted for sending a letter, charging the complainant with an unnatural crime, although in very guarded and general terms, and though the complainant does not positively swear to his innocence. *Rex* v. *Dennison*, Lofft, 148.

A party having been charged before the coroner with the crime of murder, a newspaper, pending the inquiry, published an article strongly reflecting upon him as a murderer. Having been committed for trial, he was found guilty of manslaughter, and sentenced to nine months' imprisonment with hard labour. Upon an application by him for a criminal information for such article, the court declined to interfere on the ground that there was no personal malice suggested, and that the article could now exercise no prejudicial influence. *Smith*, *Ex parte*, 21 L. T. 294.

The following words are sufficient to sustain an indictment for libel: "Why should T. be surprised at anything Mrs. W. does? If she chooses to entertain B., she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all expatriated foreigners who crowd our streets to her table, if she thinks fit." *Gregory* v. *Reg.*, 15 Q. B. 957; 15 Jur. 74; 5 Cox, C. C. 247—Ex. Ch.

The court refused to grant a criminal information against a bookseller, for printing a report of the House of Commons, though it reflected on the character of an individual. *Rex* v. *Wright*, 8 Term Rep. 293; 4 R. R. 649.

—— **Tendency to create Breach of the Peace.**]—A criminal information will not be granted against a party for sending a letter which, though libellous against him to whom it is sent, has not a tendency to create a breach of the peace. The remedy in such a case is indictment. *Greer*, *Ex parte*, 4 W. R. 50.

The defendant was tried and convicted on an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter of and concerning her, and of and concerning her character for virtue and modesty. The defendant having seen an advertisement for a situation inserted by the young woman in a newspaper, wrote, and sent to her at the address given, the letter in question, which contained a proposal in plain terms that she should surrender her chastity to him for a sum of money:—Held, that the conviction could be sustained, because, under all the circumstances, the defamatory letter might reasonably tend to provoke a breach of the peace. *Reg.* v. *Adams*, 58 L. J., M. C. 1; 22 Q. B. D. 66; 59 L. T. 903; 16 Cox, C. C. 544; 53 J. P. 377.

—— **Publication by Member of Speech in Parliament.**]—A member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contains libellous matter, although the publication is a correct report of such speech, and is made in consequence of an incorrect publication having appeared in that and other newspapers. *Rex* v. *Creevey*, 1 M. & S. 273; 14 R. R. 427.

An information lies against a member of parliament for publishing a speech in a newspaper, containing slanderous matter. *Rex* v. *Abingdon* (*Lord*), 1 Esp. 226; Peake, 236; 5 R. R. 733.

—— **Of Foreigners of Importance.**]—Publications tending to degrade and defame persons in considerable stations of power and dignity in foreign countries may be treated as libels on the ground that they may tend to involve this country in disputes or warfare. *Rex* v. *Gordon* (*Lord*), 1 Russ. C. & M. 629.

—— **Of Dead Person.**]—An indictment for publishing libellous matter reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, cannot be supported. *Rex* v. *Topham*, 4 Term Rep. 126; 2 R. R. 343.

—— **Holding up to Ridicule.**]—An information held good, though the matter published merely held the prosecutor up to ridicule. *Rex* v. *Benfield*, 2 Burr. 985.

An information lies for singing songs in the streets, reflecting on the prosecutor's children, with intent to destroy his domestic happiness. *Ib.*

So, for printing an account of a ludicrous marriage between an actress and a married man. *Rex* v. *Kinnersley*, 1 W. Bl. 294.

—— **Article on Clergy generally.**]—The court will grant a criminal information against the publisher of a newspaper for a libel reflecting on the clergy of a particular diocese, and generally upon the clergy of the church of England, though no individual prosecutor was named, and though the libellous matter was not negatived on affidavit: it is sufficient to state the publication of the libel by the defendant. *Rex* v. *Williams*, 1 D. & R. 197; 5 B. & Ald. 595; 22 R. R. 352.

—— **From Innocent Motives.**]—It is no answer to a charge of criminal publication of a libel to show that the defendant had been told that it was libellous, and not fit to be disseminated generally in the neighbourhood, and that he printed it with a view to disprove the imputation of having intended to promulgate a libel. *Rex* v. *Shipley*, 4 Dougl. 73.

—— **Report of French Police as to Prosecutor.**]—Quære, whether a foreigner, admitted to be a gambler, and expelled from a foreign country on such a charge, and just arrived in this country, where he is passing himself off under a name and title to which he is not entitled, can prosecute for libel for the mere publication of the effect of such a report honestly, without malice, and for the public benefit. *Reg.* v. *Labouchere*, 14 Cox, C. C. 419.

Publication in Newspaper—Liability.]—A proprietor of a newspaper was answerable criminally as well as civilly for misconduct in the conduct of the paper, as for the publication of a libel, though he had nothing to do with the publication, and the whole was conducted by his servants. *Rex* v. *Walter*, 3 Esp. 21; 6 R. R. 808.

The proprietor of a newspaper who is not shown to take, or who shows that he did not take, any part in the publication, was criminally answer-

able for a libel that appears in it. *Rex* v. *Alexander*, M. & M. 437.

In an indictment for libel, the proprietor of a newspaper is primâ facie answerable for what appears in it; but the presumption arising from proprietorship may be rebutted, and an exemption established. *Rex* v. *Fisher*, M. & M. 433.

At the trial of a criminal information against two defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants:—Held, that there must be a new trial, for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendant's authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part. *Reg.* v. *Holbrook*, 47 L. J., Q. B. 35; 3 Q. B. D. 60; 37 L. T. 530; 26 W. R. 144; 13 Cox, C. C. 650.

On the trial of a criminal information for libel against the proprietors of a newspaper, it appeared that the defendants had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that such editor had inserted the libel in question without the knowledge or express authority of the defendants. The jury found the defendants guilty. On a motion for a new trial on the ground that the verdict was against evidence, and of misdirection:—Held, that the general authority given to the editor was not per se evidence that the defendants had authorised or consented to the publication of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7; and that as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be a new trial. *Reg.* v. *Holbrook*, 48 L. J., Q. B. 113; 4 Q. B. D. 42; 39 L. T. 536; 27 W. R. 313; 14 Cox, C. C. 185.

On the trial of two persons on an indictment for publishing blasphemous libels in a certain print or paper, on which their names were given, one as printer, the other as publisher—proof of their identity with the persons whose names were so given, or any evidence merely connecting them with the paper, held not sufficient to fix them with liability. The 7th section of the Libel Act (6 & 7 Vict. c. 76), being held to apply, and to require evidence that they published the libels, and not merely the papers in which they were contained. Evidence that one of them published the paper held sufficient primâ facie case as against him, without any express evidence that he knew of the libels. But express evidence as to the other, that he was editor, held not sufficient, without evidence that he directed the insertion of the libel. *Reg.* v. *Ramsay*, 15 Cox, C. C. 231; Cab. & E. 126.

The defendant first tried, having originally published the paper, and having, after he had ceased to be ostensibly connected with it, continued to allow it—knowing its character—to be published on his premises, by a person in his employ, but who was allowed (in consideration of a reduction of salary) to carry on there a business of his own as bookseller and newspaper publisher—the defendant being occasionally on the premises, and knowing that the paper was sold there, though not proved to have had knowledge of any particular numbers or articles in it, and not being shown to have had otherwise any connection with it during the publication of the libels:—Held, that though there was a primâ facie case against him, yet there was also a case in answer to it, under the provisions in the Libel Act, on which the jury might well acquit him. *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 217.

—— **Directors and Signatories to Articles.**]—A limited company having printed a newspaper containing a libel for another limited company, who published the same:—Held, that in the absence of evidence of knowledge of the contents of the newspaper the directors of the former company and the signatories to the articles of association of the latter company were wrongly convicted. *Reg.* v. *Judd*, 37 W. R. 143. S. P., *Reg.* v. *Allison*, 59 L. T. 933; 16 Cox, C. C. 559; 53 J. P. 215.

Wife against Husband.]—A wife could not before and cannot since the Married Woman's Property Act take criminal proceedings against her husband for defamatory libel. *Reg.* v. *London Corporation*, 55 L. J., M. C. 118; 16 Q. B. D. 772; 54 L. T. 761; 34 W. R. 544; 16 Cox, C. C. 81; 50 J. P. 614.

2. Procedure.

a. Preliminary Steps.

Newspaper Libel—Fiat of Public Prosecutor—Discretion.]—When the Director of Public Prosecutions in England has refused to grant his fiat under 44 & 45 Vict. c. 60, s. 3, for a criminal prosecution against the proprietor, &c., of a newspaper for a libel published therein, the high court of justice has no power to interfere, the matter being left by the enactment entirely to his discretion. *Hubert*, *Ex parte*, 15 Cox, C. C. 166; 47 J. P. 724.

Fiat not necessary for Criminal Informations.]—An application upon the part of the proprietor of a newspaper, defendant in a criminal information for libel, to quash the information on the ground that the fiat of the Director of Public Prosecutions had not been obtained, the point not being here taken on the argument of the rule, was dismissed, and held that in such a case the fiat is not required. *Reg.* v. *Yates*, 52 L. J., Q. B. 778; 11 Q. B. D. 750; 15 Cox, C. C. 272. S. P., *Yates* v. *Reg.*, 54 L. J., Q. B. 258; 14 Q. B. D. 648; 52 L. T. 305; 33 W. R. 482; 19 J. P. 426—C. A.

Sufficiency of Fiat — Omission of Names of Defendants.]—The fiat of the Director of Public Prosecutions had been granted, under s. 3 of the Newspaper Libel Act, 1881, against the "editor" of the newspaper in question without naming him:—Held, by the majority of the court, that such fiat was bad, and that the conviction should be quashed. *Reg.* v. *Judd*, 37 W. R. 143.

In order to support an indictment for unlawfully writing and publishing a libel in a newspaper, it is necessary that the fiat of the Public Prosecutor, required by s. 3 of the News-

paper Libel and Registration Act, 1881, should mention by name every person against whom the prosecution is authorised to be instituted sufficiently to identify him. Where, therefore, the editor and manager of a newspaper, certain of the signatories to the articles of association of an association in which the proprietorship of the paper was vested, and the directors of a limited company incorporated under the Companies Acts, which company merely printed the paper, had been convicted of unlawfully writing and publishing a libel in such paper; and the fiat of the Public Prosecutor omitted to mention the names of any of the defendants, merely authorising the prosecution of the "publisher, editor, or printer" of the paper:—Held, that the fiat ought to have mentioned the name of every person against whom the prosecution was intended to have been allowed; and that it is the duty of the Public Prosecutor to ascertain the persons whom it is intended to prosecute before granting his fiat. *Reg.* v. *Allison*, 59 L. T. 933; 16 Cox, C. C. 559; 53 J. P. 215.

—— **Liability of Printer.**]—S. 3 of the Newspaper Libel and Registration Act, 1881, does not authorise the granting of a fiat by the Public Prosecutor in respect of the printer of a paper. *Ib.*

Order of Judge allowing Prosecution—Appeal.]—An order of a judge at chambers on an application under s. 8 of the Law of Libel Amendment Act, 1888, to allow a criminal prosecution to be commenced against the proprietor of a newspaper, is a decision in a criminal cause or matter, and no appeal lies therefrom to the divisional court. *Pulbrook, Ex parte*, 61 L. J., M. C. 91; [1892] 1 Q. B. 86; 66 L. T. 159; 40 W. R. 175; 17 Cox, C. C. 464; 56 J. P. 293.

Justices—Warrant—Bail.]—A justice of the peace out of sessions, before information filed or indictment found, has jurisdiction in the first instance to issue his warrant to apprehend a party charged on oath with publishing a libel, and to require him to find bail; and, in default of sureties, to commit him to prison to abide his trial. *Butt* v. *Conant*, 4 Moore, 195; 1 Br. & B. 548; Gow. 84; 21 R. R. 716.

b. Indictment.

Innuendoes.]—An indictment that the defendant printed and published a libel of and concerning B. O., the prosecutor, according to the tenor and effect following, viz., "B. O. of C. (meaning the said B. O.), game and rabbit destroyer, and his wife (meaning Charlotte, the wife of the said B. O.), the seller of the same in country and town," is bad for want of innuendoes or averments showing that the words alleged to be defamatory charged an indictable offence, or had reference to the calling of the prosecutor. *Reg.* v. *Yates*, 12 Cox, C. C. 233.

In an indictment for a libel against W. S., an omission to allege that the defendant published it of and concerning W. S., is not supplied by its being alleged, in the introductory part, "that the defendant intended to vilify W. S., he having been mayor of, &c., and to cause it to be believed that as such mayor he had practised corruption, and been guilty of abuse in respect to granting a licence to one J. L., to retail beer," and concluding "to the injury and disgrace of W. S."; although the innuendoes pointed the different parts of the libel to W. S. and to J. L. and to granting the licence. *Rex* v. *Marsden*, 4 M. & S. 164; 16 R. R. 429.

How far an innuendo or an averment is or is not necessary to support a charge of a libel, consisting in opprobrious words or signs, see *Home* v. *Rex*, 4 Bro. P. C. 368.

That Libel was concerning Prosecutor.]—An indictment for libel stating that the defendant, intending to defame B., published a libel containing false and scandalous matters of and concerning B., that is to say: No lady would that to her society such a crack-brained scamp as B. (meaning the said B.), shows sufficiently without more formal introduction, that the libel was of and concerning B. *Gregory* v. *Reg.*, 15 Q. B. 957; 15 Jur. 74; 5 Cox, C. C. 247—Ex. Ch.

Calculated to provoke a Breach of the Peace.]—In an indictment for a libel reflecting on the prosecutor in his profession as a solicitor, and which has been addressed and sent to him only, it must be alleged to have been written and sent with intent to provoke the prosecutor to a breach of the peace, and not with an intent to injure him in his profession. *Reg.* v. *Wegener*, 2 Stark. 245; 19 R. R. 712.

Where a defendant writes and composes a libel in one county, with an intent to publish, and afterwards publishes it in another, he may be indicted in either. *Rex* v. *Burdett*, 4 B. & Ald. 95.

Sedition.]—An indictment for sedition alleged that "the defendant, amongst other matter, uttered the words and matter following," and then set out several sentences as though they had been uttered continuously. The evidence showed that they had not been so uttered, but that the sentences had been selected from different parts of the speech, omitted, varied, or controlled by intervening between them:—Held, that there was no variance, and that if any portion of the speech omitted, varied, or controlled the sense of those parts that were set out, the onus was upon the defendant to show it. *Reg.* v. *Crossthwaite*, 3 Cox, C. C. 123.

Where an indictment contained counts for sedition, attending a seditious meeting and riot, the court refused to quash the indictment, or compel the counsel for the prosecution to elect upon which counts they would proceed, although the judgment on the last counts for sedition must be different from that upon the others. *Fussell*, 3 Cox, C. C. 291.

The words set out in an indictment for sedition were these, "if the Queen neglects to recognise the people, then the people must neglect to recognise the Queen." It was proved that the word "forget" was used in both instances, and not "neglect":—Held, to be a fatal variance as far as that sentence was concerned, and that the passage must be struck out. *Ib.*

No Averment that Libel "maliciously" published.]—In an indictment charging the offence of publishing a defamatory libel, which is dealt with by s. 4 of the Libel Act, 1843, it is unnecessary to aver that the libel was "maliciously" published. The section does not create or describe the offence in question, but merely enjoins the character of the punishment which is to follow upon conviction. *Reg.* v. *Munslow*, 64

L. J., M. C. 138; [1895] 1 Q. B. 758; 15 R. 192; 72 L. T. 301; 43 W. R. 495; 18 Cox, C. C. 112—C. C. R.

Immaterial Averment — Appointment of Directors.]—Upon the trial of an indictment for publishing a libel upon the directors of a company, it is not necessary to prove that the prosecutors were the de jure directors of the company, and properly appointed as such, it being admitted that they were the acting directors, and the libel being published upon them as such acting directors: the averment that they were directors is an immaterial averment. *Reg.* v. *Boaler*, 67 L. T. 354; 17 Cox, C. C. 569; 56 J. P. 792.

Motion to Quash.]—An indictment for libel was framed under ss. 4 and 5 of 6 & 7 Vict. c. 96, whereas the defendant was only committed under s. 5 of that act. The judge refused to quash the indictment, but quashed so much of it as purported to charge the defendant under s. 4. *Reg.* v. *Felbermann*, 51 J. P. 168.

c. Information.

What Necessary to State in Charge.]—An information for a libel need not charge the offence to have been committed vi et armis, or allege that the libellous matter is false. *Rex* v. *Burks*, 7 Term Rep. 4; 4 R. R. 365.

A criminal information for libel in one count disclosed the publication of the following words: "We have no doubt sufficient information will be obtained for a strong case to lay before the home secretary, to enable that functionary to cause it to be intimated to the suspected party that his presence here can be dispensed with, as far as it may be attended with danger to himself":—Held, that the words did not support an innuendo which alleged the meaning to be that "the prosecutor was suspected of having committed some crime which would bring his life into danger from the laws of England;" and that the count was bad. *Reg.* v. *Benfield*, 15 Q. B. 975, n.; 5 Cox, C. C. 252.

An introductory averment in an information that outrages had been committed in and in the neighbourhood of N., is divisible: so that it need not be proved that they were committed in both places; and fourteen or fifteen miles from N. may be considered in the neighbourhood. *Rex* v. *Sutton*, 4 M. & S. 532.

When granted.]—A criminal information does not lie against a party who has accused by letter a post-mistress of opening letters and tampering with them; there must be some special circumstances to entitle the applicant to that extraordinary remedy. The proper remedy is by indictment. *Littleton* (*Post-mistress*), *Ex parte*, 52 J. P. 264.

To repeat a malignant society scandal, although with no intent to injure any person in particular, is sufficient to support a criminal information. *Reg.* v. *The World*, 13 Cox, C. C. 305.

Criminal information will not be granted, where the attacks complained of have been caused by intemperate language in publications by party complaining though such publications arose from inquiries made in pursuance of his duty. Therefore, where a clergyman had, in the course of inquiries as to certain charities in his parish, published pamphlets reflecting in no measured language upon the character of his opponents, the court discharged a rule which he had obtained for a criminal information, in respect of certain attacks made upon him by way of recrimination; but intimated that if the attacks were renewed, a criminal information would be granted. *Reg.* v. *Hall*, 1 Cox, C. C. 344.

—— **Resolutions of a Vestry.**]—Two resolutions of a vestry were signed by the chairman, the first imputing sacrilege and felony to the rector in appropriating church property; the second, that it was not intended to impute sacrilege and felony:—Held, no ground for a rule for criminal information against the chairman. *Doveton, Ex parte*, 7 Cox, C. C. 16.

—— **Libel upon Deceased Foreigners—Applicant resident Abroad.**]—Upon application for leave to file a criminal information in respect of a libel upon a deceased foreign nobleman made by his representative who was not resident in this country:—Held, that the court, in the exercise of its discretion, must reject the application, for the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons. *Reg.* v. *Labouchere*, 53 L. J., Q. B. 362; 12 Q. B. D. 320; 50 L. T. 177; 32 W. R. 861; 15 Cox, C. C. 415; 48 J. P. 165.

Held, also, that the fact that the applicant does not reside in this country is a strong reason for rejecting such an application. Semble, that an application for a criminal information for a libel upon a deceased person, made by his representative, will not be granted. *Ib.*

Sedition—Certainty.]—Where an information alleged that the defendant, intending to insinuate and cause it to be believed that divers liege subjects of the king had been inhumanly cut down, maimed, and killed, by certain troops of the king, unlawfully and maliciously published a libel of and concerning the government of this realm, and of and concerning the troops, and the only innuendo in the libel was applied to the word "dragoons," meaning the troops of the king, and meaning thereby that divers liege subjects of the king had been inhumanly cut down and killed by the said troops of the king:—Held, on arrest of judgment, that this was sufficiently certain, without defining what particular troops were meant. *Rex* v. *Burdett*, 4 B. & Ald. 314; 23 R. R. 284.

Upon an information against a defendant for a libel, for that he, wickedly, maliciously, and seditiously, did write and publish, a certain false, scandalous, and seditious libel "of and concerning his majesty's government and the employment of his troops, according to the tenor and effect following" (setting forth the libel verbatim): the words "of and concerning" are a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written of and concerning the king's government and the employment of his troops. *Rex* v. *Home*, Cowp. 672.

One Libel against Two Persons.]—Information held good for publishing a libel against two

persons, where the publishing was one single offence. *Rex* v. *Benfield*, 2 Burr. 983.

Where several persons were charged in the same information, it was held good, the offence arising out of one joint act. *Ib.*

Affidavits Necessary for Application.]—It is an invariable rule not to grant an information for a libel, without an exculpatory affidavit, unless where the party libelled is abroad at a great distance, or the subject-matter of the charge is general imputation, or an accusation of criminal language held in parliament. *Rex* v. *Haswell*, 1 Dougl. 387.

It is a general rule that the court will not grant an information for a private libel, charging a particular offence, unless the prosecutor will deny the charge upon oath. *Rex* v. *Miles*, 1 Dougl. 284.

An affidavit to found a motion for a criminal information for a libel must distinctly negative the charge, unless the party libelled is abroad, or the charge is general. *Rex* v. *Wright*, 2 Chit. 162.

Although a party applying for a criminal information must show himself to be an innocent party, yet the court made a rule absolute for such information against the publisher of a libel, which affected several parties, notwithstanding that the character of the person principally attacked, and on whose affidavit the rule nisi had been obtained, was impeached on showing cause. *Reg.* v. *Gregory*, 1 P. & D. 110; 8 A. & E. 907.

A rule nisi for a criminal information for a libel was discharged, on an affidavit made by a person who swore to the truth of the libel. This person was indicted for perjury; the bill was found, and he absconded. It appeared from the affidavits of several persons that the former affidavit was entirely untrue. The court, under these circumstances, granted another rule nisi for a criminal information, and made it absolute. *Rex* v. *Ere*, 1 N. & P. 229; 5 A. & E. 780; 2 H. & W. 450.

When Right to Information Forfeited.]—On a motion for a criminal information for a libel impugning the conduct of a jury, it appeared that the foreman had published a letter commenting in violent terms on the alleged libel, and that, before publication, he communicated a copy to the other jurymen. The letter was signed by the foreman "for self and fellows;" and it appeared to the court that the affidavits afforded ground for believing that some of the jurymen knew of the foreman's intention to publish the letter early enough to have given him notice of their dissent from his doing so, which they had not done:—Held, that neither were these jurymen, nor was the foreman, entitled to the criminal information. *Reg.* v. *Lawson*, 1 Q. B. 486; 1 G. & D. 15; 10 L. J., Q. B. 175; 5 Jur. 387.

If a party who has been libelled puts himself into communication with the libeller, for the purpose of retorting upon or obtaining redress from him, the court will not grant a criminal information. *Beauclerk, Ex parte*, 7 Jur. 373.

The court will not sanction applications for criminal informations in cases of alleged libel, if resorted to for the purpose of extorting an apology. *Reg.* v. *The World*, 13 Cox, C. C. 305.

d. Justification—Truth of Libel.

Admissibility of Evidence.]—Before 6 & 7 Vict. c. 96, s. 6, where a libel imputed to others the commission of an indictable offence, evidence of the truth of it was inadmissible. *Rex* v. *Burdett*, 4 B. & Ald. 95; 22 R. R. 539.

Where an information for a libel stated that certain transactions took place, and that the libel was published of and concerning them, and then set out the libel as referring to them, and the prosecutor, at the trial, gave general proof of such transactions, to support the introductory part of his pleading, the defendant was not thereby authorised to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel. *Rex* v. *Grant*, 3 N. & M. 106; 5 B. & Ad. 1081.

Where a defendant in an information for a libel has pleaded the truth of the charges under 6 & 7 Vict. c. 96, s. 6, evidence is not admissible in support of the plea that the same charges had been previously published within the knowledge of the prosecutor, and that he had not taken legal proceedings against the publisher. *Reg.* v. *Newman*, Dears. C. C. 85; 1 El. & Bl. 268; 3 Car. & K. 252; 22 L. J., Q. B. 156; 17 Jur. 617.

Where a plea of justification contains several charges, and the prosecutor replies generally, denying the whole, the prosecutor is entitled to a verdict unless the defendant proves to the satisfaction of the jury the truth of all the material allegations; and if the defendant fails to prove the truth of all the matters charged, it is no ground for a new trial that, with respect to some of those upon which the jury gave a verdict against the defendant, their finding was against the weight of the evidence. *Ib.*

But the court, in pronouncing sentence, is to consider the evidence on the one side and on the other, and to form their own conclusion whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove the same. *Ib.*

Affidavits showing the grounds upon which the defendant proceeded in pleading certain allegations in a plea of justification, in support of which no evidence was given at the trial, are receivable in mitigation of punishment, but not as proving the truth of the allegations. *Ib.*

If, in an information for a libel, the plea states that the prosecutor, who had been a Dominican, had earned the reputation of a scandalous friar, a witness for the defendant may be asked as to the prosecutor's moral character. *Ib.*

On the trial of an indictment for libel; the libel being that the prosecutor was one of a gang of card-sharpers, innuendo, that he cheated at cards, and the plea stating specific instances of card-sharping, or cheating at cards, and also that he confederated with others for the purpose of playing and cheating at cards, and did so play and cheat at various places:—Held, that it was sufficient to prove the plea in substance, and that it was so proved, the jury finding that in two instances the plaintiff did cheat at cards, and that he did confederate with the other persons for the purpose of so playing as alleged; and that it was not necessary to prove other instances alleged. *Reg.* v. *Labouchere*, 14 Cox, C. C. 419.

Words spoken of Magistrates.]—The court refused to set aside a plea of justification

pleaded to counts of a criminal information for words spoken of and to a person acting magisterially, leaving the party to demur if he thought fit. *Reg.* v. *Rea*, 9 Cox, C. C. 401.

Seditious Libel.]—The special plea of justification given by 6 & 7 Vict. c. 96, s. 6. cannot be pleaded to an indictment for a seditious libel. *Reg.* v. *Duffy*, 2 Cox, C. C. 45.

Not a Subject of Inquiry before Magistrate.]—Upon an information for maliciously publishing a defamatory libel under the 5th section of 6 & 7 Vict. c. 96, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, and a defence based upon the truth of the libel under s. 6 of the act can only be inquired into at the trial upon a special plea framed in accordance with the terms of that section. The province of a magistrate upon a preliminary inquiry into a charge of an indictable offence discussed. *Reg.* v. *Carden*, 49 L. J., M. C. 1; 5 Q. B. D. 1; 41 L. T. 504; 28 W. R. 133; 14 Cox, C. C. 359; 44 J. P. 119.

Upon an application for a criminal information against the proprietor of a newspaper for publishing a seditious libel, evidence was tendered under the 44 & 45 Vict. c. 60, s. 4, of the truth of the libel, and that it was for the public benefit that it should be published. The magistrate refused to receive such evidence. Upon an application to the Queen's Bench Division for a conditional order for a mandamus to compel the magistrate to receive the evidence so tendered:—Held, that no such matters could be given in evidence at the trial, and that therefore the magistrate was right in refusing to admit the evidence at the preliminary inquiry. *O'Brien, Ex parte*, 12 L. R., Ir. 29; 15 Cox, C. C. 180.

On the hearing of a charge before justices of maliciously publishing a defamatory libel, the justices proceeded under 6 & 7 Vict. c. 96, s. 6, to hear evidence of the falsehood, and also of the truth of the libel:—Held, that they had not jurisdiction to hear this evidence, and that the defendant then swearing as to the falsehood of the libel, and on which he was afterwards indicted for perjury, was immaterial to the issue before the justices, and that the evidence ought not to have been given. *Reg.* v. *Townsend*, 4 F. & F. 1089; 10 Cox, C. C. 356. *See Reg.* v. *Flowers*, 44 J. P. 377.

e. Trial.

Before 32 Geo. 3, c. 60.]—Before this statute, on the trial of an indictment for a libel, the only questions for the jury were the fact of publishing, and the truth of the innuendos. *Rex* v. *St. Asaph* (*Dean*), 3 Term Rep. 428, n. S. P., *Rex* v. *Withers*, 3 Term Rep. 428; *Rex* v. *Shirley*, 4 Dougl. 73. See contra, *Rex* v. *Holt*, 5 Term Rep. 443; *Rex* v. *Woodfall*, 5 Burr. 2667.

Effect of 32 Geo. 3, c. 60.]—The statute has not taken from the court the power of pronouncing a paper to be a libel when it is such on the face of it. *Reeves* v. *Templar*, 2 Jur. 187.

In an information for a libel, the jury is to consider whether the defendant published it with a criminal intent or not. *Rex* v. *Reeves*, Peake's Add. Cas. 83; 4 R. R. 891.

Where, on the trial of an indictment for libel, the judge told the jury, in summing up, that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that, if its contents were likely to excite sedition, the defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion that it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong:—Held, that this was a correct mode of leaving the question to the jury, under the above statute. *Rex* v. *Burdett*, 4 B. & Ald. 95; 22 R. R. 539.

Conviction and Judgment.]—A defendant brought up for judgment after being convicted of publishing a libel imputing indictable offences to the prosecutor, cannot be allowed in mitigation of punishment to put in affidavits to prove the truth of the libel, but he may put in his own affidavit, stating that, at the time of publishing the libel, he believed its contents to be true, and setting out reasonable grounds for such belief. *Rex* v. *Halpin*, 4 M. & Ry. 8: 9 B. & C. 65; 7 L. J. (o.s.) M. C. 75. See also *Reg.* v. *Newman*, supra.

To an indictment for a libel, the defendant pleaded guilty, and entered into his own recognizances to appear and receive judgment when called upon to do so; and not to be called upon at all, if he discontinued to publish libels on the prosecutor. The court refused to pass judgment, unless the prosecutor produced an affidavit stating that the defendant had since the trial published libels respecting him. *Reg.* v. *Richardson*, 8 D. P. C. 511; 4 Jur. 104.

Where there was a general verdict against the defendant on a count in an information, a rule for arresting judgment was discharged, though part only of the matter was perhaps libellous; but it might be a cause for lessening the punishment. *Rex* v. *Binfield*, 2 Burr. 985.

After judgment on the defendant for a libel, the court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the court. *Rex* v. *Cator*, 2 East, 361.

A defendant may be acquitted of printing, and found guilty of publishing a libel. *Rex* v. *Williams*, 2 Camp. 646; 11 R. R. 781.

On an indictment for publishing a defamatory libel "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel. *Boaler* v. *Reg.*, 37 L. J., M. C. 85; 21 Q. B. D. 284; 59 L. T. 554; 37 W. R. 29; 16 Cox, C. C. 488; 52 J. P. 791.

A criminal information for libel contained several counts. The defendant being convicted, the judgment was, that for the offence in the first count he should be imprisoned for two months then next ensuing; for the offence in the second count two months, to be computed from and after the expiration of the imprisonment on the first count; and so on. The third count was bad:—Held, that the judgment on that count must be reversed; and that the imprisonment on the fourth count would commence from the expiration of the imprisonment on the second. *Gregory* v. *Reg.*, 15 Q. B. 974; 19 L. J., Q. B. 366; 5 Cox, C. C. 252.

Semble, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge

and consent by the editor, cannot recover against the editor the damages sustained by such conviction. *Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677; 3 L. J., Ex. 317.

Staying Hearing of Argument of Rule.]—A rule nisi for a criminal information having been obtained against W. for an alleged libel on E., W. filed affidavits in answer adducing fresh charges against E. Before cause was shown, C., who was defendant in an action at E.'s suit for libel, pleaded a justification, containing substantially the same matter as the fresh charges adduced by W., and also matter bringing into question the truth of the original charge. The court refused, on motion by E., to stay the hearing of argument on the rule against W. till the action of E. against C. should have been tried. *Reg.* v. *Willmer*, 15 Q. B. 50.

f. Evidence.

Exculpatory, when Allowed.]—The provision in Lord Campbell's Libel Act (6 & 7 Vict. c. 96), s. 7, as to allowing exculpatory evidence in answer to a primâ facie case of liability for publication, being quite general in its terms, was held to apply to a prosecution for the publication of a blasphemous libel. *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 217.

Publication in Newspapers—Previous to 32 & 33 Vict. c. 24, s. 1.]—The copy of a newspaper delivered at the stamp-office is conclusive evidence of publication to sustain an indictment against the proprietor for a libel contained in such copy. *Rex* v. *Amphlit*, 6 D. & R. 125; 4 B. & C. 35; 28 R. R. 206.

The production of the affidavit filed at the stamp-office, and of a newspaper corresponding with that therein mentioned, is sufficient proof of publication in an indictment against the proprietor for a libel. *Mayne* v. *Fletcher*, 4 M. & Ry. 311; 9 B. & C. 382; 7 L. J. (o.s.) K. B. 69.

Indictment for causing to be published in a newspaper a libel on K. The libel told a story of K., and added comments on the story, giving it a ridiculous character. The editor of the paper deposed that the defendant asked him to show K. up, and communicated the story, which the editor told to a reporter for the paper, and that this story was substantially what was published; that before the publication appeared the defendant remarked on the delay, and that after the article came out he expressed his approbation of it:—Held, that a jury might find that the defendant authorised the publication of the particular libel, notwithstanding the comments added, and although it appeared that the editor had heard the story before the defendant told it to him. *Reg.* v. *Cooper*, 8 Q. B. 533; 15 L. J., Q. B. 206.

The rule established at nisi prius in prosecutions for libel in a newspaper, viz. that after production of the stamp-office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read, as published by the parties therein named, without other proof on this point, applies equally on motions for criminal informations. *Rex* v. *Donnison*, 4 B. & Ad. 698.

A rule for a criminal information against the publisher of a newspaper libel must be drawn up on reading the newspaper, and the newspaper must be filed; otherwise the court will discharge such a rule, although properly granted on production of a certified copy from the stamp-office, under 6 & 7 Will. 4, c. 76, s. 8 (repealed), of a declaration by the defendant that he is publisher of a newspaper therein described, and on production of a newspaper corresponding to it, which contains the libel. *Reg.* v. *Woolmer*, 4 P. & D. 137; 12 A. & E. 422; 9 L. J., M. C. 92.

A motion for a criminal information for libels published in a newspaper was made upon affidavits containing the stamp-office certificate verifying the declaration of publication and printing under 6 & 7 Will. 4, c. 76, s. 8. The affidavits also set forth the libel, stating it to be contained in a newspaper which (as appeared by the affidavits) corresponded with the description in the stamp-office declaration. At the time of the motion, a newspaper, likewise so corresponding, was shown to the court. The rule nisi was granted; but it was not drawn up on reading the newspaper; nor was the newspaper annexed to the affidavit or filed:—Held, not sufficient at common law or under the statute; and that the newspaper could not be shown to the court on moving to make the rule absolute. *Ib.*

If an affidavit on which a rule nisi is granted for a criminal information for a libel does not swear to a publication, the rule cannot be supported, though the affidavits of the other side admit the publication. *Reg.* v. *Baldwin*, 3 N. & P. 342; 1 W. W. & H. 158; 8 A. & E. 168; 2 Jur. 856.

A statement in an affidavit that the defendant did print and insert a libel in a certain newspaper, a copy of which is annexed, is not sufficient proof of publication to make the defendant liable to a rule nisi. *Ib.*

The court will discharge a rule for a criminal information for a libel against the publisher of a newspaper, where, in the affidavits upon which the rule had been obtained, and the affidavits sworn at the stamp-office, the defendant was described as of different places. *Rex* v. *Francis*, 4 N. & M. 251; 2 A. & E. 49; 4 L. J., M. C. 23.

Where a newspaper is filed, together with affidavits, in support of a motion for a criminal information for a libel, the court will take notice of it, if it corresponds in the necessary particulars with the stamp-office affidavit, though it is not annexed to and expressly identified by any affidavit. *Ib.*

—— 32 & 33 Vict. c. 24, s. 1—Effect of.]—When a libel appeared in a newspaper, and a rule nisi for criminal information against S., for printing and publishing the libel, was obtained upon affidavits in which one deponent said only that copies of the newspaper had been purchased by him at the publishing office of the paper; and another, that by a foot-note at the end of the newspapers S. was stated to be the printer and publisher of them; and that the deponent believed that S. was the printer and publisher of the papers:—Held, that there was not sufficient legal evidence to show that he was the person who published the libel. *Reg.* v. *Stanger*, 40 L. J., Q. B. 96; L. R. 6 Q. B. 352; 24 L. T. 266; 19 W. R. 640.

Proof of Averments.]—An information for a libel stated that the prosecutor received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have

caused the placard to be published. In the placard it was asked if the prosecutor had not received a certain warning. The prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard if he had not received the letters :—Held, that the letters might be read as explanatory of the placard, without proof of the handwriting of them. *Rex* v. *Slaney*, 5 Car. & P. 213.

Admissibility of Report of French Police.]—A report of the French police to the Criminal Investigation Department in London, stigmatising the prosecutor and his associates as swindlers and card-sharpers, a copy of which was read by the defendant to a friend of the prosecutor before the libel was published, as the materials on which it was founded :—Held admissible, not as proof of the facts stated, and, therefore, semble, not in proof of the justification, but under the general issue as leading up to the publication of the libel, and as evidence of bona fides and honest belief in its truth, and so in aid of a defence under the general issue, and semble, that there was such defence. *Reg.* v. *Labouchere*, 14 Cox, C. C. 419.

Proof of Publication generally.]—Delivery to the party libelled is a sufficient publication to support an indictment. *Phillips* v. *Jansen*, 2 Esp. 624.

On the trial of an indictment for libel the only evidence of publication was the sending it in a letter addressed to the prosecutor himself, and the receipt of it by him :—Held, that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace. *Reg.* v. *Brooke*, 7 Cox, C. C. 251.

It is not competent to a defendant, charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons, who have never been prosecuted for it. *Rex* v. *Holt*, 5 Term Rep. 436.

Where the libel is contained in a newspaper, the defendant has a right to have read in evidence extracts from a different part of the same paper connected with the subject of the libellous passage. *Rex* v. *Lambert*, 2 Camp. 398 ; 11 R. R. 248.

Evidence of buying a libel in the shop of a known bookseller is sufficient primâ facie evidence to convict him of publication. *Rex* v. *Almon*, 5 Burr. 2686.

If a libel is alleged in an indictment to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication with either of those intentions. *Rex* v. *Evans*, 3 Stark. 35 ; 23 R. R. 754.

The delivery of a sealed letter, inclosing a libel, at a post office, is a publication of the libel there. *Rex* v. *Burdett*, 4 B. & Ald. 95 ; 22 R. R. 539.

Documents that may be given in Evidence.]—Where a number of placards is printed, and a party adopts and uses some of them, all the rest are duplicate originals, and one of them may be read against such party, without notice to produce. *Rex* v. *Watson*, 2 Stark. 190.

Other compositions of the defendant on the same subject may be produced in confirmation. *Rex* v. *Pearce*, Peake, 75.

In an information for a libel, imputing improper conduct to A., as town clerk of H., it was alleged that he was town clerk, and that it was his duty to issue his precept for summoning the grand jury. The precept was signed both by the mayor and town clerk :—Held, that this satisfied the allegation that he issued his precept. *Rex* v. *Hatfield*, 4 Car. & P. 244.

Where a libel refers to certain other papers, and is not intelligible without those papers being read, the prosecutor on the trial of an information may have those papers read to explain the libel. *Rex* v. *Slaney*, 5 Car. & P. 213.

Proof of Words spoken.]—Proof of words spoken to a person will not support an indictment charging that the defendant spoke them of such a person. *Rex* v. *Berry*, 4 Term Rep. 217.

As to Character.]—If, in an information for a libel, the plea states that the prosecutor, who had been a Dominican, had earned the reputation of a scandalous friar, a witness for the defendant may be asked as to the prosecutor's moral character. *Reg.* v. *Newman*, 3 Car. & K. 252 ; Dears. C. C. 85 ; 1 El. & Bl. 268 ; 22 L. J., Q. B. 156 ; 17 Jur. 617.

Allegation that Letter was published to Injure —Letter sent to Prosecutor only.]—An allegation, that a letter was written with intent to injure the prosecutor in his profession, cannot be supported if the letter was sent only to the prosecutor. *Rex* v. *Wegener*, 2 Stark. 245 ; 19 R. R. 712.

Vestry Book—Evidence of Notice in.]—An indictment for a libel on the treasurer of the parish of Greenwich, contained unnecessarily an averment that he was duly appointed treasurer ; an entry in the vestry-book, stating that the prosecutor was elected at a vestry duly held in pursuance of notice, was evidence that notice had been given, without which, by a particular statute, the election would have been void. *Rex* v. *Martin*, 2 Camp. 100 ; 11 R. R. 674.

g. Costs.

Of Indictment or Information.]—When a person indicted for libel is acquitted, and becomes entitled to his costs, under 6 & 7 Vict. c. 96, s. 8, he may recover them from the prosecutor by action. *Richardson* v. *Willis*, 42 L. J., Ex. 68 ; L. R. 8 Ex. 69 ; 28 L. T. 71 ; 12 Cox, C. C. 351.

Where in an information for a libel judgment is given for the defendant, he is entitled to recover from the prosecutor the costs sustained by reason of such information, under 6 & 7 Vict. c. 96, s. 8, although the only plea is not guilty, and the judge at the trial certified, under 4 & 5 Will. & M. c. 18, s. 2, that there was reasonable cause for exhibiting the indictment or information. *Reg.* v. *Latimer*, 15 Q. B. 1077 ; 20 L. J., Q. B. 129 ; 15 Jur. 314.

Where upon the trial of an information for libel under 6 & 7 Vict. c. 96, judgment is given for the defendant, he is entitled to recover from the prosecutor costs incurred previously to the filing of the information. *Reg.* v. *Steel*, 1 Q. B. D. 482 ; 24 W. R. 638 ; 13 Cox, C. C. 159.

Taxation—No Appeal from Order.]—The Court of Queen's Bench has no jurisdiction to review

the taxation of costs of an indictment for libel tried on the crown side at the assizes. *Reg.* v. *Newhouse*, 22 L. J., Q. B. 127.

The effect of s. 47 of the Judicature Act, 1873, explained by s. 19 of the act of 1875, is to prohibit appeals not only from the court of criminal appeal, but also in all criminal matters and proceedings in the high court, and the taxation of costs allowed to a successful defendant in a criminal information for libel is a proceeding in a criminal cause within the meaning of the sections, and, therefore, no appeal lies from an order of the Queen's Bench Division as to such taxation. *Reg.* v. *Steel*, 46 L. J., M. C. 1; 2 Q. B. D. 37; 35 L. T. 534; 25 W. R. 34; 13 Cox, C. C. 354—C. A.

D. RIOTS AND UNLAWFUL ASSEMBLIES.

1. *The Offence*, 1675.
2. *Duties of the Magistracy*, 1678.
3. *Aiding and Assisting the Constabulary*, 1680.
4. *Indictment*, 1680.
5. *Evidence*, 1681.
6. *Injuries to Property.*—*See* MALICIOUS INJURIES TO PROPERTY, supra, cols. 1427, et seq.

1. THE OFFENCE.

Riot—What is.]—A riot is a disturbance of the peace by three persons at the least, who, with an intent to help one another against any person who opposes them in the execution of some enterprise, whether lawful or unlawful, actually execute that enterprise in such a violent and turbulent manner as to alarm firm and courageous persons in the neighbourhood. *Reg.* v. *Graham*, 16 Cox, C. C. 420.

There is no right of public meeting in any public thoroughfare or public place of resort analogous to a public thoroughfare. A public meeting held at a place of public resort after the publication of a notice by a competent authority prohibiting the meeting is not rendered unlawful merely by reason of such publication. Whether persons are guilty of participating in a riotous assembly depends on whether they with others following them approached a place of public resort with the intention of holding a meeting there come what might, or merely approached it with the intention of requesting to be allowed to hold a meeting there, and of departing if their request was refused. If persons head a mob with the intention of getting to the place of public resort if they can, and by so doing endanger the public peace and alarm reasonable persons, the jury may find them guilty of rioting. *Ib.*

The principals and seconds in a prize fight cannot be indicted either for a riot or an affray where the fight takes place at a distance from any public highway, and being at an end when the constables arrive, the parties yield on being required to do so. *Reg.* v. *Hunt*, 1 Cox, C. C. 177.

—— **Compensation for.**]—*See* HUNDRED.

—— **Reading Proclamation, Effect of.**]—If, in reading the proclamation from the Riot Act, the magistrate omits to read the words "God save the King," at the end of it, persons remaining together for an hour after such reading of the proclamation could not be capitally convicted under 1 Geo. 1, stat. 2, c. 5, s. 1. *Rex* v. *Child*, 4 Car. & P. 442.

If the proclamation is read several times, the hour is to be computed from the first reading. *Rex* v. *Woolcock*, 5 Car. & P. 516.

A riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a transportable offence if they do not disperse within an hour; but if that proclamation is not read, the common law offence remains, which is a misdemeanour. *Rex* v. *Fursey*, 6 Car. & P. 81.

Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. *Ib.*

Unlawful Assemblies—What are.]—Any assembly of persons attended with circumstances calculated to excite alarm, is an unlawful assembly. *Reg.* v. *Neale*, 9 Car. & P. 431.

If parties assemble together for a purpose, which, if executed, would make them riotous; but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly. *Rex* v. *Birt*, 5 Car. & P. 154.

An unlawful assembly is an assembly of persons with the intention of carrying out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly ground to apprehend a breach of the peace in consequence of it. *Reg.* v. *Graham*, 16 Cox, C. C. 420.

A meeting called to adopt preparatory measures for holding a national convention, is an illegal meeting. *Reg.* v. *Fursey*, 6 Car. & P. 81.

Although a man may arm himself and his friends for the defence of the possession of his house against such as threaten to make an unlawful entry, he cannot lawfully do the same in defence of his close. *Rex* v. *Bangor* (*Bishop*), 1 Russ. C. & M. 570.

If there is such an assembly that there would have been a riot if the parties had carried their purpose into effect, this is within 1 Geo. 1, stat. 2, c. 1, s. 1; and whether there was a cessation or not, is a question for the jury. *Rex* v. *Woolcock*, 5 Car. & P. 516.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and, in viewing this question, the jury should take into their consideration the hour at which the parties meet, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. *Reg.* v. *Vincent*, 9 Car. & P. 91.

An assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful. *Rex* v. *Hunt*, 1 Russ. C. & M. 570. See *Rex* v. *Hunt*, 3 B. & Ald. 566; 22 R. R. 485.

If persons assemble to obstruct the officers of the law, all so assembling are guilty of an un-

lawful assembly, whether a riot takes place or not. *Reg.* v. *McNaughten*, 14 Cox, C. C. 576.

The march of nine men carrying with them musical instruments, upon a Sunday through the public streets of a town (in which town processions other than those of her Majesty's naval, military, and volunteer forces are prohibited from taking place on Sunday, if accompanied by instrumental music) is no evidence of an unlawful assembly (although the so marching is calculated to and does excite others to the commission of a breach of the peace) if such men did not know that their acts were calculated to lead to a breach of the peace. *Reg.* v. *Clarkson*, 66 L. T. 297 ; 17 Cox, C. C. 483 ; 56 J. P. 375.

No Intention of carrying out Purpose Unlawfully.]—The appellants assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it :—Held, that they could not be rightly convicted of an unlawful assembly. *Beatty* v. *Gillbanks*, 51 L. J., M. C. 117 : 9 Q. B. D. 308 ; 47 L. T. 194 ; 31 W. R. 275 ; 15 Cox, C. C. 138 ; 46 J. P. 789.

A. B. and S., members of the Salvation Army, led a crowd by a circuitous route through certain of the streets of the town of H., to the meeting-house of the army, S. during the march blowing the cornet loudly and in a discordant manner, and A. and B. marching with him singing hymns, beating time, and shouting loudly "Alleluia," and other expressions. Several of the inhabitants of the streets through which they passed were disturbed by the loud and discordant noises, but there were not more than fifteen members of the Salvation Army present, much of the noise being caused by a mob of 400 or 500 persons following them and hostile to their proceedings. Information having been preferred against A. B. and S. under a local act, by which a penalty was imposed on any person who should "make, excite, or join in any brawl, or otherwise disturb the public peace," it was found as a fact that they had disturbed the public peace and they were convicted :—Held, on a case stated, that there was no evidence of the offence charged upon which the defendants could be rightly convicted under the act of disturbing the public peace, and that the conviction must be quashed. *Beaty* v. *Glenister*, 51 L. T. 304.

Whether Presence is Essential.]—On an indictment for a riot, persons are not liable merely on account of their having been present and among the mob, even although they had the power of preventing it, unless they by word or act helped, incited, or encouraged it. *Reg.* v. *Atkinson*, 11 Cox, C. C. 330.

All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution, and also all those who are present when a felony is committed, and abet the doing of it, are principals in the felony. *Reg.* v. *Howell*, 9 Car. & P. 437.

If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected in point of circumstances with a subsequent riot, that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of the riot, although they are not present when it occurs. *Reg.* v. *Sharpe*, 3 Cox, C. C. 288.

And all persons who join an assembly of this kind, disregarding its probable effect, and the alarm and consternation that are likely to ensue, and all who give countenance and support to it, are criminal parties. *Redford* v. *Birley*, 3 Stark 76.

Indictment—Statute—Misdemeanour at Common Law.]—Two men were convicted upon an indictment which averred that they "unlawfully and riotously did assemble, and unlawfully, riotously, and with force, demolish and pull down the house of W., and pull down and scatter a rick of hay of W." :—Held, that upon the hypothesis that they had demolished the house, not feloniously, but in the assertion of a supposed right, the indictment could be sustained as for a misdemeanour at common law; that is, for a riot with a statement of the demolition of the house as matter of aggravation. *Reg.* v. *Casey*. Ir. R. 8 C. L. 408.

—— **Affray.**]—An indictment for an affray which does not aver that the affray took place in a public street or highway is bad, and, upon error brought, will be quashed after verdict. *Reg.* v. *O'Neill*, Ir. R. 6 C. L. 1.

Illegal Training and Drilling.]—A count in an indictment, under 60 Geo. 3 & 1 Geo. 4, c. 1, the 1st section of which prohibits assemblies of persons for the purpose of unlawfully practising military exercise, and then goes on to impose a penalty on all persons who shall train or drill any other persons, or who shall be trained or drilled, is not bad for duplicity, though it charges the offence which is prohibited, and the offence for which a penalty is imposed. *Reg.* v. *Hunt*, 3 Cox, C. C. 215. See *Hegarty* v. *Reg.*, 3 Cox, C. C. 306.

2. Duties of the Magistracy.

Generally.]—A magistrate called upon to suppress a riot is required by law to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty. *Rex* v. *Pinney*, 3 B. & Ad. 946 : 5 Car. & P. 254.

Nor will it be a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law. *Ib.*

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is prima facie evidence of a criminal neglect of duty in him ; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man ; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect. *Rex* v. *Kennett*, 5 Car. & P. 282, n.

Not bound to Head Constables.]—In suppressing a riot, he is not bound to head the special constables, or to arrange and marshal them; this is the duty of the chief constables *R x* v. *Pinney*, 3 B. & Ad. 946; 5 Car. & P. 254.

Calling out Special Constables.]—Magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to 1 & 2 Will. 4, c. 41, unless it is proved that information was laid before them, on oath, of a riot having occurred or being expected. *Ib.*

Calling out Posse Comitatus.]—A magistrate is not chargeable with neglect of duty for not having called out the posse comitatus in case of a riot, if he has given the king's subjects reasonable and timely warning to come to his assistance. *Ib.*

Calling out Soldiers.]—A magistrate who calls upon soldiers to attack a mob and suppress a riot is not bound to go with them; it is enough if he gives them his authority. *Ib.*

A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. *Rex* v. *Kennett*, 5 Car. & P. 282, n.

Mode of Dispersing Assembly.]—It is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. *Reg.* v. *Neale*, 9 Car. & P. 431.

The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly. *Ib.*

At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act. *Rex* v. *Kennett*, 5 Car. & P. 282, n.

A magistrate is not justified in forcibly dispersing a meeting upon the ground merely that he believes, and has reasonable and probable grounds for believing, that the meeting was held with an unlawful intent, unless the meeting be in itself unlawful; and a plea justifying an assault, upon the ground that it was committed by a magistrate in the dispersion of a meeting, must either allege as a fact that the meeting was unlawful, or must state facts from which its unlawfulness can be inferred. *O'Kelly* v. *Harvey*, 14 L. R. Ir. 105; 15 Cox, C. C. 435.

But if the meeting is engaged in no unlawful act, but yet the magistrate believes on reasonable grounds that there would be a breach of the peace if the meeting continued, he is justified in taking steps to stop and disperse the meeting. *Ib.*

In case of a riot all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and if they cannot otherwise succeed in doing so, they may use force. *Reg.* v. *Fursey*, 6 Car. & P. 81.

3. Aiding and Assisting the Constabulary.

Refusing to Assist.]—To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove—first, that the constable saw a breach of the peace committed; secondly, that there was a reasonable necessity for calling on the defendant for his assistance; and thirdly, that when duly called upon to assist the constable, the defendant, without any physical impossibility, or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of rioters the single aid of the defendant would not have been of any use. *Reg.* v. *Brown*, Car. & M. 314. See *Reg.* v. *Sherlock*, 35 L. J., M. C. 92; L. R. 1 C. C. 20; 12 Jur. (N.S.) 126; 13 L. T. 623; 14 W. R. 288; 10 Cox, C. C. 170.

Extent of Protection.]—A person charged to aid a constable, and who does so, is protected eundo, morando et redeundo. *Reg.* v. *Phelps*, Car. & M. 180.

4. Indictment.

Form of.]—If an indictment on 1 Geo. 1, stat. 2, c. 5, s. 1, for remaining assembled one hour after proclamation, in setting out the proclamation omits the words "of the reign of," which were contained in the proclamation read by the magistrate—this is a variance (but amendable under 14 & 15 Vict. c. 100, s. 24). *Rex* v. *Woolcock*, 5 Car. & P. 516.

Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude in terrorem populi. Several of the defendants had been convicted, and, at an ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except the words "po. se." and "guilty," written on the indictment, over the names of the convicted defendants:—Held, that this was no proof of an assault as against the present defendants, and that they could not be convicted of the riot only, as the indictment did not conclude in terrorem populi. *Rex* v. *Hughes*, 4 Car. & P. 373. *But see* 14 & 15 Vict. c. 100, s. 24.

If persons are charged with a riot, and cutting down fences, and the indictment does not conclude in terrorem populi, they cannot on that indictment be convicted of a riot, but may be convicted of an unlawful assembly. *Rex* v. *Cox*, 4 Car. & P. 138.

An indictment on 1 Geo. 1, stat. 2. c. 5, s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been in terrorem populi. *Rex* v. *James*, 5 Car. & P. 153.

Two Counts—Finding of Grand Jury.]—An indictment containing two counts, one for a riot, and the other for an assault, found by the grand jury, a true bill as to the assault and ignoramus as to the riot, is good. *Rex* v. *Fieldhouse*, Cowp. 325.

Abatement by Death.]—If four are indicted for a riot, and two die before trial, and two are found guilty, judgment will not be arrested. *Rex* v. *Scott*, 2 Burr. 1262; 1 W. Bl. 350.

5. EVIDENCE.

Presence.]—On an indictment for a riot, the parties charged must be proved to have been present before the fact of the riot can be given in evidence. *Rex* v. *Nicholson*, 1 Lewin, C. C. 300.

But it has since been held that the prosecutor is entitled to prove the acts of any of the rioters before he connects the others with the riot. *Reg.* v. *Cooper*, 1 Russ. C. & M. 585.

VII. *AGAINST PUBLIC MORALS AND POLICE.*

A. BIGAMY.

1. *Validity of Marriages*, 1681.
2. *Marriages Abroad*, 1684.
3. *Absence or Death of Parties*, 1685.
4. *Where Triable*, 1688.
5. *Indictment*, 1688.
6. *Evidence and Witnesses*, 1689.

1. VALIDITY OF MARRIAGES.

By Banns—Non-residence.]—If the first marriage was by banns, it is no objection that the parties did not reside in the parish where the banns were published, and the marriage celebrated. *Rex* v. *Hind*, R. & R. 253; 15 R. R. 740.

—— **Solemnization after Three Months.**]—The due publication of banns was completed on 1st July, the marriage taking place on 1st October following. Marriages by banns are required to be solemnized within three months after the complete publication of banns:—Held, that the marriage was valid, it not being found that the parties knowingly and wilfully intermarried without due publication of banns. *Reg.* v. *Clarke*, 16 L. T. 429; 15 W. R. 796; 10 Cox, C. C. 474.

Fictitious Name.]—Semble, that assuming a fictitious name upon the second marriage will not prevent the offence from being complete. *Rex* v. *Allison*, R. & R. 109.

And if the prisoner has written down the names for the publication of the banns, he is precluded from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. *Rex* v. *Edwards*, R. & R. 283.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:—Held, that this was no answer to the charge, although, if the first marriage had taken place under such circumstances, that would have been thereby rendered void. *Rex* v. *Penson*, 5 Car. & P. 412.

A man, having a wife living, was married to another woman in the presence of the registrar, describing himself not as Edward Rea, his true name, but as Benjamin Rea. There was no evidence to show that the second wife knew that his christian name was misdescribed:—Held, that he was guilty of bigamy. *Reg.* v. *Rea*, 41 L. J., M. C. 92; L. R. 1 C. C. 365; 26 L. T. 484; 20 W. R. 632; 12 Cox, C. C. 190.

In the publication of banns in 1817, a woman named Mary Hodgkinson was called White, a surname entered by mistake in the register of her baptism, but which she had never gone by or been entitled to. The false name was given to the officiating clergyman without any intention to mislead; nor did any individual having an interest in the marriage appear to have been deceived:—Held, that the marriage was void. It might have been otherwise, if (without any fraudulent intent) there had been only a partial variation of the name, or the addition or suppression of one christian name, or the name had been one which the party had ever used or been known by. *Rex* v. *Tibshelf*, 1 B. & Ad. 190; 8 L. J. (o.s.) M. C. 120.

To render a marriage invalid within 4 Geo. 4, c. 76, s. 22, which enacts, "that if any person shall knowingly and wilfully intermarry without the publication of banns, the marriage of such persons shall be null and void," it must be contracted by both parties with a knowledge that no due publication has taken place; and, therefore, where the intended husband procured the banns to be published in a christian and surname which the woman had never borne, but she did not know that fact until after the solemnization of the marriage, the marriage was valid. *Rex* v. *Wroxton*, 1 N. & M. 712; 4 B. & Ad. 640; 2 L. J., M. C. 64.

Valid Marriage rendered Void.]—A marriage, which would have been void by 26 Geo. 2, c. 33, and had once been rendered valid by 3 Geo. 4, c. 75, s. 2, cannot be subsequently rendered invalid by the marriage of either of the parties, during the life of the other, with a third person. *Rex* v. *St. John Delpike*, 2 B. & Ad. 226; 9 L. J. (o.s.) M. C. 79.

Marriage within Prohibited Degrees.]—When a person, already bound by an existing marriage, goes through with another person a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case. *Reg.* v. *Allen*, 41 L. J., M. C. 97; L. R. 1 C. C. 367; 26 L. T. 664; 20 W. R. 756; 12 Cox, C. C. 193.

A man having a wife living, went through the ceremony of marriage with another woman, who was within the prohibited degrees of affinity; so that the second marriage, even if not bigamous, would have been void under 5 & 6 Will. 4, c. 54, s. 2:—Held, that he was guilty of bigamy. *Ib.*

The 5 & 6 Will. 4, c. 54, renders absolutely void all marriages solemnized after the time of its passing between persons within the prohibited degrees, and which were previously voidable only by sentence of the Ecclesiastical Court pronounced during the life of both parties. *Reg.* v. *Chadwick*, 11 Q. B. 173; 17 L. J., M. C. 33; 12 Jur. 174; 2 Cox, C. C. 381.

Therefore, a marriage with deceased wife's sister contracted after the passing of that act is absolutely void. *Ib.*

A., a married woman, in the lifetime of her husband, married B., who was a widower, B. having been the husband of A.'s deceased sister:—Held, that this was bigamy in A., and that the circumstance that the marriage of A. and B. would have been wholly void under 5 & 6 Will. 4, c. 54, s. 2, even if A. had been unmarried, made

no difference. *Reg.* v. *Brawn*, 1 Car. & K. 144; 1 Cox, C. C. 33.

Minors—Consent of Parents.]—The marriage of a minor by licence without the consent required by 4 Geo. 4, c. 75, s. 16, is valid. *Rex* v. *Birmingham*, 2 M. & Ry. 230; 8 B. & C. 29; 6 L. J. (O.S.) M. C. 67. So under 6 & 7 Will. 4, c. 85, s. 25.

It is not necessary on a prosecution for bigamy for a subsequent marriage of a minor, to prove the consent of the parent to the first marriage. *Reg.* v. *Clark*, 2 Cox, C. C. 183.

By 9 Geo. 2, c. 11 (Irish), the marriage of a minor without consent is void; but if no suit be commenced within one year after the marriage, it shall be good. Therefore, where it appeared in a case of bigamy that the first marriage was celebrated in Ireland by licence, when the prisoner was a minor, without his father's consent:—Held, that it was no defence, as more than a year had elapsed from the time of the marriage. *Rex* v. *Jacobs*, 1 M. C. C. 140.

Of Marriages Abroad.]—*See* infra, next col.

In Chapels and Licensed Places—Proof.]—Upon an indictment for bigamy it was proved that the first marriage was solemnized, not in the parish church of the parish but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in this building:—Held, that the building must be presumed to have been licensed, and therefore the first marriage was valid, and the man was properly convicted of bigamy. *Reg.* v. *Cresswell*, 45 L. J., M. C. 77; 1 Q. B. D. 446; 33 L. T. 760; 24 W. R. 281; 13 Cox, C. C. 126.

Where the first marriage was solemnized in a chapel, it was necessary to show either that the chapel was one in which banns had been usually published before 26 Geo. 3, c. 33, or that the chapel was built and consecrated after that act, and before 6 Geo. 4, c. 92; and proof that marriages had been solemnized there for the last twenty years was not sufficient for this purpose. *Reg.* v. *Bowen*, 2 Car. & K. 227.

The prisoner was convicted on an indictment for bigamy. It was alleged that the first marriage took place in a dissenting chapel duly licensed for marriages, and a witness was called who proved that he was present at the marriage, that it took place in the dissenting chapel in the presence of the registrar, that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties afterwards lived together as husband and wife for some years:—Held, first, that the parol testimony of the witness sufficiently proved the fact of marriage. *Reg.* v. *Mainwaring*, Dears. & B. 132; 26 L. J., M. C. 10; 2 Jur. (N.S.) 1236; 5 W. R. 119; 7 Cox, C. C. 192.

Held, secondly, that there was primâ facie evidence that the chapel was duly registered, and was a place in which marriages might legally be solemnized. *Ib.*

A witness produced a certificate, under the hand of the superintendent registrar, of the fact that the chapel had been duly registered. It did not purport to be a copy or an extract, but the witness proved that he had examined it with the register book at the office of the superintendent registrar, and that it was correct:—Held, that the document was admissible as an examined copy or extract from the superintendent registrar's book, under 14 & 15 Vict. c. 99, s. 14, and was therefore good evidence of the due registration of the chapel. *Ib.*

Proof of a marriage before the registrar, although in a chapel not regularly licensed and registered, is sufficient. *Reg.* v. *Tilson*, 1 F. & F. 54.

Proof of a marriage in a chapel in the presence of the registrar of the district and two witnesses, is sufficient without proving that the chapel was registered. *Reg.* v. *Cradock*, 3 F. & F. 837.

Upon an indictment for bigamy, it appeared that the prisoner was married to his first wife in a place which had been registered pursuant to 6 & 7 Will. 4, c. 85. It was proved that notice of the marriage had been given to the superintendent registrar; but that notice was not produced by him. The registers of the marriage and of the building were, however, produced and read. It was objected that there ought to have been further evidence that due notice was given to the superintendent registrar; that he issued his certificate thereon, and that the marriage was celebrated in the building specified in that notice and certificate:—Held, that the evidence given proved a sufficient primâ facie case, and that the conviction was right. *Reg.* v. *Hawes*, 1 Den. C. C. 270; 2 Cox, C. C. 432.

Compare cases sub-tit. HUSBAND AND WIFE.

2. MARRIAGES ABROAD.

Law of Place where Marriage Solemnized.]—Upon a trial for bigamy, the evidence on the part of the crown to establish the alleged bigamous marriage proved that the ceremony took place in an American state; that both the parties were British subjects, professing the Roman Catholic religion; that the ceremony was performed by Roman Catholic priests in a Roman Catholic church, after publication of banns, and that the parties afterwards cohabited. No evidence was given, either by the crown or the prisoner, of the law of the state where the marriage was solemnized:—Held, that the evidence was sufficient to sustain a conviction. *Reg.* v. *Griffin*, 4 L. R. Ir. 497; 14 Cox, C. C. 308.

In an indictment for bigamy everything relating to the first marriage must be proved strictly; and evidence of a marriage in Scotland by a Roman Catholic priest, who has previously performed similar ceremonies there, will not suffice without due proof of what the law as to such marriage is, although the prisoner may have admitted that he was, in fact, married in Scotland. *Reg.* v. *Savage*, 13 Cox, C. C. 178.

Marriage in Ireland—Validity.]—The marriage of a Protestant in Ireland to a Roman Catholic, by a Roman Catholic priest, is void, by 19 Geo. 2, c. 33 (Irish). *Rex* v. *Sunderland*, 2 Lewin, C. C. 109.

A. was married to S., according to the rites of the Established Church, in 1858, and in April, 1865, during the lifetime of S., he was married to B. in a Roman Catholic church in Dublin. B. knew A. six months previously to the marriage, and believed him to be a Roman Catholic. He told B. that he was a Roman Catholic. He had been born and reared a Protestant, and had attended the Protestant service on Christmas

morning, 1864. The jury found that A. was a professing Protestant within twelve months previously to the marriage, and that he had held himself out as a Roman Catholic to the clergyman who married him, and had told the woman he was a Roman Catholic, and the jury convicted him of bigamy:—Held, that he was wrongly convicted. *Reg.* v. *Fanning*, 17 Ir. C. L. R. 289; 14 W. R. 701; 10 Cox, C. C. 411.

In Ireland, the marriage of two Roman Catholics by a Roman Catholic priest is good; and if a person at the time of such marriage declares himself to be a Roman Catholic, and the woman is a Roman Catholic, this is a good marriage as against him; and if he is afterwards tried for bigamy on this marriage (he having been before married to another wife, who was still alive), he will not be allowed to set up his supposed Protestantism as a defence to the charge. *Reg.* v. *Orgill*, 9 Car. & P. 80.

—— **Proof of.**]—To prove a marriage of two Roman Catholics in Ireland, evidence was given that the Rev. W. O'S. (who officiated) acted as a Roman Catholic priest, and that the marriage (as was usual) took place at his house, and he asked the parties if they were Roman Catholics, and that they said they were so; that part of the ceremony was in English and part in Latin; and that having asked the man if he would take the woman as his wife, and the woman if she would take the man as her husband, and each having answered in the affirmative, he pronounced them married:—Held, sufficient. *Ib.*

Marriage in Scotland—Validity.]—For what is necessary to constitute a valid marriage in Scotland, see *Rex* v. *Graham*, 2 Lewin, C. C. 97; *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 54.

A., a subject of her Majesty, and resident in England, was married in Scotland, according to the law of Scotland. He subsequently married again in the same country, and according to the same law, his first wife being alive. Both wives, at the time of their marriage, were resident in England:—Held, that he had committed an offence against 9 Geo. 4, c. 31, s. 22. *Reg.* v. *Topping*, Dears. C. C. 647; 25 L. J., M. C. 72; 2 Jur. (N.S.) 428; 4 W. R. 482; 7 Cox, C. C. 103.

—— **Proof of.**]—On a trial for bigamy a woman was called as a witness, who stated that she was present at a ceremony performed in a private house in Scotland, by a minister of some religious denomination; that she herself was married in the same way, and that parties always married in Scotland in private houses:—Held, that she was not a competent witness to prove the law of Scotland as to marriage, and that her evidence did not prove the fact of a marriage. *Reg.* v. *Povey*, Dears. C. C. 32; 22 L. J., M. C. 19; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83.

Compare cases sub-tit. HUSBAND AND WIFE—INTERNATIONAL LAW.

3. ABSENCE OR DEATH OF PARTIES.

Question for Jury—Knowledge of Prisoner.]—It is a question for the jury whether the prisoner knew that his first wife was alive. *Reg.* v. *Dane*, 1 F. & F. 323.

In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive:—Held, that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C. *Reg.* v. *Willshire*, 50 L. J., M. C. 57; 6 Q. B. D. 366; 44 L. T. 222; 29 W. R. 473; 14 Cox, C. C. 541; 45 J. P. 375.

On a trial for bigamy, it was proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age:—Held, that there was no presumption of law, either in favour of or against the continuance of A.'s life up to 1847; but that it was a question for the jury, as a matter of fact, whether or not A. was alive at the date of the second marriage in 1847. *Reg.* v. *Lumley*, 38 L. J., M. C. 86; L. R. 1 C. C. 196; 20 L. T. 454; 17 W. R. 685; 11 Cox, C. C. 274.

In 1863 the prisoner married his first wife, lived with her about a week, and then left her. It was not proved that he had since seen her. In 1867 he married another woman, his first wife being then alive. On the trial of an indictment for bigamy, the judge told the jury that they must be satisfied that the prisoner knew that his first wife was alive at the time of the second marriage:—Held, that the direction was right. *Reg.* v. *Jones*, 21 L. T. 396; 11 Cox, C. C. 358.

Where no evidence was given on either side as to his knowledge that his wife was alive, but it was proved that they had separated by agreement in 1843, and in 1857 he produced her at a trial in which he was interested:—Held, that it was for the jury to say whether there was an absence of knowledge on his part that his wife was alive in 1855, the date of the second marriage. *Reg.* v. *Cross*, 1 F. & F. 510.

Presumption of Continuation of Cohabitation.]—The prisoner was convicted of bigamy. It was proved that he had married W. in 1865, and lived with her after the marriage, but for how long was not known; that in 1882, W. being still alive, he had gone through the form of marriage with another woman, but there was no evidence as to the prisoner and W. having ever separated, or as to when, if separated, they last saw each other:—Held, that the prisoner was rightly convicted. *Reg.* v. *Jones*, 52 L. J., M. C. 96; 11 Q. B. D. 108; 48 L. T. 768; 31 W. R. 800; 15 Cox, C. C. 284; 47 J. P. 535.

Whether Prisoner must use Means of Acquiring Knowledge.]—A woman was convicted on an indictment for bigamy. It appeared that her first husband had been continually absent from her for seven years next preceding the second marriage; on which occasion she represented herself as a single woman, and was married by her maiden name. The jury being asked to consider whether she knew her husband to be alive at the time of the second marriage; and if not, whether she had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but the jury were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them:—Held, that

upon that finding the conviction could not be sustained. *Reg.* v. *Briggs*, Dears. & B. 98; 26 L. J., M. C. 7; 2 Jur. (N.S.) 1195; 5 W. R. 53; 7 Cox, C. C. 175.

Onus of Proof.]—Whether evidence is necessary on the part of the prosecution to show that the prisoner married, knowing his second wife to be alive, depends upon the particular facts of each case. *Reg.* v. *Ellis*, 1 F. & F. 309.

The law always presumes against the commission of crime; and, therefore, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him:—Held, that the sessions did right in presuming primâ facie that the first husband was dead at the time of the second marriage; and that it was incumbent on the party objecting to the second marriage to give some proof that the first husband was then alive. *Rex* v. *Twyning*, 2 B. & Ald. 386; 20 R. R. 480.

It is not necessary for the prosecution to prove affirmatively that at the time of the second marriage the prisoner knew that his first wife was alive. *Reg.* v. *Jones*, 21 L. T. 396; 11 Cox, C. C. 358.

The burden of proof that a person charged with bigamy has not been continually absent from his wife for seven years, and that she was not known to him to be living within that time, is on the prosecution and not on the prisoner, for how can he prove a negative that he did not know. *Reg.* v. *Heaton*, 3 F. & F. 819.

When it is proved that the prisoner and his first wife had lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to show that during that time he was aware of her existence; and, in absence of such proof, he is entitled to be acquitted. *Reg.* v. *Curgenwen*, 35 L. J., M. C. 58; L. R. 1 C. C. 1; 11 Jur. (N.S.) 984; 13 L. T. 383; 14 W. R. 55; 10 Cox, C. C. 152.

Absence for period of Seven Years.]—Semble, that the construction of 9 Geo. 4, c. 31, s. 22, in relation to the offence of bigamy, is this: not that the party, charged to be deprived of the benefit of its provision as a defence, must have known at the time when he contracted the second marriage that the first wife had been alive during the seven years preceding; but that to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive. *Reg.* v. *Cullen*, 9 Car. & P. 687.

When the prisoner's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and that she had never heard of the first wife, who it appeared had been living seventeen miles from where the prisoner resided:—Held, that on this evidence the prisoner ought to be acquitted on the proviso contained in 9 Geo. 4, c. 31, s. 22. *Reg.* v. *Jones*, Car. & M. 614.

Bonâ fide Belief of Death—Marriage within Seven Years.]—A bonâ fide belief by a wife that her husband is dead is no defence to an indictment for bigamy, unless he has been continuously absent for seven years. *Reg.* v. *Gibbons*, 12 Cox, C. C. 237. Contra, *Reg.* v. *Turner*, 9 Cox, C. C. 145.

In an indictment for bigamy, evidence is not admissible to show that the prisoner honestly believed that his first wife was dead, when he married a second time, within seven years of his last having heard of or seen his first wife. *Reg.* v. *Bennett*, 14 Cox, C. C. 45.

Semble, that, however reasonable such a belief may be, it can only be used in mitigation of punishment after conviction. *Ib.*

It is a good defence to an indictment for bigamy that the prisoner at the time of the second marriage honestly and bonâ fide believed that his first wife was dead, and had reasonable grounds for so believing. *Reg.* v. *Horton*, 11 Cox, C. C. 670.

To an indictment for bigamy it is a good defence that at the time of the bigamous marriage the woman had a reasonable and bonâ fide belief that her husband was dead, although seven years had not elapsed since she had last heard of him. *Reg.* v. *Moore*, 13 Cox, C. C. 544.

The prisoner was convicted under 24 & 25 Vict. c. 100, s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead:—Held, by majority of the court, that a bonâ fide belief on reasonable grounds of the death of the husband at time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong. *Reg.* v. *Tolson*, 38 L. J., M. C. 97; 23 Q. B. D. 168; 60 L. T. 899; 37 W. R. 716; 16 Cox, C. C. 629; 54 J. P. 4—C. C. R.

4. Where Triable.

Prisoner in Custody for Another Offence.]—Where a prisoner, having been apprehended for larceny, was detained in the same county for bigamy, the detainer was such an apprehension as would warrant the indicting him in that county, under 1 Jac. 1, c. 11. *Rex* v. *Gordon*, R. & R. 48.

Indictment—Averment in.]—An indictment for bigamy, committed in one county, found by a jury of another where the prisoner was apprehended, must state that fact. *Rex* v. *Fraser*, 1 M. C. C. 407.

But if an indictment for bigamy is tried at the same assizes at which the bill is found, it will sufficiently appear by the caption, that the party is in custody in the county, so as to give the court jurisdiction; and there need not, in that case, be any averment in the indictment, as to the custody. *Reg.* v. *Whiley*, 1 Car. & K. 150; 2 M. C. C. 186. See *Reg.* v. *Smythies*, 1 Den. C. C. 498; 2 Car. & K. 878; T. & M. 190; 19 L. J., M. C. 31; 13 Jur. 1034; 4 Cox, C. C. 94.

An indictment was allowed to be amended as to the allegation of apprehension in the county. *Reg.* v. *Smith*, 1 F. & F. 36.

5. Indictment.

Description of Wife.]—The second wife being described as E. C., widow; she was, in fact, not a widow, nor had she ever been represented or reputed to be so: was formerly a fatal variance, but now amendable under 14 & 15 Vict. c. 100, s. 1. *Rex* v. *Deeley*, 4 Car. & P. 579; 1 M. C. C. 303.

If there was a discrepancy between the christian name of the prisoner's first wife as laid in the indictment, and as stated in the copy of the certificate which was produced to prove the first

marriage, the prisoner must be acquitted, unless that discrepancy could be explained, or, in the absence of such proof, unless it could be shown that the first wife was known by both names. *Reg.* v. *Gooding*, Car. & M. 297.

Marriage still Subsisting.]—In an indictment, it is sufficient to aver the life of the first wife, without going on to allege that the marriage is still subsisting. *Murray* v. *Reg.*, 7 Q. B. 700; 14 L. J., Q. B. 357; 9 Jur. 596; 1 Cox. C. C. 202.

An indictment averred the first marriage, that the prisoner afterwards feloniously did marry one J., but did not aver that the second marriage took place whilst the prisoner was so married as aforesaid:—Held, bad. Quære, whether the defect was cured by a subsequent averment that the prisoner was then and there married, her former husband being now alive. *Reg.* v. *Apley*, 1 Cox, C. C. 71.

Averment as to Custody of Prisoner.]—*See* supra.

6. Evidence and Witnesses.

Certificate of Marriage.]—Where a first marriage was solemnized under 6 & 7 Will. 4, c. 85, the certificate authorised by that act and 6 & 7 Will. 4, c. 86, s. 38, coupled with the identity of the parties, is sufficient primâ facie evidence of such marriage. *Reg.* v. *Hawes*, 1 Den. C. C. 270; 2 Cox, C. C. 432.

It is not necessary to put the original register in evidence to prove a marriage. *Sayer* v. *Glossop*, 2 Car. & K. 694; 2 Ex. 409; 12 Jur. 465.

Where the proof of marriage is supported by a copy of the certificate and evidence that the prisoner cohabited with a person of the same name immediately afterwards:—Held, that in the absence of witnesses of the marriage, or some further evidence, the proof was insufficient. *Reg.* v. *Simpson*, 15 Cox, C. C. 323.

—— **Photograph to prove Identity.**]—A photographic likeness of the first husband allowed to be shown to the witnesses present at the first marriage, in order to prove his identity with the person mentioned in the marriage certificate. *Reg.* v. *Tolson*, 4 F. & F. 103.

Declarations of Prisoner.]—A prisoner's declarations, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country. *Reg.* v. *Newton*, 2 M. & Rob. 503. *S. C.*, nom. *Reg.* v. *Simmonsto*, 1 Car. & K. 164; 1 Cox, C. C. 30.

Semble, that an acknowledgment alone by the prisoner of the fact of the first marriage would not be sufficient evidence of that fact. *Rex* v. *Trueman*, 1 East, P. C. 470.

But proof of such an acknowledgment, together with evidence of cohabitation, and that the prisoner backed his assertion by producing to the witness a copy of a proceeding in a Scotch court, for having improperly contracted the marriage (but which was a nullity), will be sufficient evidence of the first marriage. *Ib.*

Evidence of a marriage in Scotland by a Roman Catholic priest, who has previously performed similar ceremonies there, will not suffice without due proof of what the law as to such marriage is, although the prisoner may have admitted that he was, in fact, married in Scotland. *Reg.* v. *Savage*, 13 Cox, C. C. 178.

There ought to be some proof of the first marriage, beyond the mere statement of the prisoner while in custody; therefore, where a man went to a police station, and stated that he had committed bigamy, and when and where the first marriage took place, and while in custody signed a statement to the same effect, the judge thought this, though some evidence of the first marriage, was not sufficient, and so told the jury. *Reg.* v. *Flaherty*, 2 Car. & K. 782.

Proof of Scotch Marriage.]—On a trial for bigamy, a woman was called as a witness, who stated that she was present at a ceremony performed in a private house in Scotland by a minister of some religious denomination; that she herself was married in the same way, and that parties always married in Scotland in private houses:—Held, that she was not a competent witness to prove the law of Scotland as to marriage, and that her evidence did not prove the fact of a marriage. *Reg.* v. *Povey*, Dears. C. C. 32; 22 L. J., M. C. 19; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83.

What Sufficient to show First Marriage Invalid.]—Evidence of the cohabitation of the first husband with another woman, his reputed wife, before the time of his marriage with the accused, and of such reputed wife being alive after the marriage, is sufficient evidence of a prior marriage to warrant an acquittal. *Reg.* v. *Wilson*, 3 F. & F. 119.

Onus of Proof.]—In charges of bigamy it is incumbent upon the prosecution to prove the validity of the first marriage. Where, therefore, the first marriage has been contracted without the due publication of banns required by 4 Geo. 4, c. 76, the prosecution, in order to show that the case is not within the statute, must prove that the want of due publication was unknown to one of the parties previously to the marriage in accordance with *Rex* v. *Wroxton* (4 B. & Ad. 640). *Reg.* v. *Kay*, 16 Cox, C. C. 292.

—— **Prisoner's Knowledge that First Wife Alive.**]—*See* ante, col. 1685.

Sentence of Jactitation, Effect of.]—Sentence of jactitation was not conclusive evidence against an indictment of bigamy; for its validity might be impeached as having been obtained by fraud. *Kingston's (Duchess) Case*, 1 Leach, C. C. 146; 1 East, P. C. 468.

Witnesses.]—A reputed wife cannot first give evidence in favour of her supposed husband. *Peat's Case*, 2 Lewin, C. C. 111.

Quære, whether a woman who has gone through the ceremony of marriage with a man can be allowed to prove the invalidity of the marriage, and that she is not his wife. *Reg.* v. *Peat*, 2 Lewin, C. C. 288.

Semble, that she may be examined upon the voir dire. *Ib.* S. P., *Rex* v. *Wakefield*, 2 Lewin, C. C. 279.

—— **Marriage primâ facie Illegal.**]—On a trial for bigamy two certificates were produced, one purporting to be the certificate of the marriage, in 1843, of the first wife to A. prior to the marriage with the prisoner in 1875; the other purporting to be a certificate of the death of A. in 1880, subsequent to the marriage with the

prisoner :—Held, that as primâ facie the marriage with the prisoner was illegal, the so-called first wife could give evidence on the trial of the accused. *Reg.* v. *Ayley*, 15 Cox, C. C. 328.

Proof of Marriage in Chapels and Licensed Places.]—*See* ante, col. 1683.

—— **Solemnized Abroad.**]—*See* ante, col. 1684.

B. BLASPHEMOUS LIBELS.—*See* supra, LIBEL, col. 1655.

C. CORRUPT PRACTICES AT ELECTIONS. —*See* ELECTION LAW.

D. NUISANCES.—*See* NUISANCE.

E. OBSCENITY AND INDECENCY.

1. OBSCENE PRINTS AND PICTURES.

Procuring with Intent to Publish.]—It is a misdemeanour to procure indecent prints with intent to publish them. *Dugdale* v. *Reg.*, 1 El. & Bl. 425; Dears. C. C. 64; 22 L. J., M. C. 50; 17 Jur. 546.

Possession with Intent to Publish.]—But to preserve and keep them in possession with such intent, is not. *Ib.*

Semble, that a count charging the defendant with having an obscene libel in his possession, with an intent to publish it, is not good. *Rex* v. *Rosenstein*, 2 Car. & P. 414.

What is sufficient Publication.]—The sale of an obscene print to a person in private, he having in the first instance requested that such prints should be shown to him, his object being to prosecute the seller, is a sufficient publication to sustain the charge. *Reg.* v. *Carlile*, 1 Cox, C. C. 229.

Report of Trial.]—One Mackey was indicted for selling a new edition of a book which was still obscene, though some of the most offensive passages had been omitted. At the trial this book was not read, but was taken as read. S. published a substantially correct report of Mackey's trial, in which, however, he set out the whole of the new edition of the book :—Held, that the publication of the report, setting out the new edition of the book, was a misdemeanour, that the obvious consequence of it would be to corrupt the public morals, and that S., however pure his motives, must be taken to have intended the consequences of his act. *Steel* v. *Brannan*, 41 L. J., M. C. 85; L. R. 7 C. P. 261; 26 L. T. 509, 20 W. R. 607.

Held, also, that the report was not privileged as being a fair report of a trial in a court of competent jurisdiction. *Ib.*

Held, also, that copies of the report were rightly ordered to be destroyed under 20 & 21 Vict. c. 83, s. 1. *Ib.*

Destruction of Books.]—An order made for the destruction of books under Lord Campbell's Act, 20 & 21 Vict. c. 83, s. 1, must state that the magistrate making it is satisfied, not only that the books are obscene, but also that their publication would amount to a misdemeanour proper to be prosecuted. *Bradlaugh, Ex parte*, 47 L. J., M. C. 105; 3 Q. B. D. 509; 38 L. T. 680; 26 W. R. 758. *And see preceding case.*

Seizure of Books.]—Copies of a pamphlet of an obscene nature were seized under 20 & 21 Vict. c. 83. The publisher did not keep or sell the pamphlet for the sake of gain, nor to prejudice good morals, but for a purpose which he considered to be good :—Held, that the object of the publisher did not alter the character of his act, the natural consequence of which he must be taken to have intended, and the natural consequence being one which would make the publication of the pamphlet a misdemeanour, and in the opinion of the justices who ordered the seizure proper to be prosecuted as such, the seizure was right. *Reg.* v. *Hicklin*, 37 L. J., M. C. 89; L. R. 3 Q. B. 360; 18 L. T. 395; 16 W. R. 801; 11 Cox, C. C. 19.

Abatement of Proceeding by Death of Complainant.]—Complaint having been duly made under 20 & 21 Vict. c. 83, that obscene books were kept by the defendant in his shop for sale, a warrant for the seizure of such books was issued, and after they had been seized the defendant was summoned to show cause why they should not be destroyed. Upon the hearing of the summons an order was made for the destruction of the books. After the issuing of the summons, but before the hearing, the complainant died, and no application to substitute another complainant was made :—Held, that the proceedings against the defendant did not lapse upon the death of the complainant, and that the order was valid. *Reg.* v. *Truelove*, 49 L. J., M. C. 57; 5 Q. B. D. 336; 42 L. T. 250; 28 W. R. 413; 14 Cox, C. C. 408; 44 J. P. 346.

Indictment.]—In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words alleged to be obscene must be set out; and if they are omitted the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error. *Bradlaugh* v. *Reg.*, 3 Q. B. D. 607; 38 L. T. 118; 26 W. R. 410; 14 Cox, C. C. 68—C. A. Reversing 46 L. J., M. C. 286.

Evidence.]—If on the trial of an indictment for publishing an obscene snuff-box, a witness proves that the defendant exhibited to him the box produced on the trial, or a box exactly similar, this is not sufficient, if the witness cannot identify the very box exhibited to him. *Rex* v. *Rosenstein*, 2 Car. & P. 414.

2. INDECENT EXPOSURE.

Public Place—What is.]—A party was indicted for an indecent exposure in an omnibus, several passengers being therein. The indictment contained two counts; one laid the offence as having been committed in an omnibus, and the other in a public highway :—Held, that an omnibus was sufficiently a public place to sustain this indictment. *Reg.* v. *Holmes*, Dears, C. C. 207; 3 Car. & K. 360; 22 L. J., M. C. 122; 17 Jur. 562; 1 W. R. 416; 6 Cox, C. C. 216.

—— **Seen only by one Person.**]—An indecent exposure in a place of public resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance,

Reg. v. *Webb*, 1 Den. C. C. 338; T. & M. 23; 2 Car. & K. 933; 18 L. J., M. C. 39; 13 Jur. 42; 3 Cox, C. C. 183. S. P., *Reg.* v. *Watson*, 2 Cox, C. C. 376.

An indecent exposure seen by one person only, and capable of being seen by one person only, is not an offence at common law. Secus, if there are other persons in such a situation as that they may be witnesses of the exposure. *Reg.* v. *Farrell*, 9 Cox, C. C. 446.

The prisoners committed fornication in open day, on a common, in the sight of one witness only, but so that anyone passing over the common or along a public footway adjacent could have seen them. There was no proof that any persons were passing over the common or along the footway at the time. Quære, whether this was an indictable offence. *Reg.* v. *Elliott*, L. & C. 103.

—— **Whether Urinal is.**]—The prisoners were convicted of indecently exposing their persons in a urinal, open to the public, which stood on a public footpath in Hyde Park, and the entrance to which was from the footpath:—Held, that the jury might well find the urinal to be a public place, and that, therefore, the conviction was good. *Reg.* v. *Harris*, 40 L. J., M. C. 67; L. R. 1 C. C. 282; 24 L. T. 74; 19 W. R. 360; 11 Cox, C. C. 659.

An indictment charged two defendants with indecent exposure of their persons in an open and public place:—Held, that a urinal with boxes or divisions for the convenience of the public, and situated in an open market, was not a public place within the meaning of the allegation. *Reg.* v. *Orchard*, 3 Cox, C. C. 248.

—— **Not in place open to Public, but where Public can See.**]—In order to render a person liable to an indictment for indecently exposing his person in a public place, it is not necessary that the exposure should be made in a place open to the public. If the act is done where a great number of persons may be offended by it, and several see it, it is sufficient. *Reg.* v. *Thallman*, L. & C. 326; 33 L. J., M. C. 58; 9 L. T. 425; 12 W. R. 88; 9 Cox, C. C. 388.

Where a man exposed himself indecently on a roof at the back of a house in London, so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any place open to the public, and seven persons in one house saw the exposure, the conviction was held good. *Ib.*

On an indictment for indecent exposure, it was proved that the prisoners went into the parlour of a publichouse and there committed the act charged; that they were seen there by a servant, who called a policeman and another man, who also witnessed the proceeding. The servant was not called as a witness:—Held, evidence of a public exposure. *Reg.* v. *Bunyan*, 1 Cox, C. C. 74.

The prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place. Upon evidence showing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without having any strict legal right so to do, and that persons so going were never in any way hindered or interfered with:—Held, that the conviction was correct, and that the jury were justified in finding that the place was public. *Reg.* v. *Wellard*, 54 L. J., M. C. 14; 14 Q. B. D. 63; 51 L. T. 604; 33 W. R. 156; 15 Cox, C. C. 559; 49 J. P. 296—C. C. R.

Semble, that the offence may be indictable if committed before divers subjects of the realm, even if the place be not public. *Ib.*

It is unlawful for men to bathe, without any screen or covering, so near a public footway frequented by females that exposure of their persons must necessarily occur, and persons who so bathe are liable to an indictment for indecency. *Reg.* v. *Reed*, 12 Cox, C. C. 1.

—— **Evidence of Usage.**]—It is no defence to such an indictment that there has been, as long as living memory extends, a usage to bathe at the place, and that there has been no exposure beyond what is necessarily incident to bathing. *Ib.*

Bathing in the sea on the beach near inhabited houses, from which the person may be distinctly seen, is an indictable offence, although the houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. *Rex* v. *Crunden*, 2 Camp. 89; 11 R. R. 671.

Nuisance—Exposing Dead Body of Child in Public Highway.]—The prisoner was indicted for unlawfully exposing the dead body of her infant child near a public highway. The jury found that the body was exposed by the prisoner in a public highway; that the place was one where many people were certain to pass and repass; and that the exposure was calculated to shock and disgust passers-by, and outrage public decency:—Held, that the prisoner was guilty of a nuisance at common law. *Reg.* v. *Clark*, 15 Cox, C. C. 171.

Indecent Exhibition.] — An obscene exhibition in a booth on a racecourse with closed doors, to a number of spectators who have paid for their admission upon the invitation of the keepers of the booth to the general public, is a misdemeanour at common law. *Reg.* v. *Saunders*, 45 L. J., M. C. 11; 1 Q. B. D. 15; 33 L. T. 677; 24 W. R. 348; 13 Cox, C. C. 116.

A herbalist, who publicly exposes and exhibits in his shop, on a highway, a picture of a man naked to his waist and covered with eruptive sores, so as to constitute an exhibition offensive and disgusting, is guilty of a nuisance, although there is nothing immoral or indecent in the picture and his motive was innocent. *Reg.* v. *Grey*, 4 F. & F. 73.

Indictment.]—An averment in an indictment, "in the sight and view of B.," does not mean that B. actually saw it, but only that he might have seen it had he chanced to look. *Reg.* v. *Webb*, 1 Den. C. C. 338; T. & M. 23; 2 Car. & K. 933; 18 L. J., M. C. 39; 13 Jur. 42; 3 Cox, C. C. 183.

An indictment for this offence, which does not conclude ad commune nocumentum, is aided by 14 & 15 Vict. c. 100. s. 25. *Reg.* v. *Holmes*, Dears. C. C. 207; 3 Car. & K. 360; 22 L. J., M. C. 122; 17 Jur. 362; 6 Cox, C. C. 216.

An indictment for indecent exposure, charging the offence to have been committed on a highway, is not sustained by evidence that the offence was committed in a place near the highway,

though in full view of it. *Reg.* v. *Farrell*, 9 Cox, C. C. 446.

Indictment against two, charging that they, being persons of wicked and unnatural dispositions, did, in an open and a public place, unlawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently in that public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the sight and view of divers of the liege subjects, in the said public place there passing, divers such practices as aforesaid, is bad, in arrest of judgment, for want of a real certainty. *Reg.* v. *Rowed*, 2 G. & D. 518; 3 Q. B. 180; 6 Jur. 396; 11 L. J., M. C. 74.

An indictment alleging that A. "in a certain open and public place did lay his hands on the person and private parts of B. with intent to stir up in his own and B.'s mind unnatural and sodomitical desires and inclinations, and to incite B. to the committing and perpetrating with A. divers unnatural and sodomitical acts, and that B. in the said open and public place, did permit and suffer A. to lay his hands, &c., with the like intent," is bad, as not stating any offence with legal certainty. *Reg.* v. *Orchard*, 3 Cox, C. C. 248.

Trial—View of Jury after Summing up.]—Upon the trial of an indictment for an indecent exposure in a urinal, the quarter sessions may allow the jury to have a view of the locus in quo after summing up the case to the jury. *Reg.* v. *Martin*, 41 L. J., M. C. 113; L. R. 1 C. C. 378; 26 L. T. 778; 20 W. R. 1016; 12 Cox, C. C. 204.

But, it is indiscreet to allow the witnesses to accompany the jury in the absence of the accused, or his advocate, or the judge. *Ib.*

Costs of Prosecution.]—An indictment for an indecent exposure of the person before one J. S., with the intent to provoke him to commit an unnatural crime, which had been removed by the defendant by certiorari, is not within s. 23 of 7 Geo. 4, c. 64, so as to enable the court before whom it is tried to grant the costs of the prosecution. *Reg.* v. ——, 3 N. & P. 627; 8 A. & E. 589.

F. POACHING, AND OFFENCES RELATING TO GAME.

1. *By Night.*
   - *a.* The Offence, 1695.
   - *b.* Apprehension of Offenders, 1699.
   - *c.* Limitation of Time for Prosecution, 1700.
   - *d.* Indictment, 1702.
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2. *In Day-time.*
   - *a.* The Offence, 1706.
   - *b.* Information and Complaint, 1707.
   - *c.* Apprehension of Offenders, 1708.
   - *d.* Ousting Jurisdiction of Justices, 1709.
   - *e.* Evidence, 1712.
   - *f.* Convictions, 1712.
3. *Unlawful Possession of Game*, 1714.

1. By Night.

a. The Offence.

Entering and being on Land—Two Offences.]—The 9 Geo. 4, c. 69, s. 9, creates two distinct offences. First, the *entering* in the night on land to the number of three, some one of them being armed; and second, the *being* in the night on land to the number of three, some one of them being armed. *Rex* v. *Kendrick*, 7 Car. & P. 184.

Entry on Land—What is.]—If nets are hung on the twigs of a hedge within the close, it is an entry, though the parties are in a lane outside the hedge. *Rex* v. *Athea*, 2 Lewin, C. C. 191. See *Pickering* v. *Rudd*, 1 Stark. 56; 4 Camp. 219; 16 R. R. 777.

If three persons go out together night-poaching, one being armed, and two of them stand in a road, and set nets in the hedge of a field of A., and send their dog into the field to drive hares into the net, and after this the third leaves them in the road and goes to poach by himself in another field of A.; this will not support an indictment for night-poaching on land of A.; for the sending in of a dog is not an entering of land within 9 Geo. 4, c. 69, s. 9; and the entering of the second field was not a joint act of the three. *Reg.* v. *Nickless*, 8 Car. & P. 757.

Six were indicted under 9 Geo. 4, c. 69, s. 9, for having been in a field at night, armed, for the purpose of taking game. Three of the six had been in the field, and three had remained outside of it, aiding and assisting the others:—Held, that the actual entry of some of the party, armed, was sufficient to support the conviction of all, though it could not be proved which of them had actually entered the field. *Reg.* v. *Whittaker*, 1 Den. C. C. 310; 2 Car. & K. 636; 17 L. J., M. C. 127; 3 Cox, C. C. 50.

Open Land—What is.]—A person was convicted under 9 Geo. 4, c. 69, s. 1, for unlawfully entering upon open land with a net, by night, for the purpose of taking and destroying game. The land was a highway, consisting of a metalled road, with waste land of varying extent on either side:—Held, that this was not open land, within the meaning of the statute. *Veysey* v. *Hoskins*, 34 L. J., M. C. 145; 11 Jur. (N.S.) 737; 12 L. T. 303; 13 W. R. 652.

Warren—Question of Fact.]—B. was caught with rabbits at night in a field forming part of a farm over which H. had the right of sporting. The justices found as a fact that this field was not a warren or ground used for the breeding or keeping of hares or rabbits within the 17th section of the Larceny Act, 1856, and convicted B. of night poaching under 9 Geo. 4, c. 69, s. 1:—Held, that it was a question of fact whether the place was within this description: and that upon this finding the conviction was right. *Bevan* v. *Hopkinson*, 34 L. T. 142.

Intention to take Game in particular Place.]—A count stated that the prisoners were in a field called A., for the purpose of then and there taking game:—Held, that they could not be convicted on that count, unless the jury was satisfied that the prisoners had an intention of taking game in that particular field. *Rex* v. *Capewell*, 5 Car. & P. 549.

On an indictment on 57 Geo. 3, c. 90, the prisoner having entered a given close with intent there to kill game, and being there found armed, it was necessary to prove an entry with that intent, into the close specified. *Rex* v. *Barham*, 1 M. C. C. 151.

To sustain an indictment for night-poaching, the parties must have been in the place charged in the indictment, with intent to destroy game there, and it is incumbent on the prosecutor to convince the jury that the defendants had an intent to destroy game in the particular place mentioned in the indictment. *Rex* v. *Gainer*, 7 Car. & P. 231.

In Concert and Co-operation]—To support an indictment for night-poaching by three or more being armed, it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, and that the rest of the party was in another wood which was separated from the place mentioned in the indictment by a turnpike road. *Rex* v. *Dowsell*, 6 Car. & P. 398.

If one of a party of poachers is found in the land specified, the rest co-operating in the pursuit in adjoining land, all may be alleged to be found in the land specified. *Rex* v. *Andrews*, 2 M. & Rob. 37. S. P., *Rex* v. *Lockett*, 7 Car. & P. 300.

Those who are watching at the outside of a preserve, for the purpose of giving the alarm, on the approach of the gamekeeper, to others who are in the preserve, and who afterwards go into the preserve for that purpose, are equally guilty with those who enter the preserve at first. *Rex* v. *Passey*, 7 Car. & P. 282.

Two of the prisoners were seen together running out of a coppice, one of them with a gun. The third immediately afterwards came out of it alone with a gun and a pheasant :—Held, insufficient evidence of concert. *Reg.* v. *Jones*, 2 Cox, C. C. 185.

It is not essential that all the prisoners charged should actually enter the inclosed places ; but, if they are associated together for the common purpose of taking game contrary to the statute, and some of the party actually enter such place to effect that purpose, while the others remain near enough to aid and assist, they may all be convicted under an indictment charging them with being in such place for such purpose. *Reg.* v. *Whittaker*, 2 Car. & K. 636; 1 Den. C. C. 310 ; 17 L. J., M. C. 127 ; 3 Cox, C. C. 50.

It is not necessary to constitute the offence of three or more persons armed entering land in the night to take game, that all the three persons should be in one close, or that the land should be in the occupation of one person. *Reg.* v. *Uezzell*, 3 Car. & K. 150; 2 Den. C. C. 274; T. & M. 598 ; 20 L. J., M. C. 192 ; 15 Jur. 434 ; 5 Cox, C. C. 188.

One of the prisoners may be in Whiteacre, another in Blackacre, and another in Greenacre, and the land may be in the occupation of different persons. The offence is complete if three persons are in one common party unlawfully upon any land, whether open or inclosed land, for the common purpose of illegally destroying game ; and it is sufficient to describe the close of land as inclosed or open land, in the occupation of a certain person or of certain persons. *Ib.* And see *Reg.* v. *Nickless*, ante, col. 1696.

Armed—Acting in Concert.]—In a case of night poaching by three or more armed, if one has a gun, all are armed within 9 Geo. 4, c. 69, s. 9. *Reg.* v. *Goodfellow*, 1 Car. & K. 724; 1 Den. C. C. 81. S. P., *Reg.* v. *Andrews*, 1 Cox, C. C. 144 ; *Reg.* v. *May*, 5 Cox, C. C. 176.

On an indictment on 57 Geo. 3, c. 90, for being out armed, with intent to kill game, it appeared that several persons were out with such intent, but only one of them was armed with a gun :—Held, that the rest, who were unarmed, were liable to be convicted under that act. *Rex* v. *Smith*, R. & R. 368.

On an indictment on 57 Geo. 3, c. 90, against a person for being found armed in the night, with intent to kill game :—Held, that if several went into a close in the night to kill game, and one had arms without the knowledge of the others, the other persons who were unarmed were not liable to be convicted. *Rex* v. *Southern*, R. & R. 444.

—— **Evidence.**]—It was no answer to a charge on 57 Geo. 3, c. 90, for being found armed in the night in a wood, with intent to kill game, that the prisoners put down their arms and left them before they were seen, if it was perceived that some one was there armed before they were seen. *Rex* v. *Nash*, R. & R. 386.

On an indictment under 57 Geo. 3, c. 90, a man might have been convicted of having entered a wood, and of being found armed there, though he was not seen in such wood. It was sufficient if there was evidence to show that he had been there armed. *Rex* v. *Worker*, 1 M. C. C. 165.

Weapons—What are.]—Large stones are offensive weapons, within 9 Geo. 4, c. 69, s. 9, if the jury is satisfied that the stones are of a description capable of inflicting serious injury if used offensively, and were brought and used for that purpose. *Reg.* v. *Grice*, 7 Car. & P. 803.

The mere use of a small stick, as a weapon, by a poacher, in a sudden affray with gamekeepers, is not enough to prove such stick an offensive weapon, under 9 Geo. 4, c. 69, s. 9. The jury must be convinced that the party took it with him for the purpose of offence. *Rex* v. *Fry*, 2 M. & Rob. 42.

A party out at night, in pursuit of game, carried a thick stick large enough to be called a bludgeon, but which he used at other times as a crutch, he being lame :—Held, that it was a question for the jury whether the prisoner had taken out this stick to use as an offensive weapon, or merely for the purpose to which he usually applied it ; and that although it was a weapon within the statute, and might be used offensively, yet that, unless the defendant took it out with an intention of so using it, the indictment could not be sustained. *Rex* v. *Palmer*, 1 M. & Rob. 70.

An indictment alleged that the defendant and others were armed with bludgeons and other offensive weapons, and the evidence was that they had sticks :—Held, that a stick was not necessarily an offensive weapon, in the absence of evidence of its size, &c., even although it had been used offensively. *Reg.* v. *Merry*, 2 Cox, C. C. 240.

Night poachers carrying things not apparently weapons, but capable of being used as such, and brought out to serve for both harmless and offensive weapons, are armed within the meaning of 9 Geo. 4, c. 69, s. 9. *Reg.* v. *Sutton*, 13 Cox, C. C. 648.

Three men in company were seen hunting game in the night-time with dogs. Two of the men were not in any way armed. The third, who was lame, only carried the stick with which he usually walked :—Held, that the jury should

not find him guilty unless satisfied that this walking-stick was an offensive weapon, and that he had carried it with the intention of using it as an offensive weapon, should occasion arise. *Reg.* v. *Williams*, 14 Cox, C. C. 59.

What is Game.]—A person cannot be convicted under 9 Geo. 4, c. 69, s. 9, for entering land by night, armed, for the purpose of taking game, whose object is to steal young pheasants which had been hatched by a hen, and which had not yet become wild. *Reg.* v. *Garnham*, 2 F. & F. 347; 8 Cox, C. C. 451.

b. Apprehension of Offenders.

By Gamekeepers.]—When gamekeepers find poachers in a wood, they need not give any intimation by words that they intend to apprehend—the circumstances are sufficient notice; and if a person out poaching sees a man running after him, he may fairly presume that the person means to apprehend him. *Rex* v. *Davis*, 7 Car. & P. 785.

On an indictment of prisoners for night poaching, and for assaulting a gamekeeper with intent, evidence of the common intent to poach does not sustain the allegation of a common intent to wound. *Reg.* v. *Doddridge*, 8 Cox, C. C. 335.

The prisoners were seen upon the land of the prosecutor at night in pursuit of game. They escaped into a highway and there assaulted the keepers. But the keepers stated that they had not followed them into the highway with an intention to arrest them there:—Held, that there being no intention on the part of the keepers to arrest them at the time when the attack was made upon them, it was not an assault within 9 Geo. 4, c. 69. *Ib.*

Gamekeepers, who were out watching in the night, heard firing of guns in the preserves of their employer, and they waited in a turnpike road, expecting the poachers to come there, which they did, and an affray ensued between the gamekeepers and the poachers:—Held, that, if the gamekeepers were then endeavouring to apprehend the poachers, they were not justified in so doing. *Reg.* v. *Meadham*, 2 Car. & K. 633.

A gamekeeper, or other person lawfully authorised under 9 Geo. 4, c. 69, s. 2, may apprehend persons found offending under that act, without calling on them to surrender, if the circumstances are such as to constitute notice of his purpose. *Rex* v. *Payne*, 1 M. C. C. 378.

A person who is employed by a lord of a manor, as a watcher of his game preserves, is a person having authority to apprehend night poachers, and he need not have any authority from the lord of the manor. *Rex* v. *Price*, 7 Car. & P. 178.

Where a person was found night poaching on the manor of A. by one of his watchers, and was pursued off the manor, and then on to it again, and there snapped his gun at the watcher, he was guilty of a capital offence under 9 Geo. 4, c. 31, ss. 11, 12. *Ib.*

The gamekeeper of a person who has merely the right of shooting over land is not justified in apprehending a person unlawfully being upon such land by night, for the purpose of taking game. *Reg.* v. *Price*, 5 Cox, C. C. 277.

A gamekeeper appointed by a person having only a permission to shoot, trying to take a gun from a poacher, and in the scuffle causing a loaded gun to go off, which killed the poacher, is guilty of manslaughter. *Reg.* v. *Wesley*, 1 F. & F. 528.

A person having only a right of shooting over land has no right to empower keepers to apprehend parties trespassing in search of game; and on their resisting with no greater violence than is used by the keepers, they will not be liable for an assault; but if the trespass is in the night, they may be indicted for night poaching. *Reg.* v. *Wood*, 1 F. & F. 470.

To justify the apprehension of an offender, under 1 & 2 Will. 4, c. 32, s. 31, it is only necessary that he should have been made to understand, by the person authorised under that section, that he is required to tell his christian name, surname, and place of abode, and that he should have refused to comply with such requisition. It is not necessary that he should have been required both to quit the land and also to tell his name. *Reg.* v. *Prestney*, 3 Cox, C. C. 505.

By Policemen.]—A policeman has no power under 25 & 26 Vict. c. 114, to apprehend persons whom he may suspect of coming from land where they have been unlawfully in pursuit of game, and such persons may lawfully resist and use such violence as is necessary to prevent their apprehension. *Reg.* v. *Spencer*, 3 F. & F. 854.

Where, under such circumstances, several persons resist with intent only to prevent their apprehension, and one of them is guilty of excess, the others are not responsible for the act of their companion exceeding the common intent. *Ib.*

A policeman can only justify stopping and searching a cart upon a highway under 25 & 26 Vict. c. 114, where he has good cause to suspect that the cart is carrying game which has been unlawfully obtained; and upon an indictment for assaulting the policeman in the execution of his duty under such circumstances, it is necessary to prove the existence of reasonable grounds of suspicion; where no reasonable grounds of suspicion can be shown, persons are justified in resisting the search. *Reg.* v. *Spencer*, 3 F. & F. 857.

By other Persons.]—The servant of the owner of a wood attempted to apprehend a poacher whom he found there at eight o'clock on the morning of the 17th December, and the poacher shot at him:—Held, that this was not a capital offence within 9 Geo. 4, c. 31, ss. 11, 12, as there was no proof that the poacher was in pursuit of game an hour before sunrise. *Rex* v. *Tomlinson*, 7 Car. & P. 183.

The 14 & 15 Vict. c. 19, s. 11, which gives any person a right to apprehend persons committing indictable offences in the night, applies to persons night poaching within 9 Geo. 4, c. 69, s. 9, although the night is defined to begin and end at different times in the two statutes. *Reg.* v. *Sanderson*, 1 F. & F. 598.

c. Limitation of Time for Prosecution.

Prosecution Commenced within Twelve Months.]—B. and G. were convicted of night poaching. The indictment was upon 9 Geo. 4, c. 69; by s. 4 of which it is enacted, that the prosecution for every offence "punishable by indictment by virtue of this act shall be com-

menced within twelve calendar months after the commission of the offence." The offence was committed on the 4th of December, 1845. The information before the justices, and warrant, were on the 19th of December, 1845. B. was apprehended and committed on the 5th of September, 1846, and G. on the 21st of October, 1846. The indictment was preferred on the 5th of April, 1847:—Held, that the prosecution was commenced in time, and the conviction right. *Reg.* v. *Brooke*, 1 Den. C. C. 217; 2 Car. & K. 402; 2 Cox, C. C. 436.

Where it appeared that the offence was committed on the 12th January, 1844, and the indictment was preferred on the 1st March, 1845, and the warrant of commitment by which the defendant was committed to take his trial was given in evidence, and it was dated on the 11th December, 1844:—Held, that it was sufficiently shown that the prosecution was commenced within twelve calendar months after the commission of the offence, within s. 4. *Reg.* v. *Austin*, 1 Car. & K. 621.

In a case of night poaching by persons armed, the offence was committed on the 4th December, 1845. On the 19th December, 1845, information of the offence was made before a magistrate, who on that day granted warrants to apprehend A. and B., two of the offenders. On one of these warrants A. was apprehended and committed for trial on the 16th September, 1846; B. being apprehended on the other warrant, and committed for trial on the 21st October, 1846. The indictment was preferred and found on the 5th April, 1847:—Held, that the prosecution was commenced within twelve calendar months after the commission of the offence, and that it was commenced by the information and warrants to apprehend, or at all events by the apprehension of the prisoners. *Reg.* v. *Gibson*, 2 Car. & K. 402.

Quære, whether the preferring of an indictment against a party for night poaching, which is ignored, is a commencement of the prosecution within 9 Geo. 4, c. 69, s. 4, so as to warrant the conviction of the party on another indictment preferred four years after the offence. *Rex* v. *Kilminster*, 7 Car. & P. 228.

The issuing of a warrant of apprehension is not a commencement of proceedings within 9 Geo. 4, c. 69, s. 4. *Reg.* v. *Hull*, 2 F. & F. 16.

Upon the trial of an indictment in order to prove that the proceedings were commenced within twelve months after the commission of the offence, a warrant for the party's apprehension issued within the twelve months was produced; but the information on which the warrant was founded was not put in evidence:—Held, that in the absence of the information, the warrant was not legal evidence that the proceedings had been commenced within the time limited. *Reg.* v. *Parker*, L. & C. 459; 33 L. J., M. C. 135; 10 Jur. (N.S.) 596; 10 L. T. 463; 12 W. R. 765; 9 Cox, C. C. 475.

C. was indicted for night poaching on the 6th February, 1863. He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, and to move in arrest of judgment, upon the ground that the proceedings against him had not been commenced within twelve calendar months, as directed by 9 Geo. 4, c. 69, s. 4:—Held, that the application to withdraw the plea was one which ought to be granted, and that as no warrant or information was produced showing that proceedings had been commenced within twelve months, the objection was fatal. *Reg.* v. *Cusbolt*, 21 L. T. 263; 11 Cox, C. C. 385.

d. Indictment.

Averment of Place.]—An indictment on 57 Geo. 3, c. 90, charging a party with having entered into a forest, chase, &c., with intent to destroy game, and being found armed in the night, must, in some way or other, have particularised the place. *Rex* v. *Ridley*, R. & R. 515.

In an indictment under 9 Geo. 4, c. 69, s. 9, it is sufficient to charge entering, &c., certain land in the occupation of A., without specifying whether it was inclosed or not. *Rex* v. *Andrews*, 2 M. & Rob. 37. S. P., *Reg.* v. *Morris*, 5 Cox, C. C. 205.

Or to name any particular close; it is sufficient to say, "land in the occupation of B. or C.," as the fact may be. *Reg.* v. *Uezzell*, T. & M. 598; 2 Den. C. C. 274; 3 Car. & K. 150; 20 L. J., M. C. 192; 15 Jur. 434; 5 Cox, C. C. 188.

But "a certain cover in the parish of A." is too general a description to sustain an indictment for poaching. *Rex* v. *Crick*, 5 Car. & P. 508.

An indictment for night poaching stated the offence to have been committed in a wood, called "the Old Walk, of, and belonging to, and then in the occupation of James, Earl of W.;" and it was proved that the occupation was correctly stated, but that the name of the wood was Long Walk, and that it had never been called Old Walk:—Held, a variance. *Rex* v. *Owen*, Car. C. L. 309; 1 M. C. C. 118.

To whom Land belongs.]—It is sufficient to allege that the land is land "of and belonging to J. W. D." without stating it to be in the occupation of J. W. D. *Reg.* v. *Riley*, 3 Car. & K. 116.

Assaulting Gamekeeper.]—An indictment for assaulting a gamekeeper with a weapon, stated that the defendants were in certain land of J. R., Earl of B., by night, armed with guns, for the purpose of destroying game, and that they were "then and there in the said land by night, as aforesaid, by one W. R., the servant of the said J. R., Earl of B., then and there having lawful authority to seize and apprehend the said [defendants] found," and that the defendants with the guns assaulted and offered violence to W. R.:—Held, that the indictment was bad, as it did not sufficiently show that the defendants, when found by W. R., were committing any offence against the 9 Geo. 4, c. 64. *Reg.* v. *Curnock*, 9 Car. & P. 730.

By Night.]—Where an indictment alleged that A., B., C., D., to the number of three and more together, did by night unlawfully enter divers closes there situate, and being in the occupation of E., and were there and then in the said closes, armed with guns for the purpose of destroying game:—Held, that it did not contain a sufficient averment that the defendants were by night in the closes for the purpose of destroying game. *Davies* v. *Rex*, 10 B. & C. 89; 5 M. & Ry. 78; 8 L. J. (O.S.) M. C. 49.

Being Armed.]—In an indictment for night poaching, it is advisable to insert a distinct averment that the defendants were armed when they entered and were on the land, in addition to the usual allegation, "being then and there by

night as aforesaid armed." *Rex* v. *Wilks*, 7 Car. & P. 811.

A count for assaulting a gamekeeper alleged that the defendants, with other persons, to the number of three or more, entered by night a certain close with guns and other offensive weapons, for the purpose of taking and destroying game, and then proceeded to allege that the defendants being then and there in the said land were found by one H. S., the servant of B. W. W., and there with the said guns assaulted and beat the said H. S.:—Held, that the count was defective for not alleging that the defendants were in the close armed with guns, &c., according to the language of s. 9 of 9 Geo. 4, c. 69. *Reg.* v. *May*, 5 Cox, C. C. 176.

An indictment charged A., B. and six others, "that they, being respectively armed with guns and other offensive weapons, entered." A. and B. were each proved to have been armed with a gun, the other six with bludgeons. Objection, that the averment, "other offensive weapons" (not specifying what), made the arming of the other six only constructive, which was not sufficient to bring them within the statute:—Held good. *Reg.* v. *Goodfellow*, 1 Den. C. C. 81; 1 Car. & K. 724.

Previous Convictions.]—An indictment under 9 Geo. 4, c. 69, s. 1, that on the 20th of December, 1854, C. was convicted for that he, within the space of six calendar months last past, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did, by night, then and there unlawfully enter a close with a gun, for the purpose of then and there taking and destroying game, and that he was then sentenced to be imprisoned for the period of three calendar months; that afterwards, to wit, on the 27th of November, A.D. 1858, he was duly convicted, for that he, within six calendar months next before, &c., to wit, on the 24th of November, 1858, in the night of the same day, by night, unlawfully did enter, and be in and upon certain inclosed land, with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, and was then adjudged to be imprisoned for six calendar months—is good, as it sufficiently shows upon the face of it, that two previous convictions of offences within the terms of the act had taken place. *Cureton* v. *Reg.*, 1 B. & S. 208; 30 L. J., M. C. 149; 4 L. T. 286; 9 W. R. 655; 8 Cox, C. C. 481.

Joinder of Counts.]—A count for night poaching may be joined with a count for assaulting a gamekeeper authorised to apprehend, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Rex* v. *Finucane*, 5 Car. & P. 551.

Amendment at Trial.]—A variance between the allegation of occupation of land in an indictment for night poaching, and the proof of the occupation, will, if not such as to have misled, be amended at the trial. *Reg.* v. *Sutton*, 13 Cox, C. C. 648.

Abandonment of Counts—Effect of.]—A first count charged the prisoners under 9 Geo. 4, c. 69, s. 2, with being found on land at night armed with a gun for the purpose of taking game, by A. and B., who had lawful authority to apprehend them, and that they, being about to apprehend them, the prisoners with a weapon assaulted and wounded them; a second count charged an unlawful wounding; and the third and fourth counts charged a common assault. The counsel for the prosecution abandoned the last three counts, and elected to stand on the first count. The jury returned a verdict of guilty of night poaching and a common assault. Upon a question raised, whether the prisoners could be convicted of a common assault upon the first count:—Held, that the prosecuting counsel having withdrawn the counts for common assault from the jury, the question ought not to be entertained. *Reg.* v. *Day*, 22 L. T. 452; 11 Cox, C. C. 505.

e. Evidence.

Authority to Apprehend.]—On an indictment for wounding with intent to prevent lawful apprehension, it was proved that the prisoners were found poaching in the night, armed, in a preserve which had belonged to the Earl of L., and then was in possession of the earl's trustees. The person trying to apprehend was a watcher employed by the head keeper, the latter having been appointed by the earl some twenty years before, and paid by his agent down to the time of the trial, but the head keeper had never had any direct communication with the trustees:—Held, sufficient proof of an authority to apprehend. *Reg.* v. *Fielding*, 2 Car. & K. 621.

Without Permission of Owner.]—Where A. was indicted for night poaching on the land of the prosecutor, which land was in the occupation of a tenant:—Held, that it was not necessary, in order to support the indictment, to show by evidence that A. was there without the permission of the tenant, or of the prosecutor, if the right to take game upon the land had been reserved to him. *Reg.* v. *Wood*, Dears. & B. 1; 25 L. J., M. C. 96; 2 Jur. (N.S.) 478; 4 W. R. 509; 7 Cox, C. C. 106.

Being in Close with intention of taking Game.]—Two were charged with being by night, and armed, in a close for the purpose therein of destroying game. It was proved that they passed through the close without doing anything in it, and that after being lost sight of for two hours they were found three miles off with game in their possession:—Held, that there was evidence that they were in that particular close for the purpose of taking game, and that if persons went out with a general intention of taking game, that was sufficient evidence of an intent to take game in every field through which they passed, in which game might be expected to be found. *Reg.* v. *Higgs*, 10 Cox, C. C. 527.

Intent to take Game Inferred.]—An indictment under 9 Geo. 4, c. 69, charged, that the prisoners "were in the Great Ground on the 11th February, armed, with intent, then and there, to take game." The evidence showed that the prisoners were all seen, for the first time, in the Great Ground, employed in taking down two nets; after this was done they picked up some dead hares, which were lying on the ground near the nets, and hanging them on long sticks over their shoulders, walked homewards with them. It also appeared that they had dogs with them in the Great Ground:—Held, that the questions for the jury were, first, whether

they were in the Great Ground with the intent to take game at that time, and that such intent might be inferred from the presence of the nets and dogs, though they might have taken the hares elsewhere. *Reg.* v. *Turner*, 3 Cox, C. C. 304.

Being Armed.]—Held, also, that the allegation that they were armed could not be sustained, unless the jury should be of opinion that they took the sticks for the double purpose of carrying away the game, and of attack or defence in the event of their being interrupted by keepers while in the pursuit of game. *Ib.*

Previous Convictions.]—On an indictment for night poaching, having been twice summarily convicted, the convictions produced contained no allegation that the defendant had entered at night:—Held, insufficient evidence of a previous conviction. *Reg.* v. *Merry*, 2 Cox, C. C. 240.

f. Convictions and Commitments.

Conviction—Form.] — A conviction under 9 Geo. 4, c. 69, s. 1, must allege that the defendants by night, were in certain land for the purpose of taking game in such land; it not being sufficient to follow the words of the statute. *Fletcher* v. *Calthorp*, 1 New Sess. Cas. 529; 8 Q. B. 880; 14 L. J., Q. B. 95; 9 Jur. 205.

Previous Convictions—Evidence.]—*See* supra.

—— **Form and Contents.**] — A conviction under 9 Geo. 4, c. 69, s. 1, stating, that on the 20th of December, 1854, C. was convicted, for that he, within the space of six calendar months last past, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did, by night, then and there unlawfully enter a close with a gun, for the purpose of then and there taking and destroying game, and that he was then sentenced to be imprisoned for the period of three calendar months: that afterwards, to wit, on the 27th of November, A.D. 1858, he was duly convicted, for that he, within six calendar months next before, &c., to wit, on the 24th of November, 1858, in the night of the same day, by night, unlawfully did enter and be in and upon certain inclosed land, with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, and was then adjudged to be imprisoned for six calendar months—is good, as it sufficiently shows upon the face of it, that two previous convictions of offences within the terms of the act had taken place. *Cureton* v. *Reg.*, 1 B. & S. 208; 30 L. J., M. C. 149; 4 L. T. 286; 9 W. R. 665; 8 Cox, C. C. 481.

Commitment.]—A warrant of commitment, reciting an order of sessions confirming a conviction under 9 Geo. 4, c. 69, s. 1, ordering the prisoners, at the expiration of their term of imprisonment, to find sureties not to offend again, instead of not so to offend again, is ill. *Reg.* v. *Reynolds*, 13 L. J., M. C. 65; 8 Jur. 192.

The court will presume that the commitment contains a true recital of the conviction; therefore, where the certiorari is taken away, and the prosecutor seeks, under s. 7, to avail himself of the conviction to cure a defect in the commitment, the prisoner is not bound, nor is it his duty to bring the conviction before the court. *Ib.*

g. Informations.

What sufficient to give Jurisdiction.]—An information under 9 Geo. 4, c. 69, s. 1, for entering land for the purpose of taking game, is sufficient to give the justices before whom it is laid jurisdiction to hear the charge, although it does not allege that the entry was for the purpose of taking game there. *Reg.* v. *Western*, 37 L. J., M. C. 81; L. R. 1 C. C. 122; 18 L. T. 299; 16 W. R. 730; 11 Cox, C. C. 93.

2. In Day-time.

a. The Offence.

What Game.]—The 1 & 2 Will. 4, c. 32, s. 30, which imposes a penalty for trespass in search or pursuit of game, means in search or pursuit of live game. *Kenyon* v. *Hart*, 6 B. & S. 249: 34 L. J., M. C. 87; 11 Jur. (N.S.) 602; 11 L. T. 733; 13 W. R. 406.

Reservation of Game to Landlord.]—An agreement under which a tenant held contained a stipulation that he would not destroy any game, and would endeavour to preserve all game bred and being on the farm. He was convicted under 1 & 2 Will. 4, c. 32, s. 12, that he being the occupier of land, the right of killing the game on such land being reserved to his landlord, did unlawfully kill upon such land game:—Held, that the stipulation in the agreement could not be construed as a reservation of game to the landlord, and that the conviction ought to be quashed. *Coleman* v. *Bathurst*, 40 L. J., M. C. 131; L. R. 6 Q. B. 366; 24 L. T. 426; 19 W. R. 848.

What amounts to a Trespass.]—To constitute the offence of trespassing upon land in search or pursuit of game, under 1 & 2 Will. 4, c. 32, s. 30, there must be a bodily entering or being of the person upon the land upon which the trespass is alleged to have taken place, and there may be a trespass within the act, though, at the time, the person is upon a highway. *Reg.* v. *Pratt*, Dears. C. C. 502; 3 C. L. R. 686; 4 El. & Bl. 860; 24 L. J., M. C. 113; 1 Jur. (N.S.) 681; 3 W. R. 372.

Firing at game from a highway is a trespass in pursuit of game. *Mayhew* v. *Wardley*, 14 C. B. (N.S.) 550; 8 L. T. 504; 2 N. R. 325.

A. being upon his own land (or land upon which he was privileged to shoot), fired at and killed a pheasant in the land of B., and went upon B.'s land (without leave), and picked it up:—Held, a trespass in search or pursuit of game, the whole being one continuous act. *Osborn* v. *Meadows*, 12 C. B. (N.S.) 10; 31 L. J., M. C. 238; 8 Jur. (N.S.) 1079; 6 L. T. 240; 10 W. R. 537.

A., standing on his own land, a pheasant rose up on it, and flew to the close of B. A. fired a gun, and struck it while over that close, whereupon the bird fell dead, and A. entered and picked it up:—Held, that this was not a trespass in search or pursuit of game within 1 & 2 Will. 4, c. 32, s. 30, unless the facts were such as to show that the firing at the bird, the entry on the close of B., and the picking up of the bird, all formed part of one continuous transaction. *Kenyon* v

Hart, 6 B. & S. 249 ; 34 L. J., M. C. 87 ; 11 Jur. (N.S.) 602 ; 11 L. T. 733 ; 13 W. R. 496.

—— **By Servants of Tenant.**]—A tenant of land, the right of sporting over which was reserved to the landlord, employed persons, as his servants, to kill rabbits on the land :—Held, that the servants were not liable, for having acted in that employment, to be convicted under 1 & 2 Will. 4, c. 32, s. 30, for a trespass in pursuit of coneys. *Spicer* v. *Barnard*, 1 El. & El. 874 ; 28 L. J., M. C. 176 ; 5 Jur. (N.S.) 961 ; 7 W. R. 467. S. P., *Padwick* v. *King*, 7 C. B. (N.S.) 88 ; 29 L. J., M. C. 42 ; 6 Jur. (N.S.) 274 ; 1 L. T. 98.

What Parties Liable to Conviction.]—In support of an information against A. for aiding and abetting B. to commit the offence of trespass in pursuit of game, there was evidence that A. drove B. in a conveyance along a turnpike road for a lawful purpose ; that the conveyance was afterwards stopped, when B. got out and entered a field and shot a hare, which he gave to A. on returning to the conveyance, and then A. drove along the road :—Held, that there was evidence on which the justices might find A. guilty of the offence so charged. *Stacey* v. *Whitehurst*, 18 C. B. (N.S.) 344 ; 34 L. J., M. C. 94 ; 11 L. T. 710 ; 13 W. R. 384.

Where two persons are jointly engaged in the unlawful act, they may be severally convicted thereof. *Mayhew* v. *Wardley*, 14 C. B. (N.S.) 550 ; 8 L. T. 504.

Leave and Licence.]—The leave and licence of the occupier, to be an answer to such complaint, must precede the act of trespass. *Morden* v. *Porter*, 7 C. B. (N.S.) 641 ; 29 L. J., M. C. 213 ; 1 L. T. 403 ; 8 W. R. 262.

A landlord, who on letting a farm verbally has reserved the game to himself, has thereby a sufficient authority to give leave to a person to kill game on such farm, to prevent any such person from being a trespasser thereon in pursuit of game within s. 30 of 1 & 2 Will. 4, c. 32. *Jones* v. *Williams*, 46 L. J., M. C. 270 ; 36 L. T. 559.

On Sunday.]—A. was convicted for that he, on the 15th of August (being Sunday), did use snares for the purpose of killing game. He set the snares on the 13th and 14th of August, and on the 15th the snares were seen set ready to catch game, and two dead grouse were found caught in snares :—Held, that a snare was an engine or instrument within 1 & 2 Will. 4, c. 32, s. 3, and that putting down a snare on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, was using an engine or an instrument on Sunday. *Allen* v. *Thompson*, 39 L. J., M. C. 102 ; L. R. 5 Q. B. 336 ; 22 L. T. 472 ; 18 W. R. 1196.

b. Information and Complaint.

By whom laid.]—An information for trespassing in pursuit or search of game may, under 1 & 2 Will. 4, c. 32, s. 20, be laid by a common informer, or a person who has no interest in the land trespassed upon. *Middleton* v. *Gale*, 8 A. & E. 155 ; 3 N. & P. 372 ; 1 W. W. & H. 352 ; 7 L. J., M. C. 103 ; 2 Jur. 819.

A complaint of trespass in pursuit of game, under 1 & 2 Will. 4, c. 32, s. 30, need not be made by a person having an interest in the land. *Morden* v. *Porter*, 7 C. B. (N.S.) 641 ; 29 L. J., M. C. 213 ; 1 L. T. 403 ; 8 W. R. 262.

Under 6 & 7 Will. 4, c. 65, s. 9, an information under 1 & 2 Will. 4, c. 32, if laid by a person not deposing, on oath, to the matter of the charge, must distinctly show that the charge was deposed to by some other credible witness on oath. *Reg.* v. *Scotton*, 5 Q. B. 493 ; D. & M. 501 ; 1 New Sess. Cas. 27 ; 13 L. J., M. C. 58.

Trial of Prisoners Separately—Discretion.]—At petty sessions an information was laid against two persons charging that they did use a gun and kill two pheasants contrary to 1 & 2 Will. 4, c. 32, s. 3 ; each claimed to be tried separately in order to call the other as a witness ; the justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each of them, imposing a penalty of 3*l.* :—Held, that it was in the discretion of the justices whether they would hear the charge separately or not ; that, as the penalty was imposed upon every person acting in contravention of the statute, each was separately liable to the whole penalty, and that separate convictions were right. *Reg.* v. *Littlechild*, *Reg.* v. *Heslop*, 40 L. J., M. C. 137 ; L. R. 6 Q. B. 293 ; 24 L. T. 233 ; 19 W. R. 748.

c. Apprehension of Offenders.

When Justified.]—To justify the apprehension of a person under 1 & 2 Will. 4, c. 32, s. 31, he must have been required to quit the land, and to tell his name ; and the wilfully continuing or returning upon the land, to justify an apprehension, must be upon the same land, and for the purpose of pursuing game there. *Rex* v. *Long*, 7 Car. & P. 314.

To justify the apprehension of an offender under 1 & 2 Will. 4, c. 32, s. 31, it is only necessary that he should have been made to understand, by the person authorised under that section, that he is required to tell his christian name, surname, and place of abode, and that he should have refused to comply with such requisition. It is not necessary that he should have been required both to quit the land and also to tell his name. *Reg.* v. *Prestney*, 3 Cox, C. C. 505.

A warrant for neglecting to appear to a summons for trespass in search of coneys, under 1 & 2 Will. 4, c. 32, s. 30, was issued against C., directed to all the peace officers in the county. A peace officer in the county met C. and said he apprehended him under this warrant, but the warrant was not in his possession at the time. C. resisted, and, having severely injured the officer, escaped, but afterwards surrendered himself. The justices fined him 10*s.* for the trespass, and sentenced him to six months' hard labour for assaulting the officer in the execution of his office :—Held, that the arrest under the circumstances would not have been in the execution of the constable's office, and that the conviction for assault must be quashed. *Codd* v. *Cabe*, 45 L. J., M. C. 101 ; 1 Ex. D. 352 ; 34 L. T. 453 ; 13 Cox, C. C. 202.

Action against two for assaulting the plaintiff, and tearing his clothes. A plea stated, that before the committing those trespasses the plaintiff was found by the defendants on the lands of S. in search of game, without his licence and against his will, and that the plaintiff had in his possession a hare, which appeared to have been recently killed. Whereupon one defendant, as

servant of and by command of S., demanded the hare, which the plaintiff refused to deliver; that the said defendant demanded the hare from the plaintiff, and because he refused to deliver it, and kept it in his possession, both defendants, as such servants, and by such command, in order to take the same for the use of S., seized the plaintiff, and took it from him according to 1 & 2 Will. 4, c. 32, s. 36. Another plea stated, that just before the trespasses, the plaintiff had in his possession a dead hare belonging to S. without his leave and licence, wherefore the defendants did, as his servants, and by his command, demand the same from the plaintiff, which he refused to deliver, and which he detained, whereupon the defendants, as such servants, seized the plaintiff (concluding as in the former plea):—Held, that the first plea was bad, for not sufficiently showing when the second demand was made, or that it was made on the land of S.; and that the second plea was also bad, for not stating that the defendants gently laid their hands on the plaintiff in order to take the game, and that because he resisted, they necessarily committed the trespasses complained of, doing as little damage, and using as little violence to the plaintiff as they could on that occasion. *Wisdom* v. *Hodson*, 3 Tyr. 811.

Notice of Action—Belief that Person had Authority.]—In an action for assault and taking away the plaintiff's game certificate and gun, it appeared, that after the plaintiff had given his name and place of abode, the defendant pushed him out of the field into a public road, and then took away his gun. The defendant alleged that he had acted under 1 & 2 Will. 4, c. 32, s. 31, and was entitled to notice of action:—Held, that the judge was right in leaving it to the jury whether defendant acted on the belief that he had authority under 1 & 2 Will. 4, c. 32, and whether he had reasonable ground for that belief. *Cox* v. *Reid*, 13 Q. B. 558; 18 L. J., Q. B. 216; 13 Jur. 563. *See further*, PRACTICE (NOTICE OF ACTION).

d. Ousting Jurisdiction of Justices.

Adjournment asked to Produce Evidence of Authority.]—On the hearing of an information for trespassing in pursuit of game, it was stated by the parties that they had authority from the owner of the land; but being not prepared to prove that fact, they asked for an adjournment:—Semble, that this was a claim of right on a matter which would be a defence to an action; and therefore, under the proviso in s. 30 of 1 & 2 Will. 4, c. 32, the justices ought not to have proceeded to convict. *Reg.* v. *Cridland*, 7 El. & Bl. 853; 27 L. J., M. C. 28; 3 Jur. (N.S.) 1213; 5 W. R. 679.

B. was charged with trespass in pursuit of game, under 1 & 2 Will. 4, c. 32, s. 30, and was proved to have shot game on glebe land over which the rector of the parish had always exercised the privilege of sporting. The defence of B. was that he was game watcher, employed by three gentlemen who were proved to rent shooting from the lord of the manor, and that the lord claimed the shooting over part of the glebe under an inclosure act. He proved that his employers ordered him to go upon this land, but he produced no evidence, although an adjournment was offered for that purpose, that the land upon which the alleged trespass was committed was included in the lands over which his employers' shooting extended, nor in the disputed part of the glebe. The magistrate decided that he had no bonâ fide claim of right to shoot on this particular land, and convicted him of the trespass:—Held, that, under the circumstances, the magistrate was justified in convicting. *Birnie* v. *Marshall*, 35 L. T. 373.

Bonâ fide Question of Title.]—A question of title bonâ fide raised in the course of proceedings, on an information, before justices, for trespassing in pursuit of game, operates to oust the jurisdiction of the justices, and their proper course is to dismiss the charge. *Legg* v. *Pardoe*, 9 C. B. (N.S.) 289; 30 L. J., M. C. 108; 7 Jur. (N.S.) 499; 3 L. T. 371; 9 W. R. 234.

The bona fides of the claim is for the justices to determine. *Ib.*

M. laid an information against A. for trespassing in pursuit of game, under 1 & 2 Will. 4, c. 32 (Game Act), s. 30. At the hearing he gave evidence that the lords of the manor had, in 1815, granted the right of shooting, down to the present time, and that he was then renting the shooting of them. On A.'s part it was alleged that he had a lease from the lords of the manor of the lands said to be trespassed upon, dated 1859, in which there was no reservation of a right to the game, and that the alleged trespass was committed in the assertion of his right to the game. The justices having convicted A.:—Held, that under the circumstances, the claim of right having been bonâ fide made, the jurisdiction of the justices was ousted. *Adams* v. *Masters*, 24 L. T. 502.

The tenant of a farm under a lease which reserved the game to the lessor, but did not expressly say that it did so exclusively, shot three hares in the presence of the keeper to assert his right. He set up this claim of right on the hearing of an information against him before the justices, and alleged that it ousted their jurisdiction. They found that the claim was not bonâ fide, because he had a copy of the lease, and convicted him:—Held, that this finding as to the bona fides was not conclusive, because there was no evidence that his claim was made malâ fide; and that as he asserted his claim of right the magistrates had no jurisdiction to hear the information. *Lovesy* v. *Stallard*, 30 L. T. 792.

A trespasser in search of game set up as a defence, under 1 & 2 Will. 4, c. 32, s. 30, the leave and licence of the occupier under a parol lease. The occupier denied that the game was reserved; evidence was given to show that it was:—Held, that the defence was not bonâ fide, and, therefore, the jurisdiction of the justices was not ousted. *Reg.* v. *Critchlow*, 25 W. R. 681.

Semble, that if there is any evidence to show that the game is reserved, it becomes a question of fact to be decided by the justices. *Ib.*

Where a party made a claim of right to shoot over lands as lord of a manor, and gave in evidence in support of such right, certain documents of title and an inclosure act, but the justices convicted him on the ground that he did not bonâ fide believe, when he committed the trespass, that he had any such right as that claimed by him; the court quashed the conviction on the ground that there was evidence of the bona fides of the claim set up. *Reg.* v. *Derbyshire JJ.*, 11 W. R. 780.

Title alleged must be of Party himself, not of Third Person.]—Where proceedings for trespass-

ing on land in pursuit of game are taken before justices against a person who raises a question of title, he must allege such title to be in himself, and not in a third person; and it is the province of the justices to determine whether or not such claim has a reasonable foundation. *Cornwell* v. *Sanders*, 3 B. & S. 206; 32 L. J., M. C. 6; 9 Jur. (N.S.) 540; 7 L. T. 356; 11 W. R. 87.

Mere Assertion.]—A person charged with trespassing in pursuit of game in the day-time on land in the occupation of a tenant to A., set up a claim of right to shoot over the land, on the ground that he and every one who chose had always shot there till some recent acts of interruption, and declared his readiness to try the right with A.:—Held, that the mere assertion of such a general right in himself and every one else, though he really believed it, without showing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict. *Leatt* v. *Vine*, 30 L. J., M. C. 207; 8 L. T. 581.

Mere Belief of Title.]—It is not sufficient to oust the jurisdiction of the justices in regard to a charge of trespass in pursuit of game under 1 & 2 Will. 4, c. 32, that there is an honest claim of right, if such claim is absurd and impossible in point of law. The question is whether a reasonable claim of right is involved, and not one of mens rea, inasmuch as the statute is not a mere criminal statute, but is intended for the protection of the peculiar rights of persons entitled to shoot game. *Watkins* v. *Major*, 44 L. J., M. C. 164; L. R. 10 C. P. 662; 33 L. T. 352; 24 W. R. 164.

The mere belief of a person, however bonâ fide, in the existence of the right asserted, is insufficient, unless accompanied by some colour for the claim, to oust the jurisdiction of the justices. *Cornwell* v. *Sanders*, 3 B. & S. 206; 32 L. J., M. C. 6; 9 Jur. (N.S.) 540; 7 L. T. 356; 11 W. R. 87.

Reasonable Claim of Right.]—A person being summoned before justices for trespassing in pursuit of game upon waste and common land in the occupation of the lord of the manor, denied such occupation, alleging the proprietorship of the land to be in third parties. There was some evidence in support of the claim of the lord, but the evidence preponderated considerably in favour of the title as set up by the party trespassing. The justices having convicted him:—Held, that the court would not impugn their decision. *Ib.*

An information was laid against K. for a trespass in pursuit of game. At the hearing, he gave in evidence a lease, dated 1794, for ninety-nine years, of the land upon which the trespass was alleged to have been committed, to a party through whom he claimed, the lessor being the party through whom the informant claimed the right to the game. The lease contained the following reservation to the lessor: "and also liberty to hawk, hunt, set and fowl in and upon the demised premises during the term hereinafter granted." K. having set up his title through the lessee to take game upon the land, and so disputed the right of the justices to adjudicate, they held that the claim of right was not sufficient to oust their jurisdiction, and convicted him:—Held, that the objection being made bonâ fide, it was a reasonable one, and that the jurisdiction of the justices was ousted. *Reg* v. *Kayley*, 10 L. T. 339.

e. Evidence.

Competency of Witnesses.]—An information before justices under 1 & 2 Will. 4, c. 32, s. 23, for using an engine for the purpose of taking game without the authority of a certificate, is a criminal proceeding in which the party is charged with the commission of an offence punishable on summary conviction, within 14 & 15 Vict. c. 99, s. 3; and therefore the party charged is not competent or compellable to give evidence for or against himself. *Cattell* v. *Ireson*, El. Bl. & El. 91; 27 L. J., M. C. 167; 4 Jur. (N.S.) 560; 6 W. R. 469.

Production of Deed giving Right of Shooting.]—A landowner, by deed, granted the right of shooting to G. over land, of which B. afterwards became occupier. Upon an information against B. for entering and being in the daytime upon land in search of and in pursuit of game (the land being that in his own occupation), G. deposed that he had the exclusive right of shooting over the same, and that he had given no authority to B. to shoot, but the deed was not put in evidence. The justices having convicted:—Held, that the conviction, unsupported by the production of the deed, was wrong. *Barker* v. *Davis*, 34 L. J., M. C. 140; 11 Jur. (N.S.) 651.

Parol Evidence of what Party said before Magistrate.]—Parol evidence of what a party says before a magistrate, on the hearing of a case of trespass, under 1 & 2 Will. 4, c. 32, s. 30, is admissible, although, in fact, what he said was taken down; as this is not a case in which it is the magistrate's duty to take down what is said before him. *Robinson* v. *Vaughton*, 8 Car. & P. 252.

Right exercised for Seven Years.]—Evidence that a party has exercised the right of killing game for seven years upon land is primâ facie evidence of the right under 1 & 2 Will. 4, c. 32, s. 26, which makes it lawful for any person having the right of killing the game upon any land, to seize game recently killed, found in the possession of any person upon such land in pursuit of game. *Reg.* v. *Wall*, 2 Cox, C. C. 288.

Trespass with Dogs where Hares seen.]—To sustain a charge of trespass in pursuit of game, brought under the 27 & 28 Vict. c. 67, the only evidence given on behalf of the complainants to prove the commission of the offence was, that the defendant, with two greyhounds, was trespassing on lands of the complainants where hares had been frequently seen, and that he went away on being called on to stop by a caretaker of the complainants. The caretaker deposed that he believed the defendant was beating for hares:—Held, that there was no evidence that the defendant had committed an offence under the statute. *Kingston (Countess)* v. *O'Neill*, 6 L. R. Ir. 101; 14 Cox, C. C. 466.

f. Convictions.

Form and Validity.]—In a conviction for a trespass in the daytime, under 1 & 2 Will. 4, c. 32, s. 30, the words "enter and be" constitute

only one offence. *Rex* v. *Mellor*, 2 D. P. C. 173.

The place of committing the trespass may be described in the conviction as certain land, without giving it a name, or setting it out with abuttals. *Ib.*

As, by s. 45, the conviction itself cannot be removed out of the inferior court, a verified copy may be used to ascertain whether the conviction is valid. *Ib.*

After a conviction by two justices under 1 & 2 Will. 4, c. 32, s. 30, and before any formal conviction had been drawn up, one of such justices changed his mind, and together with a third justice who had not heard the case, but without the concurrence of the other justice who had convicted, reversed such conviction:—Held, that such reversal was irregular, but that as no conviction had been drawn up there was no good conviction existing, and the whole proceeding was a miscarriage *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T. 559. See *Reg.* v. *Waterford JJ.*, 18 W. R. 164.

Imposition and Payment of Penalties.]—By 1 & 2 Will. 4, c. 32, s. 37, every penalty for any offence against that act is to be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish in which the offence shall have been committed; to be by such overseer or officer paid over to the use of the general county rate; but by 5 & 6 Will. 4, c. 20, s. 21, reciting the former act, it is enacted that one moiety of all such penalties shall go and be paid to the person who shall inform and prosecute for the same, and the other moiety only shall go and be paid to such overseer or officer, and be by him applied in manner before directed:—Held, that a conviction for an offence against the former act, which directed the whole penalty to be paid "to W. J., one of the overseers of the poor of the parish, &c., to be by him applied according to the directions of the statute in such case made and provided," is bad. *Griffith* v. *Harries*, 2 M. & W. 335; M. & H. 8; 6 L. J., M. C. 29; 1 Jur. 57.

A conviction for trespassing in search of game in the daytime, under 1 & 2 Will. 4, c. 32, s. 30, included four persons, and adjudicated that "each of them, the said J. C., J. B, W. W., and J. S., so making default, shall be imprisoned for one month, unless the said several sums, and the costs and charges of conveying each of them, the said J. C., J. B., W. W., and J. S., so making default, to gaol, shall be sooner paid":—Held, that it made each to be imprisoned until the costs of conveying all to gaol had been paid, and therefore was bad, inasmuch as the 11 & 12 Vict. c. 43, s. 23, only made each liable for the costs of conveying him to gaol. *Reg.* v. *Cridland*, 7 El. & Bl. 853; 27 L. J., M. C. 28; 3 Jur. (N.S.) 1213; 5 W. R. 679.

A conviction for killing a pheasant contrary to s. 3 of the 1 & 2 Will. 4, c. 32, following the form given in schedule (I. 2) to 11 & 12 Vict. c. 43, adjudged the offender to forfeit and pay a penalty. "to be paid and applied according to law." By 1 & 2 Will. 4, c. 32, s. 37, and by 5 & 6 Will. 4, c. 20, s. 21, the penalty is directed to be paid, one half to the informer, and one half to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish in which the offence shall have been committed:—Held, that the conviction was sufficient, by virtue of 11 & 12 Vict. c. 43, ss. 17, 32, being in the former given by the schedule to that act referred to in s. 17, though it did not in terms distribute the penalty, nor name the informer or the overseer to whom the penalty was to be paid. *Reg.* v. *Hyde*, 7 El. & Bl. 859, n; 21 L. J., M. C. 94; 16 Jur. 337.

A conviction under 1 & 2 Will. 4, c. 32, s. 3, adjudged the defendant to pay a fine of 5*s.*, "to be paid and applied according to law," and in default of payment to be imprisoned for two months:—Held, that the justices had no jurisdiction to order the defendant to be imprisoned, as the imprisonment was conditional on the non-payment of the penalty, and they had not, by the conviction, directed the manner in which the penalty should be paid, as required by 5 & 6 Will. 4, c. 20, s. 21. *Hyde, Ex parte*. 15 Jur. 803.

Quashing—No Notice of Objection.]—A party summarily convicted appealed under 1 & 2 Will. 4, c. 32, giving notice of several objections on the merits. By the conviction, when returned to the sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The sessions quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed:—Held, that, assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given. *Rex* v. *Boulthee*, 4 A. & E. 498; 6 N. & M. 26; 1 H. & W. 713; 5 L. J., M. C. 57.

Barring Actions.]—A. ordered and authorised B. to sport over the lands of C., which he did. D., by the assent of C., laid an information before a magistrate against B. for the trespass under 1 & 2 Will. 4, c. 32, s. 30. The magistrate dismissed the complaint:—Held, in an action by C. against A. and B. for this trespass, that the proceedings before the magistrate were a bar to the action, both as to A. and B., under s. 46; and that to be a bar, it was not necessary that the magistrate should convict of the trespass, it being sufficient if he adjudicated between the parties. *Robinson* v. *Vaughton*, 8 Car. & P. 242.

3. Unlawful Possession of Game.

Evidence.]—A common carrier between B. and R. was met by a police constable coming along the turnpike road to R. with his horse and cart. The constable, suspecting that he had been unlawfully on land in pursuit of game, asked him if he had any game in his cart, to which he replied that he had only a few rabbits. The constable then searched the cart, and found in a basket, beneath the rabbits, a pheasant, nine partridges (three of which had been shot, and six netted), and two hares (one of which had been shot, and the other trapped). The game was wet, and had been recently killed; and the boots of the carrier (who fainted when the game was discovered) were dirty, although the road was dry. The justices who convicted him found that "no evidence was given on the one hand to show that the game was unlawfully obtained, or on the other hand to show that it was lawfully obtained":—Held, that the foregoing circumstances did not constitute sufficient evidence on which

he could be convicted of having obtained game by unlawfully going on land in search or pursuit of game within 25 & 26 Vict. c. 114, s. 2. *Jones v. Dicker*, 22 L. T. 95.

Two men were seen together by a policeman on the 16th of December on a highway, about half-past nine p.m. One had a net under his arm for catching hares. Nothing else was found on either of them; but they had a lurcher with them. The policeman had heard a dog yelping as if in chase of a hare or rabbit a little time before these men came along the road. The night was damp and the net was wettish. They were both convicted under 25 & 26 Vict. c. 114, s. 2:—Held, that there was evidence to support the conviction: for that it was not necessary that they should have caught any game: it was sufficient if they had used the net for the purpose, though unsuccessfully, of which there was evidence. *Jenkin* v. *King*, or *Reg.* v. *Cornwall JJ.*, 41 L. J., M. C. 145; L. R. 7 Q. B. 478; 26 L. T. 428; 20 W. R. 669.

Jurisdiction.]—In order to give jurisdiction to magistrates to convict of an offence under 25 & 26 Vict. c. 114, s. 2, it is necessary that the game or instruments for killing or taking game should be seized and detained on the highway. *Turner* v. *Morgan*, 44 L. J., M. C. 161; L. R. 10 C. P. 587; 33 L. T. 172; 23 W. R. 659.

A man, whilst going in a cart along a highway, was required to stop by a constable. He drove off without obeying the order to stop, and shortly afterwards delivered to G. several rabbits, of which the constable subsequently took possession:—Held, that, as the rabbits were not seized by the constable whilst they were in his possession upon the highway, he could not be convicted under 25 & 26 Vict. c. 114, s. 2. *Ib.*

G. SEPULTURE—DESECRATION OF.

Removing Dead Bodies for Purpose of Dissection.]—Taking up dead bodies even though for the purpose of dissection is an indictable offence. *Reg.* v. *Lynn*, 2 Term Rep. 733; 1 Leach, C. C. 497.

Selling the dead body of a person capitally convicted for dissection, where dissection was no part of the sentence, was a misdemeanour at common law; and in order to support an indictment for such offence, it was not necessary that there should be direct evidence that the defendant sold the body for lucre and gain, and for the purpose of being dissected. *Rex* v. *Cundick*, D. & R. N. P. C. 13.

Taking Body with Intent to Sell.]—It is an indictable offence against decency to take a person's dead body with intent to sell or dispose of it for gain and profit. *Rex* v. *Gilles*, R. & R. 336, n. *b.* And see *Rex* v. *Duffin*, R. & R. 365.

Master of Workhouse Selling Bodies—No Request by Relations.]—A master of a workhouse, after showing the bodies of deceased paupers in coffins to their relatives, caused the relatives to follow other coffins to the graves, and the appearance of a funeral to be gone through. The relatives had not required that the bodies should be interred without anatomical examination, according to 2 & 3 Will. 4, c. 75, s. 7. The master of the workhouse then sent the bodies to Guy's Hospital for dissection, and received therefor sums of money in proportion to the number of bodies sent. After dissection the bodies were buried. The jury found that the master of the workhouse had caused the appearance of funerals to be gone through, with a view to prevent the relatives requiring the bodies to be interred without anatomical examination:—Held, that an indictment charging the master of the workhouse, in one count, with selling the bodies, in another with taking away the bodies for gain to delay the burial with intent to have them dissected, and in a third with intent to sell and dispose of them, could not be sustained, as the master of the workhouse had lawful possession of the bodies within 2 & 3 Will. 4, c. 75, s. 7, and the relatives had made no request that the bodies should be interred without anatomical examination. *Reg.* v. *Feist*, Dears. & B. 54; 27 L. J., M. C. 164; 4 Jur. (N.S.) 541; 6 W. R. 546; 8 Cox, C. C. 18.

Exposing Dead Body in Public Highway.]—The prisoner was indicted for unlawfully exposing the dead body of her infant child near a public highway. The jury found that the body was exposed by the prisoner in a public highway; that the place was one where many people were certain to pass and repass; and that the exposure was calculated to shock and disgust passers-by and outrage public decency:—Held, that the prisoner was guilty of a nuisance at common law. *Reg.* v. *Clark*, 15 Cox, C. C. 171.

Not providing for Burial.]—A parent, who has not the means of providing burial for the body of his deceased child, is not liable to be indicted for a misdemeanour in not providing for its burial, even though a nuisance is occasioned by allowing the body to remain unburied, and although the poor-law authorities of the union have offered him money to defray the expenses of burial, by way of loan, as he is not bound under such circumstances to contract a debt. *Reg.* v. *Vann*, 2 Den. C. C. 325; T. & M. 632; 21 L. J., M. C. 39; 15 Jur. 1090; 5 Cox, C. C. 379.

Where no ecclesiastical prohibition attaches, semble that every householder in whose house a dead body lies is bound by common law to inter the body decently. *Reg.* v. *Stewart*, 4 P. & D. 349; 12 A. & E. 773.

Cremation.]—The mere act of burning a dead human body is not in itself a crime, but if it is burnt in an indecent manner or in such a way as to give offence to any portion of the public being in a place where they had a right to be, it is a common nuisance. *Reg.* v. *Price*, 53 L. J., M. C. 51; 12 Q. B. D. 247; 33 W. R. 45, n.; 15 Cox, C. C. 389. See *Williams* v. *Williams*, 51 L. J., Ch. 385; 20 Ch. D. 659; 46 L. T. 275; 30 W. R. 438; 15 Cox, C. C. 39; 46 J. P. 726.

Removal of Corpse from Burying Ground, whether Consecrated or not.]—It is a misdemeanour at common law to remove, without lawful authority, a corpse from a grave in a burying ground belonging to a congregation of protestant dissenters, and it is no defence to such a charge that the motive of the person removing the body was pious and laudable. *Reg.* v. *Sharpe*, Dears. & B. 160; 26 L. J., M. C. 47; 3 Jur. (N.S.) 192; 5 W. R. 318; 7 Cox, C. C. 214.

The defendant was indicted for unlawfully, wilfully, and indecently digging open graves in a burial-ground, and taking and removing parts

of the bodies of persons buried therein, and interfering with and offering indignities to the remains of the said bodies. The evidence showed that the defendant employed persons to excavate for building operations the burial-ground attached to a nonconformist place of worship, which had been disused as a burial-ground for some time; and the jury found that, in the course of the excavation, bones that formed parts of human remains, and of the same human skeleton, were dug up, but that they were not disturbed in an improper and indecent manner:—Held, that the defendant was guilty of a misdemeanour at common law. *Reg.* v. *Jacobson*, 14 Cox, C. C. 522.

D. PROCEDURE AND PRACTICE.

I. JURISDICTION.

1. *Admiralty Jurisdiction*, 1717.
2. *Offence Committed on Land Abroad*, 1720.
3. *Central Criminal Court*, 1721.
4. *Commissions and Gaol Delivery*, 1723.
5. *Quarter Sessions*, 1725.
6. *Offences Committed near Boundaries of Counties*, 1725.
7. *County of City or Town*, 1726.
8. *In Boroughs*, 1726.
9. *Offences on Sea near Shore of County*, 1726.
10. *Offences during Journeys and Voyages*, 1727.
11. *In Particular Cases*, 1727.

1. Admiralty Jurisdiction.

Persons on board British Ships in Rivers and Estuaries.]—Certain bonds or valuable securities were stolen from a British ocean-going merchant ship whilst she was lying afloat, in the ordinary course of her trading, in the river at Rotterdam, in Holland, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide. There were no bridges between the ship and the sea, and the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship:—Held, that the prisoners could be properly tried and convicted at the Central Criminal Court in this country, as the larceny took place within the jurisdiction of the admiralty of England. *Reg.* v. *Carr*, 52 L. J., M. C. 12; 10 Q. B. D. 76; 47 L. T. 451; 31 W. R. 121; 4 Asp. M. C. 604; 15 Cox, C. C. 129; 47 J. P. 38.

The criminal jurisdiction of the admiralty of England extends over British ships, not only on the high seas but also in rivers, below the bridges, where the tide ebbs and flows, and where great ships go, though at a spot where the municipal authorities of a foreign country might exercise concurrent jurisdiction, if invoked. *Reg.* v. *Anderson*, 38 L. J., M. C. 12; L. R. 1 C. C. 161; 19 L. T. 400; 17 W. R. 208; 11 Cox, C. C. 198.

The admiralty jurisdiction extends to estuaries although the common law tribunals have a concurrent jurisdiction. *Rex* v. *Bruce*, R. & R. 243; 2 Leach, C. C. 1093.

Larceny committed on board an English ship lying in a river in China, is within the jurisdiction of the Central Criminal Court. *Rex* v. *Allen*, 1 M. C. C. 494; 7 Car. & P. 664.

Semble, there would be jurisdiction at common law if a British ship was on the high seas, or infra primos pontes, or in a tidal river where great ships come and go. *Reg.* v. *Armstrong*, 13 Cox, C. C. 184.

—— **Offence not Completed.**]—The murder need not be consummated or wholly completed on board such ship to deprive jurisdiction. *Ib.*

Persons on board British Ship on High Seas.]—An English ship upon the high seas is to be considered as part of the territory of England; and therefore a foreigner, who whilst on board such ship commits an offence against the English laws, is amenable to those laws; and it makes no difference whether he has gone on board voluntarily, or has been taken and detained there against his will. *Reg.* v. *Sattler*, Dears. & B. 525; 27 L. J., M. C. 18; 4 Jur. (N.S.) 98; 6 W. R. 227; 7 Cox, C. C. 431.

A person is found within the jurisdiction of a court of justice, within the meaning of the 18 & 19 Vict. c. 91, s. 21, when he is actually present there, whether he has come within such jurisdiction voluntarily, or has been brought there against his will. *Ib.*

The defendant was convicted on an indictment charging him with assaulting the prosecutors on the high seas, and imprisoning and detaining them. They were Chilian subjects, and had been ordered by the government of Chili to be banished from that country to England. The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with the Chilian government to take the prosecutors from Valparaiso to Liverpool; and they were accordingly brought on board his vessel by the officers of the government, and were carried by the defendant to Liverpool under his contract:—Held, that although the conviction could not be supported for the assault and imprisonment in the Chilian waters, it must be sustained for that which was done out of the Chilian territory, and that although the defendant was justified in receiving the prosecutors on board his vessel in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and the detention of the prisoners and conveying them to Liverpool was a wrong intentionally planned and executed in pursuance of the contract, amounting to a false imprisonment, and triable by English law. *Reg.* v. *Lesley*, Bell, C. C. 220; 29 L. J., M. C. 97; 6 Jur. (N.S.) 202; 1 L. T. 452; 8 W. R. 220; 8 Cox, C. C. 269.

—— **Indictment.**]—In an indictment preferred at the assizes for a felony committed on the high seas, it is sufficient to allege that the offence was committed on the high seas, without also averring that the offence was committed within the jurisdiction of the admiralty. *Reg.* v. *Jones*, 2 Car. & K. 165; 1 Den. C. C. 101.

British Ship—How Proved.]—On the trial of an indictable offence, committed on board a British ship on the high seas, it is not necessary to prove the register of such ship under the Merchant Shipping Act, 1854, Part II., or that she belongs to a person qualified to be owner of a British ship according to the terms of that act. *Reg.* v. *Von Seberg*, 39 L. J., M. C. 133; L. R. 1 C. C. 264; 22 L. T. 523; 18 W. R. 935.

Upon the trial of an indictment against a sailor for wounding the mate on board a ship on the high seas, the master of the ship, the boatswain, and one of the crew, having stated the ship was a British ship, and was sailing under the British flag:—Held, that the ship was sufficiently proved to be a British ship. *Ib.*

A hulk retaining the general appointments of a ship, registered as a British ship, and hoisting the British ensign, although only used as a floating warehouse, is primâ facie sufficiently a British ship to be within the 17 & 18 Vict. c. 104, s. 267, and a murder committed thereon is within the jurisdiction of the admiralty. *Reg.* v. *Armstrong*, 13 Cox, C. C. 184.

To prove that a ship is a British ship, it is not necessary to produce the register or a copy thereof; it is sufficient to show orally that she belongs to British owners and carries the British flag. *Reg.* v. *Allen*, 10 Cox, C. C. 405.

Upon an indictment for murder, it was proved that the offence was committed upon the high seas, in a ship sailing under the British flag, which was foreign built, and all the crew of which, both officers and men, including the prisoner and the deceased, were foreigners. A certified copy of the register was put in evidence, in which one Rehder was described as the sole owner, and as being of London, and a merchant. Rehder was not a born Englishman, and there was no evidence of his having letters of denization, or that he had been naturalised:—Held, that the ship was not a British ship so as to give jurisdiction in this country to try the offence. *Reg.* v. *Bjornsen*, L. & C. 545; 34 L. J., M. C. 180; 11 Jur. (N.S.) 589; 12 L. T. 473; 13 W. R. 664; 10 Cox, C. C. 74.

—— **Ship taken by British Ship.**]—On the trial of Brazilians for the murder of P., it appeared that a British cruiser, engaged in the prevention of the slave-trade, manned two boats, and sent them, commanded by a lieutenant, to board the Brazilian ship F. He did so, and finding her fitted up for slaves, but with no slaves on board, took her. After this, the lieutenant in the ship F. chased the ship E., also Brazilian, and sent a boat with P., who was a midshipman, to board her. She had slaves on board, and was captured, and part of her crew put on board the F., and left there, with the captain and cook of the F., as prisoners in charge of P. and British seamen. Neither the boats nor the F., after she was taken, had any instructions on board, but the cruiser had. Such of the crew of the E., as were thus put on board the F., and the cook of the F., all Brazilians, rose on P. and the British seamen and killed them all: but the captain of the F. would not join in the transaction. It was contended for the prosecution, that the F. and E. were legally taken under 5 Geo. 3, c. 113, and 7 & 8 Geo. 4, c. 74, and the Portuguese and Brazilian treaties as to slave-trading; and that the prisoners were in lawful custody, and the ship F. in the lawful custody of the queen's officers. The prisoners were convicted of the murder, but a majority of the judges held the conviction wrong, on the ground of want of jurisdiction in an English court to try an offence committed on board the F.; and that, if the lawful possession of that vessel by the British Crown through its officers would be sufficient to give jurisdiction, there was no evidence brought before the court at the trial to show that the possession was lawful. *Reg.* v. *Serva*, 2 Car. & K. 53; 1 Den. C. C. 104.

—— **Position of Ship.**]—Oral testimony as to the position of a ship at a given time is better evidence than the production of the log-book. *Reg.* v. *Allen*, 10 Cox, C. C. 405.

Jurisdiction over Foreign Ship.]—A German vessel carrying the German flag, under the command and immediate direction of a German subject, collided with an English steamer navigating the English channel at a point within two miles and a half from Dover beach, and the collision caused the English ship to sink and the death by drowning of an English subject on board of her. The prisoner was tried and found guilty of manslaughter at the Central Criminal Court:—Held, by a majority of the court, that the Central Criminal Court had no jurisdiction to try the case. *Reg.* v. *Keyn*, 46 L. J., M. C. 17; 2 Ex. D. 63; 13 Cox, C. C. 403. See now the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 2.

2. Offence Committed on Land Abroad.

By British Subject on Foreigner.]—A British subject, who committed a murder in a foreign country upon a person who was not a British subject, was triable in England under 9 Geo. 4, c. 31, s. 7. *Reg.* v. *Azzopardi*, 1 Car. & K. 203; 2 M. C. C. 289; 1 Cox, C. C. 28.

Under 33 Hen. 8, c. 23, a British subject was indictable for the murder of another British subject in the jurisdiction of a foreign state. *Rex* v. *Sawyer*, R. & R. 294; 2 Car. & K. 101. S. P., *Rex* v. *Ealing*, Car. C. L. 105.

By Foreigner on British Subject.] — Manslaughter committed in China by an alien enemy who had been a prisoner of war and was then acting as a mariner on board an English merchant ship, could not be tried in England under 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 36. *Rex* v. *Depardo*, 1 Taunt. 26; R. & R. 134; 9 R. R. 693.

A foreigner cannot be tried in England for the murder of a British subject in a foreign country. *Rex* v. *Mattos*, 7 C. & P. 458.

By Foreigner on Foreigner — Death in England.]—If one foreigner inflicts a blow on another foreigner in a foreign vessel on the high seas, and the person so struck in a few days afterwards lands in England and dies there, the homicide is not cognisable by the courts of this country by virtue of 9 Geo. 4, c. 31, s. 8, or of 2 Geo. 2, c. 21, s. 1. *Reg.* v. *Lewis*, Dears. & B. 182; 26 L. J., M. C. 104; 3 Jur. (N.S.) 525; 7 Cox, C. C. 277.

Death on Board Ship.]—Where the death was on shipboard, though the blows were given on shore, the offence could not be said to have been committed according to the words of 9 Geo. 4, c. 31, s. 7, "on land out of the United Kingdom." *Rex* v. *Mattos*, 7 C. & P. 458.

Indictment.]—In an indictment on 9 Geo. 4, c. 31, s. 7, for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his Majesty. To prove the allegation that the prisoner was a subject of his Majesty, his own declaration

is evidence to go to the jury, and it will be for them to say whether they are satisfied that he is in fact a British-born subject. *Rex* v. *Helsham*, 4 Car. & P. 394.

3. Central Criminal Court.

Constitution of Court.]—The 4 & 5 Will. 4, c. 4, s. 36, subs. 1, 2, after establishing and constituting the Central Criminal Court, and authorising the crown to issue commissions of oyer and terminer and gaol delivery, enacts that it shall be lawful for the judges of the court, "or any two or more of them, to inquire of. hear, determine and adjudge" the offences specified:—Held, that this enactment did not require that two judges should sit on the trial of an indictment. That, supposing the attendance of one of the aldermen of the city named in the commission was necessary in addition to the presiding judge, it was no ground of error that the same alderman was not present throughout the trial:—Held, also, that more than one court might sit at the same time. *Leverson* v. *Reg.*, 10 B. & S. 404; 38 L. J., M. C. 97; L. R. 4 Q. B. 394; 20 L. T. 485; 18 W. R. 251; 10 Cox, C. C. 286.

The judge of the Sheriff's Court of the city of London has jurisdiction to sit as a judge of the Central Criminal Court. *Ib.*

Jurisdiction—Admiralty.]—A foreigner was convicted of manslaughter at the Central Criminal Court, committed on board a British vessel, in the river Garonne, within the boundaries of the French empire. about thirty-five miles from the sea, and at a spot about 300 yards from the nearest shore, within the ebb and flow of the tide:—Held right, inasmuch as it was a place within the jurisdiction of the admiralty of England, which that court had jurisdiction to try under 4 & 5 Will. 4, c. 36, s. 22. *Reg.* v. *Anderson*, 38 L. J., M. C. 12; L. R. 1 C. C. 161; 19 L. T. 400; 17 W. R. 208: 11 Cox, C. C. 198. See also *Reg.* v. *Keyn*, 46 L. J., M. C. 17; 2 Ex. D. 63; 13 Cox, C. C. 403.

Larceny committed on board an English ship lying in a river in China is within the jurisdiction of the Central Criminal Court. *Rex* v. *Allen*, 7 Car. & P. 664; 1 M. C. C. 494.

—— **Larceny.**]—A. was indicted at common law for simple larceny, in stealing in Middlesex a quantity of lead. The lead was stolen from the roof of the church of Iver in Buckinghamshire. The prisoner was indicted at the Central Criminal Court, which has jurisdiction in Middlesex (under 4 & 5 Will. 4, c. 36), but not in Buckinghamshire:—Held, that he could not be convicted there, on the ground that the original taking not being a larceny, but created by statute a felony, the subsequent possession could not be considered a larceny. *Rex* v. *Millar*, 7 C. & P. 665.

—— **Libel.**]—In a prosecution at the Central Criminal Court for publishing a libel, it is not necessary, for the purpose of giving jurisdiction, that the prosecutor should have entered into recognisance, or that the defendant should have been in custody, or be bound to appear according to 4 & 5 Will. 4, c. 36, s. 13. *Reg.* v. *Gregory*, 7 Q. B. 274; 14 L. J., M. C. 82; 9 Jur. 593.

—— **Forgery.**]—A. was indicted at the Central Criminal Court for forgery. He was not shown either to have committed the forgery, or to have been in custody within the jurisdiction of the court till the moment before the trial, when he surrendered in discharge of his bail:—Held, that he was triable in that court under 11 Geo. 4 & 1 Will. 4, c 66, s. 21, as being in custody within its jurisdiction. *Reg.* v. *Smythies*, 1 Den. C. C. 498; 2 Car. & K. 878; T. & M. 190; 19 L. J., M. C. 31; 13 Jur. 1034; 4 Cox, C. C. 94.

—— **Casting away Ship.**]—The Central Criminal Court has jurisdiction to try accessories before the fact to the felony of casting away and destroying a ship on the high seas, on an indictment against principal and accessory, though the principal felon is not amenable to justice. *Reg.* v. *Wallace*, 2 M. C. C. 200; Car. & M. 200.

—— **Murder.**]—A British subject might be indicted at the Central Criminal Court under 9 Geo. 4, c. 31, s. 7, for the murder of a foreigner out of the Queen's dominions. *Reg.* v. *Azzopardi*, 1 Car. & K. 203; 2 M. C. C. 289; 1 Cox, C. C. 28.

Certiorari—On what Terms.]—When, after removal, the defendant is ordered to be tried under the act 19 & 20 Vict. c. 16, at the Central Criminal Court, the Court of Queen's Bench will not make it a condition, under s. 24, that the prosecutor shall furnish the defendant with evidence which, it is suggested, has been obtained by the prosecutor since the taking of the depositions. *Reg.* v. *Palmer*, 5 El. & Bl. 1024.

—— **Grounds for.**]—It is not a sufficient ground for the removal of an indictment, under 19 & 20 Vict. c. 16, s. 3, for trial at the Central Criminal Court, that, on the occasion of the first apprehension of the prisoner, some months before the time for trial, articles and paragraphs had appeared in some papers of the particular town in which the trial would take place, of a nature likely to create prejudice against him, and that the case had become matter of conversation amongst certain classes in that town, it not appearing either that those papers had a general circulation in the county, or that the case had become matter of general conversation in the county, as the jurors would be taken from the county as well as the town. *Reg.* v. *Ruston*, 11 W. R. 209.

—— **Certificate, Form of.**]—The certificate mentioned in 19 & 20 Vict. c. 16, s. 25, may be in the form supplied by the Treasury. *Reg.* v. *Balcombe*, 25 W. R. 585.

—— **By what Jury Tried.**]—An indictment for libel was preferred in the Central Criminal Court, the publication being laid as having taken place "at the parish of St. M., in the county of Middlesex, within the jurisdiction of the Central Criminal Court." The defendant having removed it by certiorari, it came on to be tried at nisi prius, in Middlesex, when he withdrew his plea of not guilty:—Held, that there was a sufficient venue assigned to the material fact. *Reg.* v. *Gregory*, 7 Q. B. 274; 14 L. J., M. C. 82; 9 Jur. 593.

Before 9 & 10 Vict. c. 24, s. 3, an indictment alleging the offence to have been committed at the parish of M., in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, was found at the Central Criminal Court and removed by certiorari:—Held, that the case

was properly tried by a Middlesex jury. *Reg.* v. *Hunt*, 10 Q. B. 925; 17 L. J., M. C. 14; 11 Jur. 822. S. P., *Reg.* v. *Castro*, 28 L. T. 342; 12 Cox, C. C. 454.

Mandamus.]—Mandamus will not lie to the judges and justices of the Central Criminal Court. The recorder of London, upon the trial and conviction of a prisoner charged with larceny, having refused to order (under 24 & 25 Vict. c. 96, s. 100) the person with whom stolen property was pledged to restore it to the prosecutor, the Queen's Bench Division refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the recorder to make such order. *Reg.* v. *Central Criminal Court Judges*, 52 L. J., M. C. 121; 11 Q. B. D. 479; 15 Cox, C. C. 325.

4. COMMISSIONS AND GAOL DELIVERY.

Jurisdiction.]—An offence was committed within a locality which had a separate body of justices exercising jurisdiction within the liberty, by virtue of three separate commissions: first, the ordinary commission of the peace; secondly, a commission to try all treasons, misprisions of treasons, insurrections, murders, felonies, manslaughters, &c.; thirdly, a general commission of gaol delivery. Neither of the commissions contained any non-intromittent clause; but the general county magistrates, in fact, exercised no jurisdiction within the liberty, which had a gaol and separate custos rotulorum and clerk of the peace:—Held, that these commissions did not oust the jurisdiction of her Majesty's justices of gaol delivery for the whole county; and that the prisoner having been removed from the liberty by writs of habeas ad deliberandum and recipias corpus was properly tried by such justices. *Reg.* v. *Crane*, 3 Cox, C. C. 53.

The general authority given by the commission of general gaol delivery to justices of assize to deliver the gaols of all manner of prisoners found therein, confers no jurisdiction over prisoners directed by statute to be dealt with by the court of general or quarter sessions, though found within the prison of the county. A commitment, therefore, of such a prisoner to the assizes will be bad, and will entitle the prisoner to his discharge from custody. The effect of the Home Office Circular of March, 1883, on the form of commitments. *Reg.* v. *Ward*, 15 Cox, C. C. 321.

Power of Judge of Assize to order Indictments found at Quarter Sessions to be forwarded.]—An indictment was found at the county sessions at Bedford against the defendant for obstructing a highway. Upon the certificate of such finding, he was taken before a magistrate, and bound by recognisance to appear and plead at the assizes. The indictment was not transmitted to the assizes, but was in the custody of the clerk of the peace:—Held, that the judge of assize had no power to order the clerk of the peace to send the indictment to the assizes; that, as it was found at the sessions, and not transmitted for trial at the assizes, the court had no jurisdiction to try the same. *Reg.* v. *Wildman*, 12 Cox, C. C. 354.

But a second indictment for the same offence being found by the grand jury at the assizes:—Held that the defendant, being bound to appear by recognisance, must be called upon to plead to the second indictment. *Ib.*

Division into different Courts.]—Under a commission of oyer and terminer, the general court may be divided into as many courts as convenience requires; and each separate court is to be considered as held, not only before the judge actually sitting, but also constructively before all the members of the commission then acting under it. *Leverson* v. *Reg.*, 10 B. & S. 404; 38 L. J., M. C. 97; L. R. 4 Q. B. 394; 20 L. T. 485; 18 W. R. 251; 11 Cox, C. C. 286.

Right of Prisoner on Bail to be Tried—Not in Custody at the Time of holding of the Assize.]—The Orders in Council, of August, 1879, made in pursuance of the Winter Assize Acts, 1876 and 1877, declare which counties are to be united for the purpose of holding a winter assize, and in each instance enact, that "Nothing in this order shall authorise the trial or require the attendance at the said winter assizes, for the said winter assize county, of any prisoner who shall have been admitted to bail, and who shall not at the time of the holding of such winter assize county be in custody":—Held, that a prisoner who had been admitted to bail, and who surrendered after the opening of the commission, was not in custody "at the time of the holding of the assizes," and could not therefore be tried. *Reg.* v. *Stafford*, 14 Cox, C. C. 353.

In order to entitle himself to be tried he should have surrendered before the opening of the commission. *Ib.*

Construction.]—An allegation upon a record that three judges executed a commission in relation to the trial of prisoners, to try before whom that commission was issued, is an affirmative allegation of the authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others. *O'Brien* v. *Reg.*, 2 H. L. Cas. 465.

Discharge by Gaol Delivery.]—Prisoners triable under special commissions may be discharged by gaol delivery. *Rex* v. *Platt*, 1 Leach, C. C. 157, 170.

A prisoner in custody under a defective commitment may be discharged under a gaol delivery. *Ib.*

It is not imperative on a commissioner of gaol delivery to discharge all the prisoners in the gaol who were not indicted; it being discretionary in him to continue on their commitments such prisoners as appear to him committed for trial, but against whom the witnesses did not appear, having been bound over to the sessions. *Anon.*, R. & R. 173.

The judges' commission of gaol delivery applies only to untried prisoners in the gaol, and not to untried prisoners in houses of correction. *Reg.* v. *Arlett*, 2 Car. & K. 596; 3 Cox, C. C. 431.

Reading over Commission.]—A special commission for the trial of a prisoner having been read in open court at the opening of the commission, immediately before the delivery of the charge to the grand jury, an application made at the arraignment by his counsel for the commission to be then read a second time, upon the

ground that it had not been read in the presence of the prisoner, was refused. *Reg.* v. *Bernard*, 1 F. & F. 240.

5. Quarter Sessions.

Assizes occurring at same Time.]—The jurisdiction of a recorder of a borough is not determined or suspended by the arrival of the judges of assize in the same county, and the rule applies equally to the jurisdiction of county justices of the peace: therefore general quarter sessions of the peace for a borough or county may be held concurrently with assizes in the same county, though it would be highly inconvenient to do so. *Smith* v. *Reg.*, 3 New Sess. Cas. 564; 13 Q. B. 738; 18 L. J., M. C. 207; 13 Jur. 850.

Where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county, after the grand jury at the assizes has been discharged, the better course is for the quarter sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, and then to adjourn to a future day. *Anon.*, 9 Car. & P. 790.

Goods Stolen and Carried into another County.]—*See* ante, col. 1403.

Goods Stolen Abroad and Brought to England.]—*See* ante, col. 1404.

Larceny on High Seas.]—The court of quarter sessions has jurisdiction to try cases of larceny committed on the high seas where the offender is apprehended within the jurisdiction of such court. *Reg.* v. *Peel*, L. & C. 231; 32 L. J., M. C. 65; 8 Jur. (N.S.) 1185; 7 L. T. 336; 11 W. R. 40; 9 Cox, C. C. 220.

6. Offences Committed near Boundaries of Counties.

Distance—How Measured.]—This means a distance of 500 yards measured in a direct line from the border, and not 500 yards by the nearest road. *Reg.* v. *Wood*, 5 Jur. 225.

In what Cases.]—An indictment at quarter sessions for the borough of S., stated that A., late of the parish of M., in the county of N., and in the borough of S., at the parish aforesaid, in the borough aforesaid, committed an assault. The marginal venue was "borough of S." The parish is entirely in the county of N., the rest of the borough in the county of L. The defendant removed the indictment by certiorari, and a venire was awarded into the county of L., where he was tried and convicted. The offence was committed in a part of the parish which is in the borough, and within 500 yards from the boundary of L.:—Held, that the venue, as laid, was in N.; and notwithstanding the proceedings under the certiorari, that the trial was without jurisdiction, and judgment was arrested. *Reg.* v. *Mitchell*, 2 Q. B. 636; 2 G. & D. 274; 11 L. J., M. C. 55; 6 Jur. 505.

Held, also, that for the trial to be good in either county, under 7 Geo. 4, c. 64, s. 12, the offence must have been laid and tried in one and the same county. *Ib.*

The provisions of s. 12 of 7 Geo. 4, c. 64, are confined to county boundaries and to prosecutions in counties; they do not apply to prosecutions in limited jurisdictions. *Rex* v. *Welsh*, 1 M. C. C. 175.

Newcastle-upon-Tyne is a county corporate within 7 Geo. 4, c. 64, s. 12. *Reg.* v. *Errington*, 2 Lewin, C. C. 278.

7. County of City or Town.

The 38 Geo. 3, c. 52, s. 2, which relates to the trial of offences in an adjoining county, only applies to cities and towns corporate which are counties of themselves, and not to towns corporate which are not counties of themselves. *Reg.* v. *Milner*, 2 Car. & K. 310.

Where an offence, committed within a limited jurisdiction, is tried in the adjoining county, under 38 Geo. 3, c. 52, s. 2, the venue in the margin of the indictment is properly laid in the county where the offence is tried, and there is no necessity for an averment in the body of the indictment to connect the county of the city or town within which the offence is alleged to have been committed with the venue of the county from which the jury comes. *Reg.* v. *Stokes*, 4 Cox, C. C. 453.

A felony committed in a county of a town, the style of which is "town of Kingston-upon-Hull and county of the same town":—Held, to be sufficiently laid in the venue of an indictment tried in the next adjoining county, as "Yorkshire being the next adjoining county to the town and county of Kingston-upon-Hull, to wit," the venue being imperfect, there being no "county of Kingston-upon-Hull." *Reg.* v. *Grundy*, 2 Cox, C. C. 357.

The indictment stated the offence to have been committed in the county of N., it was proved to have been committed in the county of the town of N.:—Held, that although under 38 Geo. 3, c. 52, it was triable in the county at large, the offence should have been laid in the county of the town. *Rex* v. *Mellor*, R. & R. 144.

An indictment in the next adjoining county, for an offence within an inferior county, need not aver that the former is the next adjoining county. When the record is regularly drawn up that may be stated in the caption; but the indictment must state the offence to have been committed in the inferior county. *Rex* v. *Goff*, R. & R. 179.

8. In Boroughs.

If a felony is committed in that part of the county of a town which has been added to it by the Boundary Act, 2 & 3 Will. 4, c. 64, and the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, it is triable in the county of the town. *Rex* v. *Piller*, 7 Car. & P. 337.

Where an offence is committed in a borough which is situate partly in one county and partly in another, the offence is triable in either county, under 14 & 15 Vict. c. 55, s. 19. *Reg.* v. *Gallant*, 1 F. & F. 57.

Since the 5 & 6 Will. 4, c. 76, all offences committed in Bristol, and the cities and towns named in schedule C, are triable at the assizes for Gloucestershire, and the other counties named in that schedule; and the jurisdiction of the assizes is not affected by the grant of a recorder and a quarter sessions to such cities or towns. *Reg.* v. *Holden*, 8 Car. & P. 605.

9. Offences on Sea near Shore of County.

Three were indicted for feloniously cutting and wounding. The venue was laid in Glamorgan-

shire, and the indictment was preferred and tried at the assizes for that county. The offence was committed on board an American ship anchored in the Penarth Roads, in the Bristol Channel, three-quarters of a mile from the coast of Glamorganshire, at a spot never left dry by the tide, but within a quarter of a mile from the land which is left dry. The place in question is situated between the shore of the county of Glamorgan and two islands, which islands have always been treated as part of the county of Glamorgan. It was also about ten miles from the opposite shore of Somersetshire. The Penarth Roads are ninety miles from the mouth of the Channel:—Held, that the part of the sea where the vessel was when the offence was committed formed part of the body of the county of Glamorgan. *Reg.* v. *Cunningham*, Bell, C. C. 72; 28 L. J., M. C. 66; 5 Jur. (N.S.) 202; 7 W. R. 179; 8 Cox, C. C. 104.

That part of the seashore which lies between high and low water mark is within and part of the adjoining county, so that the justices of the county have jurisdiction in offences committed thereon, whether the land is covered with water or not at the time of the commission of the offence. *Embleton* v. *Brown*, 3 El. & El. 234; 30 L. J., M. C. 1; 6 Jur. (N.S.) 1298.

10. Offences during Journeys and Voyages.

In what Cases.]—7 Geo. 4, c. 64, s. 13, is not confined in its operation to the carriages of common carriers or to public conveyances, but if property is stolen from any carriage employed on any journey, the offender may, by virtue of the above section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed. *Reg.* v. *Sharp*, Dears. C. C. 415; 24 L. J., M. C. 40; 6 Cox, C. C. 418.

Where the evidence is consistent with the fact of an article having been abstracted from a railway carriage, either in the course of the journey through the county of A., or after its arrival at its ultimate destination in the county of B., and the prisoner is indicted in A. under 7 Geo. 4, c. 64, s. 13, the case must go to the jury, who are to say whether they are satisfied that the larceny was committed in the course of the journey or afterwards. *Reg.* v. *Pierce*, 6 Cox, C. C. 117.

The act of stealing must be committed "in or upon the coach," to bring it within 7 Geo. 4, c. 64, s. 13. *Rex* v. *Sharpe*, 2 Lewin, C. C. 233.

On an indictment for assault, it was proved that the assault was committed in one of the carriages of a train running from Brighton to New Cross, and before the train had arrived at the Three Bridges Station, in Sussex. At that station the prosecutrix left the carriage in which she had been riding with the defendant and rode in another carriage of the same train to New Cross, which is within the jurisdiction of the Central Criminal Court:—Held, that by the joint operation of the 7 Geo. 4, c. 64, s. 13, and 4 & 5 Will. 4, c. 36, s. 2, the indictment was properly preferred and tried at the Central Criminal Court. *Reg.* v. *French*, 8 Cox, C. C. 252.

11. In Particular Cases.

Sending Threatening Letter.]—The offence of sending a threatening letter may be laid in the county where it is delivered by the post to the prosecutor. *Rex* v. *Esser*, 2 East, P. C. 1125. S. P., *Rex* v. *Gidwood*, 2 East, P. C. 1120; 1 Leach, C. C. 142.

If a man writes a letter with intent to provoke a challenge, seals it up and puts it into the post-office in Westminster, addressed to a person in the city of London, who receives it there, the writer may be indicted for this offence in the county of Middlesex. *Rex* v. *Williams*, 2 Camp. 506; 11 R. R. 781.

Forgery—Prisoner in Custody in County.]—On an indictment for forgery at common law, it is not necessary to prove that the party charged was in custody before the time of the trial, in order to give jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 66, s. 24. *Reg.* v. *Smythies*, T. & M. 190; 1 Den. C. C. 498; 19 L. J., M. C. 31; 13 Jur. 1034; 4 Cox, C. C. 94.

—— **Averment as to.**]—Where a prisoner was tried for forgery in the county where he was in custody, under 11 Geo. 4 & 1 Will. 4, c. 66, s. 24, the forgery might be alleged to have been committed in that county, and there need not be any averment that the prisoner was in custody there. *Rex* v. *James*, 7 Car. & P. 553.

Uttering Forged Documents.]—Putting a letter into the Manchester post-office containing a forged instrument, is an uttering in the county of Lancaster. *Rex* v. *Perkin*, 2 Lewin, C. C. 150.

Conspiracy.]—An information at common law for a conspiracy between the captain and purser of a man-of-war, for planning and fabricating false vouchers to cheat the crown (which planning and fabrication were done upon the high seas), is well triable in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person, a holder of one of such vouchers (a bill of exchange), for payment, which he there received. *Rex* v. *Brisac*, 4 East, 164; 7 R. R. 551.

Embezzlement.]—An indictment for embezzlement may be laid either in the county in which the money was received, or in the county where the prisoner disowned having received the money. *Rex* v. *Hobson*, R. & R. 56; 1 East, P. C. Add. xxiv.; 2 Leach, C. C. 975.

If a servant receives money for his master in the county of A., and, being called upon to account for it in the county of B., there denies the receipt of it, he may be indicted for the embezzlement in the latter county. *Rex* v. *Taylor*, 3 Bos. & P. 596; R. & R. 63; 2 Leach, C. C. 974.

A clerk, whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact

collected the money in question. These letters were duly received by the employers in Middlesex:—Held, that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex. *Reg.* v. *Rogers*, 47 L. J., M. C. 11; 3 Q. B. D. 28; 37 L. T. 473; 26 W. R. 61; 14 Cox, C. C. 22.

It was the duty of a commercial traveller to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. He, on the 1st and 2nd March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him and taxed him with receiving moneys and not accounting to them for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned to Grantham on either of the days, or at what time of the respective days he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money:—Held, that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham. *Reg.* v. *Treadgold*, 39 L. T. 291; 14 Cox, C. C. 220.

A prisoner was a travelling salesman, whose duty it was to go into the county of D. every Monday to sell goods and receive money for them there, and return with it to his master in N. every Saturday. He received two sums of money for his master in D., but never returned to render any account. Two months afterwards he was met by his master in N., who asked him what he had done with the money. The prisoner said he was sorry for what he had done; he had spent it:—Held, that he was rightly indicted in N., there having been evidence to go to the jury of an embezzlement in N. *Reg.* v. *Murdock*, 2 Den. C. C. 298; T. & M. 604; 21 L. J., M. C. 22; 16 Jur. 19; 5 Cox, C. C. 360.

False Pretences.]—An indictment charged a defendant with obtaining by false pretences, a post-office order. It was proved that the prosecutor, at the request of the prisoner, transmitted through the post a letter containing a post-office order:—Held, that the defendant was properly tried in the county in which that letter was posted, though it was received by the prisoner in a different county. *Reg.* v. *Jones*, 1 Den. C. C. 551; T. & M. 270; 3 Car. & K. 346; 4 New Sess. Cas. 953; 19 L. J., M. C. 162; 14 Jur. 533; 4 Cox, C. C. 198.

A., by means of false pretences contained in a letter written and posted by him in the county of C., received in the same county the money obtained by it, which was sent to him by the prosecutor in a letter. The letter containing the false pretences was received by the prosecutor in the county of the borough of C., and the letter enclosing the money was posted in that county. A. was indicted for obtaining the money by means of the false pretences contained in his letter:—Held, that the venue was well laid in the county of the borough of C. *Reg.* v. *Leech*, Dears. C. C. 642; 25 L. J., M. C. 77; 2 Jur. (N.S.) 428; 4 W. R. 482; 7 Cox, C. C. 100.

One who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained. *Reg.* v. *Stanbury*, L. & C. 128; 31 L. J., M. C. 88; 8 Jur. (N.S.) 84; 5 L. T. 686; 10 W. R. 236; 9 Cox, C. C. 94.

On an indictment for obtaining money by a false pretence which was alleged to have been by sending a certain false return of fees to the commissioners of the Treasury, it appeared that the return was received by them in Westminster, with a letter dated Northampton, and an affidavit sworn there; and that they, on the faith of it, drew up a minute, which operated as an authority to the paymaster-general to pay a certain amount to the prisoner (as compensation under 7 & 8 Vict. c. 96) at Westminster, the venue laid being Northamptonshire:—Held, that there was reasonable evidence that the false representation was forwarded from Northampton; that it was if false and fraudulent, a false pretence within the statute; that in effect the money was obtained by means of the minute, being a mere matter of regulation, and not a judicial proceeding; and that, therefore, the venue was right, and the indictment was supported. *Reg.* v. *Cooke*, 1 F. & F. 64.

Where a misdemeanor consists of different parts, as much of the charge as amounts to a misdemeanor in law must be proved in the county in which the venue is laid. *Rex* v. *Buttery*, 3 B. & C. 700; 5 D. & R. 616.

The prisoner wrote and posted at N. in England, a letter addressed to G. abroad, containing a false pretence by means of which he received and cashed in N. a draft from G.:—Held, that the prisoner could be tried at N. *Reg.* v. *Holmes*, 53 L. J., M. C. 37; 12 Q. B. D. 23; 49 L. T. 540; 32 W. R. 392; 15 Cox, C. C. 343.

Undischarged Bankrupt—Obtaining Credit over £20.]—An undischarged bankrupt residing in the county of L. while in the county of S. purchased a quantity of fish at an auction, for which he obtained credit. Part of the fish he disposed of in the county of S., and the remainder he sent to the county of L. Upon an indictment laid in the county of L. which charged him with having, while he was an undischarged bankrupt, unlawfully obtained credit to the extent of 20*l.* and upwards without informing the persons from whom credit was obtained of the fact that he was an undischarged bankrupt, contrary to 46 & 47 Vict. c. 52, s. 31:—Held, that the credit was obtained in the county of S., and that the indictment was therefore wrongly laid in the county of L. *Reg.* v. *Dureon*, 59 L. T. 932; 16 Cox, C. C. 556; 53 J. P. 280—C. C. R.

A person may be indicted in England for having, whilst resident therein, obtained credit within the meaning of s. 31 of the Bankruptcy Act, 1883, from a person resident in Ireland at the time such credit was obtained. *Reg.* v. *Peters*, 55 L. J., M. C. 173; 16 Q. B. D. 636; 54 L. T. 545; 34 W. R. 399; 16 Cox, C. C. 36; 50 J. P. 631—C. C. R.

Receiving Stolen Property.]—The half of a bank note which had been stolen during its transit through the post-office from S. in Wiltshire to Bristol, was afterwards enclosed by the prisoner in a letter addressed to the bankers at S., requesting payment of it. This letter was posted by the prisoner at Bath, and arrived with its contents in due course at S. There was no other evidence of any receipt or possession by the

prisoner in Wiltshire:—Held, upon an indictment for receiving the stolen half note, that he was rightly tried in Wiltshire, as the possession of the post-office or of the bankers was his possession. *Reg.* v. *Cryer*, Dears. & B. 324; 26 L. J., M. C. 192; 3 Jur. (N.S.) 698; 5 W. R. 738; 7 Cox, C. C. 335.

II. INDICTMENT.

1. *When it Lies*, 1731.
2. *Binding over Prosecutor to Prosecute—Vexatious Indictments Act*, 1734.
3. *Caption*, 1737.
4. *Allegations in.*
   a. Generally, 1738.
   b. Description of the Party accused, 1741.
   c. As to Time and Place, 1741.
   d. Name of Party injured, or whose Property stolen, &c., 1742.
   e. Description of Property or Instrument, 1746.
   f. Value, 1747.
   g. Contra Pacem and Contra Formam Statuti, 1747.
   h. Amendment when allowed, 1748.
5. *Several Counts*, 1752.
6. *When Prosecution put to Election*, 1753.
7. *Copy of Indictment, &c.*, 1756.
8. *Demurrer and Quashing Indictment*, 1757.
9. *Aider by Verdict*, 1761.
10. *Nolle Prosequi*, 1762.
11. *Powers of Grand Jury. See infra*, col. 1791.
12. *Removal of. See* CROWN OFFICE (CERTIORARI).

1. WHEN IT LIES.

In Particular Cases.]—*See previous sub-heads.*

Civil Injury.]—An indictment will not lie for a mere civil injury. *Rex* v. *Storr*, 3 Burr. 1698.

As for pulling off the thatch of a man's dwelling-house. *Rex* v. *Atkins*, 3 Burr. 1706.

Or for selling as two chaldrons of coals a less quantity. *Rex* v. *Osborn*, 3 Burr. 1697.

Where express Remedy given.]—That which is declared by statute to be a misdemeanor cannot be a felony. *Rex* v. *Walford*, 5 Esp. 62.

An indictment lies not upon an act of parliament which creates a new offence, and prescribes a particular remedy. *Rex* v. *Wright*, 1 Burr. 543.

When a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued, and no other. *Reg.* v. *Lovibond*, 24 L. T. 357; 19 W. R. 753.

Where, therefore, a party had violated the provisions of s. 75 of the 25 & 26 Vict. c. 102, by erecting a building without the consent of the Metropolitan Board of Works and beyond the line of building as provided for by that section, and which section points out the remedy for such violation by summary proceedings before a justice:—Held, that the remedy for such offence was by summary proceedings only, and that an indictment would not lie. *Ib.*

See also STATUTE.

Statute passed after Forgery and before Uttering.]—On an indictment for forging a scrip receipt, it must appear that the receipt was signed subsequently to the passing of the statute on which the indictment is founded; but though signed before, yet, if it was uttered after the passing of the act, the prisoner may be convicted on the count for uttering it, knowing it to be forged. *Rex* v. *Reeves*, 2 Leach, C. C. 808, 814.

After Statute repealed.]—A person charged with an offence under an act of parliament which is repealed before the time of trial comes must not be put upon trial. *Anon.*, 2 Lewin, C. C. 22.

Where, between the finding on an indictment and plea pleaded, the statute upon which alone the indictment could be supported was repealed, the judgment is invalid. *Reg.* v. *Denton*, Dears. C. C. 3; 18 Q. B. 761; 21 L. J., M. C. 207; 17 Jur. 453. See *Reg.* v. *St. Mawgan*, 8 A. & E. 496; 3 N. & P. 502; 7 L. J., M. C. 98.

Where a statute creating an offence is repealed, a person cannot be afterwards proceeded against, even though the repealing statute reenacts the penal clauses of the repealed statute. *Reg.* v. *Swan*, 4 Cox, C. C. 108. See *Rex* v. *McKenzie*, R. & R. 429.

An indictment for conspiracy to violate the provisions of a statute will lie after the repeal of such statute, for an offence committed before the repeal. *Reg.* v. *Thompson*, 16 Q. B. 832; Dears. C. C. 3; 20 L. J., M. C. 183; 17 Jur. 453.

Where special Provision in Statute.]—An indictment for a conspiracy at common law will lie against two or more persons for conspiring to commit an offence for which special provision is made by statute. *Reg.* v. *Bunn*, 12 Cox, C. C. 316.

Prohibition and Penalty.]—Where a prohibition and a penalty are contained in the same section of a statute, the remedy must be by proceeding for the penalty; but where the prohibition is in one section, and the penalties are in a subsequent section, an indictment will lie. *Reg.* v. *Buchanan*, 8 Q. B. 883; 15 L. J., Q. B. 227; 10 Jur. 736; 2 Cox, C. C. 36.

Acting as an attorney without having been admitted is a misdemeanor indictable under 6 & 7 Vict. c. 73, s. 2, although a person so acting is incapable of maintaining an action for fees, and the so acting is a contempt of court. *Ib.*

Refusing to marry Persons.]—To sustain an indictment against a clergyman for refusing to marry persons who had obtained a registrar's certificate for that purpose, they must have presented themselves to him to be married at some time when he could legally have married them. *Reg.* v. *James*, 3 Car. & K. 167; T & M. 300; 2 Den. C. C. 1; 14 Jur. 940.

Non-Repair of Highways.]—*See* WAY.

Disobeying Orders of Justices.]—An indictment lies for disobeying an order of sessions. *Rex* v. *Robinson*, 2 Burr. 799; 2 Ld. Ken. 513.

The quarter sessions of a county made regulations as to the expenses to be allowed in cases of felony, and by one of them directed that the taxed bill of costs should be annexed to the order for their payment. These regulations were confirmed by a judge, under 7 Geo. 4, c. 64, s. 26. In a case of felony, the clerk of assize made out the items of the costs allowed, and on the other half of the same sheet of paper wrote

the order for the payment of their amount. The attorney for the prosecution tore off the first half of the paper which contained the items, and presented the other half to the county treasurer for payment. The treasurer refused to pay:—Held, that on account of the mutilation of the order the treasurer was not indictable for this refusal *Reg.* v. *Jones*, 9 Car. & P. 401; 2 M. C. C. 171.

If, on an indictment for disobeying an order of justices, in not abating a nuisance under the Building Act, it appears to have been founded on an order made in a case in which the justices had no jurisdiction, the judge at nisi prius will direct an acquittal, although the defect appears on the record. *Rex* v. *Hollis*, 2 Stark. 536.

An indictment lies against the president and stewards of a friendly society for disobeying an order of justices addressed to them to re-admit a member, though it is sworn that the power of doing so is not in the president and stewards, but in a committee. *Rex* v. *Wade*, 1 B. & Ad. 861; 9 L. J. (O.S.) M. C. 113.

The general rule that an indictment, and not a mandamus, is the proper mode of enforcing obedience by a ministerial officer to an order of sessions, does not prevail where the court sees that the ministerial officer is put forward merely as a nominal party, and that other persons are there who are to be compelled to perform the duty. *Reg.* v. *Wood Ditton*, 18 L. J., M. C. 218.

Under the 7 & 8 Vict. c. 101, an order in bastardy, invalid on the face of it, was made, and afterwards superseded, by the same magistrates: and, upon a fresh application, a second order was made, against which there was no appeal:—Held, that the second order was valid; and an indictment for disobedience to such order was upheld. *Reg.* v. *Brisby*, 3 New. Sess. Cas. 591; T. & M. 109; 1 Den. C. C. 416; 2 Car. & K. 962; 18 L. J., M. C. 157; 13 Jur. 520; 3 Cox, C. C. 476.

On dismissing an appeal against a poor-rate, it was ordered by the sessions, that the appellants, "upon service of the order, or a true copy thereof, should pay to the respondents 91*l.* for their costs and charges by reason of the appeal." An indictment for disobedience of the order stating that a true copy of it was served on the defendants, who then and there had notice of the order is sufficient. *Reg.* v. *Mortlock*, 7 Q. B. 459; 2 New. Sess. Cas. 108; 14 L. J., M. C. 153; 9 Jur. 621.

Held, also, that it was no objection to the order that the amount of costs, having in the meantime being taxed by the clerks of the peace, was inserted in the order at an adjourned sessions, as the circumstances of the case warranted the conclusion that the parties assented to such a course. *Ib.*

Upon the trial of an indictment for disobeying an order of justices, the recital upon the face of the order of the facts giving the magistrates jurisdiction is not evidence of the existence of such facts; nor is the setting out of the order in hæc verba in the indictment a sufficient allegation of the truth of the facts therein recited. *Rex* v. *Gilkes*, 2 M. & Ry. 454; 8 B. & C. 439; 3 Car. & P. 52; 6 L. J. (O.S.) M. C. 118.

Not registering Birth.]—The 6 & 7 Will. 4, c. 86, s. 20, which enacts that the father or mother of a child, or, in case of their illness or absence, the occupier of the house in which the child should have been born, shall, within forty-two days after the birth, give information of the particulars thereof to the registrar, upon request, is imperative, and the party disobeying it is liable to an indictment. *Reg.* v. *Price*, 3 P. & D. 421; 11 A. & E. 727; 9 L. J., M. C. 49; 4 Jur. 291.

Overseers not accounting.]—An indictment against overseers, on 4 & 5 Will. 4, c. 76, s. 47, for not accounting to the auditor of a union upon request, on a day appointed by him, is bad, unless it appears that there was some rule, order or regulation of the commissioners, that the overseers should account upon such request. *Reg.* v. *Crossley*, 2 P. & D. 319; 10 A. &. E. 132; 8 L. J., M. C. 81; 3 Jur. 675.

Disobedience to Order of Court of Competent Jurisdiction.]—If there is a positive averment of disobedience of an order of a court of competent jurisdiction, an indictment is good without a direct allegation of that which is the foundation of such jurisdiction; nor can a defendant otherwise avail himself, either at the trial or elsewhere, but by showing a want of jurisdiction in the court. *Rex* v. *Mytton*, Cald. 536; 1 Bott's P. L. 428 n.; 4 Doug. 333; 3 Esp. 200 n.

2. Binding over Prosecutor to Prosecute —Vexatious Indictments Act.

To what Offences applicable.]—B. was summoned before justices for aiding and abetting S. to obtain money by false pretences, and both were committed to take their trial, S. on the charge of attempting to obtain money by false pretences, and B. on the charge of aiding and abetting S. to commit that offence. At the sessions an indictment against S. and B. for jointly attempting to obtain money by false pretences was preferred, without the leave required by the Vexatious Indictments Act (22 & 23 Vict. c. 17), and found by the grand jury, upon which they were tried jointly, and S. acquitted and B. found guilty. At the trial the objection was taken and overruled, that the indictment having been preferred against B. for an offence upon which he had not been committed for trial, the indictment should be quashed:—Held, that the Vexatious Indictments Act, s. 1, was inapplicable, as that applied only to the offence of "obtaining money or other property by false pretences," and not to the offence of "attempting to obtain money or other property by false pretences." *Reg.* v. *Burton*, 32 L. T. 539; 13 Cox, C. C. 71.

Whether an indictment under 24 & 25 Vict. c. 115, for giving false evidence before a court martial is an indictment for perjury within 22 & 23 Vict. c. 17, is doubtful. *Reg.* v. *Heane*, 4 B. & S. 947; 33 L. J., M. C. 115; 10 Jur. (N.S.) 724; 9 L. T. 719; 9 Cox, C. C. 433.

When Magistrate bound to take Recognisance—Discretion.]—A magistrate, if he refuses to commit or bail the person charged, is bound, under 22 & 23 Vict. c. 17, s. 2, to take the recognisance of the prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse if no indictable offence is disclosed. *Wason, Ex parte*, 38 L. J., Q. B. 302; L. R. 4 Q. B. 573; 17 W. R. 881.

Where, therefore, the offence charged is that of conspiracy, by three persons, two of whom are members of the House of Lords, to deceive the

House, and so to prevent the due course of justice and injure and prejudice a third person, by making statements in the House which they know to be false, the magistrate is right in refusing to take any proceedings: as members of either House of Parliament are not civilly or criminally liable for any statements made in the House, nor for a conspiracy to make such statements. *Ib.*

Where a prosecutor bonâ fide prefers before a justice and within his jurisdiction, a charge or complaint in respect of an offence within the Vexatious Indictments Act, 1859, and the justice dismisses it for want of evidence, such dismissal is equivalent to a refusal to commit, and the prosecutor is entitled to require the justice to take his recognisance to prosecute the charge or complaint by way of indictment. *Reg.* v. *London Corporation*, 54 L. T. 646; 16 Cox, C. C. 77; 50 J. P. 711.

The court will not interfere with the exercise of the discretion of the judge under this act. *Reg.* v. *Bray*, 3 B. & S. 253; 32 L. J., M. C. 11; 7 L. T. 248; 11 W. R. 7; 9 Cox, C. C. 215.

Consent of Judge to Prosecution.]—It is sufficient if the consent of the judge to the prosecution is given in writing; and no previous summons of or notice to the party, or even an affidavit of the facts, is necessary. *Ib.*

Joinder of Counts — Charges withdrawn—Statute not complied with.]—Counsel for the prosecution applied ex parte under 30 & 31 Vict. c. 35, s. 1, for leave to add two counts to the indictments based upon charges that had been withdrawn before the police magistrate; the counsel for the prosecution did not state in his application that they had been so withdrawn. Leave was granted, the two counts were added, and the indictment sent up to the grand jury, who found a true bill against the defendants in respect of the whole indictment. The indictment was removed by certiorari into the Queen's Bench Division of the High Court. The defendants then obtained a rule nisi, calling upon the prosecution to show cause why the two additional counts should not be quashed:—Held, on argument of the rule, that the counts must be quashed on the ground that the leave of the court to add them was obtained on materials insufficient for the exercise of its discretion; and that the obtaining of such leave in cases under the Vexatious Indictments Act, and acts amending it, is not a mere formality, but must conform to the spirit and intention of those acts. *Reg.* v. *Bradlaugh*, 47 L. T. 477; 31 W. R. 229; 15 Cox, C. C. 156; 47 J. P. 71.

It is not necessary to obtain the leave of the court under 30 & 31 Vict. c. 35, for the addition of counts for offences within the Vexatious Indictments Act (if the facts on which the counts are founded appear on the depositions), before the indictment is presented to the grand jury. *Reg.* v. *Clarke*, 59 J. P. 248.

The provisions of the Vexatious Indictments Act must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed. *Reg.* v. *Fuidge*, L. & C. 390; 33 L. J., M. C. 74; 10 Jur. (N.S.) 160; 9 L. T. 777; 12 W. R. 351; 9 Cox, C. C. 430.

An indictment contained two counts for obtaining money by false pretences on two several occasions, the requirements of the above statute having been complied with in respect of one of the cases only. The prisoner refused to plead, and a plea of not guilty was entered by the direction of the court. Evidence was given upon each count, and the prisoner was convicted upon each:—Held, first, that the second count ought to have been quashed, and that therefore the conviction upon that count could not stand. *Ib.*

Held, secondly, that, as evidence was received which would have been inadmissible upon the trial of the first count alone, the conviction upon that count also was bad. *Ib.*

Indictment—Form of.]—It is not necessary that an indictment should aver that the conditions imposed by 22 & 23 Vict. c. 17, s. 1, had been performed; e.g. that it had been preferred by the direction or with the consent of a judge, or of the attorney or solicitor general. *Knowlden* v. *Reg.*, 5 B. & S. 532; 33 L. J., M. C. 219; 10 Jur. (N.S.) 1177; 10 L. T. 691; 12 W. R. 957; 9 Cox, C. C. 483.

Recognisances, when exhausted.] — Three persons were severally bound by recognisances to appear at the next session of the Central Criminal Court, and there surrender themselves, and plead to such indictment as might be found against them for or in respect of a charge of conspiracy to cheat and defraud. The prosecutors were also bound over to appear at such next session, and to prefer, or cause to be preferred, a bill of indictment against the persons accused of the offence of conspiracy, and duly to prosecute such indictment, and give evidence thereon. At the next session an indictment was preferred and found, and the defendants surrendered; but in consequence of the absence of a material witness for the prosecution the trial was put off, and the recognisances duly respited until the next session. Before the next session the solicitor-general directed an indictment for a conspiracy to be preferred against the three defendants and a fourth person, and a second indictment was preferred and found against them all, upon which the original defendants appeared, but refused to plead. A plea of not guilty was entered for them, and they were found guilty and sentenced:—Held, that the indictment was preferred with proper authority, and the recognisances duly entered into, as the charge on which the defendants were tried was the same as that to which the recognisances related, and those recognisances were not exhausted by the first indictment being preferred, and the defendants surrendering. *Ib.*

—— **Sufficiency of.**]—In considering the sufficiency of a recognisance to prosecute under the Vexatious Indictment Act, s. 1, reference may be made to the accompanying depositions to ascertain the particulars of the offence to be charged. *Reg.* v. *Bell*, 12 Cox, C. C. 37.

—— **Discharging.**]—A prosecutor who has required the magistrates to take his recognisances to prosecute, on a charge within the 22 & 23 Vict. c. 17, s. 2, when the magistrates have refused to commit the person charged, must either go on with the prosecution or have his recognisances forfeited, as it would defeat the object of the statute if he was allowed to move

to have his recognisances discharged. *Reg.* v. *Hargreaves*, 2 F. & F. 790.

Error.]—Error will not lie for non-compliance with the Vexatious Indictments Act. *Boaler* v. *Reg.*, 57 L. J., M. C. 85 ; 59 L. T. 554 ; 16 Cox, C. C. 488.

3. Caption.

Jurisdiction.]—The caption of an indictment must show that the court where it was found had jurisdiction. *Rex* v. *Fearnley*, 1 Leach, C. C. 425.

Effect of.]—The statement of venue in the margin implies only that the indictment is found by a grand jury of the county named, not (as in civil cases) that the complaint is laid as arising within the county. *Reg.* v. *O'Connor*, 5 Q. B. 16 ; D. & M. 761 ; 13 L. J., M. C. 33 ; 7 Jur. 719.

Parish—Addition of.]—It was sufficient to allege a county as a venue in an indictment. without the addition of the parish, vill or other place. *Reg.* v. *Gompertz*, 14 L. J., M. C. 118 ; 9 Jur. 401.

At the Central Criminal Court a person was indicted for a burglary in a house, which was stated in the indictment to be in the "parish of W." The prosecutor stated that the correct name of the parish was St. Mary W. In 4 & 5 Will. 4, c. 36, s. 2, this parish is called "the parish of W." :—Held, sufficient. *Reg.* v. *St. John*, 9 Car. & P. 40.

Parish partly in Two Counties.]—If a parish is partly situate in the county of W., and partly in the county of S., it is sufficient, in an indictment for larceny, to state the offence to have been committed at the parish of H., in the county of W. *Rex* v. *Perkins*, 4 Car. & P. 363.

Venue—Aider by Verdict.]—Where, in an indictment, after describing the defendant as "of the parish of A. in the county of B.," the offence is laid to have been committed "at the parish aforesaid," omitting any statement of county, this statement of the venue, if defective, was cured by 7 Geo. 4, c. 60, s. 20, after verdict, the case having been tried by a jury of the county first named. *Reg.* v. *Albert*, D. & M. 89 ; 5 Q. B. 37 ; 12 L. J.. M. C. 117 ; 7 Jur. 741.

In an indictment for a misdemeanor, a count containing no statement of venue, either by reference or otherwise, was bad at common law after verdict, though a venue was stated in the margin of the indictment. *Reg.* v. *O'Connor*, 5 Q. B. 16 ; D. & M. 761 ; 13 L. J., M. C. 33 ; 7 Jur. 719.

Of our Lady the Queen.]—An indictment beginning "The jurors *of* our lady the Queen," is not bad in arrest of judgment. The words, "of our lady the Queen," may be rejected as surplusage, the jurors intended being those mentioned in the caption. *Reg.* v. *Turner*, 2 M. & Rob. 214. See *Broome* v. *Reg.*, 12 Q. B. 834 ; 17 L. J., M. C. 152 ; 12 Jur. 538 ; 3 Cox, C. C. 49—Ex. Ch.

Names of Grand Jurors.]—In the nisi prius record of an indictment removed by certiorari, the names of the grand jurors who found the indictment need not be inserted in the caption. *Rex* v. *Davis*, 1 Car. & P. 470.

It is not necessary to specify the names of the grand jury in the record of the caption of an indictment ; it is enough to aver that the indictment was found by twelve good and lawful men, for the party indicted has an opportunity of resorting to the original caption, where the names of the jurors appear. *Aylett* v. *Rex*, 3 Bro. P. C. 529 ; 6 A. & E. 247, n ; 1 R. R. 152.

The caption of an indictment on which a defendant had been convicted was drawn up by the clerk of the peace from the minutes of sessions, and returned with the indictment to the crown officer. It stated the presentment to be made by the oaths of A., B., C., D. (naming twelve grand jurors), and others, good and lawful men. A rule was obtained (with a view to a court of error), calling on the clerk of the peace to show cause why the caption should not be amended by inserting the true names and number of the grand jury sworn. Proof was given by affidavit, that the real number exceeded twenty-five. The clerk did not deny this, but stated that he had no minute or recollection of the names or number :—Held, that the caption was not incorrect in omitting to state the number and all the names of the grand jury ; and that, under these circumstances, no alteration could be made in it, and the defendant received judgment. *Rex* v. *Marsh*, 6 A. & E. 236 ; 1 N. & P. 187 ; 2 H. & W. 366 ; 6 L. J., M. C. 153.

Grand Jurors sworn and affirmed.]—Semble, no objection can be sustained to the caption of an indictment for an allegation that the grand jurors were sworn and affirmed without showing that those who were sworn were persons who ought to have affirmed and vice versâ. *Mulcahy* v. *Reg.* L. R. 3 H. L. 306, 322.

Jurors of County.]—Semble, per Patteson, J., that an indictment which omits to describe the jurors as jurors of the county is bad. *Whitehead* v. *Reg.*, 7 Q. B. 582 ; 14 L. J., M. C. 165 ; 9 Jur. 594.

A caption stating that an indictment was found at the sessions holden at Warwick, in and for the county of Warwick and by adjournment thence at Coventry, in and for the same county, upon the oath of A., B., &c., good and lawful men of the county then and there sworn to inquire for the body of the county, is a sufficient caption under the 5 & 6 Vict. c. 110, annexing the county of the city of Coventry to Warwickshire. *Holloway* v. *Reg.*, 17 Q. B. 319 ; 2 Den. C. C. 287 ; 15 Jur. 825.

4. Allegations in.

a. Generally.

Construction.] — Except in certain cases, where technical expressions having grown by long use into law are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation ; and if the sense of any word is in ordinary acceptation ambiguous, it will be construed according as the context and subject-matter require it to be. in order to make the whole consistent and sensible. The word "until" may therefore be construed either exclusive or inclusive of the day to which it is applied accord-

ing to the context and subject-matter. *Rex* v. *Stevens*, 5 East, 244 ; 1 Smith, 437.

Inconsistency or Repugnancy.] — Every indictment must contain a complete description of such fact and circumstances as constitute the crime, without inconsistency or repugnancy. *Ib.*

Surplusage.] — If an indictment is in itself good, tautologous words will be rejected as surplusage. *Rex* v. *Morris*, 1 Leach, C. C. 109. S. P., *Rex* v. *Jones*, infra.

A bad indictment may be made good by rejecting as insensible and useless such words as obstruct the sense of it. *Rex* v. *Redmond*, 1 Leach, C. C. 477.

Negativing Exemption.]—Exemptions from a penal law may be given in evidence on not guilty ; and the negative need not be set forth in the indictment. *Rex* v. *Pemberton*, 1 W. Bl. 230. And see *Rex* v. *Banks*, 1 Esp. 144 ; 5 R. R. 726.

Matter of Inducement — Material Facts — General Averment.]—A count in an indictment stating that the defendants "within the limits of her Majesty's dominions and after the coming into operation therein of the Foreign Enlistment Act, 1870, and without the licence of her Majesty, were engaged in the preparation of a military expedition to proceed against the dominions of a friendly State," is a valid count, inasmuch as it contains a reasonable and intelligible statement that the defendants, in a place within her Majesty's dominions in which the act was in operation, were engaged in the preparation of an expedition which would be an offence against the act. *Reg.* v. *Jameson*, 65 L. J., M. C. 218 ; [1896] 2 Q. B. 425 ; 75 L. T. 77 ; 18 Cox, C. C. 392 ; 60 J. P. 662.

It is not necessary in a count in an indictment under the Foreign Enlistment Act, 1870, which concludes with the allegation that the offence is against the form of the statute and against the peace of the Queen, to state that the defendants are in fact, if they be so, subjects of the Queen. *Ib.*

Offence triable summarily—Claim to be tried by Jury.]—Where a prisoner who is charged with an offence punishable summarily with more than three months' imprisonment has exercised his right under s. 17 of the Summary Jurisdiction Act, 1879, and has claimed to be tried by a jury, it is not necessary that the indictment found against him should contain any averment of such a claim having been made. *Reg.* v. *Chambers*, 65 L. J., M. C. 214 ; 75 L. T. 76 ; 18 Cox, C. C. 401 ; 60 J. P. 586—C. C. R.

How Framed.]—A statement in an indictment may be either according to the fact or the legal operation. *Rex* v. *Healey*, 1 M. C. C. 1.

Recital.]—The words "as follow, that is to say," when introductory to a recital in an indictment, do not bind the party to an exact and a verbatim recital. *Rex* v. *Hart*, 1 Leach, C. C. 145 ; 2 East, P. C. 978 ; 1 Dougl. 193 ; Cowp. 229. S. P., *Rex* v. *May*, 1 Leach, C. C. 192.

Intent, when necessary.] — Where an evil intent accompanying an act, is necessary to constitute such act a crime, the intent must be alleged in the indictment, and proved ; though it is sufficient to allege it in the prefatory part of the indictment. But where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor. *Rex* v. *Phillips*, 6 East, 464 ; 2 Smith, 550 ; 8 R. R. 511.

An indictment charged that a surgeon, knowingly and with intention to deceive, signed a certificate required by 9 Geo. 4, c. 41, s. 30, for the detention of persons in lunatic asylums, without having visited and personally examined the patient, contrary to the statute : the jury negatived the intention to deceive, and found him guilty :—Held, that in the description of the offence, the averment of intention was surplusage, and that such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law. *Rex* v. *Jones*, 2 B. & Ad. 611 ; 9 L. J. (O.S.) M. C. 98.

Where too general.]—An indictment under the Corrupt Practices Act, 1883, which merely charges the defendant with being guilty of a corrupt practice at an election, but does not specifically allege against him what that corrupt practice was, is bad for generality. *Reg.* v. *Norton*, 16 Cox, C. C. 59. S. P., *Reg.* v. *Stronlger*, 55 L. J., M. C. 137 ; 17 Q. B. D. 327 ; 55 L. T. 122 ; 34 W. R. 719 ; 16 Cox, C. C. 85 ; 51 J. P. 278.

Applicable to Two Offences.]—An indictment, which may apply to either of two different definite offences, is bad. *Rex* v. *Marshall*, 1 M. C. C. 158.

Duplicity.]—Duplicity in an indictment is no ground of error. *Nash* v. *Reg.*, 4 B. & S. 935 ; 33 L. J., M. C. 94 ; 10 Jur. (N.S.) 819 ; 9 L. T. 716 ; 12 W. R. 421 ; 9 Cox, C. C. 424.

Interlineation.]—If an indictment has an interlineation, and has a caret at the proper place, where the interlined words are to come in, the court will take notice of the caret, and read the indictment correctly. *Rex* v. *Davis*, 7 Car. & P. 319.

Ungrammatical.] — An indictment, ungrammatical, is not bad if the real meaning is sufficiently expressed. *Reg.* v. *Stokes*, 1 Den. C. C. 307.

Ad commune nocumentum.]—Since 14 & 15 Vict. c. 100, s. 24, an indictment for a public nuisance need not conclude ad commune nocumentum. *Reg.* v. *Holmes*, Dear. C. C. 207 ; 22 L. J., M. C. 122 ; 17 Jur. 532 ; 1 W. R. 416.

Title of Statute.]—Semble, when the title an act is not correctly set out in an indictment, but the variation from the true title is so small that the court can have no doubt what statute is referred to by the title indicated, no objection can be sustained to the sufficiency of the indictment on account of the variance. *Reg.* v. *Westley*, Bell, C. C. 193 ; 29 L. J., M. C. 35 ; 5 Jur. (N.S.) 1362 ; 8 W. R. 63 ; 8 Cox, C. C. 244.

Feloniously.] — In felonies the indictment

must allege them to have been done feloniously; and therefore, where a statute creates a felony, it is not sufficient to charge the offender merely in the terms of the statute. *Reg.* v. *Gray*, L. & C. 365; 33 L. J., M. C. 78; 10 Jur. (N.S.) 160; 9 L. T. 733; 12 W. R. 350; 9 Cox, C. C. 417.

Aider by Verdict.]—After verdict defective averments in a second count of an indictment may be cured by reference to sufficient averments in the first count. *Reg.* v. *Waverton*, 2 Den. C. C. 340; 17 Q. B. 562; 21 L. J., M. C. 7; 16 Jur. 16.

There is no distinction between civil and criminal pleadings as to defective allegations, which are aided by verdict at common law. *Heymann* v. *Reg.*, L. R. 8 Q. B. 102; 28 L. T. 162; 21 W. R. 357; 12 Cox, C. C. 383.

b. Description of the Party Accused.

When Name unknown.]—If the name of a prisoner is unknown, and he refuses to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison, will be sufficient. *Rex* v. ——, R. & R. 489.

But an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, is insufficient. *Ib.*

Servant.]—An indictment against A. by the addition of "servant" was ill. *Rex* v. *Checketts*, 6 M. & S. 88.

Wife.]—Where a woman was indicted as "the wife of A.," it is sufficient proof that she was so, without adducing further evidence to prove that fact. *Rex* v. *Knight*, 1 Car. & P. 116.

When on the trial of a woman for larceny it appears that they addressed each other as husband and wife and passed and appeared as such, and were so spoken of by the witnesses for the prosecution, the female ought not to be indicted as a single woman. *Reg.* v. *Woodward*, 8 Car. & P. 561.

Wife or Widow—Amendment.]—A woman charged with the murder of her husband was described as "A., the wife of J. O., late of the parish of S., in the county of W., labourer." The judge ordered this to be amended by striking out the word "wife," and inserting the word "widow." *Reg.* v. *Orchard*, 8 Car. & P. 565.

c. As to Time and Place.

Time—After Verdict.]—Where dates in an indictment are laid under a videlicet, the videlicet may be rejected after verdict in order to support the indictment. *Ryalls* v. *Reg.*, 11 Q. B. 781; 18 L. J., M. C. 69; 13 Jur. 259; 3 Cox, C. C. 254—Ex. Ch.

After verdict, to support an indictment, and to show that the provisions of a statute have been complied with, dates laid under a videlicet will be taken to be true. *Reg.* v. *Scott*, Dears. & B. 47; 25 L. J., M. C. 128; 2 Jur. (N.S.) 1096; 4 W. R. 777; 7 Cox, C. C. 164. S. P. *Rex* v. *Brown*, M. & M. 163.

In an indictment for assault and battery, the only allegation of the year in which the offence was committed was "in the tenth year of our Sovereign Lady Queen Victoria":—Held, that by 7 Geo. 4, c. 64, s. 20, this was no ground of error. *Broome* v. *Reg.*, 12 Q. B. 834; 17 L. J., M. C. 152; 12 Jur. 538; 3 Cox, C. C. 49—Ex. Ch.

—— **Day before that mentioned in Statute.**]—Where a statute makes an offence committed after a given day triable in the county where the party is apprehended, and authorises laying it as if committed in that county, and does not vary the nature and character of the offence, it is no objection that the day laid in the indictment is before the day the statute mentions, if the offence was in fact committed after that day. *Rex* v. *Treharne*, 1 M. C. C. 298.

—— **Day not yet arrived.**]—The objection that an offence was laid in an indictment to have been committed on a day which had not yet arrived, could only be taken advantage of on demurrer, and could not be taken after a plea of not guilty. *Reg.* v. *Fenwick*, 2 Car. & K. 915; 4 Cox, C. C. 139.

Place—Parish, whether necessary.]—In an indictment for burglary, it is sufficient to allege that the burglary was committed at a place, naming it, e.g. "at Norton-juxta-Kempsey, in the county aforesaid," without stating the place to be the parish, vill, chapelry, or the like. *Reg.* v. *Brookes*, Car. & M. 543.

—— **No such Place in County.**]—It was no objection on the plea of not guilty that there was no such place in the county as that in which the offence was stated to have been committed, and the fact that there was no such place in the county could only be taken advantage of by plea in abatement. *Rex* v. *Woodward*, 1 M. C. C. 323.

—— **What Parish.**]—In an indictment, alleging a dwelling-house to be "situate at the parish aforesaid," the parish last mentioned must be intended. *Rex* v. *Richards*, 1 M. & Rob. 177.

A house is properly described as in the parish of Birmingham, although for certain ecclesiastical purposes that parish is divided into three divisions, each called a parish. *Reg.* v. *Howell*, 9 Car. & P. 437.

—— **When Material.**]—Where place is material, the place stated will be taken to be the true place. *Rex* v. *Napper*, 1 M. C. C. 44.

—— **Construction.**]—Words of reference, as "there" and "said" in an indictment, will not be referred to the last antecedent, where the sense requires that they should be referred to some prior antecedent. *Rex* v. *Wright*, 3 N. & M. 892; 1 A. & E. 434; 3 L. J., Ex, 370.

d. Name of Party Injured, or whose Property Stolen, &c.

Persons bearing same Name—Assault.]—On an indictment for an assault on A. B., it is sufficient to prove that an assault was committed on a person bearing that name, although two persons bore the same name, viz. A. B. the elder, and A. B. the younger, and the assault had been

committed on the latter only. *Rex* v. *Peace*, 3 B. & Ald. 579.

Assumed Name.]—A prosecutor may be described by a name he has assumed, although it is not his right name, if he has been known by that name for several previous years. *Rex* v. *Norton*, R. & R. 510.

Marriage after Offence.]—An indictment for robbery on an unmarried woman in her maiden name is good, although she marries before indictment found. *Rex* v. *Turner*, 1 Leach, C. C. 536.

Name by which usually known.]—It is sufficient to describe a prosecutor by the name by which he is commonly and best known. *Reg.* v. *Gregory*, 2 New Sess. Cas. 229; 8 Q. B. 508; 15 L. J., M. C. 38; 10 Jur. 387; 1 Cox, C. C. 263.

A foreigner residing in this country, whose name was Charles Frederick Augustus William D'Este, and who was commonly called the Duke of Brunswick and Luneberg, though not de facto the reigning duke, was sufficiently described as Charles Frederick Augustus William, Duke of Brunswick and Luneberg. *Ib.* S. P. *Rex* v. *Berriman*, 5 Car. & P. 601; *Rex* v. ——, 6 Car. & P. 408.

Christian Names.]—The prisoners were indicted for stealing certain articles from Richard Henry John Beaumont McCumming; there was evidence of the prosecutor's surname being McCumming, but there was no evidence what his christian names were:—Held, that the indictment was not sustainable. *Reg.* v. *Dent*, 2 Cox, C. C. 354.

The only evidence of the christian name of the prosecutor was that of a witness who had seen him sign an information, not in the presence of the prisoners, and also the depositions when before the magistrates, in the presence of the prisoners. The witness knew nothing of the prosecutor's christian name except from having seen him sign his name on those two occasions:—Held, that the witness's evidence was admissible to prove that fact of the prosecutor's name. *Reg.* v. *Toole*, Dears. & B. 194; 26 L. J., M. C. 79; 3 Jur. (N.S.) 420; 5 W. R. 558; 7 Cox, C. C. 266.

On an indictment for assaulting S. B. it was proved that the prosecutrix was baptised S. A. B., but was known in her family as S. B. only:—Held, insufficient. *Reg.* v. *Lippiatt*, 1 Cox, C. C. 56. See *Reg.* v. *Smith*, 1 Cox, C. C. 248.

Property stolen described in an indictment as belonging to J. H. S., whereas, in fact, the name was H. J. S., is improperly described. *Reg.* v. *James*, 2 Cox, C. C. 227.

—— **Variance.**]—A count in an indictment charged that defendant made an assault upon one "Henry B.," "and him, the said William B., did beat, and other wrongs to the said William B.," did, to the "damage of the said William B." On motion in arrest of judgment, held sufficient. *Reg.* v. *Crispin*, 11 Q. B. 913; 17 L. J., M. C. 128.

If there was a discrepancy between the christian name of the prisoner's first wife as laid in the indictment, and as stated in the copy of the certificate which was produced to prove the first marriage, the prisoner must be acquitted, unless that discrepancy could be explained, or, in the absence of such proof, unless it could be shown that the first wife was known by both names, *Reg.* v. *Gooding*, Car. & M. 297.

Name Unknown.]—If the name of a party killed is not known, he may be stated to be "a certain person to the jurors unknown." *Rex* v. *Clark*, R. & R. 358.

Idem sonans.]—The name of John M'Nicoll, signed to a forged instrument, was in the setting out of the forged instrument in the indictment written John M'Nicole:—Held, no variance. *Reg.* v. *Wilson*, 2 Car. & K. 527; 1 Den. C. C. 284; 17 L. J.. M. C. 82; 2 Cox, C. C. 426.

The question, whether the name of a prosecutor, as set forth in an indictment, and the name as it appears in evidence, are idem sonans, is a matter of fact which is for the jury; and where it is reserved as a question of law, the court cannot say that words spelt differently are the same in sound. *Reg.* v. *Davis*, 2 Den. C. C. 231; T. & M. 557; 20 L. J., M. C. 207; 15 Jur. 546; 5 Cox, C. C. 237.

An indictment for assaulting one Whyneard is good, although it was proved that his name was Winyard. *Rex* v. *Foster*, R. & R. 412.

But M'Cann is not idem sonans with M'Carn. *Rex* v. *Tannet*, R. & R. 351.

Nor Shakespeare with Shakepear. *Rex* v. *Shakespeare*, 10 East, 83.

Nor Tabart with Tarbart. *Bingham* v. *Dickie*, 5 Taunt, 814.

Esquire.]—The prosecutor was termed in the indictment J. N. B. esquire: it was proved that his name was J. N. B., but no evidence was given that he was an esquire:—Held, that the court would take notice that esquire was an addition, and not part of the name, and that it was immaterial that such addition should be proved as laid. *Reg.* v. *Keys*, 2 Cox, C. C. 225. S. P. *Rex* v. *Ogilvie*, 2 Car. & P. 230.

Unbaptised Child.]—A child not named is a proper description in an indictment for ill-treatment of a child that has not acquired a name by baptism or usage. *Reg.* v. *Waters*, 2 Car. & K. 864; T. & M. 57; 1 Den. C. C. 386; 18 L. J., M. C. 53; 13 Jur. 130; 3 Cox, C. C. 300.

But not baptised would be insufficient. *Ib.*

Corporation.]—A corporation must prosecute in its corporate name; and the addition of such name as a description of the persons of which the corporation is composed is not sufficient in an indictment. *Rex* v. *Patrick*, 1 Leach, C. C. 253; 2 East, P. C. 1059.

Illegitimate Child.]—A bastard must not be described by his mother's name till he has acquired that name by reputation. *Rex* v. *Clark*, R. & R. 358.

The deceased was an illegitimate child twelve days old, and it was not even suggested that it had been baptised, but the prisoner, its mother, had said that she would like to have the child named Mary Anne, and on two occasions afterwards called the child Mary Anne, and on another occasion Little Mary. The prisoner's master, who was father of the child, had stated to one of the witnesses for the prosecution that he was a Baptist. The indictment alleged the child to be "a certain female child, whose name to the jurors was unknown." The prisoner was convicted, and the judges held the

conviction to be right. *Rex* v. *Smith*, 6 Car. & P. 151 ; 1 M. C. C. 402.

An indictment charged the murder of Eliza Waters. The deceased was the illegitimate child of the prisoner, whose name was Ellen Waters ; and a witness said on trial—"The child was called Eliza ; I took it to be baptised, and said it was Eleanor Waters' child":—Held, that it was not sufficient proof that the surname of the deceased was Waters. *Rex* v. *Waters*, 7 Car. & P. 250 ; 1 M. C. C. 457.

In an indictment for the murder of a bastard child, the absence of a name is sufficiently accounted for by the child being described as "lately before born of the body of J. H." *Reg.* v. *Hogg*, 2 M. & Rob. 380.

Indictment stated, that the prisoner, a single woman, on the 27th August, 1844, brought forth a male child alive ; that she afterwards, to wit, on the day and year aforesaid, killed this child. Objection that the indictment ought to have stated the name of the child, or that its name was unknown to the jurors, overruled at the trial, on the ground that there was no presumption, from the mere fact of birth, that the child had a name, it being a bastard ; that the indictment afforded no presumption of its having acquired a name by reputation or baptism ; that an averment that the name was unknown implied the acquisition of some name :—Conviction held right. *Reg.* v. *Willis*, 1 Den. C. C. 80 ; 1 Car. & K. 722.

An indictment for murder of a bastard child described as Harriet Stroud is not sustained by proof of a child christened Harriet, and only called by that name, though the mother's name was Stroud. The proper description is Harriet. A child "whose name is to the jurors unknown" is not good, because the name of Harriet was known. *Reg.* v. *Stroud*, 2 M. C. C. 270 ; 1 Car. & K. 187.

On an indictment for the murder of W. S. it was proved that the deceased was the infant illegitimate child of S. S., the prisoner, that he was sometimes called W. S. and was spoken of as S. S.'s child and as W. S. in the prisoner's presence ; there was no evidence as to his being baptised :—Held, sufficient evidence that the deceased had acquired the name of W. S. by reputation. *Reg.* v. *Scarborough*, 3 Cox, C. C. 72.

Peers.]—A peer of Ireland cannot sue or prosecute by his name of dignity, but must be described by his proper name, with the addition of his degree and title. *Rex* v. *Graham*, 2 Leach, C. C. 547.

An indictment for manslaughter described the deceased, who was a peer of Ireland, as "H. S., Baron M. of C., in the county of R., in that part of the united kingdom called Ireland." It was proved that H. was his christian name, S. his family surname, and Baron M., &c. his title :—Held, no variance, and that the court was not bound to construe H. S. to be one christian name. *Rex* v. *Brinklett*, 5 Car. & P. 146.

In an indictment for larceny of goods the property of a peer who is a baron, the goods may be laid as the goods of G. T. R., Lord D., without styling him Baron D., although the more proper way to describe a peer is by his christian name, and his degree in the peerage, as duke, earl, baron, or the like. *Reg.* v. *Pitts*, 8 Car. & P. 761.

In an indictment for stealing the goods of a peer, it is necessary to describe him by his christian name and title ; describing him by the latter only, as the Earl Cornwallis, is insufficient. *Reg.* v. *Caley*, 5 Jur. 709.

A. and B. were tried on an indictment charging them with having assaulted the gamekeeper of George William Frederick Charles, Duke of Cambridge. At the trial, none of the witnesses could prove the christian names of the duke, but there was evidence that George William were two of his names, and that it was believed there were others :—Held, that the court was not bound, and was perfectly right in refusing to amend the indictment, by striking out the names of Frederick Charles ; and that as there was no amendment and no evidence of the duke's christian names A. and B. were entitled to an acquittal. *Reg.* v. *Frost*, Dears. C. C. 474 ; 3 C. L. R. 665 ; 24 L. J., M. C. 116 ; 1 Jur. (N.S.) 407 ; 6 Cox, C. C. 526.

e. Description of Property or Instrument.

Tin or Iron.]—In an indictment for receiving stolen tin, ingots of tin are properly described as so many pounds weight of tin. *Reg.* v. *Mansfield*, Car. & M. 140.

So it would be proper to describe a bar of iron as so many pounds weight of iron. *Ib.*

Particular Name acquired.]—But if an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed ; thus it would be a misdescription to describe cloth as so many pounds weight of wool, or sovereigns as so many ounces of gold. *Ib.*

Mixture.]—Substances mechanically mixed should not be described "as a certain mixture consisting of, &c.," but by the names applicable to them before such mixture. Secus, with regard to substances chemically mixed. *Reg.* v. *Bond*, 1 Den. C. C. 517.

Bank Notes.]—Bank notes are properly described in an indictment for larceny as money, although at the time they were stolen they were not in circulation, but were in the hands of the bankers themselves. *Reg.* v. *West*, Dears. & B. 109 : 26 L. J., M. C. 6 ; 2 Jur. (N.S.) 1123 ; 5 W. R. 50 ; 7 Cox, C. C. 183.

Instruments — Setting out.] — Instruments need not be set out in an indictment, except where it is material for the court to see that they fall within a particular description. That is not the case where a false pretence is charged. *Reg.* v. *Coulson*, T. & M. 332 : 1 Den. C. C. 592 ; 19 L. J., M. C. 182 ; 14 Jur. 557 ; 4 Cox, C. C. 227.

In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words alleged to be obscene must be set out ; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error. *Bradlaugh* v. *Reg.*, 3 Q. B. D. 607 ; 38 L. T. 118 ; 26 W. R. 410 ; 14 Cox, C. C. 68—C. A. Reversing 46 L. J., M. C. 286.

Mortgage Deeds not Goods and Chattels.]—An indictment for burglary charged an intent to steal goods and chattels. The jury found that

the prisoner broke into the house with intent to steal certain mortgage deeds. The mortgage deeds were valid subsisting securities for money which the prosecutor had advanced to the prisoner:—Held, that they could not properly be described as goods and chattels, and that the indictment was not proved. *Reg.* v. *Powell*, 2 Den. C. C. 403; 21 L. J., M. C. 78; 16 Jur. 177; 5 Cox, C. C. 396.

f. Value.

Guilder.—The word "guilder" is sufficiently an English word to justify its use in an indictment as a translation of the Polish word "zlotych," which is also called a guilder and a florin. *Rex* v. *Harris*, 7 Car. & P. 416.

Specific Sum due under a Levy.]—Where a count stated that the defendant made an assault upon a person who was in lawful possession of goods, under a levy for a specified sum of money for arrears of assessed taxes, with intent unlawfully to force him out of possession:—Held, that it was necessary to prove that the specific sum was due, although no sum need have been stated. *Rex* v. *Ford*, 4 N. & M. 451; 2 A. & E. 588; 4 L. J., M. C. 58.

Thing stolen must be of some Value.]—Although to make a thing the subject of an indictment for larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. *Reg.* v. *Morris*, 9 Car. & P. 349. *See* 14 & 15 Vict. c. 100, s. 5.

When Value essential.] —Where value is essential to constitute an offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles, the grand jury having ascribed that value only to all those articles collectively. *Rex* v. *Forsyth*, R. & R. 274.

Aider by Verdict.]—Counts under 2 & 3 Will. 4, c. 123, s. 3, stating that plates had engraved on them, in the Polish language, a promissory note for payment of money, to wit, for the payment of five florins, without stating the value, were good after verdict. *Rex* v. *Warshaner*, 1 M. C. C. 466.

g. Contra Pacem and Contra Formam Statuti.

Unnecessary.]—The conclusion to a count "contra formam statuti" is now, by 14 & 15 Vict. c. 100, s. 24, no longer necessary. *Castro* v. *Reg.* 50 L. J., Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox, C. C. 546; 45 J. P. 452—H. L. (E.)

Liability under Statute—Omission—Corporation.]—An indictment against a corporation, which in the absence of a statute would not be liable to be indicted, for non-repair of a highway, is bad unless it concludes "against the form of the statute," and the objection is fatal even after verdict. *Reg.* v. *Poole (Corporation)*, 56 L. J., M. C. 131; 19 Q. B. D. 602, 683; 57 L. T. 485; 36 W. R. 239; 16 Cox, C. C. 323; 52 J. P. 84.

Before 14 & 15 Vict. c. 100, s. 24.]—Where an act of parliament does not create an offence, but alters the punishment for an offence at common law, it is not necessary that the indictment should conclude contra formam statuti. *Williams* v. *Reg.*, 7 Q. B. 250; 14 L. J., M. C. 164; 10 Jur. 155; 1 Cox, C. C. 179.

An indictment preferred at the assizes under the 7 & 8 Vict. c. 2, for a crime committed on the high seas, need not conclude contra formam statuti. *Reg.* v. *Serva*, 2 Car. & K. 53; 1 Den. C. C. 104.

Where a statute declares an offence and awards a punishment, and by a subsequent act the punishment is altered, the indictment for such offence should conclude against the form of the statutes. *Reg.* v. *Adams*, Car. & M. 299.

The omission of contra formam statuti in an indictment for a statutable offence was good ground for an arrest of judgment, and was not cured by 7 & 8 Geo. 4, c. 64, ss. 20, 21. *Reg.* v. *Radcliffe*, 2 M. C. C. 68; 2 Lewin, C. C. 57.

It was no objection to a conviction of manslaughter on an indictment for murder that the indictment did not conclude contra formam statuti. *Rex* v. *Chatburn*, 1 M. C. C. 403. S. P., *Rex* v. *Berry*, 1 M. & Rob. 463.

In an indictment for an offence at common law, a conclusion of contra formam statuti might be rejected as surplusage. *Rex* v. *Mathews*, 3 Term Rep. 162; Nolan, 202.

It is an offence at common law to obstruct the execution of powers granted by statute, and an indictment for such offence need not, and ought not, to conclude contra formam statuti. *Rex* v. *Smith*, 2 Dougl. 441.

If one statute subjects an offence to a pecuniary penalty, and a subsequent statute makes it felony, an indictment for the felony concluding against the form of the statute (in the singular number only) is right. *Rex* v. *Pim*, R. & R. 425.

When Copies of Statute differ.]—Where an indictment set out the title of an old statute agreeably to Ruffhead, which differed from a copy of the act printed by the king's printer, the court refused to direct a non-suit without proof of an examination of the parliament rolls. *Rex* v. *Burnett*, 3 Camp. 344.

h. Amendment, when Allowed.

At what Time allowed.]—As a general rule a judge on the trial of an indictment will not allow an amendment to be made after the counsel for the defence has addressed the jury. *Reg.* v. *Rymes*, 3 Car. & K. 326.

The proper course is for the prosecutor's counsel to adduce all his evidence and ask for the amendment before he closes his case, and if the amendment is made the prisoner's counsel addresses the jury on the indictment as amended. *Ib.*

The power of amendment should be exercised before the case goes to the jury. *Reg.* v. *Frost*, Dears. C. C. 474; 3 C. L. R. 665; 24 L. J., M. C. 116; 1 Jur. (N.S.) 406; 3 W. R. 401; 6 Cox, C. C. 526.

On an objection to the entry of a judgment, on the ground that it was a general judgment upon all the counts, and one of them was bad, the court ordered the case to stand over to allow the prosecution to apply to the court below to amend. *Gregory* v. *Reg.*, 15 Q. B. 957; 19 L. J., Q. B. 366; 15 Jur. 79—Ex. Ch.

Semble, per Cresswell, J., that after verdict

the court has no power to amend a count so as to make a jury party to the finding. *Reg.* v. *Harris*, Dears. C. C. 344.

Amendments may be made even after the counsel for the prisoner has addressed the jury and closed his case. *Reg.* v. *Fullarton*, 6 Cox, C. C. 194.

An indictment for receiving, alleged by mistake that the prosecutor, instead of the prisoner, knew that the goods were stolen. The defect was not noticed till after verdict, when a motion was made in arrest of judgment; but the court then amended the indictment:—Held, that the amendment could not be made after verdict. *Reg.* v. *Larkin*, Dears. C. C. 365; 2 C. L. R. 775; 23 L. J., M. C. 125; 18 Jur. 539; 2 W. R. 496; 6 Cox, C. C. 377. S. P., *Reg.* v. *Oliver*, 36 L. T. 114; 25 W. R. 323; 13 Cox, C. C. 588.

Where no Inquiry before Magistrate.]—Where the case had not been inquired into before a magistrate, but the bill has been merely found by the grand jury, the court will not go out of its way to assist the prosecution by amending the indictment and inserting certain names, on objection taken that the charges therein set out are not specified with sufficient particularity. *Reg.* v. *O'Callaghan*, 14 Cox, C. C. 499.

Matter of Discretion.]—A. and B. were indicted for assaulting a gamekeeper, they being unlawfully upon land in the occupation of one "George William Frederick Charles Duke of Cambridge." A witness proved that "George William" were two of the duke's christian names, and that he had other christian names, which, however, were unknown to the witness. The court of quarter session refused to amend by striking out the words "Frederick Charles," and left it to the jury to say whether they were satisfied, upon the evidence, of the identity of the Duke of Cambridge as occupier of the land in question:—Held, first, that the power of amendment was in the discretion of the sessions; and that the court, therefore, could not say that the sessions were bound to amend. *Reg.* v. *Frost*, Dears. C. C. 474; 3 C. L. R. 665; 24 L. J., M. C. 116; 1 Jur. (N.S.) 406; 3 W. R. 401; 6 Cox, C. C. 526.

In what Cases—Christian Names.]—Held, secondly, that the sessions were right in refusing to make the amendment asked, but that they might have amended by striking out all the christian names; the indictment could then have been sustained, as containing a sufficient descriptive appellation of the prosecutor. *Ib.*

—— **Demurrable for generality.**]—An indictment will not be allowed to be amended after plea, if in its amended form it might be demurrable for generality. *Reg.* v. *Lallement*, 6 Cox, C. C. 204.

—— **When Prisoner not misled.**]—A variance between the allegation of occupation of land in an indictment for night poaching, and the proof of the occupation, will, if not such as to have misled, be amended at the trial. *Reg.* v. *Sutton*, 13 Cox, C. C. 648.

—— **Ownership of Property.**]—In an indictment for larceny of property belonging to a banking company, the property was laid to be in the manager of the bank. The banking business was carried on by a joint-stock banking company, and there were more than twenty partners or shareholders; but no registration, or appointment of a public officer, under 7 Geo. 4, c. 46, was proved. The judge amended the indictment by stating the property to be in "W." (one of the partners) "and others":—Held, that under 7 Geo. 4, c. 64, s. 14, the amendment was right. *Reg.* v. *Pritchard*, L. & C. 34; 30 L. J., M. C. 169; 7 Jur. (N.S.) 557; 4 L. T. 340; 9 W. R. 579; 8 Cox, C. C. 461. S. P., *Reg.* v. *Fullarton*, 6 Cox, C. C. 194, contra *Reg.* v. *Ward*, 7 Cox, C. C. 421.

The secretary of a friendly society, of which A. B. and others were the trustees, was charged with embezzling money belonging to the society. In the indictment the property was laid as "of A. B. and others," without alleging that they were trustees of the society:—Held, that the indictment might be amended by adding the words "trustees of," &c. *Reg.* v. *Marks*, 10 Cox, C. C. 367.

An amendment in the name of the owner of stolen property may be made at the trial. *Reg.* v. *Vincent*, 2 Den. C. C. 464: 3 Car. & K. 246; 21 L. J., M. C. 109; 16 Jur. 457; 5 Cox, C. C. 537.

Where stolen property has been laid in a wrong person, the indictment may be amended. *Reg.* v. *Fullarton*, 6 Cox, C. C. 194.

—— **Description of Statute.**]—A judge has power to amend the description of an act of parliament in an indictment. *Reg.* v. *Westley*, Bell, C. C. 193; 29 L. J., M. C. 35; 5 Jur. (N.S.) 1362; 8 W. R. 63; 8 Cox, C. C. 244.

—— **Feloniously.**]—The court will not amend an indictment by striking out the word "feloniously," and thereby convert the charge into a misdemeanor, where the document given in evidence to sustain a charge of forgery will not sustain the charge of felony, although evidence of a common law misdemeanor. *Reg.* v. *Wright*, 2 F. & F. 320.

—— **Name of Prosecutrix.**]—An indictment charged with the intent to kill and murder Annie Welton. The prosecution failed to prove the child had ever borne such a name:—Held, that the indictment might be amended. *Reg.* v. *Welton*, 9 Cox, C. C. 297.

On objection before plea to the first count of the indictment that the words "a certain woman" were too vague, and, therefore, that the count was bad, the judge allowed the prosecution to amend by inserting the words "a woman to the jurors unknown" instead of the words objected to. *Reg.* v. *Titley*, 14 Cox, C. C. 502.

The second wife being described as E. C., widow; she was, in fact, not a widow, nor had she ever been represented or reputed to be so:—formerly a fatal variance, but now amendable under 14 & 15 Vict. c. 100, s. 1. *Rex* v. *Deeley*, 4 Car. & P. 579; 1 M. C. C. 303.

—— **Perjury — Certificate.**]—Perjury was alleged to have been committed at a trial for setting fire to a barn, the certificate of the trial and conviction showed that the offence was setting fire to a stack; on its being proved that the barn and stack were destroyed by the same fire the indictment was amended. *Reg.* v. *Neville*, 6 Cox, C. C. 69.

—— **False Pretences.**]—An indictment alleged that money was obtained by a false pretence that the defendant had served an affiliation order personally on B., the evidence showed that the pretence was that the defendant had left the order with a third person to give to B. :—Held a variance unamendable under s. 1 of 14 & 15 Vict. c. 100. *Reg.* v. *Bailey*, 6 Cox, C. C. 29.

Where in an indictment for false pretences the words "with intent to defraud" are omitted, the indictment is bad, and cannot be amended under s. 1 of 14 & 15 Vict. c. 100. *Reg.* v. *James*, 12 Cox, C. C. 127.

—— **Guilty Knowledge.**]—An indictment charging D. L. as a receiver of stolen goods, "he, the said A. B., well knowing them to have been feloniously stolen," is, in arrest of judgment, a bad indictment, and is not capable of being amended. *Reg.* v. *Larkin*, Dears. C. C. 365 ; 23 L. J., M. C. 125 ; 2 C. L. R. 775 ; 18 Jur. 539 ; 2 W. R. 496 ; 6 Cox, C. C. 377.

—— **Description of Justices.**]—The judge has power, under 14 & 15 Vict. c. 100, s. 1, to amend an indictment for perjury, describing the justices before whom the perjury was committed as justices for a county, where they are proved to be justices for a borough only. *Reg.* v. *Western*, 37 L. J., M. C. 81 ; L. R. 1 C. C. 122 ; 18 L. T. 299 ; 16 W. R. 730 ; 11 Cox, C. C. 93. S. P., *Reg.* v. *Wilcox*, 37 W. R. 686.

—— **Description of Place when material.**]—An indictment for concealing the birth of a child, alleged the concealment to have been in and among a certain heap of carrots, and the evidence was that the body was laid upon the heap but behind it, so that it was hidden from the passers by, by the upper part of the heap :—Held, that the provision of 14 & 15 Vict. c. 100, s. 1, did not extend to such an amendment as this. *Reg.* v. ——, 6 Cox, C. C. 391.

—— **Drunk and disorderly.**]—Where an indictment stated that the prisoner had committed perjury at the hearing of a summons before the magistrates, charging a woman with being "drunk," whereas the summons was really for being "drunk and disorderly" :—Held, that the court had power, under 14 & 15 Vict. c. 100, s. 1, to amend the indictment by adding the words "and disorderly." *Reg.* v. *Tymms*, 11 Cox, C. C. 645.

—— **"Money" for Sum stolen.**]—A man was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign :—Held, that by 14 & 15 Vict. c. 100, s. 1, the court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence," and that, by s. 18, the indictment so amended was proved. *Reg.* v. *Gumble*, 42 L. J., M. C. 7 ; L. R. 2 C. C. 1 ; 27 L. T. 692 ; 21 W. R. 299 ; 12 Cox, C. C. 248.

—— **Footway or Carriage-way.**]—Indictment for obstructing a footway leading from A. to G. The footway was for half a mile from its commencement, as described in the indictment, a carriage-way ; the obstruction was in the part beyond :—Held, that this was a misdescription, which ought to be amended under 14 & 15 Vict. c. 100, s. 1. *Reg.* v. *Sturge*, 3 El. & Bl. 734 ; 23 L. J., M. C. 172 ; 18 Jur. 1052 ; 2 W. R. 477.

—— **Description of Prisoner.**]—A woman was charged with the murder of her husband. In the indictment she was described as "A., the wife of J. O., late of the parish of S., in the county of W., labourer." The judge ordered this to be amended by striking out the word "wife" and inserting the word "widow." *Reg.* v. *Orchard*, 8 Car. & P. 565.

Effect of Amendment—Court of Appeal.]—When an indictment is amended at the trial, the court of appeal cannot consider it as it originally stood, but only in its amended form. *Reg.* v. *Webster*, L. & C. 77.

5. Several Counts.

Each Count a separate Indictment.]—Each count in an indictment is, to all intents and purposes, a separate indictment in itself. *Latham* v. *Reg.*, 5 B. & S. 635 ; 33 L. J., M. C. 197 ; 10 Jur. (N.S.) 1145 ; 10 L. T. 571 ; 12 W. R. 908 ; 9 Cox, C. C. 516.

Where, therefore, it appeared by the record that the defendants pleaded not guilty generally to an indictment containing two counts, and that the jury found a verdict of guilty upon the one count, but it did not appear that they found any verdict upon the other :—Held, that the conviction and judgment upon the one were, nevertheless, good. *Ib.*

Count for Felony and Misdemeanor.]—A prisoner was arraigned upon an indictment, containing one count for felony and one for misdemeanor ; and, having pleaded not guilty, was duly tried and convicted of felony :—Held, that the misjoinder was no objection to the conviction. *Reg.* v. *Ferguson*, Dears. C. C. 427 ; 24 L. J., M. C. 61 ; 1 Jur. (N.S.) 73 ; 3 W. R. 178 ; 6 Cox, C. C. 454.

Adding Counts—Rights of Prisoner.]—Where the counsel for the prosecution has obtained leave to add a count on the ground that the indictment, as framed, will not enable him to disclose all the facts of the transaction, the defendant cannot claim to be tried at once upon the indictment already preferred, and the trial must be postponed. *Reg.* v. *Stone*, 1 F. & F. 310.

—— **Vexatious Indictments Act.**]—*See* ante, col. 1734.

Motion to quash Counts — Time for.]—An application to have certain counts struck out of an indictment, ought to be made before plea pleaded ; it is too late to take such objection at the close of the case for the prosecution. Per cur. in *Reg.* v. *Chapple*, 66 L. T. 124 ; 17 Cox, C. C. 455 ; 56 J. P. 360—C. C. R.

Joinder of Counts—Arrest of Judgment.]—If several felonies are charged in the same indictment, it is not objectionable, either upon demurrer or in arrest of judgment, for on the face of the indictment every count imports to be for a different offence. *Anon.*, 2 Leach, C. C. 1105, n.

But if it appears before plea, or the jury is charged, that they are separate offences, it is usual to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his right of challenge. *Ib.*

It is no objection in arrest of judgment that the indictment contains several charges of the same nature in the different counts. *Young* v. *Rex*, 3 Term Rep. 98; 1 R. R. 660. And see *Rex* v. *Towle*, 2 Marsh. 466.

It is no ground in arrest of judgment, after a conviction for a felony, that the indictment also contains a count for a misdemeanor. *Rex* v. *Ferguson*, Dears. C. C. 427; 24 L. J., M. C. 61; 1 Jur. (N.S.) 73; 3 W. R. 178; 6 Cox, C. C. 454.

It is no ground of objection to an indictment in arrest of judgment that it contains several counts for distinct felonies. *Reg.* v. *Heywood*, L. & C. 451; 33 L. J., M. C. 133; 10 L. T. 464; 12 W. R. 764; 9 Cox, C. C. 479.

Joinder—What may be.]—Two indictments for the same offence, one for the felony under a statute, and the other for the misdemeanor at common law, ought not to be preferred or found at the same time. *Rex* v. *Doran*, 1 Leach, C. C. 538.

If one endeavours to commit two separate offences, a count in an indictment charging that endeavour may contain those two offences. *Rex* v. *Fuller*, 1 Bos. & P. 181.

The mere fact that a defendant is a competent witness on some counts of an indictment, and not on others, does not of itself prevent the two sets of counts being joined in the same indictment, provided that the two sets of counts are in other respects such as may be lawfully joined in the same indictment. *Reg.* v. *Wilde*, 59 J. P. 296.

—— **Where several Parties to Indictment.**]—On an indictment against two, charging them with a joint offence, either may be found guilty; but they cannot be found guilty separately of separate parts of the charge. *Rex* v. *Hempstead*, R. & R. 341.

And if they are found guilty separately, upon a pardon or nolle prosequi as to the one who stands second upon the verdict, the judgment may be given against the other. *Ib.*

If two men are indicted, and one of them appears to be innocent and the other guilty, but the prosecutor cannot identify them respectively, both must be acquitted. *Rex* v. *Richardson*, 1 Leach, C. C. 387.

Non-joinder—Two Indictments—Practice.]—Where a person stole two pigs belonging to the same person at the same time, and after being convicted and punished for stealing one of the pigs, was indicted at a subsequent assize for stealing the other:—Held, that this might legally be done; but semble that in such a case, the second prosecution ought not to be proceeded with. *Reg.* v. *Brettell*, Car. & M. 609.

6. When Prosecution put to Election.

In Cases of Misdemeanor.]—A person may be charged with several offences of the same nature in the same indictment, and the judge will not, in cases of misdemeanor, require the prosecutor to confine himself to one offence. *Rex* v. *Jones*, 2 Camp. 131; 11 R. R. 680.

Joinder embarrassing Prisoner.]—The proper course to pursue, when a joinder of counts has a tendency to embarrass a prisoner in his defence, is to apply to the judge either to quash the indictment or to compel the prosecutor to elect on which count he will proceed. *Reg.* v. *Heywood*, L. & C. 451; 33 L. J., M. C. 133; 10 L. T. 464; 12 W. R. 764; 9 Cox, C. C. 479.

Same Offence charged capitally and as a Misdemeanor.]—If two bills of indictment are preferred for the same offence, the one charging it capitally, the other as a misdemeanor, and both are found, the judge will put the party upon his election which to go upon, and direct an acquittal on the other. *Rex* v. *Smith*, 3 Car. & P. 412.

If an indictment contains a count for robbery, and a count for an assault with intent to rob, the judge will put the prosecutor to his election. *Rex* v. *Gough*, 1 M. & Rob. 71.

Same Transaction—Two Indictments.] — A prosecutor cannot maintain two indictments for misdemeanor for the same transaction: he must elect to proceed with one and abandon the other. *Rex* v. *Britton*, 1 M. & Rob. 297.

A. was indicted for shooting at B., a gamekeeper; there being another indictment against A. for night-poaching:—Held, that although both indictments related to the same transactions, yet these were offences quite distinct from each other, and that the prosecutor ought not to be put to his election to go upon one indictment and to abandon the other. *Rex* v. *Handley*, 5 Car. & P. 565.

On a count for uttering several forged receipts, the court will not put the prosecutor to his election on which receipt to proceed, if they be all uttered at the same time. *Rex* v. *Thomas*, 2 East, P. C. 934.

Where a prisoner was indicted in one count for stealing coal from the mine of H. J. G., and in the same count for stealing coal from the mines of thirty other proprietors, and it appeared that all the coal so alleged to be stolen had been raised at one shaft:—Held, that the prosecutor could not be called upon to elect on what charge he would go to the jury. *Reg.* v. *Bleasdale*, 2 Car. & K. 765.

See also cases, ante, Larceny.

On an indictment for rape charging the prisoner both as principal in the first degree, and as an aider and an abettor of other men in the rape, evidence may be given of several rapes on the same woman, at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutrix to elect on which count to proceed. *Rex* v. *Folkes*, 1 M. C. C. 354.

Principal and Accessory.]—Where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed. *Reg.* v. *Brannon*, 14 Cox, C. C. 394.

In what Cases.]—When there are counts in an indictment for forging a bill, acceptance, and indorsement, the prosecutor is not driven to elect on which he will proceed. *Rex* v. *Young*, 2 Peake, 228.

If two are indicted for a conspiracy and for a libel, and at the close of the case for the prosecution, there is evidence against both as to the

conspiracy, but no evidence against one of them as to the libel, the judge will put the prosecutor to elect which charge he will go upon before the defendant's counsel enters on the defence. *Reg.* v. *Murphy*, 8 Car. & P. 276.

If two persons are jointly indicted for obstructing a highway, and on the evidence no joint act of obstruction appears, the judge will, as soon as the case for the prosecution is closed, put the prosecutor's counsel to elect which of them they will proceed against, and then take an acquittal for the other. *Rex* v. *Lynn*, 1 Car. & P. 528.

In indictments under 11 & 12 Vict. c. 46, s. 3, there may be as many counts charging a felonious receiving as there are counts charging stealing; and the prosecutor cannot be put to his election on what count or counts he will proceed. *Reg.* v. *Beeton*, 1 Den. C. C. 414; T. & M. 87; 2 Car. & K. 960; 4 New Sess. Cas. 60; 18 L. J., M. C. 117; 13 Jur. 394: 3 Cox, C. C. 451.

An indictment contained counts charging various misdemeanors, amongst them counts for conspiracy. There being evidence to go to the jury upon the conspiracy only, the prosecution was made to elect upon which count the case should be left to the jury. *Reg.* v. *Braun*, 9 Cox, C. C. 284.

Certain wharfingers and their servants being indicted in various counts for conspiracy to defraud, by false statements as to goods deposited with them, and insured by the owners against fire; one set of counts being laid with reference to a fire occurring on the 7th of June, 1864, and another with reference to a fire occurring on the 25th of November, 1864:—Held, that the prosecution must elect on which of the two transactions in the first instance to rely. *Reg.* v. *Barry*, 4 F. & F. 389.

When an indictment contains counts for offences within the Admiralty jurisdiction, and others for offences on the high seas, the prosecution will not be put to their election as to which set of counts they will proceed upon. *Reg.* v. *Jones*, 11 Cox, C. C. 393.

A prisoner being charged on several counts with setting fire to a building described as in the occupation of different persons, also with setting fire to goods in a building so described, the prosecutor was not put to elect, as it might be all one act. *Reg.* v. *Davis*, 3 F. & F. 19.

In a case of arson, the indictment contained five counts, each of which charged a firing of a house of a different owner. It was opened, that the five houses were in a row, and that one fire burnt them all. Upon this opening, the judge would not put the prosecutor to elect, as it was all one transaction. *Reg.* v. *Trueman*, 8 Car. & P. 727.

When an indictment for false pretences is in several counts charging the prisoner with obtaining money from different persons under different false pretences, the prosecution must elect on which count to proceed. *Reg.* v. *Bassett*, 1 Cox, C. C. 51.

Where an indictment charged three separate felonies in three distinct counts, the prosecution were put to their election as to which count they would proceed upon. *Reg.* v. *Ward*, 10 Cox, C. C. 42.

Discretion of Judge.]—It is in the discretion of the judge whether he will allow several felonies to be given in evidence under one indictment; where they are, in fact, so mixed as not to be separated without inconvenience, it will be allowed. *Reg.* v. *Hinley*, 2 M. & Rob. 524; 1 Cox, C. C. 12.

The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. *Reg.* v. *Trueman*, 8 Car. & P. 727.

Conviction on Count elected.]—A party was tried upon an indictment which contained two counts, one for embezzlement, and the other for larceny as a bailee. At the close of the case for the prosecution, it was objected that the indictment was bad for misjoinder of counts, and the court thereupon directed the counsel for the crown to elect upon which count he would proceed, the counsel for the prisoner contending that such a course was inadmissible. The counsel for the crown elected to proceed upon the second count, and on that count the prisoner was convicted:—Held, that the conviction was right. *Reg.* v. *Holman*, L. & C. 177; 8 Jur. (N.S.) 1082; 6 L. T. 474; 10 W. R. 718; 9 Cox, C. C. 201.

In Case of Larceny.]—*See* ante, LARCENY and EMBEZZLEMENT.

7. COPY OF INDICTMENT, &c.

When Prisoner entitled to.]—A prisoner upon his acquittal is not entitled ex debito justitiæ to a copy of his indictment. *Rex* v. *Brangan*, 1 Leach, C. C. 27.

Without an order of the court. *Morrison* v. *Kelly*, 1 W. Bl. 485.

A prisoner indicted for felony is not entitled to a copy of the indictment found against him, or to a copy of the jury panel, or to copies of the panels returned at former sessions of the court. *Reg.* v. *Mitchell*, 3 Cox, C. C. 1.

Where the application is opposed by the attorney-general, the court will not order a party indicted for embezzlement to be furnished with a copy of the indictments found against him, though they are very voluminous and contain a great many counts; but in such case the court will order the accused to be furnished with a full bill of particulars. *Reg.* v. *Hughes*, 4 Cox, C. C. 445.

A prisoner charged under 11 & 12 Vict. c. 12, is not of right entitled to a copy of the indictment, nor will the court exercise its discretion in his favour by awarding him a copy ex gratiâ. *Ib.*

But he is so entitled in cases of misdemeanor as a matter of right, without a previous application to the court. *Evans* v. *Phillips*, 2 Selw. N. P. 952; 1 Phil. Evid. 407.

A prisoner is entitled to a copy of his indictment to enable him to plead autrefois acquit. *Rex* v. *Vandercomb*, 2 Leach, C. C. 711; 2 East, P. C. 519.

A copy of an indictment is necessary on the trial of an action for malicious prosecution; and the court will not entertain the question whether it was obtained by fraud. *Taddy* v. *Barlow*, 1 M. & Ry. 275; 6 L. J. (O.S.) M. C. 19; 31 R. R. 325.

—— In Cases of Treason.]—*See* ante, col. 1601.

Record of Proceedings.]—Where a party has been tried at a court of quarter sessions, which has previously lapsed for want of due adjourn-

ment, he has a right to have a record of the proceedings made up by the clerk of the peace, although the object of the application is to enable him to support a plea of autrefois convict. *Rex* v. *Middlesex JJ.*, 3 N. & M. 110.

Crown Office Certificate.]—A prosecutor of an indictment for misdemeanor may obtain the usual crown office certificate of his bill having been found, for the purpose of taking out a judge's warrant against the defendant, without obtaining an office copy of the indictment. *Rex* v. *Redfern*, 2 A. & E. 387; 4 N. & M. 198.

8. DEMURRER AND QUASHING INDICTMENT.

Demurrer—Objections to Jurisdiction.]—Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the jurisdiction of such court, as to the subject-matter of the indictment. *Rex* v. *Fearnley*, 1 Term Rep. 316.

—— **What may be demurred to.**]—It is no objection on demurrer, that several different defendants are charged, in different counts of an indictment, for offences of the same nature. *Rex* v. *Kingston*, 8 East, 41; 9 R. R. 373.

A mistake in the year of the Queen's reign in which the offence is stated to have occurred is corrected by pleading over, and can only be taken advantage of on demurrer. *Reg.* v. *Fenwick*, 4 Cox, C. C. 139; 2 Car. & K. 915.

An indictment for a nuisance is not to be quashed, but is to be demurred to. *Rex* v. *Sutton*, 4 Burr. 2116.

The omission of a prisoner's addition is not demurrable. *Reg.* v. *Hunt*, 3 Cox, C. C 215.

Nor where a limit is imposed by statute for the commencement of proceedings, for the omission to state the time of committing the offence. *Ib.*

—— **Whole Record looked at.**]—On a demurrer to an indictment, the superior court will look into the whole record. *Rex* v. *Fearnley*, 1 Leach, C. C. 425.

—— **Pleading over to.**]—A prisoner cannot of right demur and plead over to an indictment for felony. *Reg.* v. *Odgers*, 2 M. & Rob. 479.

A prisoner on an indictment for murder may demur, and if the demurrer is overruled, he may plead not guilty; and, semble, that he may demur and plead over to the felony at the same time. *Reg.* v. *Phelps*, Car. & M. 180 S. P., *Reg.* v. *Adams*, Car. & M. 29. But see *Reg.* v. *Mitchell*, 3 Cox, C. C. 31.

In embezzlement, if the prisoner demurs to the indictment, and the demurrer is decided against him, he may still plead over to the felony, and take his trial. *Reg.* v. *Purchase*, Car. & M. 617.

The court has a discretion to allow a defendant to demur and plead over to an indictment for a misdemeanor. *Reg.* v. *Birmingham and Gloucester Ry.*, 3 Q. B. 223; 2 G. & D. 236; 6 Jur. 804.

An indictment against a township for non-repair of a highway, alleged that the inhabitants, "the common highway being in decay, from the time whereof the memory of man is not to the contrary, ought to repair, and still ought to repair when and so often as it shall become necessary." The indictment contained no allegation that the defendants had ever repaired the road. The court granted leave to demur, with liberty to plead over in case of judgment against them on the demurrer. *Reg.* v. *Tryddyn*, 1 B. C. C. 19; 21 L. J., M. C. 108.

—— **Demurrer after Plea.**]—Where a prisoner, in felony, has, in the absence of his counsel, pleaded to an indictment which is objectionable on demurrer, the judge will, on the application of his counsel, allow him to demur before the evidence is gone into. *Reg.* v. *Purchase*, Car. & M. 617.

Where a defendant had pleaded inadvertently to an indictment under circumstances which might show it to have been a mistake on his part, the court refused to allow him to withdraw his plea for the purpose of demurring, where the objection was one of a technical character, not in any way affecting the merits of the case. *Reg.* v. *Brown*, 2 Cox, C. C. 127. S. P., *Reg.* v. *Odgers*, 2 M. & Rob. 479.

—— **Rule to join in Demurrer.**]—Besides the common four-day rule on a defendant in misdemeanor to join in demurrer to his plea, there must be a peremptory rule giving him a certain day in the discretion of the court, without which judgment cannot be signed against him, *Rex* v. *Johnson*, 6 East, 583; 2 Smith, 591; 8 R. R. 550.

—— **Judgment Final or leave to withdraw Demurrer.**]—After argument upon demurrer it is in the discretion of the court to allow the demurrer to be withdrawn and a plea of not guilty entered. *Reg.* v. *Smith*, 4 Cox, C. C. 42.

But on indictment for felony, the judgment on demurrer is final, and the prisoner will not be allowed to plead over. *Reg.* v. *Hendy*, 4 Cox, C. C. 243. See *Reg.* v. *Duffy*, 4 Cox, C. C. 24; *Reg.* v. *Serva*, 2 Car. & K. 53.

If a defendant demurs to an indictment, whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment. *Rex* v. *Gibson*, 8 East, 107, 111.

If an indictment for felony is demurred to, and judgment is given against the prisoner on demurrer, such judgment is final, and sentence will be passed upon it; and it is not a judgment quod respondeat ouster. *Reg.* v. *Fuderman*, 3 Car. & K. 359; T. & M. 286; 1 Den. C. C. 565; 4 New Sess. Cass. 161; 19 L. J., M. C. 147; 14 Jur. 377; 4 Cox, C. C. 361.

When Queen's Bench will quash or stay Proceedings.]—The Queen's Bench will not quash or stay proceedings on an indictment, if there is no obvious defect upon the face of the indictment. *Reg.* v. *Burnby*, 5 Q. B. 348; D. & M. 362; 13 L. J., M. C. 29; 8 Jur. 240.

An indictment for perjury committed upon an examination before a surveyor-general of the customs did not aver that it was preferred under the direction of the commissioners, under 3 & 4 Will. 4, c. 53, s. 112, and motion was made to quash the indictment or to stay proceedings, upon an affidavit that such direction had not been given. The court refused to interfere summarily. *Ib.*

Two indictments, the one for misdemeanor, the other for felony, had been removed into the Queen's Bench. The court refused to quash them, upon an affidavit stating that they both related

to the same transaction. *Reg.* v. *Stockley*, 2 G. & D. 728; 3 Q. B. 238; 11 L. J., M. C. 105.

Where a clear defect of jurisdiction appears on the face of an indictment, or is shown by affidavit, the court will, on the application of a defendant, quash the indictment after he has pleaded. In a doubtful case the court will exercise its discretion, and leave him to his remedy by writ of error. *Reg.* v. *Heane*, 4 B. & S. 947; 33 L. J., M. C. 115; 10 Jur. (N.S.) 724; 9 L. T. 719; 12 W. R. 417; 9 Cox, C. C. 433.

An indictment for forgery found at the quarter sessions is a nullity, and therefore, where indictments for forging requests for the delivery of goods had been found at the quarter sessions, and transmitted to the assizes, the judge ordered that they should be quashed and new indictments prepared at the assizes. *Reg.* v. *Rigby*, 8 Car. & P. 770.

A judge at nisi prius has no jurisdiction to try an indictment for perjury at common law found at the quarter sessions, and removed by certiorari into Queen's Bench: an indictment so found being void. *Rex* v. *Haynes*, R. & M. 298. See *Rex* v. *Hewitt*, R. & R. 158.

Where several different defendants are charged in different counts of an indictment for offences of the same nature, it may be a ground for applying to the court to quash the indictment. *Rex* v. *Kingston*, 8 East, 41; 9 R. R. 373.

An indictment for a nuisance must be demurred to and cannot be quashed. *Rex* v. *Sutton*, 4 Burr. 2116.

The court refused to quash upon motion an indictment for selling by false weights. *Rex* v. *Crookes*, 3 Burr. 1841.

Or an indictment against several for entering a lead mine and carrying away lead, on the ground that it was a mere trespass. *Rex* v. *Johnston*, 1 Wils. 325.

But an indictment for converting a house into a hospital for taking in and delivering lewd, idle and disorderly unmarried women, was quashed. *Rex* v. *Macdonald*, 3 Burr. 1645.

The court will not, on the application of the defendant, quash an indictment for perjury. *Reg.* v. *Withers*, 4 Cox, C. C. 17.

The court will not quash an indictment for perjury, because it does not contain the addition to the defendant's name, without an affidavit of the true addition being produced. *Rex* v. *Thomas*, 3 D. & R. 621; 2 L. J. (O.S.) K. B. 41.

Where an indictment at common law for disobeying an order of sessions for the maintenance of a bastard child was defective, but only on points which rendered it bad on demurrer, the court refused to interfere by quashing it. *Reg.* v. *Taylor*, 9 D. P. C. 600; 5 Jur. 679.

A motion to quash an indictment may be made on the ground that the indictment discloses no indictable offence. *Reg.* v. *Hall*, 60 L. J., M. C. 124; 64 L. T. 394; 17 Cox, C. C. 278.

—— **Rule Absolute in First Instance.**]—A rule to quash an indictment for informality at the instance of the prosecutor, is absolute in the first instance, although the defendant has removed it by certiorari, and has not yet appeared and pleaded. *Reg.* v. *Stowell*, 1 D. (N.S.) 320; 5 Jur. 1010.

—— **Not quashed in Part.**]—An indictment cannot be quashed in part. *Reg.* v. *Withers*, 4 Cox, C. C. 17.

—— **Where Sessions have Jurisdiction.**]—An order of quarter sessions, brought up by certiorari, appeared to be an order quashing an indictment containing counts for forcible entries, assaults, and a riot:—Held, that the sessions, having jurisdiction over the subject-matter of the indictment, had jurisdiction to quash it. *Reg.* v. *Wilson*, 6 Q. B. 620; 1 New Sess. Cas. 427; 14 L. J., M. C. 3; 8 Jur. 1009.

Where a court of quarter sessions had quashed an indictment which was within their jurisdiction, the court will not inquire, the order being brought up by certiorari, whether the indictment was properly quashed; the proper way of raising such a question is by a writ of error. *Ib.*

—— **When quashed.**]—After judgment on demurrer, an indictment cannot be quashed at the instance of the prosecutor. *Reg.* v. *Smith*, 2 M. & Rob. 109.

The court will not quash a defective indictment on the motion of the prosecutor, after plea pleaded, before another good indictment is found. *Rex* v. *Wynn*, 2 East, 226.

—— **Terms.**]—Terms may be imposed on a prosecutor before he is allowed to quash his own indictment. *Rex* v. *Webb*, 3 Burr. 1468; 1 W. Bl. 460.

An indictment against a defendant, standing first in order in the paper, was moved to be quashed on the usual terms, but the court only allowed it to be quashed on disclosing the name of the prosecutor, and that the substituted indictment should stand in the same situation as the first would have done. *Rex* v. *Glenn*, 3 B. & Ald. 373.

A person who has pleaded to an indictment which is invalid, on account of its having been found upon the testimony of witnesses not duly sworn to give evidence, may be required to plead to another indictment for the same offence, without the first indictment being quashed by the court. *Rex* v. *Chamberlain*, 6 Car. & P. 97.

A., being indicted for perjury at the spring assizes, 1843, at those assizes entered into recognisances to try at the summer assizes, 1844; but, it being discovered before that time that the indictment was defective, another indictment was preferred and found at those assizes, on which the prosecutor wished the defendant to be tried:—Held, that the defendant was entitled to have the first indictment disposed of before he could be tried on the second; but the judge quashed the first indictment upon the terms of the prosecutor paying the defendant his costs of the traverse and recognisance, and the defendant proceeding to trial on the second indictment without traversing. *Reg.* v. *Dunn*, 1 Car. & K. 730.

Judge may refuse to try Bad Indictment.]—A judge may refuse to try an indictment clearly bad in point of law. An indictment for perjury, not averring the matters falsely sworn to be material, nor showing them to be so, is within this authority. *Rex* v. *Tremaine*, 5 D. & R. 413; 3 B. & C. 761; R. & M. 147; 3 L. J. (O.S.) K. B. 57. S. P., *Rex* v. *Hipper*, R. & M. 210.

Counsel are not allowed to argue at length the invalidity of an indictment for the purpose of inducing the court to refuse to try it. But it is sometimes convenient for counsel to suggest a

point on which an indictment is clearly bad, to save the time of the court. *Rex* v. *Abraham*, 1 M. & Rob. 7.

9. Aider by Verdict.

As to Dates.]—*See* ante, col. 1741.

In what Cases.]—A defendant in an indictment cannot, after plea, take advantage of any defect which is aided after verdict by 7 Geo. 4, c. 64, s. 20; the only mode of taking advantage of such defects being by demurrer. *Reg.* v. *Ellis*, Car. & M. 564. S. P., *Reg.* v. *Law*, 2 M. & Rob. 197.

An indictment charged the commission of the offence "in the 10th year of our Sovereign Lady Victoria," not saying "of the reign":—Held, that the objection, if otherwise valid, was cured by 7 Geo. 4, c. 64, s. 20. *Broome* v. *Reg.*, 12 Q. B. 834; 17 L. J., M. C. 152; 12 Jur. 538; 3 Cox, C. C. 49—Ex. Ch.

Counts under 2 & 3 Will. 4, c. 123, s. 3, stating that plates had engraved on them, in the Polish language, a promissory note for payment of money, to wit, for the payment of five florins, without stating the value, were good after verdict. *Rex* v. *Warshaner*, 1 M. C. C. 466.

Describing a foreign note wholly in the English language is not sufficient; but this objection is cured after verdict by 7 Geo. 4, c. 64, s. 21. *Rex* v. *Harris*, 7 Car. & P. 429.

An indictment charged the prisoner with unlawfully receiving goods which had been obtained by false pretences well knowing that the goods had been so obtained, but omitted to set out what the particular false pretences were:—Held, that the objection not having been taken before plea was cured by the verdict of guilty. *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94; L. R. 2 C. C. 74; 28 L. T. 881; 21 W. R. 791; 12 Cox, C. C. 479. See also *Hamilton* v. *Reg.*, 9 Q. B. 271; 16 L. J., M. C. 9; 10 Jur. 1028; 2 Cox, C. C. 11. *Reg.* v. *Knight*, 37 L. T. 801; 14 Cox, C. C. 31.

Where, in an indictment, after describing the defendant as "of the parish of A. in the county of B.," the offence is laid to have been committed "at the parish aforesaid," omitting any statement of county, this statement of the venue, if defective, was cured by 7 Geo. 4, c. 60, s. 20, after verdict, the case having been tried by a jury of the county first named. *Reg.* v. *Albert*, D. & M. 89; 5 Q. B. 37; 12 L. J., M. C. 117; 7 Jur. 741.

In an indictment for a misdemeanor, a count containing no statement of venue, either by reference or otherwise, was bad at common law after verdict, though a venue was stated in the margin of the indictment. *Reg.* v. *O'Connor*, D. & M. 761; 5 Q. B. 16; 13 L. J., M. C. 33; 7 Jur. 719.

After verdict defective averments in a second count of an indictment may be cured by reference to sufficient averments in the first count. *Reg.* v. *Warerton*, 2 Den. C. C. 340; 17 Q. B. 562; 21 L. J., M. C. 7; 16 Jur. 16.

There is no distinction between civil and criminal pleadings as to defective allegations, which are aided by verdict at common law. *Heymann* v. *Reg.*, L. R. 8 Q. B. 102; 28 L. T. 162; 21 W. R. 357; 12 Cox, C. C. 383.

The prisoner was tried and convicted upon an indictment which alleged that at an election for members of parliament for the borough of Ipswich, holden on 25th of November, 1885, he was guilty of corrupt practices against the form of the statute in that case made and provided. It was proved at the trial that he had promised money to two voters to induce them to vote. After verdict the objection was taken that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged:—Held, that, if the indictment were defective, the defect was cured after verdict. *Reg.* v. *Stroulger*, 55 L. J., M. C. 137; 17 Q. B. D. 327; 55 L. T. 122; 34 W. R. 719; 16 Cox, C. C. 85; 51 J. P. 278—C. C. R.

See also cases under previous sub-heads.

10. Nolle Prosequi.

A nolle prosequi can only be entered by the authority of the attorney-general. *Reg.* v. *Dunn*, 1 Car. & K. 730; S. P., *Elworthy* v. *Bird*, 9 Moore, 430; 2 Bing. 258; 3 L. J. (O.S.) C. P. 260; *Reg.* v. *Colling*, 2 Cox, C. C. 184.

Where, in an indictment for perjury, the attorney-general enters a nolle prosequi on the part of the crown, he does so on his own responsibility, and the Queen's Bench will not interfere. *Reg.* v. *Allen*, 1 B. & S. 850; 31 L. J., M. C. 129; 8 Jur. (N.S.) 230; 5 L. T. 636; 9 Cox, C. C. 120.

An attorney-general is at liberty, after having entered a nolle prosequi on an indictment, to file an ex-officio information for the same offence; and the pendency of an indictment or an information is not a good plea to an information subsequently filed against the same party for the same offence. *Reg.* v. *Mitchel*, 3 Cox, C. C. 93.

Where a defendant has been found guilty upon several counts of an information for bribery, the attorney-general may enter a nolle prosequi on one of them, after a rule nisi for a new trial. *Reg.* v. *Leatham*, 3 El. & El. 658; 30 L. J., Q. B. 205; 7 Jur. (N.S.) 674; 3 L. T. 504; 9 W. R. 33; 8 Cox, C. C. 498.

III. TRIAL.

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k. Illness of Prisoner during Trial.—*See* post, col. 1801.
l. Contempt of Court.—*See* CONTEMPT OF COURT.

1. CHANGING VENUE.

In what Cases.]—The court removed an indictment from the Central Criminal Court, and changed the venue from London to Westminster, where it was a prosecution instituted by the corporation of London, for a conspiracy in procuring false votes to be given at an election to the office of bridgemaster. *Reg.* v. *Simpson*, 5 Jur. 462.

Where the court grants a rule to change the venue in an indictment, on the ground that the defendant is unlikely to have a fair trial where it is laid, the court will change it to some other county on the same circuit. *Anon.*, 6 Jur. 131.

The court will permit a suggestion to be entered on the record for the purpose of carrying the trial of a misdemeanor into an adjoining county on the application of one of several defendants, although it does not appear that the others have assented to the application, if there is no reason for believing that they dissent. *Reg.* v. *Browne*, 6 Jur. 168.

In Felony.]—On a trial for felony, the jury was not able to agree upon a verdict, and the prisoner was discharged. The crown then moved to have a second trial in some other county, on the ground that a fair trial could not be had in the county where the offence was committed:—Held, that the court of Queen's Bench had the same jurisdiction to change the place of trial in felony as in misdemeanor, and that the place of trial should be changed, as the court was of opinion that a fair trial could not be had in the county where the offence was committed. *Reg.* v. *Barrett*, Ir. R. 4 C. L. 285; 18 W. R. 671.

The court has jurisdiction to change the place of trial in felony as well as in misdemeanor. *Reg.* v. *Fay*, Ir. R. 6 C. L. 436.

In order to view Premises.]—When it appears to be necessary for the purpose of a criminal trial that the jury should have a view of premises situated in a different county from that in which the offence was committed, this is sufficient reason for ordering the trial to take place in such county. *Reg.* v. *Sheldon*, 32 L. T. 27.

Grounds of changing—Fair Trial impossible.]—Where there was a prospect of a fair trial, the court refused to change the venue, though the witnesses resided in another county. *Reg.* v. *Dunn*, 11 Jur. 287.

The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction. *Reg.* v. *Patent Eureka and Sanitary Manure Co.*, 13 L. T. 365.

The court has no power to change the venue in a criminal case, nor will they order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience and difficulty in securing the attendance of the defendant's witnesses. *Reg.* v. *Cavendish*, 2 Cox, C. C. 176.

The court will remove an indictment for a misdemeanor from one county to another, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county. *Rex* v. *Hunt*, 3 B. & Ald. 444; 2 Chit. 130.

It is no reason for changing the venue in an indictment for a conspiracy in destroying foxes and other noxious animals, that the gentry of the county in which the indictment was found are addicted to fox-hunting. *Rex* v. *King*, 2 Chit. 217.

Evidence of partiality must be extremely strong to induce the court to change the venue in a criminal information. *Rex* v. *Harris*, 3 Burr. 1330; 1 W. Bl. 378.

In felony, the court refused to allow the defendant to enter a suggestion for changing the venue, on the ground of prejudice pervading the county. *Rex* v. *Penpraze*, 1 N. & M. 312; 4 B. & Ad. 573.

The court has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by certiorari, for the purpose of awarding the jury process into a foreign country; but this power will not be exercised unless it is absolutely necessary for the purpose of securing an impartial trial. *Rex* v. *Holden*, 2 N. & M. 167; 5 B. & Ad. 347.

It is no ground for removing the trial of an indictment from a large county, that a strong prejudice exists against the defendant in the county town where the trial is to take place. *Reg.* v. *Stephenson*, 5 Jur. 341.

Imposition of Terms on the Crown.]—In an indictment for murder the trial had twice been ready for hearing; once in the local venue where the alleged crime was committed, and once in the venue fixed by the Winter Assizes Act. On both these occasions the trial was postponed on the ground that an impartial trial could not be had; it appearing on affidavit that large numbers of the jurors, who would try the case, were members of an association called "The Land League," which association had subscribed to the defence of the prisoners, the crime being of an agrarian nature. The venue was now changed from the local one, to a district where it appeared probable that a fair and impartial trial could be had, the crown being put under terms to expedite the hearing of the case, and to pay the costs to the accused persons necessarily incurred by the change of venue. *Reg.* v. *Phelan*, 14 Cox, C. C. 579.

Additional Costs.]—On an indictment found at the assizes, the venue was changed at the defendant's instance to another county, and he entered into the usual bond to pay all additional costs incurred in consequence of the change; the commission day in the latter county was on a Saturday, and in the former county on a Wednesday:—Held, that he was properly chargeable with the costs of the witnesses in staying at the assize town on the Sunday, as they were all bound to have been there on the commission day. *Reg.* v. *Newton*, 1 Cox, C. C. 195.

2. ARRAIGNMENT.

How made.]—Arraignments may be without holding up the hand. *Rex* v. *Ratcliffe*, 1 W. Bl. 3.

Standing mute by Act of God or of Malice.]—Where a prisoner, on being arraigned, stated that he was deaf, on which the indictment was read over to him, and he apparently did not hear it: the judge directed a jury to be empanelled to try whether he stood mute by the act of God or of malice. *Rex* v. *Halton*, R. & M. 78.

And his counsel has a right to address the jury and call witnesses for him. *Rex* v. *Roberts*, Car. C. L. 57.

If a person stands mute upon his arraignment, the court may direct the sheriff to return a jury instanter, to try whether he stands mute obstinately or by the visitation of God; and if they find that he stands obstinately mute, sentence may be passed without further inquiry. *Rex* v. *Mercier*, 1 Leach, C. C. 183. S. P., *Rex* v. *Steel*, 1 Leach, C. C. 451.

Semble, that where a prisoner, being called on to plead, remains mute, the court cannot hear evidence to prove that he does so through malice, and then enter a plea of not guilty under 7 & 8 Geo. 4, c. 28, s. 2; but a jury must be empanelled to try the question of malice, and it is upon their finding that the court is authorised to enter the plea. *Reg.* v. *Israel*, 2 Cox, C. C. 263.

The 7 & 8 Geo. 4, c. 28, s. 2, authorising the court to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to the case of a party who refuses to plead on the ground that he had previously pleaded to another indictment for the same offence, but which indictment was not valid in consequence of its having been found upon the testimony of witnesses not duly sworn to give evidence before the grand jury. *Rex* v. *Bitton*, 6 Car. & P. 92.

A person, deaf and dumb, was to be tried for a capital felony: the judge ordered a jury to be empanelled, to try whether he was mute by the visitation of God; the jury found that he was so. The jury was then sworn to try whether he was able to plead, which they found in the affirmative; and the prisoner by a sign pleaded not guilty. The judge then ordered the jury to be sworn to try whether the prisoner was now sane or not; and on the question, he directed the jury to consider whether the prisoner had sufficient intellect to comprehend the course of the proceedings, so as to make a proper defence, to challenge any juror he might wish to object to, and to comprehend the details of the evidence; and that if they thought he had not, they should find him not of sane mind. The jury did so, and the judge ordered the prisoner to be detained under 39 & 40 Geo. 3, c. 94, s. 2. *Rex* v. *Pritchard*, 7 Car. & P. 303.

A person, deaf and dumb, was to be tried for a misdemeanor. A jury was empanelled to try whether he was mute by the visitation of God, and on their finding that he was so, they were sworn to try if he was of sound mind, and on their finding that he was so, his counsel pleaded not guilty for him, and the trial proceeded in the usual manner, and the evidence was not interpreted to the prisoner. *Reg.* v. *Whitfield*, 3 Car. & K. 121.

A prisoner when called upon to plead to an indictment, stood mute. A jury was empanelled and sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been returned, the court ordered a plea of not guilty to be entered on the record. *Reg.* v. *Schleter*, 10 Cox, C. C. 409.

A person who was unable to read or write, and who could only speak a few words in a whisper, was indicted for murder. It was submitted that he was not in a condition to plead, and ought not to be put upon his trial. The judge thereupon ordered a jury to be sworn, who, in answer to specific questions put to them by the judge, said that the prisoner was able to plead, that he was sane, that at the present time he was incapable of speaking so as to instruct his solicitor, and that his incapacity was caused by his own act. In consequence of these answers the prisoner was called upon to plead, but having pleaded not guilty his trial was adjourned till the next sessions. *Reg.* v. *Harris*, 61 J. P. 762.

Declining to plead.]—A prisoner declining to plead to an indictment, the court directed a plea of not guilty to be entered. *Reg.* v. *Bernard*, 1 F. & F. 240.

When Objection should be taken that Prisoner not fit to be tried.]—A prisoner being arraigned on two indictments for murder, and having, with apparent intelligence, pleaded to one, and declined to plead to the other, the plea of not guilty was entered for him by statute with the assent of his counsel. The case being then opened, and the first witness examined, and it being then set up by his counsel that he was insane, or not in a fit state to be tried:—Held, that the proper time for making that suggestion was before the prisoner pleaded; and, had it so been made, a jury should have been impannelled to try the question, whether he was sane and in a fit state to be tried, but as the trial had been begun, and it would be manifestly inconvenient to recommence the trial of the collateral issue, and as, moreover, the evidence as to the prisoner's present sanity was very much mixed up with the general question of his sanity, it was open to the court, under 39 & 40 Geo. 3, c. 94, to take the whole of the evidence, and then leave to the jury both questions as to his state of mind at the time of the act and at the time of the trial. *Reg.* v. *Southey*, 4 F. & F. 864.

3. Postponing or Adjourning Trial.

a. Postponement.

Application, when made.]—A motion to put off a trial, on an indictment for felony, cannot be entertained till after plea pleaded. *Reg.* v. *Bolam*, 2 M. & Rob. 192.

Absence of material Witness.]—A prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination that witness could give material evidence for the prisoner:—Held, that this was sufficient ground for postponing the trial, without showing that any endeavour had been made on the part of the prisoner to procure the witness's attendance, as the prisoner might necessarily expect, from his having been bound over, that he would appear. *Reg.* v. *M'Carthy*, Car. & M. 625.

When a witness for the prosecution is so ill as not to be able to travel, the judge may, in his discretion, postpone the trial. *Reg.* v. *Tait*, 2 F. & F. 553.

On an indictment for bribery, the trial was, on the application of the prosecutor, postponed to the next assizes, on account of the absence of material evidence. *Reg.* v. *Mobbs*, 2 F. & F. 18.

An issue upon the identity of a person is to be tried instanter. *Rex* v. *Rogers*, 3 Burr. 1809.

—— **Not examined before Magistrate.**]—If it is moved, on the part of the prosecution in a felony, to put off the trial, on the ground of the absence of a material witness, who has not made a deposition before the committing magistrate, the judge will require an affidavit stating what points the witness is expected to prove, in order that he may form a judgment as to the witness being material or not. *Reg.* v. *Savage*, 1 Car. & K. 75.

A trial for murder was put off until the next assizes, upon an application on the part of the prosecution, on the ground of the inability of a material witness to attend, although the witness was not examined before the magistrates, there being an affidavit of a medical man as to an injury to the witness, rendering it, in his opinion, unsafe that he should travel, and this even after the trial had been appointed for a particular day. *Reg.* v. *Lawrence*, 4 F. & F. 901.

—— **What Evidence sufficient that Witness cannot attend.**]—Where it was stated by the grand jury on their returning a true bill for murder, that an important witness was too ill to give evidence in court, the jury directed two surgeons to see the witness; and on their stating on the voir dire that the witness was too ill to give evidence in court, the judge ordered the trial to be postponed to the next assizes, and the prisoner to be detained in custody. *Reg.* v. *Chapman*, 8 Car & P. 538.

An affidavit of a surgeon, that the witness is the mother of an unweaned child, which is afflicted with inflammation of the lungs, and that the child could neither be brought to the assize town nor separated from its mother without danger to its life, is sufficient ground for the absence of the witness, in order to found a motion to postpone the trial. *Reg.* v. *Savage*, 1 Car. & K. 75.

Production of fresh Evidence.]—The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not, previously to the trial, communicated to the other side) may be ground for a postponement of the trial, if it appears necessary to justice. *Reg.* v. *Flannagan*, 15 Cox, C. C. 403.

Effect of, on Prisoner.]—Before the spring assizes, 1840, A. was committed to take his trial at those assizes for shooting B. The trial was postponed to the summer assizes, on the ground that B. was too ill from his wounds to be able to attend to give evidence. Before the summer assizes B. died, and at those assizes a true bill for the murder of B. was found against A., and application was made on the part of the prosecution, to postpone the trial to the next spring assizes, on the ground of the illness of a material witness. The judge granted the application, and held, that A. was not entitled to his discharge under s. 7 of the Habeas Corpus Act. *Reg.* v. *Bowen*, 9 Car. & P. 509.

If it is moved on the part of the prosecution in a case of felony to postpone the trial on the ground of the absence of a material witness, the practice, where the absence of the witness can be traced to the acts of the prisoner or his friends, is not to discharge the prisoner from custody, except on very sufficient bail; but where no collusion appears between the absent witness and the prisoner, or his friends, the practice is to discharge the prisoner on his own recognisance. *Rex* v. *Beardmore*, 7 Car. & P. 497.

Where a trial for felony is postponed, on the application of the counsel for the prosecution, on the ground of the absence of a material witness, it is in the discretion of the judge, whether, on consideration of the circumstances of each particular case, he will order the prisoner to be detained till the next assizes, or admit him to bail, or discharge him on his own recognisance. *Rex* v. *Osborn*, 7 Car. & P. 799.

Extreme Poverty—Attendance of Witnesses.]—The court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family were in extreme poverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given to her the requisite funds would be provided. *Reg.* v. *Langhurst*, 4 F. & F. 969; 10 Cox, C. C. 353.

—— **Affidavit.**]—The affidavit of the prisoner's attorney, setting forth the information he had received from the mother, was held to be insufficient. *Ib.*

No Time to prepare Defence.]—Trial postponed on an affidavit by the prisoner's solicitor that he had not had sufficient time to prepare for the defence, and suggesting the possibility of a defence. *Reg.* v. *Taylor*, 11 Cox, C. C. 310.

Danger to Public from Infection.]—A case was postponed on the ground that infection might be conveyed to the public by the attendance of the witnesses. *Reg.* v. *Taylor*, 15 Cox, C. C. 8.

Arrest of Defendant.]—A defendant in an indictment for perjury, tried at the sittings in the Queen's Bench, was arrested on the Wednesday before the trial, as he was going to the chambers of his counsel to deliver his brief. The case was called on for trial on the Saturday, and the judge would not postpone it unless it could be shown that the arrest was by collusion with the prosecutor; and the fact that a witness for the prosecution stood by while the arrest took place is not sufficient to raise that inference. *Reg.* v. *Gordon*, Car. & M. 410.

Opportunity of sifting Character and Evidence of Witnesses.]—An application to postpone the trial of a prisoner charged with murder, in order to afford an opportunity of investigating the evidence and characters of certain witnesses, who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the accused on the life of the deceased, was refused. *Reg* v. *Johnson*, 2 Car. & K. 354.

That other Charges may be brought against Prisoner.]—Upon a charge of murder by poison, the presentation of a bill to the grand jury cannot be postponed to the next assizes, on the ground

that other and like charges may before that time be brought against the prisoner, and if no bill of indictment is so presented, he is entitled to be discharged. *Reg.* v. *Heesom*, 14 Cox, C. C. 40.

Principal Witness incompetent to take Oath.]—A judge at assizes may postpone a trial until the next assizes, if he finds the principal witness wholly incompetent to take an oath from ignorance; and may order the witness to be instructed in the meantime by a clergyman in the principles of his duty, and the nature and obligation of an oath. *Rex* v. *White*, 1 Leach, C. C. 430.

Where a bill for rape on a child under the age of ten has been ignored by the grand jury, in consequence of the judge refusing to allow the child to be sworn as a witness, on the ground of her want of knowledge of the obligation of an oath, the prisoner was ordered to be detained in custody until the child could be properly instructed. *Reg.* v. *Baylis*, 4 Cox, C. C. 23.

In a case of carnally knowing and abusing a girl under ten years old, it appeared on an application on the part of the prosecution to postpone the trial, that the girl was only six years old, and by reason of her age, incapable of taking an oath:—Held, that the trial ought not to be postponed in order that the child might be instructed as to the nature of an oath; but that there might be cases of children of more matured intellect, e.g. of ten or twelve years old, who might be from neglected education incapable of being sworn, in which such a postponement might be proper. *Reg.* v. *Nicholas*, 2 Car. & K. 246; 2 Cox, C. C. 136.

Prejudice preventing Fair Trial.]—It is a good ground for putting off a trial, that the jury panels at the assizes have been taken from a neighbourhood where an excitement has been raised against the prisoner likely to prevent a fair trial. *Reg.* v. *Bolam*, 2 M. & Rob. 192.

Pending Examination of Witnesses abroad.]—A defendant indicted for misdemeanors committed by him in the West Indies in a public capacity, under 42 Geo. 3, c. 85, is not entitled, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts abroad, to examine witnesses, which are directed to be issued in such cases at the discretion of the court; but he must lay before the court such special grounds by affidavit, as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such cases is of course entitled to writs of mandamus for the like purpose. *Rex* v. *Jones*, 8 East, 31; 9 R. R. 368.

Expenses of Prosecution.]—Upon the postponement of a trial for the recovery of a witness who is ill, the prosecutor may then be allowed the costs of the prosecution incurred up to the date of the postponement. *Reg.* v. *Wilson*, 12 Cox, C. C. 622.

b. Adjournment.

In what Cases.]—When a trial is not concluded on the day on which it is begun, the judge can adjourn it from day to day without the defendant's consent. *Rex* v. *Stone*, 6 Term Rep. 530; 3 R. R. 253. S. P., *Reg.* v. *Castro*, 43 L. J., Q. B. 105; L. R. 9 Q. B. 350, 356.

When the witnesses for the prosecution have been examined the case may be adjourned in order that the production of a thing essential to the proof may be obtained. *Reg* v. *Wenborn*, 6 Jur. 267.

After the case for the prosecution had been opened it was found that owing to the detention of a train the witnesses for the prosecution had not arrived, and the trial was adjourned and the jury locked up. *Reg.* v. *Foster*, 3 Car. & K. 206.

The judge in a case of felony has no authority to order an adjournment (i.e. to another day) on account of the mere absence of the prosecutor and his witnesses. *Reg.* v. *Parr*, 2 F. & F. 861.

Or to adjourn a criminal trial when once the jury is sworn. *Reg.* v. *Tempest*, 1 F. & F. 381.

But a prisoner's trial may be adjourned if the case has only been opened by counsel for the prosecution, but not after evidence has been called. *Reg.* v. *Robson*, 4 F. & F. 360.

Averment in Record.]—Where there is an averment in the record of a proper and legal adjournment of the sessions from day to day, it is not necessary that the record should state the day or days upon which the trial took place. *O'Brien* v. *Reg*, 26 L. R., Ir. 451—C. A.

4. Pleas.

a. Pleas in Abatement.

How pleaded.]—A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. *O'Connell* v. *Reg.*, 11 Cl. & F. 155; 9 Jur. 25; 1 Cox, C. C. 413.

Amendment of.]—The court will not allow a defective plea in abatement, to an indictment for a misdemeanor, to be amended. *Rex* v. *Cooke*, 4 D. & R. 592; 2 B. & C. 871; 2 L. J. (o.s.) K. B. 152.

Misnomer.]—Before 7 Geo. 4, c. 64, s. 19, one indicted for a misdemeanor might plead in abatement a misnomer of his surname—Shakepear for Shakespeare, which need not be taken for idem sonans; and the plea concluding with praying judgment of the indictment, that he might not be compelled to answer the same, was good. *Rex* v. *Shakespeare*, 10 East, 83.

Where a defendant was indicted with an alias dictus, and pleaded in abatement that he was not known by such name, the plea must have been demurred to, or issue taken thereon; and it could not be quashed on motion. *Rex* v. *Clark*, 1 D. & R. 43. S. P., *Rex* v *Cooke*, 4D. & R. 114; 2 B. & C. 618.

Peer.]—Where a defendant pleaded in abatement to an indictment for a misdemeanor, that he was a peer, such plea was bad on demurrer, for not stating that he was a peer of the United Kingdom, and showing in what manner he derived his title. *Rex* v. *Cooke*, 4 D. & R. 592; 2 B. & C. 871.

Affidavit.]—A dilatory plea to an indictment was set aside for want of an affidavit to verify it. *Rex* v. *Grainger*, 3 Burr. 1617.

Pleading over.]—A defendant in an indictment for a misdemeanor cannot plead over to the charge, after a plea in abatement for a misnomer, on which issue was taken and found against

him. *Rex* v. *Gibson*, 8 East, 107. See *Reg.* v. *Phelps*, Car. & M. 180.

Judgment on.]—Although the prosecutor having demurred to a plea in abatement concluded in bar, praying final judgment:—Held, that the court was not precluded thereby, but was bound to give that judgment which was right on the whole record. *Reg.* v. *Mitchell*, 3 Cox, C. C. 94.

Where a replication to a plea in abatement introduces new matter, upon which issue may be taken, the prosecutor is entitled to pray final judgment. *Ib.*

b. Special Pleas.

In addition to Not Guilty.]—In criminal cases a defendant cannot plead a special plea in addition to not guilty. *Reg.* v. *Strahan*, 7 Cox, C. C. 85. S. P., *Reg.* v. *Sheen*, Bell, C. C. 97; 28 L. J., M. C. 91; 5 Jur. (N.S.) 151; 7 W. R. 255; 8 Cox, C. C. 143.

c. Withdrawing Plea.

Discretion of Judge.]—It is purely for the discretion of the judge at the trial, whether a plea of not guilty may be withdrawn or not; and the exercise of such discretion cannot be reviewed upon a case reserved. *Reg.* v. *Brown*, 17 L. J., M. C. 145.

Trial in Queen's Bench.]—Where an indictment has been removed and sent down to trial as a queen's bench record, the defendant cannot withdraw his plea of not guilty and plead guilty. *Rex* v. *Barrett*, 2 Lewin, C. C. 264.

Retracting Plea of Guilty.]—A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot be allowed to retract his plea and plead not guilty. *Reg.* v. *Selbe*, 9 Car. & P. 346.

On the trial of an indictment for forgery against two, one of them, after the opening speech for the prosecution, asked to be allowed to withdraw his plea of not guilty and to plead guilty. This was done, and the plea of guilty was recorded. He was then examined as a witness for the prosecution against the other, and swore that he had no knowledge of the instrument being forged. Upon this he was allowed to withdraw his plea of guilty and to plead not guilty, the jury withdrawing their verdict. The trial of the other party was then proceeded with, and, on his acquittal, the one who had withdrawn his plea was put upon his trial. *Reg.* v. *Clouter*, 8 Cox, C. C. 237.

d. Autrefois Acquit and Autrefois Convict.

1. *Validity.*

Indictment in wrong Country.]—An acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county. *Rex.* v. *Welsh*, 1 M. C. C. 175.

Judgment reversed in Error.]—A plea of autrefois convict or acquit, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to a subsequent indictment for the same offence. *Reg.* v. *Drury*, 3 Car. & K. 193; 18 L. J., M. C. 189; 3 Cox, C. C. 546.

A judgment reversed is the same as no judgment; and upon a record without any judgment no punishment can be inflicted. *Ib.*

Defect in Record.]—Where, by reason of some defect in the record, either in the indictment, place of trial, process or the like, a prisoner has not been lawfully liable to suffer judgment for the offence charged, he has not been in jeopardy in the same, which entitles him to plead the former proceeding, in bar to a subsequent indictment. *Ib.*

A prisoner is lawfully liable to suffer punishment on an erroneous record, until it is reversed in a court of error. *Ib.*

Bad Indictment.]—A judgment on demurrer in felony, on the ground that the indictment does not sufficiently charge a felony, is no bar to a subsequent good indictment for the same felony. *Reg.* v. *Richmond*, 1 Car. & K. 240.

A prisoner acquitted for forgery on a variance between the instrument proved and the form in which it was set out in the indictment cannot plead autrefois acquit to another indictment for the same offence, unless the instrument be again misrecited in the same manner. *Rex* v. *Coogan*, 1 Leach, C. C. 448.

Prisoner put in Peril.]—The defence of autrefois convict is a common law defence available in every case where a man is put in peril more than once for the same act, whether the charges are made before magistrates or tried before a jury. *Wemyss* v. *Hopkins*, 44 L. J., M. C. 101; L. R. 10 Q. B. 378; 33 L. T. 9; 23 W. R. 691.

Where a prisoner was indicted at quarter sessions on four counts, charging him with "unlawfully inflicting grievous bodily harm," "unlawful wounding,' "unlawfully assaulting, occasioning actual bodily harm," and "common assault," arising out of one transaction, and the jury convicted on the fourth count, but were unable to agree upon a verdict on the first three, and were discharged; it was held at the assizes, to which the prisoner was sent for trial on the first three counts, that the prisoner had been autrefois convict, and must, therefore, be discharged. *Reg.* v. *Grimwood*, 60 J. P. 809.

Evidence which might have been adduced at first Trial.]—If the prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment: and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. *Rex* v. *Sheen*, 2 Car. & P. 635.

Facts sustaining first Indictment.]—A plea of autrefois acquit cannot be pleaded unless the facts charged in the second indictment would, if true, have sustained the first. *Rex* v. *Vandercomb*, 2 East, P. C. 519; 2 Leach, C. C. 708.

—— **Acquittal for Felony—Misdemeanor.**]—By 24 & 25 Vict. c. 97, s. 35, and 24 & 25 Vict. c. 100, it is enacted that any person who unlawfully and maliciously throws upon or across any railway any wood, stone, or other matter with intent to endanger the safety of any passenger travelling or being upon such railway, or with intent to obstruct or injure any engine

shall be guilty of felony, and being convicted thereof shall be liable to penal servitude for life, or to be imprisoned for any time not exceeding two years:—Held, that an acquittal upon an indictment charging the prisoner with a felony was no bar to a subsequent indictment being preferred upon the same facts for a misdemeanor under the provisions of the above statutes. *Reg.* v. *Gilmore*, 15 Cox, C. C. 85.

An acquittal of an offence charged as a larceny cannot be pleaded in bar to an indictment for the same offence charged as a false pretence. *Reg.* v. *Henderson*, Car. & M. 328.

False Pretences—Larceny of same Goods.]—A person cannot, after having been convicted upon an indictment for the misdemeanor of obtaining credit for goods by false pretences or other fraud, be lawfully tried upon an indictment for larceny of the same goods. *Reg.* v. *King*, 66 L. J., Q. B. 87; [1897] 1 Q. B. 214; 75 L. T. 392; 18 Cox, C. C. 447; 61 J. P. 329—C. C. R.

No punishment at First Trial.]—A person who has been convicted of an assault by a court of summary jurisdiction, but has been discharged without any sentence of fine or imprisonment, on giving security to be of good behaviour, cannot afterwards be convicted on an indictment for the same assault. *Reg.* v. *Miles*, 59 L. J., M. C. 56; 24 Q. B. D. 423; 62 L. T. 572; 38 W. R. 334; 17 Cox, C. C. 9; 54 J. P. 549—C. C. R.

Burglary—Felony committed—Intent to commit Felony.]—A plea of autrefois acquit of a burglary, where the felony is laid as actually committed, cannot be pleaded to an indictment for the same burglary laid with intent to commit the felony, for they are two distinct and different offences. *Rex* v. *Vandercomb*, supra.

Murder — Burglary with Violence.] — If a party charged with the crime of murder, committed in the perpetration of a burglary, is generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence. *Reg.* v. *Gould*, 9 Car. & P. 364.

Manslaughter—Murder.]—A man was tried for manslaughter, and found guilty and sentenced. Shortly after his trial the coroner's jury returned an inquisition for wilful murder upon the same facts. At the next assizes he was arraigned upon such inquisition, when he pleaded autrefois convict. The facts of identity of the prisoner and deceased having been given in evidence, and the judge having read the depositions, which, as he thought, disclosed a case of manslaughter, he held the plea to be proved, at the same time stating that if he thought the case would ultimately have resolved itself into one of murder, he should have tried the prisoner, and if necessary, reserved the point. *Reg.* v. *Tancock*, 34 L. T. 455; 13 Cox, C. C. 217.

Murder—Poisoning with Intent to Murder.]—Upon an indictment under 7 Will. 4 & 1 Vict. c. 85, ss. 3, 4, for administering poison with intent to murder, a previous acquittal on an indictment for murder founded on the same facts could not be pleaded in bar. *Reg.* v. *Connell*, 6 Cox, C. C. 178.

Murder by administering Noxious Thing.]—A first count for murdering a male bastard child, stated that the prisoner gave and administered a large quantity of oil of vitriol, and forced the child to take into his mouth and throat a large quantity of the said oil of vitriol, the prisoner knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder, choking, suffocating, and strangling occasioned thereby, languished and died. The second count was for murdering the child, by administering a certain acid called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof he became injured and disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder occasioned thereby. A plea, that the prisoner had been acquitted for murdering a base infant male child, by giving and administering a certain deadly poison, to wit, oil of vitriol, and by forcing the child to take, drink, and swallow down a large quantity of the said oil of vitriol, the prisoner knowing it to be a deadly poison, whereby the child became sick and distempered in his body, and, by the sickness and distemper occasioned thereby, languished and died, is a good bar to the indictment. *Rex* v. *Clark*, 1 Br. & B. 473.

Assault—Murder.]—A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do grievous bodily harm, and the prosecutor having subsequently died, he was indicted for murder:—Held, that he was properly indicted. *Reg.* v. *Salvi*, 10 Cox, C. C. 481, n.

Murder—Assault.]—Two were indicted for having, on the 10th November, 1849, assaulted P. They pleaded autrefois acquit, and in their plea set out an indictment for murder, the third count of which alleged that they had murdered the deceased, by beatings on 5th November and 1st December, 1849, and 1st January, 1850, and on divers other days between the 5th November and 1st January; and the plea averred that the assaults charged in the second indictment were identically the same as those of which they had been acquitted on the trial of the first. The replication was, that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the indictment. On the first trial the counsel for the crown had stated the assaults as conducing to the death, and had given them in evidence to sustain the charge of murder. It was proved, however, that the cause of death was a blow inflicted shortly before the death of the deceased, which occurred on the 4th of January, but there was no evidence to show by whom the blow was struck; and the prisoners were acquitted. The judge, on the second trial, told the jury, that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find the prisoners guilty. The jury found the prisoners guilty:—Held, that the conviction was right, as the prisoners could not, on the trial for murder, have been convicted, under 7 Will. 4 &

1 Vict. c. 85, s. 11, of the assaults for which they were indicted on the second trial. *Reg.* v. *Bird*, T. & M. 374; 2 Den. C. C. 94; 20 L. J., M. C. 70; 15 Jur. 193; 5 Cox, C. C. 20.

Assault — Felonious Stabbing.]—A plea of autrefois convict of an assault before justices, under 9 Geo. 4, c. 31, s. 27, is a bar to an indictment for feloniously stabbing in the same transaction. *Reg.* v. *Walker*, 2 M. & Rob. 446.

Assault — Manslaughter.]—But a previous summary conviction for an assault under 24 & 25 Vict. c. 100, s. 45, is not a bar to an indictment for manslaughter of the party assaulted, founded upon the same facts. *Reg.* v. *Morris*, 36 L. J., M. C. 84; L. R. 1 C. C. 90; 16 L. T. 636; 15 W. R. 999; 10 Cox, C. C. 480.

Where there has been a summary conviction under the Summary Jurisdiction Act, 1879, for assault, and the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of autrefois convict is not a good answer by the person so summarily convicted of an indictment for the manslaughter of the person assaulted. The death of the deceased person is one of the facts constituting the cause for a prosecution for manslaughter. *Reg.* v. *Friel*, 17 Cox, C. C. 325.

Rape—Assault with Intent to commit Rape.]—An acquittal on an indictment for rape could not be successfully pleaded to a subsequent indictment for an assault with intent to commit a rape, nor could an acquittal on an indictment for feloniously stabbing, with intent to do grievous bodily harm, be successfully pleaded to an indictment for an assault, though, in each case, the transaction was the same, and the accused might have been convicted of an assault under 7 Will. 4 & 1 Vict. c. 85, s. 11. *Reg.* v. *Gisson*, 2 Car. & K. 781.

Perjury—Same Affidavit.]—One was indicted in Middlesex for perjury committed in an affidavit, which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit filed in the Court of King's Bench, and on this he was acquitted; after which he was indicted again in Middlesex for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that in fact the defendant was so sworn in Middlesex, and not in London:—Held, that he was entitled to plead autrefois acquit, for the jurat was not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment, and therefore the defendant had been once before put in jeopardy for the same offence. *Rex* v. *Emden*, 9 East, 437.

Larceny—Property of A. or B.]—The prisoner stole the goods of J. B. from his stall, which at the time was in the charge of R. B. his son, a child of fourteen, who lived with his father, and worked for him. The first indictment against him for stealing the goods described them as the property of R. B. The sessions thinking this a wrong description directed an acquittal, and caused a new bill to be sent up laying the property in J. B. To this indictment he pleaded autrefois acquit:—Held, that the plea could not be sustained, for the prisoner could not, on the evidence, have been convicted on the first indictment, charging the property as that of R. B., and that the court could only look at the first indictment as it stood, without considering whether the allegation as to the ownership of the goods might not have been amended so as to have warranted a conviction. *Reg.* v. *Green*, Dears. & B. 113; 26 L. J., M. C. 17; 2 Jur. (N.S.) 1146; 5 W. R. 52; 7 Cox, C. C. 186. See *Reg.* v. *Austin*, 2 Cox, C. C. 59.

Larceny at Common Law and under Statute.]—In one indictment the prisoners were charged with larceny at common law, and for feloniously receiving "the goods aforesaid." They were acquitted on the ground that the alleged goods were a fixture in a building. They were then charged upon a second indictment under the 24 & 25 Vict. c. 96, s. 31, for stealing the fixture, to which charge they pleaded autrefois acquit. The presiding chairman at sessions held that plea not to be proved, and the prisoners then pleaded not guilty, but were convicted:—Held, that the ruling of the chairman was right, and that the prisoners had not been in peril on the count for receiving in the first indictment. *Reg.* v. *O'Brien*, 46 L. T. 177; 15 Cox, C. C. 29.

Principal—Accessory before Fact.]—A person who is tried for felony as a principal, and acquitted, cannot plead that acquittal in bar of another indictment, which charges him with being an accessory before the fact to the same felony. *Rex* v. *Plant*, 7 Car. & P. 575.

A person who is tried as a principal and acquitted cannot plead that acquittal in bar of an indictment charging him with being an accessory before the fact to the same felony. *Rex* v. *Birchenough*, 1 M. C. C. 477; 7 Car. & P. 575. See *Rex* v. *Parry*, 7 Car. & P. 836. *See* 24 & 25 Vict. c. 94, s. 1.

Joint Indictment—Single Indictment.]—Plea by one prisoner, indicted singly for receiving stolen goods, of autrefois acquit, under an indictment against him and four others, on which one was convicted, and the prisoner and the three others were acquitted, is good. *Rex* v. *Dann*, 1 M. C. C. 424.

Evidence showing former Indictment incorrect.]—Indictment that the defendant, in the reign of the present king, kept a common gaming-house; plea, that the defendant, in the reign of the present king, was acquitted upon an indictment for keeping a common gaming-house in the reign of the late king, against the peace of our said lord the king; and averring the identity of the offences: demurrer, concluding with a prayer of judgment of respondeat ouster:—Held, first, that the plea was bad, because the indictment on which the acquittal was founded charged an offence committed in the reign of the late king, and the defendant could not by averment show that the offence charged in both indictments was the same; and secondly, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of respondeat ouster. *Rex* v. *Taylor*, 5 D. & R. 422; 3 B. & C. 502; 3 L. J., (O.S.) K. B. 68.

Verdict of Guilty—Second Indictment by Order of Judge.]—A first count charged the

prisoners with having in their possession a mould intended to impress the stamp of the reverse side of a shilling; the second stated, that the mould was intended to impress the obverse side; the third stated that it was intended to impress part or parts of the reverse side; and the fourth stated the same as to the obverse side. A verdict of guilty having been recorded, a motion was made in arrest of judgment, on the ground that the two last counts were bad for uncertainty, whereupon the judge directed another indictment to be preferred. The second indictment contained the first two counts of the previous one; a third and fourth stated, that the mould was intended to impress parts of the obverse and parts of the reverse sides; a fifth and sixth used the word "part" instead of parts. The prisoner pleaded autrefois convict. The twelve judges decided that the plea was bad, and confirmed the second conviction. *Rex* v. *Phillips*, 1 Jur. 427.

Second Indictment should have been included in First.]—A prisoner was tried, on the 6th of April, 1863, upon an indictment charging him with having, on the 22nd of January, 1863, stolen 25lbs. of copper, the property of A., and was acquitted. He was again tried on the 29th of June, 1863, upon an indictment which charged him, in a first count, with having, on the 20th September, 1862, stolen a riddle, the property of A., and in the second count, with having, on the 16th of January, 1863, stolen five shovels, also the property of A. The prisoner had been in A.'s employ several years, and the riddle and shovels were found in his possession on the 21st of January, 1863, but there was no evidence to show when they were stolen:—Held, first, that he was not entitled to be acquitted upon the second trial on the ground that the charge of stealing the riddle and shovels ought to have been included in the first indictment, and that on these facts a verdict was rightly found against him upon a plea of autrefois acquit. *Reg.* v. *Knight*, L. & C. 378; 9 L. T. 808; 9 Cox, C. C. 437.

Plea—Duplicity—Two Acquittals.]—If, in a plea of autrefois acquit, the prisoner was to insist on two distinct records of acquittal, his plea would be bad for duplicity. *Rex* v. *Sheen*, 2 Car. & P. 635.

Discharge of Jury by Judge—How pleaded.]—On the trial of an information for a misdemeanor the judge discharged the jury. The defendant then put a plea on the record, setting out the facts under which the jury was discharged, in the nature of a plea autrefois acquit:—Held, that this matter could not be raised by way of plea, but must be raised by way of error on the record after conviction. *Reg.* v. *Charlesworth*, 4 L. T. 638; 9 W. R. 805; 9 Cox, C. C. 40.

ii. *Practice.*

Not Guilty.]—A prisoner may plead not guilty, after his special plea of autrefois acquit is found against him. *Rex* v. *Welch*, Car. C. L. 56.

Informal mode of pleading.]—The court will not reject a plea of autrefois convict on account of the informal manner in which it is handed in by the prisoner, but will assign counsel to put it into a formal shape, and postpone the trial, to give time for its preparation. *Rex* v. *Chamberlain*, 6 Car. & P. 93.

Jury charged—Two Issues.]—The jury cannot be charged at the same time to try the two issues of autrefois acquit and not guilty. *Rex* v. *Roche*, 1 Leach, C. C. 134.

Right to begin.]—Four persons were tried for a rape, upon an indictment containing counts charging each as principal, and the others as aiders and abettors. They were acquitted; and it being proposed on the following day to try three of them for another rape upon the same person (the second indictment being exactly the same as the first, with the omission only of the fourth prisoner), they pleaded autrefois acquit to the second indictment, averring the identity of the offences. To this plea there was a replication that the offences were different:—Held, that on this issue the prisoner's counsel must begin. *Rex* v. *Parry*, 7 Car. & P. 836.

Evidence—Counsel.]—To sustain a plea of autrefois acquit the counsel at the former trial may be examined to show from his notes what evidence was given. *Reg.* v. *Bird*, 5 Cox, C. C. 11.

—— **Proof by Record.**]—A plea of autrefois convict can only be proved by the record; and the indictment, with the finding of the jury, indorsed by the proper officer, is not sufficient, although it appears that no record has been made up. But the court, before whom the prisoner is brought to be tried the second time, will postpone the trial at the request of the prisoner, on an affidavit of the fact, to give time for an application for a mandamus to compel the making up of the record. *Rex* v *Bowman*, 6 Car. & P. 101.

—— **Proceedings Coram non judice.**]—A plea of autrefois convict stated that the prisoner was indicted, convicted, and sentenced, at a session of the peace, duly holden by adjournment on the 5th of July; replication, nul tiel record. The record, produced in support of the plea, stated that the indictment was found at a session commenced and holden on Monday the 1st of July, and that the court was adjourned till Tuesday the 2nd; that the court, having re-assembled on Thursday the 4th, was adjourned to Friday the 5th, when the prisoner was tried and convicted:—Held, that the plea of autrefois convict was not proved by the record, inasmuch as for want of an adjournment from the Tuesday to the Thursday, the proceedings on the Friday were coram non judice, and a nullity. *Rex* v. *Bowman*, 6 Car. & P. 337.

—— **Drawing up Record.**]—During the sitting under the same commission, the original indictment, and minutes of the verdict upon it, are receivable in evidence in support of a plea of autrefois acquit, without a record being drawn up. In order to his pleading autrefois acquit in a case of felony, the prisoner has not a right to a copy of the second indictment, but he has a right to have the indictment read slowly. *Rex* v. *Parry*, 7 Car. & P. 836.

Verdict on Issue is Final.]—The prisoner's counsel put in the commitment and the former indictment, and also the minutes of the former acquittal written on the indictment. On this

evidence the jury found that the offences were the same; and it being referred for the opinion of judges, whether there was any evidence to justify and support the verdict, and if not whether such verdict was final, and operated as a bar to any further proceedings by the crown—upon the second indictment:—Held, that the verdict of the jury was final, and the prisoners were discharged. *Rex* v. *Parry*, 7 Car. & P. 836.

A verdict for a prisoner, on an issue of autrefois convict, cannot be set aside, and a new trial had, though without evidence, and against the opinion of the judge. *Rex* v. *Lea*, 2 M. C. C. 9.

5. Recognisances.

a. Entering into.

Sufficiency of.]—In considering the sufficiency of a recognisance to prosecute under the Vexatious Indictment Act, s. 1, reference may be made to the accompanying depositions to ascertain the particulars of the offence to be charged. *Reg.* v. *Bell*, 12 Cox, C. C. 37.

Where a party, indicted at the quarter sessions for a conspiracy, had entered into an insufficient recognisance to take his trial:—Held, that the court, on a removal by certiorari, might discharge it on motion, and compel him to enter into better securities. *Rex* v. *Hooper*, 1 Chit. 491.

Quarter Sessions—Practice.]—The usual practice in taking the recognisance of a person convicted at quarter sessions is that the person so convicted, before he is allowed to leave the court, enters orally into the recognisance before the officer of the court, who makes a minute of it; and the recognisance is not formally drawn up till afterwards. *Jeffreys, Ex parte*, 32 J. P. 280.

Amount of.]—The 5 Geo. 2, c. 19, s. 3, requiring the party removing a conviction by a magistrate to enter into a recognisance, with two sureties in 50*l.*, conditioned to prosecute the writ with effect, was not complied with by the party and his two sureties entering into a recognisance in 25*l.* each, but it must be in the entire sum of 50*l.* *Rex* v. *Dunn*, 8 Term Rep. 217.

Sheriff arresting Persons.]—A sheriff has no authority to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions for a misdemeanor; he can only take a recognisance for their appearance. *Bengough* v. *Rossiter*, 4 Term Rep. 505; 2 H. Bl. 418, 426.

Under vexatious Indictments Act.]—*See* ante, col. 1734.

Enlarging — In what Cases.] — Where a prisoner has made default, the recognisance of the prosecutor may be enlarged till the apprehension of the prisoner. *Young, In re*, 2 Cox, C. C. 280.

Where an indictment for felony was found at the Central Criminal Court against a peer of the realm and several commoners, at a time while the houses of parliament were not sitting, the recognisances of the commoners were respited from session to session, until after the case of the peer had been disposed of in the House of Lords. *Reg.* v. *Douglas*, Car. & M. 193.

A judge sitting at nisi prius, acting under 14 & 15 Vict. c. 100, s. 19, compelled the defendant in a cause to enter into recognisances to appear and take his trial for perjury at the next sessions of the Central Criminal Court, and bound the plaintiff in recognisances to prosecute:—Held, that the court of Exchequer had no power to enlarge those recognisances to a subsequent sessions of the Central Criminal Court. *Horridge* v. *Hawkins*, 15 Jur. 1086.

—— **Jurisdiction of Quarter Sessions.**]—Indictment for misdemeanor at the quarter sessions. The defendant pleaded guilty, and was bound by recognisances to appear for judgment at the next quarter sessions, and judgment was respited. At the next April sessions judgment was further respited until the June sessions, when judgment was given, and the defendant sentenced to be fined and imprisoned. On error brought:—Held, that a court of quarter sessions has power to respite cases from one sessions to another. *Keen* v. *Reg.*, 3 New Sess. Cas. 25: 10 Q. B. 928; 16 L. J., M. C. 180; 11 Jur. 1060; 2 Cox, C. C. 341.

The record stated, that at the first session "it was considered and adjudged that the defendant should enter into recognisances to appear":—Held, that these words did not give the order the effect of a judgment, so as to oust the sessions of their jurisdiction to give judgment at the subsequent sessions. *Ib.*

Who can enter into.]—A person of the age of sixteen is competent to enter into a recognisance conditioned to prosecute on a criminal charge. *Williams, Ex parte*, M'Clel. 493; 13 Price, 673; 28 R. R. 735.

By a local act, commissioners were enabled to rate every person or persons who occupied land in the parish:—Held, that a corporation was liable to be rated, although by a clause, giving an appeal to the sessions to any party aggrieved, such party was bound to enter into a recognisance. *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 314.

—— **Indictment against Corporation—Certiorari.**]—An indictment against a corporation, found at quarter sessions, may be removed by certiorari, at the instance of the prosecutor, without his entering into the recognisance required by 16 & 17 Vict. c. 30, s. 5. *Reg.* v. *Manchester Corporation*, 7 El. & Bl. 453; 26 L. J., M. C. 65; 3 Jur. (N.S.) 839; 5 W. R. 373.

Magistrates before whom entered into.]—A declaration on a scire facias, upon a recognisance to keep the peace, described the justices before whom the recognisance was taken as "Lee B. Townshend, Esq., and I. H. Harper, Esq.:"—Held, that the christian names of the justices did not appear to be insufficiently stated. *Reg.* v. *Dale*, 17 Q. B. 64; 20 L. J., M. C. 240; 15 Jur. 657.

In the margin of a recognisance "Middlesex" only was inserted, and the instrument was stated to have been "taken and acknowledged, the day and year above said, before me, T. B. B., a magistrate for Surrey;" and in the body, that the defendant and his bail "came before me, T. B. B., Esq., one of her Majesty's justices of the peace in and for the county of Surrey." It was objected that the recognisance was void, because it did not show jurisdiction:—Held, that, assuming the instrument to be of doubtful

validity, the court would, notwithstanding, estreat the recognisance into the Exchequer, where the objection might be relied on. *Reg.* v. *Sydserff*, 2 D. & L. 564; 14 L. J., Q. B. 44; 9 Jur. 280.

No Notice of Trial necessary.]—Where a defendant is under recognisances to appear and take his trial at a particular session of the Central Criminal Court, no notice of trial to the prosecutor is requisite, and he is bound to be prepared to try at that session. *Reg.* v. *Parker*, 3 Cox, C. C. 299. See also *Rex* v. *Clark*, infra.

b. Estreat.

At Assizes—Certiorari.]—Recognisances entered into by a defendant prosecuted for libel at the assizes may be brought up by certiorari into the Queen's Bench Division to be estreated. The Divisional Court, on such a motion, in order to ascertain whether there has been a breach of the conditions, may decide whether there has been a libel published or not. *Reg.* v. *Brooke*, 59 J. P. 6.

Notice to Defendant or Surety.]—When the condition of the recognisances is that the defendant abstains from doing an act, e.g. from publishing libels, it is not necessary to give him or his surety notice to perform the conditions. Rule 124 of the Crown Office Rules, which requires a notice, applies when the condition is to do some act, and not merely to abstain from doing something. *Ib.*

Into the Exchequer.]—Where a recognisance taken before a justice of the peace, upon the removal of an indictment into the Queen's Bench, had been returned and filed, the court permitted it to be estreated into the Exchequer though it had not been inrolled. *Reg.* v. *Sydserff*, 2 D. & L. 564; 14 L. J., Q. B. 44; 9 Jur. 280.

Recognisances estreated into the Exchequer may be discharged or compounded by the court, according to the equity and circumstances of the case. *Pellew, In re*, 13 Price, 299. *S. C.*, nom. *Pellew, Ex parte*, M'Clel. 111; 28 R. R. 683.

The 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37, do not oust the Court of Exchequer of its jurisdiction, where forfeited recognisances have been actually estreated into it from an inferior jurisdiction. *Ib.*

For the course to be pursued in enforcing estreats into the Court of Exchequer from the King's Bench, see *Rex* v. *Thackle*, M'Clel. & Y. 514, 523.

No Notice of Trial given.]—Where a defendant, on being taken into custody on the 8th June, under a judge's warrant issued against him on an indictment for a blasphemous libel, entered into a recognisance to appear and plead within the first eight days of the ensuing Trinity term, and to try the cause at the Middlesex sittings after that term, and pleaded not guilty, but did not give notice of trial or make up the record, either for the sittings after Trinity or Michaelmas term, nor was any rule obtained for respiting the estreating of the recognisance; and the prosecutors gave notice of trial after Trinity and Michaelmas terms, but the causes were not tried in either; but made remanets to the sittings after Hilary, and the defendant was ready to take his trial on both these occasions; and the recognisance was estreated in Hilary term, without any notice having been given to the defendant, or any motion made by the prosecutors:—Held, that the estreat was regular, and conformable to the ordinary practice. *Rex* v. *Clark*, 5 B. & Ald. 728. See also *Reg.* v. *Parker*, supra.

Practice thereon.]—The condition of a recognisance returned, filed, and inrolled as of record, cannot be varied by a rule of court. *Rex* v. *Bingham*, 3 Y. & J. 101.

Upon the removal of an indictment for a misdemeanor from the Central Criminal Court, by the defendants, and a conviction in the Queen's Bench, the recognisance entered into by the bail is liable to be estreated for non-payment of the costs of the prosecution, although they are not mentioned in the condition of the recognisance. *Reg.* v. *Hague*, 5 Jur. 1008.

Recognisances of bail taken under 5 & 6 Will. & M. c. 11, on the removal of an indictment, cannot be estreated, the defendant having agreed with the prosecutor to plead guilty and submit to a nominal fine, without the knowledge of the bail. *Rex* v. *Rogers*, 2 H. & W. 124.

The court has jurisdiction to respite and stay process on estreated recognisances, and they will do so on application, in order to give the cognizors an opportunity of trying a question of law respecting the subject-matter of the condition, although the forfeiture imports the breach of a duty imposed by competent authority under an act of parliament. *Fridlington, In re*, 9 Price, 658.

Where a party is in custody under process issued on an estreated recognizance, into which he alleges that he has not entered, the proper course is to come into court, and traverse the recognizance. *Stowell, Ex parte*, 1 D. & L. 995; 13 L. J., Ex 328; 8 Jur. 740.

Where a party, bound at the quarter sessions in recognisances to keep the peace, is afterwards convicted at the petty sessions of an assault, in order to estreat the recognisances it is necessary to bring them up by certiorari, and proceed therein by scire facias. *White, In re*, 1 New Sess. Cas. 9.

When a recognisance of bail to keep the peace has been returned for the purpose of being estreated, the court will not send it back again to be amended, upon a suggestion of an error appearing on the face of it. *Higgins, Ex parte*, 2 D. (N.S.) 713; 7 Jur. 441.

Where a recognisance has been removed for the purpose of being estreated, the court will not grant a mandamus to the justices to correct a clerical error vitiating the recognisance. *Reg.* v. *Stack*, 12 L. J., M. C. 58.

Power of Sessions.]—A party who had applied for a beer licence, which was refused, appealed against the refusal to the October quarter sessions, and entered into a recognisance to try the appeal, abide the judgment of the court, and pay such costs as the court might award. The appeal was dismissed, and the court ordered the appellant to pay costs to the respondent forthwith. A blank was left in the order as to the sums, which the clerk of the peace had not time to fix before the sessions adjourned. The sessions adjourned to the next November. Before the adjournment day, the clerk of the peace fixed the costs and filled up the order. After the adjourned

sessions had terminated, but before the next sessions, which were held on the next January, payment was demanded of the appellant, who did not pay. On affidavit of this, the sessions holden in January estreated the recognisance :—Held, that the sessions had power to estreat the recognisance, and that process might be taken upon it under 3 Geo. 4, c. 46. *Reg.* v. *Ely JJ.*, 5 El. & Bl. 489 ; 25 L. J., M. C. 1 ; 1 Jur. (N.S.) 1017 ; 4 W. R. 5.

Held, also, that it was not necessary that the order should direct the costs to be paid to the clerk of the peace, under 11 & 12 Vict. c. 43, s. 27. *Ib.*

If a recognisance is estreated at the quarter sessions, and a writ issues to the sheriff to levy under 3 Geo. 4, c. 46, s. 6, and the sheriff levies the amount, the court of quarter sessions has not the power to mitigate the amount, although the money has been actually levied ; and the party cannot compel the sheriff to pay back the difference. *Haynes* v. *Hayton*, 7 B. & C. 293; 2 Car. & P. 621 ; 5 L. J. (o.s.) M. C. 136 ; 31 R. R. 205.

When a recognisance to keep the peace, taken before two justices, was forfeited by a conviction for an assault, and the quarter sessions, on proof of the record of conviction, ordered the recognisance to be estreated :—Held, that they had no authority to make such an order, and that the proper course of proceeding was by scire facias on the recognisance. *Rex* v. *Yorkshire* (*W. R.*) *JJ.*, 2 N. & P. 457 ; 7 A. & E. 583 ; 7 L. J., M. C. 9 ; 2 Jur. 253.

Although an order of the court of quarter sessions to estreat a recognisance for a forfeiture out of the sessions is a nullity, yet a certiorari will be awarded to remove it in order to quash it. *Reg.* v. *Yorkshire* (*W. R.*) *JJ.*, 2 N. & P. 457 ; 7 A. & E. 583 ; 7 L. J., M. C. 9.

Since 3 Geo. 4, c. 46, the Court of Exchequer has no jurisdiction over recognisances forfeited either before justices out of sessions or at the sessions. *Ib.*

Duty of Clerk of the Peace.]—It is the duty of the clerk of the peace to put the law in motion to levy all recognisances forfeited at quarter sessions. *Ib.*

The duplicate of fines, issues, amercements, and forfeited recognisances, required to be delivered into the Exchequer by the clerk of the peace, under 3 Geo. 4, c. 46, s. 14, must be delivered in on oath. *Hodgson, Ex parte*, 2 Y. & J. 142. 1 L. J., Ex. 39.

But where the amount of estreats to be certified by clerks of the peace, town clerks, &c., to the court, is under 5*l.*, they may verify the return or certificate by affidavit without a commission or personal appearance. *Tomlin, Ex parte* or *In re*, 1 D. P. C. 303 ; 2 C. & J. 122 ; 2 Tyr. 176 ; 1 L. J., Ex. 39.

c. Forfeiture and Discharge.

Forfeiture — King a Trustee.]—The king is only trustee for the party in a forfeited recognisance. *Rex* v. *Ayres*, 4 Burr. 2118.

—— **Award of Arbitrator.**]—Where A. entered into a recognisance to pay to the king a certain sum, or such sum as B. should award ; and afterwards by rule of court C. was, by consent of parties, substituted as arbitrator in lieu of B., and C. made his award :—Held, that the recognisance was not forfeited by non-performance of the award of C. *Rex* v. *Bingham*, 3 Y. & J. 101.

—— **When Recognisance passes to Corporation.**]—By a charter of Edward 4, the crown granted to a corporation "all penalties forfeited and to be forfeited, of all and every the barons, &c., in whatsoever courts the same barons, &c., should happen to be adjudged." By a charter of Car. 2, "all fines, forfeitures, &c., in the courts aforesaid, arising, &c.," were also granted to the corporation :—Held, that under neither of these charters did a forfeited recognisance to appear to answer a charge of misdemeanor pass to the corporation. *Rex* v. *Dover* (*Corporation*) 1 C., M. & R. 726 ; 5 Tyr. 279 ; 4 L. J., Ex. 94.

A charter of the year 1399 granted to a corporation "all fines for trespass and other offences whatsoever and also fines for licences to agree and all amercements ransoms and forfeited issues forfeitures year day waste and estrepment. . . ." A second charter of the year 1448 granted to the same corporation "all issues fines and amercements from whatsoever pledges and mainpernors. . . ." Held, that the words did not in either case include recognisances estreated on the failure of persons accused of felony or misdemeanor to appear and take their trial at assizes. *Nottingham Corporation, In re*, 66 L. J., Q. B. 883 ; [1897] 2 Q. B. 502 ; 77 L. T. 210 ; 61 J. P. 725.

Notice—Time—Service.]—The word forthwith in a notice to a party charged criminally, and out on bail, to appear on pain of forfeiting his recognisance, means, within a reasonable time from the service, and not from the date of the notice. *Reg.* v. *Price*, 8 Moore, P. C. 203.

Discharge—When entered into per incuriam.]—When two members of a corporate body entered into their recognisances to appear and plead to an indictment for non-repair of a highway, the judge ordered them to be discharged from such recognisances on the ground that they were entered into per incuriam. *Reg.* v. *Bury Improvement Commissioners*, 11 Cox, C. C. 641.

—— **Impossibility of Performance.**]—To an action upon a recognisance or an obligation, impossibility, by act of God, of performance of the condition, is a good defence. *Leitrim* (*Earl*) v. *Steward*, Ir. R. 5 C. L. 27.

—— **When Prosecution not willing to proceed.**]—Where a prisoner has been committed for trial at the assizes, and parties bound over by a magistrate to prosecute and give evidence, the judge will not discharge the recognisances on an intimation that the attorney-general does not think it a proper case for prosecution. *Reg.* v. *Freakley*, 6 Cox, C. C. 75.

The court refused to discharge, without preferring a bill of indictment, the recognisances of prosecutors, being members of a society for promoting religious knowledge among the poor, who had caused a servant to be committed for embezzlement ; the application being made, not on the ground of any defect in the evidence, but on the ground that the prosecutors thought that the reformation of the offender would be best promoted by such a course. *Rex* v. *Paul*, 6 Car. & P. 323.

But where, at the assizes, parish officers were under recognisances to prosecute a pauper for obtaining money by false pretences, the judge permitted the recognisances to be discharged.

the party having been in prison several weeks, and the parish being unwilling to indict. *Rex* v. *Adams*, 6 Car. & P. 324.

—— **Absence of Witness.**]—Where the trial of prisoners had been successively postponed for two assizes, in consequence of the absence of a material witness, and the affidavit on which application was made for further postponement, stated, that the witness in question was believed to have gone to India as a soldier, so that there was not any prospect of his soon return, the judge ordered the recognisances of the prosecutor to be discharged, and discharged the prisoners without compelling them to enter into any recognisances for their future appearance. *Reg.* v. *Bridgman*, Car. & M. 271.

—— **Prisoner a Lunatic.**]—Where a prisoner has been removed to a lunatic asylum, under 3 & 4 Vict. c. 54, the recognisances of the prosecutor and witnesses will not be discharged, but will be respited until the next assizes or sine die. *Reg.* v. *Cohus*, 1 Cox, C. C. 207. S. P., *Reg.* v. *Blackwell*, 7 Cox, C. C. 353.

—— **Wife and Family supported by Parish.**]—A defendant having been committed to prison on a forfeited recognisance, his wife and family becoming burdensome to the parish, is not a sufficient ground to discharge him. *Rex* v. *Stancher*, 3 Price, 261.

—— **Sessions, Jurisdiction of—Liability of Sheriff.**]—Where, upon a recognisance forfeited at quarter sessions, the sheriff has levied part of the penalty, and has the defendant in execution for the residue, the sessions have jurisdiction over the whole recognisance; and if the sheriff has notice that they have discharged the defendant wholly therefrom, before the money levied had been paid over to the treasury, an action lies against the sheriff for the amount. *Harper* v. *Hayton*, 5 M. & Ry. 307; 8 L. J. (O.S.) M. C. 129.

—— **Costs.**]—When an indictment had been removed by certiorari, and the defendant, being convicted, had become liable to costs, the court refused to discharge the recognisances of the bail to the certiorari until the costs were paid, although the recognisances made no mention of costs, but the court stayed the proceedings on recognisances with respect to the defendant propter paupertatem. *Reg.* v. *Thornton*, 1 L. M. & P. 192; 4 Ex. 820; 19 L. J., M. C. 113.

A recognisance to remove an indictment from the court of oyer and terminer, at Hick's Hall, is a recognisance at common law, and not within 5 & 6 Will. & M. c. 11, s. 2, and the same may be discharged without costs. *Rex* v. *Fousdea*, 1 Burr. 10.

The condition of a recognisance to pay the seizing officer the costs occasioned by a claim, is broken by the non-payment to the seizing officer of the general costs of resisting the claim, though such costs are not incurred personally by the seizing officer. *Rex* v. *Bullock*, 1 M. & W. 726; 1 Tyr. & G. 998; 5 L. J., Ex. 259.

—— **Motion.**]—A motion to discharge a defendant from estreated recognisances, under 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the treasury. *Tipton, In re*, 3 D. P. C. 177.

In order to discharge a forfeited recognisance estreated into the exchequer by order of a judge, the party must have the constat of the proceedings from the office of the clerk of the estreats in court; and notice of motion should be given to him and to the solicitor of the treasury. *Rex* v. *Holden*, 3 Tyr. 580; 2 L. J., Ex. 240.

The motion to discharge a forfeited recognisance should be made on either of the days in the week when the treasurer's remembrancer is present. *Dunk, Ex parte*, 2 Tyr. 500.

Although the city of London is entitled to forfeited recognisances entered into within the city of London, yet the courts will not allow a recognisance to be discharged though the motion is made with the consent of the city solicitor, unless notice has been given to the attorney-general. *Reg.* v. *Morris*, 1 M. & W. 510; 1 Tyr. & G. 805; 5 L. J., Ex. 170.

—— **At what Time.**]—Where a defendant entered into a recognisance to appear to and try an indictment for perjury against her in Trinity Term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the court would not in Michaelmas Term discharge the recognisance, but ordered that it should not be put in suit before the last day of the term. *Rex* v. *Grote*, 3 D. P. C. 955.

Indemnity of Surety.]—A. entered into a recognisance of bail for B. on the removal by certiorari of an indictment for conspiracy. B. was convicted, and the recognisance was estreated for nonpayment of the prosecutor's costs:—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones* v. *Orchard*, 16 C. B. 614; 24 L. J., C. P. 229; 1 Jur. (N.S.) 936; 3 W. R. 554.

A recognisance is not a record until it is inrolled, and, therefore, where a defendant pleaded to an action on bills of exchange, that the plaintiff was indebted to him by virtue of a recognisance taken in the court of exchequer, which was still in force, as by the recognisance remaining in the court before the barons will appear, without stating that it was inrolled; a replication, that the plaintiff was not so indebted, concluding to the country, was held good, inasmuch as the plea did not state a debt due by recognisance, which was matter of record. *Glynn* v. *Thorpe*, 1 B. & Ald. 153.

6. Other Points.

a. Bringing up Prisoner.

In Custody in another County.]—Where a defendant is in custody in the county of A., upon an attachment issuing out of the court of exchequer, he may be removed to the county of B., to take his trial upon an indictment found in the latter county. *Wetton, In re*, 1 C. & J. 459; 1 Tyr. 385.

b. Standing in the Dock.

A person who surrenders to take his trial, on a charge of felony at the assizes, must be tried at the bar of the court, and cannot take his trial at any other part of the court, even with the consent of the prosecutor. *Reg.* v. *St. George*, 9 Car. & P. 483.

A merchant was indicted for an offence against the act of parliament prohibiting slave-trading. His counsel applied to the court to allow him to sit by him, not on the ground of his position in society, but because he was a foreigner, and

several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during his trial :—Held, that the application was one which ought not to be granted. *Reg.* v. *Zulueta*, 1 Car. & K. 215 ; 1 Cox, C. C. 20.

Where a captain in the army surrendered in discharge of his bail to take his trial, for feloniously shooting at another (in a duel) with intent to kill him :—Held, that he must take his place within the dock like all other prisoners charged with felony ; but on his expressing a wish to that effect, he was allowed to have three friends to stand beside him there. *Reg.* v. *Douglas*, Car. & M. 193.

But a defendant who surrenders to take his trial on a charge of misdemeanor, need not stand at the bar to be tried, but may be allowed a place at the table of the court. *Reg.* v. *Lovett*, 9 Car. & P. 462.

c. Reading Indictment.

On a trial for felony the prisoner is entitled to have the indictment read slowly over once, and only once. *Reg.* v. *Dowling*, 3 Cox, C. C. 509.

An indictment for perjury, removed by certiorari, came on to be tried as a nisi prius record. As soon as the jury was sworn, the defendant asked to have the indictment read at length to the court and jury. The judge directed it to be done. *Reg.* v. *Newton*, 1 Car. & K. 469.

Previous Conviction not included.]—*See* ante, col. 1597.

d. Order of Trial.

Joint Indictment—Separate Trial.]—Where several prisoners are jointly indicted, the judge will not allow a separate trial on the ground that the depositions disclose statements and confessions made by one prisoner implicating another, which are calculated to prejudice the jury, and that there is no legal evidence disclosed against the other prisoner. *Reg.* v. *Blackburn*, 6 Cox, C. C. 333.

Where two persons were charged with murder in the same indictment and had made statements implicating one another which were evidence for the prosecution, the court, on the application of the counsel appearing for one prisoner, allowed them to have separate trials. *Reg.* v. *Jackson*, 7 Cox, C. C. 357.

One of several prisoners jointly indicted for a conspiracy to murder may be tried separately. *Reg.* v. *Ahearne*, 6 Cox, C. C. 6.

On an indictment of three persons jointly for publishing blasphemous libels in certain numbers of a newspaper, two of them, whose names were on it as editor and publisher, having already been convicted on a charge of publishing similar libels in another number of the paper :—Held, that the third, whose case was that he was not connected with the paper at all, had a right to be on his application tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution, as the prosecutor would be entitled to give any evidence in his power to fix the defendant with a joint liability for the acts of the others. *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 217.

There is no right to a separate trial in cases of a joint indictment. It is solely a matter for the discretion of the court. *Reg.* v. *Ram*, 17 Cox, C. C. 609.

The court has not authority, without the consent of the prosecution, to permit a separate trial of persons jointly indicted. *Reg.* v. *Richards*, 1 Cox, C. C. 62.

Several Indictments—Same Jury.]—By consent a jury may be charged with the trial of two or more indictments at the same time, even though the indictments be for different offences, and against different persons, where the circumstances upon which the indictments are founded form part of the same transaction. *Reg.* v. *Brett*, 3 Cox, C. C. 79.

—— **Order of Trial.**]—Where two prisoners were separately indicted for successive rapes on the same woman, one only being defended by counsel, and the prosecution having elected to take the undefended case first, the application by counsel that the defended case should be taken first was refused. *Reg*, v. *Bennett*, 10 Cox, C. C. 331.

e. Right of Acquittal on Indictment of Several.

If several are charged with the same offence, and no evidence is given against one of them, he is entitled to an acquittal before the others are called upon for their defence, to enable them to call him as a witness. *Bounty Case*, 1 East, 313, n. And see *Rex* v. *Rowland*, R. & M. 401.

On an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness. *Rex* v. *Rowland*, R. & M. 401. And see *Rex* v. *Kroehl*, 2 Stark. 343 ; 11 East, 313, n. ; *Reg.* v. *Owen*, 9 Car. & P. 83.

A person jointly indicted with another under the Prevention of Cruelty to and Protection of Children Act, 1889, but against whom no case is established, is not entitled to be discharged at the close of the case for the prosecution where the other person charged elects to give evidence under s. 7. *Reg.* v. *Martin*, 17 Cox, C. C. 36.

f. Trial on a Verdict in a Civil Case.

If a verdict is found for a defendant in an action of slander ; on a justification of words of felony, the plaintiff may be arraigned without a grand jury. *Cook* v. *Field*, 3 Esp. 133 ; 6 R. R. 822.

In an action for money received, if it appears that the defendant received the money from the plaintiff to carry to a bank, and that instead of so doing he kept it, the judge will leave it to the jury to say, whether he received it with an intent to steal it, and then feloniously converted it ; and if the jury finds this in the affirmative, the judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this finding. *Prosser* v. *Rowe*, 2 Car. & P. 421.

g. Money and Chattels of Prisoners.

Delivery of Money before Trial.]—The court will direct money found upon a prisoner to be restored to him before trial, if it appears by the

depositions that it is in no way material to the charge upon which he is to be tried. *Rex* v. *Barnett*, 3 Car. & P. 600.

The judge will not grant an order for the delivery to a prisoner of money found on his person: for, semble, neither a judge nor a justice of the peace has power to make such an order. *Reg.* v. *Pierce*, 6 Cox, C. C. 117.

Where a prisoner, a week after the commission of the offence, was apprehended on a charge of robbing A. of 25*l.* in notes, and 9*l.* in gold; and on the prisoner was found the sum of 12*l.* in gold, but none of it identified; the judge ordered 5*l.* to be restored to the prisoner, in order to enable him to make his defence. *Rex* v. *Rooney*, 7 Car. & P. 515.

—— **Restoration of Money and Documents.**]—The court will not order that money taken from a prisoner charged with high treason be restored to him, unless it is made to appear to the court that the money forms no part of the proof against him. *Reg.* v. *Frost*, 9 Car. & P. 132.

The court will not order that papers taken from his house shall be restored to him; neither will they order that he shall be furnished with copies of them. *Reg.* v. *Frost*, 9 Car. & P. 133.

Taking possession of Goods by Police.]—The police have power under a warrant for the arrest of a person charged with stealing goods to take possession of the goods for the purposes of the prosecution. A person therefore is justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police, who have taken possession of them under such circumstances. *Tyler* v. *L. & S. W. Ry.*, 1 Cab. & E. 285.

Peace officers when arresting persons under a warrant, are empowered to take and detain evidence of crime, whether the crime charged is treason, felony, or misdemeanor. *Dillon* v. *O'Brien*, 20 L. R. Ir. 300; 16 Cox, C. C. 245.

Police taking Money from Prisoner.]—A defendant, committed to take his trial at the assizes for assaulting a constable, had 2*l.* 3*s.* 8*d.* taken from him by the constable who conveyed him to prison, to pay for (as was alleged) the expenses of conveying him to the prison, and his maintenance in prison till the trial, this being the ordinary practice in the county of Stafford:—Held, that the practice was wrong, and the judge directed the money to be restored to the defendant. *Reg.* v. *Bass*, 2 Car. & K. 822.

A constable who apprehends a prisoner has no right to take away from him any money which he has about him, unless it is in some way connected with the offence with which he is charged; as he thereby deprives him of the means of making his defence. *Rex* v. *O'Donnell*, 7 Car. & P. 138. S. P., *Rex* v. *Kinsey*, 7 Car. & P. 447; *Rex* v. *Jones*, 6 Car. & P. 343; *Rex* v. *Burgess*, 7 Car. & P. 488.

Money found on Prisoner not Debt due from Police.]—Money in the possession of a prisoner which is taken possession of by the police upon his apprehension, and retained by them after his conviction, does not render the police debtors to the prisoner, and is not a debt which can be attached under garnishee proceedings. *Bice* v. *Jarvis*, 49 J. P. 264.

Power of Attorney.]—There is no objection to a prisoner who is under a charge of felony, executing, before his trial, a power of attorney, to obtain money from a savings bank, for the purpose of paying his attorney for conducting his defence, or paying any other bonâ fide debt. *Rex* v. *Coxon*, 7 Car. & P. 651.

Disposal of Chattels—Order for.]—A judge has no power, either by statute or at common law, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor. *Reg.* v. *London Corporation*, El. Bl. & El. 509; 27 L. J., M. C. 231; 4 Jur. (N.S.) 1078. *S. C.*, nom. *Reg.* v. *Pierce*, Bell, C. C. 235; 8 Cox, 344.

There is no jurisdiction to make an order that certain pawn tickets found on a prisoner when arrested, who is afterwards convicted and sentenced for uttering a forged bill of exchange, should be delivered over to the prosecutor, although there is reason to believe that the goods represented by the pawn tickets were purchased with the proceeds of the forged bill. *Reg.* v. *Rolfe*, 53 J. P. 823.

See also supra, LARCENY.

h. Affidavits.

Removal from Files.]—The court will direct an affidavit in a case of misdemeanor, which contains matter both scandalous and irrelevant, to be removed from the files of the court; and the party who has filed it is liable to be visited as for a contempt of court. *Reg.* v. *Gregory*, 1 Car. & K. 228.

If an affidavit contains matter that is irrelevant and scandalous, the court, though it cannot direct its removal from the files, will give the party attacked an opportunity of denying the defamatory matter, upon oath, by a counter affidavit. *Ib.*

i. Death of Parties.

Where two conspire and one dies, the other may still be indicted for the conspiracy. *Rex* v. *Nicholls*, 13 East, 412, n.; 12 R. R. 388.

Where one defendant in conspiracy dies between the indictment and trial, it is no ground of a venire de novo for a mis-trial, if the trial proceeds against both, no suggestion of the death being entered on the record. *Reg.* v. *Kenrick*, 5 Q. B. 49; D. & M. 208; 12 L. J., M. C. 135; 7 Jur. 848.

If four are indicted for a riot and two die before trial, and two are found guilty, judgment will not be arrested. *Rex* v. *Scott*, 3 Burr. 1262; 1 W. Bl. 350.

Complaint having been duly made under 20 & 21 Vict. c. 83, that obscene books were kept by the defendant in his shop for sale, a warrant for the seizure of such books was issued, and after they had been seized the defendant was summoned to show cause why they should not be destroyed. Upon the hearing of the summons an order was made for the destruction of the books. After the issuing of the summons, but before the hearing, the complainant died, and no application to substitute another complainant was made:—Held, that the proceedings against the defendant did not lapse upon the death of the complainant, and that the order was valid. *Reg.* v. *Truelove*, 49 L. J., M. C. 57; 5 Q. B. D. 336; 42 L. T. 250; 28 W. R. 413; 14 Cox, C. C. 408; 44 J. P. 346.

j. The Prosecution.

In whose Name conducted.]—A corporation must prosecute in its corporate name; and the addition of such name as a description of the persons of which the corporation is composed is not sufficient in an indictment. *Rex* v. *Patrick*, 1 Leach, C. C. 253; 2 East, P. C. 1059.

A vestry was empowered by act of parliament to indict any person who should stop or impede rights of way in the parish, and to take such other proceedings for opening thereof as should appear expedient:—Held, that the vestry must indict in the name of the Queen, and sue in equity in the name of the attorney-general, and that they could not proceed in their own name. *Bermondsey Vestry* v. *Brown*, 35 Beav. 226.

IV. JURIES AND CHALLENGES.

1. *Grand Jury*, 1791.
2. *Petty and Special Jury*, 1793.
3. *Challenges*, 1796.
4. *View*, 1800.
5. *Locking-up*, 1800.
6. *Discharge of*, 1800.
7. *Jury Process*, 1802.
8. *Questions for Jury*, 1803.

1. Grand Jury.

Constitution—Who may Serve on.]—An Irish peer ought not to serve on a grand jury, unless he is a member of the House of Commons, he then being to all intents and purposes a commoner. *Headley (Lord), In re*, R. & R. 117.

A person may serve on the grand jury although he is not a freeholder. *Anon.*, R. & R. 117.

—— **Number.**]—A grand jury ought not to consist of more than twenty-three persons. *Rex* v. *Marsh*, 1 N. & P. 187; 6 A. & E. 236; 2 H. & W. 366; 6 L. J., M. C. 153; 1 Jur. 38.

Where more than twenty-three persons are sworn upon a grand jury, and a bill of indictment is found by them, to which a defendant pleads, and is tried and found guilty, the court will not quash the indictment. *Ib.*

Postponing Presentment of a Bill.]—Upon a charge of murder by poison, the presentment of a bill to the grand jury cannot be postponed to the next assizes, on the ground that other and like charges may before that time be brought against the prisoner, and if no bill of indictment is so presented, he is entitled to be discharged. *Reg.* v. *Heesom*, 14 Cox, C. C. 40.

Finding Bill after ignoring one against same Person.]—If the grand jury, at the assizes or sessions, has ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions, and if such other bill is sent before them they should take no notice of it. *Reg.* v. *Humphreys*, Car. & M. 601. S. P., *Reg.* v. *Austin*, 4 Cox, C. C. 387. See contra, *Reg.* v. *Newton*, 2 M. & Rob. 503; *Reg.* v. *Simmonite*, 1 Cox, C. C. 30.

Bill found after Discharge.]—The grand jury had come into court and had been discharged and had left the court, but had neither left the building nor separated. The judges directed them to be sent for back into court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them. *Reg.* v. *Holloway*, 9 Car. & P. 43.

True Bill mislaid—Discharge.]—A bill found and indorsed by the grand jury as a true bill but accidentally mislaid and not brought into court until after they had been discharged must go before a grand jury again. *Reg.* v. *Thompson*, 1 Cox, C. C. 268.

Cannot ignore Bill on Ground of Insanity.]—A grand jury has no authority by law to ignore a bill for murder on the ground of insanity, though it appears clearly from the testimony of the witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane; but if they believe that the acts, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill; otherwise the court cannot order the detention of the party during the pleasure of the crown, as it can either on arraignment or trial under the 39 & 40 Geo. 3, c. 94, ss. 1 & 2. *Reg.* v. *Hodges*, 8 Car. & P. 195.

Swearing and affirming.]—Semble, that no objection to the caption of an indictment for an allegation that the grand jurors were sworn and affirmed, can be sustained without showing that those who were sworn were persons who ought to have affirmed, or that those who were affirmed were persons who ought to have been sworn. *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306.

Affidavits or Explanations, whether receivable.]—The court will not receive an affidavit of a grand juror as to what passed in the grand jury-room, upon the subject of a bill of indictment. *Rex* v. *Marsh*, 1 N. & P. 187; 6 A. & E. 236; 2 H. & W. 366; 1 Jur. 38.

The grand jury returned a bill of indictment which contained ten counts, for forging and uttering the acceptance of a bill of exchange, with an indorsement—"a true bill on both counts," and the prisoner pleaded to the whole ten counts. After the case for the prosecution had concluded, the prisoner's counsel pointed this out. The grand jury was discharged, and the judge would not allow one of the grand jurors to be called as a witness to explain their finding. *Reg.* v. *Cooke*, 8 Car. & P. 582.

Swearing Witnesses.]—Where the grand jury has found a bill, the judges before whom the case comes to be tried ought not to enquire whether the witnesses were properly sworn previously to their going before the jury; and it seems that an improper mode of swearing them will not vitiate an indictment, as the grand jury is at liberty to find a bill upon their own knowledge only. *Reg.* v. *Russell*, Car. & M. 247.

If witnesses go before the grand jury without being sworn, and the bill is found, and the prisoner tried and convicted, it is proper to recommend him for a free pardon. *Rex* v. *Dickenson*, R. & R. 401.

Evidence—Written Explanation.]—A grand jury cannot on a suspicion that the witness has been tampered with by the prisoner, receive in evidence his written explanation, in lieu of his parol testimony for the purpose of finding a bill. *Denby's Case*, 1 Leach, C. C. 514.

—— **Depositions, when Admissible.**] — *See* DEPOSITIONS, post, col. 1838.

—— **Pleading Guilty.**] — Where a prisoner has communicated his intention of pleading guilty, the grand jury may act on their knowledge of that fact and find a true bill. *Reg.* v. *Tong*, 2 Cox, C. C. 290.

Powers of.]—Upon a bill for murder against A. and B., the jury returned a true bill against A. for murder, and against B. for manslaughter:—Held, a good finding as to A., and a nullity as to B, and a fresh indictment for manslaughter was preferred against the latter. *Reg.* v. *Bubb*, 4 Cox, C. C. 457.

An indictment consisting of two counts, one for a riot, indorsed by the jury ignoramus, the other for an assault, returned billa vera, is good. *Rex* v. *Fieldhouse*, Cowp. 325.

If the grand jury at the assizes or sessions has ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions: and if such other bill is sent before them they should take no notice of it. *Reg.* v. *Humphreys*, Car. & M. 601. S. P., *Reg.* v. *Austin*, 4 Cox, C. C. 385. See contra, *Reg.* v. *Newton*, 2 M. & Rob. 503; *Reg.* v. *Simmonite*, 1 Cox, C. C. 30.

But a prisoner, who had been arrested in Canada under the Colonial Arrest Act (6 & 7 Vict. c. 34), s. 5, upon a charge of burglary, for which the bill was ignored, was allowed to be arraigned upon another charge. *Reg.* v. *Philips*, 1 F. & F. 105.

2. PETTY AND SPECIAL JURY.

Special Jury.]—There is no power in the court to order a special jury to be struck for the trial of a person charged with felony. *Reg.* v. *Mayne*, 32 W. R. 95.

Number.]—In criminal cases, twelve jurors must appear on the record. *Rex* v. *St. Michael*, 2 W. Bl. 718.

It is not necessary that the record should state the names of the jurors, or that the number of the jury amounted to twelve, if it appears, either expressly or by manifest implication, that the jury consisted of twelve. *O'Brien* v. *Reg.*, 26 L. R., Ir. 451—C. A.

A new panel of seventy-two jurors may be ordered by the judge to be summoned during the assizes, and a conviction for felony by a jury selected therefrom, after challenging, though more than forty-eight, is valid. *Reg.* v. *Cropper*, 2 M. C. C. 18.

Of whom Composed—On Removal by Certiorari.]—An indictment, containing two counts, one alleging perjury committed in Middlesex, the other alleging perjury committed in London, was tried, upon removal by certiorari from the Central Criminal Court, before the Queen's Bench, sitting at bar:—Held, that it was no valid objection to the jurisdiction of the court that the jury was entirely from the county of Middlesex. *Reg.* v. *Castro*, 28 L. T. 342; 12 Cox, C. C. 454. S. P., *Reg.* v. *Hunt*, 10 Q. B. 925; 17 L. J., M. C. 14; 11 Jur. 822.

Juryman taken Ill during Trial.]—If a juryman is taken so ill as to be incapable of attending through the trial, another juryman returned in the panel may be added to the eleven jurymen, but the prisoner should be offered his challenges over again as to the eleven, the eleven should be sworn de novo, and the trial begin again. *Rex* v. *Edwards*, R. & R. 234; 2 Leach, C. C. 621, n.; 3 Camp. 207, n.; 4 Taunt. 309; 13 R. R. 601.

Where a juryman is taken so ill as to be unable to continue, another juryman may be sworn with the eleven jurymen already on the trial, and the witnesses already heard being recalled. *Reg.* v. *Beere*, 2 M. & Rob. 472. S. P., *Rex* v. *Scalbert*, 2 Leach, C. C. 620; *Reg.* v. *Ashe*, 1 Cox, C. C. 150.

Copy of Panel.]—A prisoner indicted for felony is not entitled to a copy of the jury panel. *Reg.* v. *Dowling*, 3 Cox, C. C. 509.

The court will not compel the prosecutors to give a list of their names to the defendant previously to striking a special jury, but will give such directions, by consent of the prosecutors, as shall prevent prejudice accruing to the defendant in consequence of such list not being furnished. *Reg.* v. *Nicholson*, 8 D. P. C. 422; 4 Jur. 558.

Assent to Verdict Inferred.]—In general, the assent of all the jury to the verdict pronounced by the foreman in their presence and hearing is to be conclusively inferred; and no affidavit can in any case be admitted to the contrary. *Rex* v. *Wooller*, 2 Stark. 111; 18 R. R. 402.

Exemption.]—The exemption from serving as jurymen, claimed by the members of the Barbers' Company, under the charters of 1 Edw. 4, and 5 Car. 1, and the 18 Geo 2, c. 15, does not extend to the Central Criminal Court, but is confined to the local courts of the city, viz. those holden before the mayor, the sheriff or the coroner. *White, In re*, Car. & M. 189.

Should take Law from Judge.]—The jury should take the law from the judge; and therefore, when cases had been cited to the judge in a legal argument, and he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's counsel to them. *Reg.* v. *Parish*, 8 Car. & P. 94.

Special Finding.]—In a case of felony, the judge will not direct the jury to find special facts, and the jury may, if they think proper, find a general verdict, instead of finding special facts with a view to raise a question of law. *Reg.* v. *Allday*, 8 Car. & P. 136.

Special Verdict.]—The conservators of the river T. having indicted the local board of S., as the rural sanitary authority, for having, in contravention of s. 63 of the Thames Navigation Act, 1866, "caused or, without lawful excuse, suffered," sewage matter to flow into the said river T. within their district, in connection with which certain points of law were necessarily involved:—Held, that the proper course to follow was to take a special verdict (prepared by both sides) from the jury, after formal evidence of the matters alleged in the special verdict had been given, and the points of law arising therein should be subsequently discussed by the court. *Reg.* v. *Staines Local Board*, 52 J. P. 215.

Jury of Matrons.]—If a jury of matrons wishes

to have the evidence of a surgeon before they give their verdict, they should return into court, and the surgeon should be examined as a witness in open court. *Reg.* v. *Wycherley*, 8 Car. & P. 262.

Proof of Value of Article.] — Where, in a criminal prosecution, it is essential to prove the particular value of an article, the jury may use that general knowledge which any man can bring to the subject; but if any of the jurors has a particular knowledge on the subject, arising from his being in the trade, he ought to be sworn and examined as a witness. *Rex* v. *Rosser*, 7 Car. & P. 648.

Swearing Jurors.]—A Scotch covenanter may be sworn in as a juryman in a court of criminal law by the ceremony of holding up his hand, without kissing the book. *Walker's Case*, 1 Leach, C. C. 498; 3 R. R. 717.

Person Sworn by Mistake.]—Upon trial of a prisoner for murder, the name of Joseph Henry Thorne was called from the jury panel as a juror to try him, when William Thornley, who was also upon the jury panel, by mistake answered to the name, went into the jury-box, and, not being challenged, was duly sworn; the trial proceeded, and the prisoner was convicted and sentenced. The mistake was not discovered till the following day:—Held, that this was not a question of law arising at the trial over which the court of criminal appeal had jurisdiction. *Reg.* v. *Mellor*, Dears. & B. 468; 27 L. J., M. C. 121; 4 Jur. (N.S.) 214; 7 Cox, C. C. 454.

Held, also, that there had been no mis-trial, but quære whether the objection made would be matter of error. *Ib.* S. P., *Reg.* v. *Metcalfe*, 3 Cox, C. C. 220.

Where on the trial of an indictment for perjury, it was necessary to swear talesmen from the common jury panel, and one J. Williams being called, his son R. H. Williams (at the request of his father, and without collusion) appeared for him and was sworn and served on the jury, he not being of age, neither having a qualification, not being on the panel:—Held, that there was a mis-trial, and a rule obtained for a new trial was made absolute *Rex* v. *Tremearne*, 7 D. & R. 684; 5 B. & C. 254; 4 L. J. (O.S.) K. B. 157; 29 R. R. 234.

A juror was summoned in error, but not returned in the panel, and in mistake was sworn to try; during the progress of the trial, these facts were discovered. The jury was discharged, and a fresh jury constituted, by taking another juryman in the place of the one who had served in error. *Reg.* v. *Phillips*, 11 Cox, C. C. 142.

One Juryman a Grand Juryman.]—After a special jury had been sworn for the trial of a defendant for a misdemeanour, one of the jury stated that he had sat on the grand jury who found the bill. It was proposed on behalf of the prosecution that the juryman should retire from the box, but the defendant refused to assent to that course; the trial proceeded, and the defendant was convicted. The defendant afterwards moved for a new trial on the ground of a mis-trial, but the court refused to grant him a rule. *Reg.* v. *Sullivan*, 1 P. & D. 96; 8 A. & E. 31; 1 W. W. & H. 610; 8 L. J., M. C. 3.

3. Challenges.

At what Stage.]—The challenge of a juror, either by the crown or by the prisoner, must be before the oath is commenced. The moment the oath is begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. *Reg.* v. *Frost*, 9 Car. & P. 136.

After issue joined between the crown and the prisoner when the jury is called, and before they are sworn, is the only time when the prisoner has the right of challenge. *Reg.* v. *Key*, 3 Car. & K. 371; T. & M. 623; 2 Den. C. C. 347; 21 L. J., M. C. 35; 15 Jur. 1065

See *Reg.* v. *Flint*, 3 Cox, C. C. 66.

The challenge must be made before the book is given into the hands of the jury, and before the officer has recited the oath, and it is too late, though made before the juror kisses the book. *Reg.* v. *Giorgetti*, 4 F. & F. 546.

No challenge, either to the array or to the polls, can be taken until a full jury has appeared; therefore, where the challenges are taken previously, they are irregularly made, and out of season. *Rex* v. *Edmonds*, 4 B. & Ald. 471; 23 R. R. 350.

No jury can be challenged until a full jury appears in the box. *Reg.* v. *Lacey*, 3 Cox, C. C. 517.

Number of Challenges.]—In a criminal information for conspiracy, where the trial takes place before a special jury struck under the old system, the traverser is entitled to six challenges from the reduced panel:—Held (per Barry, J., Fitzgerald, J., dissentiente), that the doctrine on this point is correctly stated by May, C.J., in *Reg.* v. *Casey* (13 Cox, C.C. 645). *Reg.* v. *Parnell*, 14 Cox, C. C. 505.

Grounds of Challenge to Polls.]—On the trial of an indictment for a riot, it is ground for the prosecutor's challenging a juror, that he is an inhabitant of the town where the riot occurred, and that he has taken an active part in the matter which led to it. *Reg.* v. *Swain*, 2 M. & Rob. 112; 2 Lewin, C. C. 116.

The fact that a juror is over sixty years of age is not a ground of challenge. *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306, and *S. C.*, in Q. B.; Ir. R. 1 C. L. 13; 15 W. R. 446.

Alienage is a ground of challenge to a juror; but if the party has an opportunity of making his challenge, and neglects, he cannot afterwards make the objection. *Rex* v. *Sutton*, 8 B. & C. 417; 6 L. J. (O.S.) M. C. 102. *S. C.*, nom. *Rex* v. *Despard*, 2 M. & Ry. 406.

In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors who are subsequently called, as to their qualification. *Reg.* v. *Geach*, 9 Car. & P. 499.

It is no cause of challenge of a juror by the counsel for the prosecution in case of felony, that the juror is a client of the prisoner, who is an attorney. *Ib.*

Nor that the juror has visited the prisoner as a friend since he has been in prison. *Ib.*

It is not a ground of challenge that a juror on other trials has not found a verdict for the crown. *Reg.* v. *Sawdon*, 2 Lewin, C. C. 117.

For Cause Shown.]—If, on the trial of a case of felony, the prisoner peremptorily challenges some of the jurors, and the counsel for the prosecution also challenges so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and, as each juror then appears, for the counsel for the prosecution to state their cause of challenge; and if they have not sufficient cause, and the prisoner does not challenge, for such juror to be sworn. *Reg.* v. *Geach*, 9 Car. & P. 499.

Upon a challenge for cause, the person making the challenge must be prepared to prove the cause. *Rex* v. *Savage*, 1 M. C. C. 51.

On the trial of a misdemeanour on the crown side of the assizes, it is a fair mode of practice to allow the defendants to object to the jurors, as they are called, without showing any cause, till the panel is exhausted, and then to recall the jurors in the same order in which they were called at first, and then not to allow any challenge except for cause, and this is the constant practice on the Welsh circuit, where challenges of jurors very frequently occur. *Reg.* v. *Blakeman*, 3 Car. & K. 97.

Peremptory Challenges.]—There can be no peremptory challenges in collateral issues. *Rex* v. *Ratcliffe*, 1 W. Bl. 3.

The right of a prisoner to a peremptory challenge of jurors to the number of twenty exists in all cases of felony, and is not confined to those which are punishable capitally. *Gray* v. *Reg.*, 11 Cl. & F. 427; 8 Jur. 879.

Challenge to Array.]—It is no objection in arrest of judgment that the sheriff, who was the prosecutor, returned the jury; it ought to have been taken by way of challenge. *Rex* v. *Sheppard*, 1 Leach, C. C. 101.

Challenge to the array is only where the sheriff has been guilty of wilful default, and the summoning of the jury is a duty purely ministerial. *Reg.* v. *Burke*, 10 Cox, C. C. 519.

Where the sheriff's officer had neglected to summon one of the special jurymen returned on the panel:—Held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff. *Rex* v. *Edmonds*, 4 B. & Ald. 471; 23 R. R. 350.

A challenge of the array, stating that the sheriff "has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel," is bad, as being too general. *Reg.* v. *Hughes*, 1 Car. & K. 235.

Prisoner cannot ask Juryman Questions.]—Where a party has the right of challenge, he is not entitled to ask a juryman questions for the purpose of eliciting whether it would be expedient to exercise such right. *Reg.* v. *Stewart*, 1 Cox, C. C. 174.

Severing Challenges.]—When a principal and accessory are indicted together, they will not be allowed to sever their challenges, so as to be tried separately. *Reg.* v. *Fisher*, 3 Cox, C. C. 68.

Challenging Jury Afresh—Trial as to Previous Conviction.]—Where a prisoner was found guilty on an indictment for larceny, which contained a count for a previous conviction, and, after conviction for the larceny, the court thought fit to swear the jury afresh to try the question of whether the prisoner had been previously convicted:—Held, that he was not entitled to challenge the jury afresh. *Reg.* v. *Key*, T. & M. 623; 2 Den. C. C. 347; 3 Car. & K. 371; 21 L. J., M. C. 35; 15 Jur. 1065.

Challenging Jury Afresh when one Juryman taken Ill.]—See *Rex* v. *Edwards* and *Reg.* v. *Beere*, ante, col. 1794.

Power of Prisoner to Withdraw.]—A prisoner, in a case of felony, having challenged twenty jurors peremptorily, cannot withdraw one of those challenges to challenge another jury, instead of one that he had previously challenged. *Rex* v. *Parry*, 7 Car. & P. 836; 1 Jur. 674.

Ordering Jurors to Stand by.]—The right of ordering jurors to stand by, in cases of misdemeanour, may be exercised by a private prosecutor equally with the crown. *Reg.* v. *M'Gowen*, 11 Ir. C. L. R. 207.

On a writ of error upon an indictment for murder, the record stated, that in forming the jury, after challenges by the crown without cause assigned, and by the prisoner, nine only of those called were elected to be sworn. Twelve of the jurors returned upon the panel were during that time deliberating upon their verdict in another case. Thereupon the name of I., who had been before ordered to stand by upon a challenge by the crown without cause being assigned, was again called, and being again challenged by the crown, the counsel for the prisoner prayed that the crown might be put to assign cause. Before any judgment was given by the court the twelve jurors who sat as the jury in the other case came into court and gave their verdict. Thereupon the counsel for the crown prayed that I. should be ordered to stand by until those twelve should be called. The counsel for the prisoner objected that I. should be sworn, unless good cause of challenge was assigned by the crown. The court adjudged that I. should stand by, and that the names of the jurors who so came into court should then be called instead of the name of P., who stood next after I. The three required to complete the panel were taken from those jurors:—Held, that, it being conceded that the 33 Edw. 1, st. 4, and 6 Geo. 4, c. 50, s. 29, did not take away the power of the crown to challenge without assigning cause till the panel had been gone through or perused, the panel had not been gone through or perused, so as to require the crown to assign cause of challenge, when the twelve jurors came into court, nor until their names had been called, and thereupon the judge was right in ordering I. to stand by the second time. *Mansell* v. *Reg.*, 8 El. & Bl. 54; Dears. & B. 375; 27 L. J., M. C. 4; 4 Jur. (N.S.) 432—Ex. Ch.

The record stated that P., named on the panel, was called, and elected, and tried, to the intent that he should be sworn; without being sworn, he said that he had conscientious scruples against capital punishment. The counsel for the crown prayed that he should be ordered to stand by. The counsel for the prisoner prayed that the crown should assign cause of challenge. The judge told him that if he felt that he could not do his duty he had better withdraw; and thereupon it was ordered by the court that he should stand by:—Held, that this was a challenge by

the crown without assigning cause, and therefore the judge was right in ordering P. to stand by. *Ib.*

Held, that the statement that the court ordered jurymen to stand by was unobjectionable, as it meant, that, being challenged by the crown, they were to stand aside until the proper time for deciding upon the challenge arrived. *Ib.*

Order in which Names Called.]—The names of the jurors who had served in the other case, standing in different parts of the panel, were called over consecutively before any who had been already called once were called again:—Held, that this was a proper course; that there was no fixed rule of practice as to the order in which the names of the jurors on the panel should be called; and that if the usual course was departed from it was not ground of error. *Ib.*

Talesmen—Who may be.]—Where, on an indictment for the publication of a libel (appointed to be tried by a special jury), a tales panel was quashed for unindifferency in the sheriff:—Held, that a writ of venire facias juratores might be awarded to the coroner of the county, although two of the special jurors summoned attended on a former occasion; and upon a prayer for an award of a tales de circumstantibus at nisi prius, it is not compulsory on the coroner or sheriff to select the talesmen from among the bystanders accidentally in court; but they may be chosen from among persons previously appointed by the coroner or sheriff to be in attendance, in expectation that a tales would be necessary. *Rex* v. *Dolby*, 3 D. & R. 311; 2 B. & C. 104; 1 L. J. (o.s.) K. B. 241; 24 R. R. 647.

Since 7 & 8 Will. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the bystanders. *Rex* v. *Hill*, 1 Car. &. P. 667.

On the trial of a quo warranto, which has been made a special jury cause, jurors who have been summoned to try the prisoners on the crown side of the assize are not thereby qualified to act as talesmen. *Rex* v. *Tipping*, 1 Car. & P. 668.

—— **Warrant.**]—The warrant for a tales on a trial in a county palatine must come from the king's attorney-general. *Rex* v. *Lamb*, 4 Burr. 2171.

Semble, that, in an information at the suit of the attorney-general, a tales may be prayed for the crown without his warrant, though he is not present; but not for the defendant. *Att.-Gen.* v. *Parsons*, 2 M. & W. 23; 2 Gale, 227.

—— **Some Special Jurymen not Summoned.**]—On the trial of an information for a libel, only ten special jurymen appeared, and two talesmen were accordingly sworn to fill up the jury:—Held, to be no ground for a new trial that two of the non-attending special jurymen named in the panel had not been summoned to attend, although it appeared that this fact was unknown to the defendant until after the trial was over. *Rex* v. *Hunt*, 3 B. & Ald. 430; 23 R. R. 333.

—— **Challenge to array of.**]—On the trial at nisi prius of an indictment for libel, on which only three special jurors appeared, the counsel for the prosecution prayed a tales, and the defendant challenged the array of the tales, on the ground that the sheriff was a subscriber to a society who were the prosecutors; and, on issue taken on this challenge, two triers were appointed by the court, who found in favour of the challenge, and the cause was made a remanet. *Rex* v. *Dolby*, 1 Car. & K. 238.

4. View.

When Permitted.]—Where, on the trial of a rape, it was wished on the part of the prisoner that the jury should see the place at which the offence was said to have been committed, and the place was so near to the court that the jury could have a view without inconvenience, the judge allowed a view, although the prosecutor did not consent to it. *Reg.* v. *Whalley*, 2 Car. & K. 376; 2 Cox, C. C. 231.

The court will only under peculiar circumstances grant a view in an indictment for perjury; but a view will be refused if there is any risk of its misleading the jury. *Anon.*, 2 Chit. 422.

—— **After Summing-up.**]—It is no irregularity to allow a jury in a criminal case to have a view of premises after the judge has summed up. *Reg.* v. *Martin*, 41 L. J., M. C. 113; L. R. 1 C. C. 378; 26 L. T. 778; 20 W. R. 1016; 12 Cox, C. C. 204.

Venue Changed.]—When it appears to be necessary for the purpose of a criminal trial that the jury should have a view of premises situated in a different county from that in which the offence was committed, this is sufficient reason for ordering the trial to take place in such county. *Reg.* v. *Sheldon*, 32 L. T. 27.

5. Locking up.

Juryman Ill.]—If after a jury is locked up to consider their verdict in a capital case one of them is ill, the judge will allow a medical man to see him, and anything which the medical man in his discretion will give him bonâ fide as medicine he may have, but not sustenance. *Reg.* v. *Newton*, 3 Car. & K. 85; 13 Q. B. 716; 18 L. J., M. C. 201; 13 Jur. 606; 3 Cox, C. C. 489.

Until Discharge.]—The jury cannot be allowed to separate after the delivery of the judge's charge until they are finally discharged; nor except by consent can they, even in the custody of the sheriff, be removed to any place outside the precincts of the court for their better accommodation. *Reg.* v. *O'Connell*, 1 Cox, C. C. 410.

In Cases of Misdemeanour.]—Upon the trial of an indictment for a misdemeanour, which continued for more than one day, the jury, without the knowledge or consent of the defendants, separated at night:—Held, that the verdict was not therefore void. *Rex* v. *Kinnear*, 2 B. & Ald. 462.

6. Discharge of.

How long Jury should be Kept.]—After the jury has retired to consider their verdict in a criminal case, whether felony or misdemeanour, and has remained in deliberation a full and sufficient time without being able to agree upon

a verdict, it is in the discretion of the judge to discharge them if there is no reasonable prospect of their agreeing upon a verdict. *Winsor* v. *Reg.*, 7 B. & S. 490; 35 L. J., M. C. 161; L. R. 1 Q. B. 390; 12 Jur. (N.S.) 561; 14 L. T. 567; 14 W. R. 695; 10 Cox, C. C. 327—Ex. Ch. S. P., *Reg.* v. *Newton*, 3 Cox, C. C. 489.

—— **Matter of Discretion.**]—The exercise of such discretion by a judge cannot be reviewed by a court of error. *Ib.*

Effect of Discharge on Prisoner.]—The maxim that a man cannot be put in peril twice for the same offence, means that a man cannot be tried again for an offence upon which a verdict of acquittal or conviction has been given, and not that a man cannot be tried again for the same offence where the first trial has proved abortive, and no verdict was given. *Ib.*

Where, in a case of misdemeanour, the jury is improperly and against the will of the defendant, discharged by the judge from giving a verdict after the trial has begun, this is not equivalent to an acquittal, nor does it entitle the defendant quod eat sine die. *Reg.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J., M. C. 25; 8 Jur. (N.S.) 1091; 5 L. T. 150; 9 W. R. 842; 9 Cox, C. C. 44. *S. C.*, at nisi prius, 2 F. & F. 326.

Where a man was indicted, pleaded not guilty, and was given in charge to the jury, who retired to deliberate, and had not agreed upon a verdict by the time all the rest of the business before the court was finished, when they were discharged by the judge and the prisoner remanded:—Held, that the dismissal of the jury was not equivalent to an acquittal, and that he might lawfully be put upon his trial the second time. *Reg.* v. *Davison*, 2 F. & F. 250; 8 Cox, C. C. 360.

By Consent.]—A jury may be discharged by consent, after having been charged. *Reg.* v. *Deane*, 5 Cox, C. C. 501.

Illness of Prisoner.]—If a prisoner indicted for a felony, with whom the jury is charged, is by sudden illness during the trial rendered incapable of remaining at the bar, the jury may be discharged from the trial of that indictment, and the prisoner, on his recovery, tried by another jury. *Rex* v. *Stevenson*, 2 Leach, C. C. 546. S. P., *Rex* v. *Streek*, 2 Car. & P. 413.

Prisoner not understanding Proceedings.]—If at any stage of the trial it is found that the prisoner has not sufficient intellect to understand the nature of the proceedings, the jury should be discharged, and the prisoner detained under 39 & 40 Geo. 3, c. 94, s. 2. *Reg.* v. *Berry*, 45 L. J., M. C. 123; 1 Q. B. D. 447; 34 L. T. 590; 13 Cox, C. C. 189.

One Juryman leaving without Permission.]—In the course of the trial, and during the examination of witnesses, one of the jurors had, without leave, and without it being noticed by any one, left the jury-box and also the court house, whereupon the court discharged the jury without giving a verdict, and a fresh jury was empanelled. The prisoner was afterwards tried and convicted before a fresh jury:—Held, that the course pursued was right. *Reg.* v. *Ward*, 17 L. T. 220; 16 W. R. 281; 10 Cox, C. C. 573.

Grounds of—Relation to Prisoner.]—If during the trial of a felony it is discovered that the prisoner has a relation on the jury, this is no ground for discharging the jury. *Reg.* v. *Wardle*, Car. & M. 647.

7. Jury Process.

The jury process in an indictment for a conspiracy was made returnable on one of the three days before full term; and on the same day a continuance by a new venire was awarded:—Held, not erroneous; inasmuch as the return day was conformable to 1 Will. 4, c. 3, s. 2, and the court, though not sitting for the despatch of business before full term, might award the continuances on the return days. *Wright* v. *Reg.*, 14 Q. B. 148; 14 Jur. 305—Ex. Ch.

Held, also, that, even if there had been a discontinuance in the jury process, the defendant waived the objection by afterwards pleading guilty to the indictment. *Ib.*

Two defendants being indicted for conspiracy, one of them cannot, on writ of error, object to a discontinuance in the process against the other. *Ib.*

An indictment at quarter sessions contained two counts: one charging a stealing of moneys above the value of 5*l.* in a dwelling-house; the other charging simply a stealing of moneys of the same description as those contained in the first. The jury process directed the jury to be summoned to inquire if the prisoners were guilty of the felony in the indictment specified; and the verdict found them guilty of the felony aforesaid. Upon that verdict they were adjudged to be transported for fourteen years. The judgment was reversed in the Queen's Bench, with a direction that a venire de novo should be awarded by the sessions:—Held, first, that the jury process had been misawarded in the first instance, and therefore a venire de novo had been properly awarded by the Queen's Bench; and that it was no objection that judgment had been given upon the prisoners by the sessions. *Campbell* v. *Reg.*, 11 Q. B. 799; 17 L. J., M. C. 89; 12 Jur. 117; 2 Cox, C. C. 463—Ex. Ch.

Held, secondly, that the direction to award a venire de novo was not void, inasmuch as the sessions, being a court of oyer and terminer, is not an inferior court, and is a continuing court of oyer and terminer. *Ib.*

The record in an indictment set out an award of the venire to the sheriff, which required him to return "good and lawful men of the county," and stated that the sheriff returned persons following (naming them), but the return did not state that the persons named were "good and lawful men of the county":—Held, that the jurors must be taken to have been good and lawful men of the county. *Mansell* v. *Reg.*, 8 El. & Bl. 54; Dears. & B. 375; 27 L. J., M. C. 4—Ex. Ch.

The 16 & 17 Vict. c. 113 (Ir.), s. 109, which prescribes the summoning of jurors to try civil as well as criminal issues, according to the precept of the judge of assize, does not interfere with the common law authority of justices of gaol delivery to order a jury to be returned instanter, when, from the panel having been quashed, or for any other reason, a sufficient jury cannot otherwise be had. *O'Neill* v. *Reg.*, 4 Ir. C. L. R. 221; 6 Cox, C. C. 495.

8. Questions for Jury.

Construction of Unlawful Notice.] — The prisoner was indicted under the Whiteboy Act for posting a notice to the following effect:—"G. T. is hereby declared boycotted by the competent tribunal for taking into his employment Stanley, the assassin. All Irishmen must shun him as their deadly enemy." The indictment alleged that the notice tended (1) to excite an unlawful confederacy; (2) to excite a riot; (3) to induce persons to shun George Thompson against the form of the statute. The judge at the trial, upon the requisition of the counsel for the crown, ruled that the notice on the face of it was an unlawful notice within the meaning of the statute, but reserved for the court the point whether he should have so ruled or should have left the question to the jury. The jury, in answer to the only question submitted to them, found that the prisoner had in fact posted the notice and the prisoner was accordingly convicted:—Held, that the notice was capable of bearing the meaning alleged in the indictment, but that the question whether it did in fact bear such meaning should not have been withdrawn from the jury. *Reg.* v. *Coady*, 15 Cox, C. C. 89.

Particular Cases.]—*See* supra, C. Particular Offences.

V. COUNSEL, ADDRESSES TO JURY, &c.

1. *Counsel for Prosecution*, 1803.
2. *Defence by Counsel*, 1804.
3. *Right of Reply and Summing up Evidence*, 1808.

1. Counsel for Prosecution.

Duties of.] — It is a general principle of criminal procedure, that counsel for the prosecution should consider themselves not merely as advocates for a party, but as ministers of justice, and not as struggling for a verdict, but as assistants in the ascertainment of truth according to law. *Reg.* v. *Berens*, 4 F. & F. 842.

It is the duty of the counsel for the prosecution to be assistant to the court in the furtherance of justice, and not act as counsel for any particular person or party. *Reg.* v. *Hursfield*, 8 Car. & P. 269.

The fiction of law in criminal cases is, that the judge is counsel for the prisoner. It is a violation of this principle, and indecent, to constitute the judge counsel for the prosecution, and leave him to make out from the depositions a case against the prisoner. Therefore, all prosecutions ought to be conducted by counsel, and the court will in all cases direct the depositions to be handed to counsel for that purpose. *Reg.* v. *Page*, 2 Cox, C. C. 220.

Where no counsel is engaged for the prosecution, and the depositions are handed, by direction of the court, to a gentleman at the bar, he should consider himself as counsel for the crown, and act in all respects as he would if he had been instructed by the prosecutor; and should not consider himself merely as acting in assistance of the judge, by examining the witnesses. *Reg.* v. *Littleton*, 9 Car. & P. 671.

Whether Prosecutor can conduct Case in Person.]—A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel. *Rex* v. *Brice*, 2 B. & Ald. 606; 1 Chit. 352.

In a criminal prosecution it is not competent to the prosecutor to appear and conduct the case in person. *Reg.* v. *Gurney*, 11 Cox, C. C. 414.

Opening Case for Prosecution.]—In opening the case for the prosecution in felony counsel ought to state declarations proposed to be proved, as well as facts. *Rex* v. *Orrell*, 1 M. & Rob. 469. S. P., *Rex* v. *Davis*, 7 Car. & P. 783; *Rex* v. *Hartel*, 7 Car. & P. 773.

Unless the declarations amount to a confession; and then they should not be opened. *Rex* v. *Davis*, 7 Car. & P. 783. S. P., *Rex* v. *Hartel*, 7 Car. & P. 773.

Where there is counsel for the prisoner, the counsel for the prosecution ought always to open the case; but he should not open if the prisoner has no counsel, unless there is some peculiarity in the facts of the case to require it. *Rex* v. *Gascoigne*, 7 Car. & P. 772.

The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the crown, and to state that if such attack should be made, he should be prepared to rebut it; he also has a right to read to the jury the general observations of a judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopts them as his own opinions, and makes them part of his own address to the jury. *Reg.* v. *Courvoisier*, 9 Car. & P. 362.

If additional evidence is discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury. *Ib.*

Counsel for the prosecution opening no case against one prisoner, statements made by that prisoner are not to be used except in a regular way of evidence. *Reg.* v. *Gardner*, 9 Cox, C. C. 332.

2. Defence by Counsel.

Queen's Counsel.]—On the trial of a criminal information a Queen's counsel ought not to be counsel for the defendant without a licence from the Queen, or at the least a letter from the secretary of state; and it is not enough that an application for a licence has been sent to the secretary of state from an assize town in the country, to which no answer has been received at the time of the cause being tried. *Reg.* v. *Bartlett*, 2 Car. & K. 321.

Where a Queen's counsel was instructed to argue a criminal case for a defendant, on a point reserved, but at the time fixed for the argument, had not obtained a licence from her Majesty to argue against the crown, but only a certificate from the secretary of state's office, the court directed the argument to stand over for such licence to be obtained. *Reg.* v. *Jones*, 9 Car. & P. 401; 2 M. C. C. 171.

Assignment by the Court.]—The court may properly request counsel to give his honorary services to a prisoner. Aliter, with an attorney. But the court will recommend, that, in such cases, the crown should pay the fees both of counsel and attorney, as assigned. *Reg.* v. *Fogarty*, 5 Cox, C. C. 161.

On a trial for murder, the court refused to

allow counsel to appear for a prisoner without his expressed assent. *Reg.* v. *Ysenado*, 6 Cox, C. C. 386.

The only counsel who are recognised by the court are the two counsel who are assigned by the court, and the court will not take notice of any assistant counsel. *Reg.* v. *Frost*, 9 Car. & P. 135.

Counsel may be assigned for a prisoner charged with high treason, upon an application made to the clerk of the crown, during an adjournment of the commissioners, between the finding of the indictment and the arraignment, or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried. *Ib.*

Prisoners defended by Counsel—Order of Addresses.]—Where the counsel for several prisoners cannot agree as to the order in which they are to address the jury, the court will call upon them, not in the order of their seniority, but in the order in which the names of the prisoners stand in the indictment. *Reg.* v. *Barber*, 1 Car. & K. 434. S. P., *Reg.* v. *Richards*, 1 Cox, C. C. 62.

When several prisoners are defended by different counsel, the order of their defences is not to be determined by the seniority of their counsel at the bar, but on the precise offence charged against each; and in a well-drawn indictment, the order in which the prisoners should be called on for their defence usually coincides with the order of their names in the indictment. *Reg.* v. *Meadows*, 2 Jur. (N.S.) 718.

Where several persons are indicted for the same offence, the order in which they should be called on to make their defence is not determined by the order in which their names stand in the indictment. *Reg.* v. *Holman*, 3 Jur. (N.S.) 722.

—— **Witnesses to Fact called by one Prisoner.**]—But where the counsel for one prisoner has to examine witnesses to facts, the counsel for another cannot be allowed to postpone his address to the jury until after those witnesses have been examined. *Reg.* v. *Barber*, 1 Car. & K. 434.

Some Undefended—Statement.]—Where two prisoners are jointly indicted, and the second in the indictment only is defended by counsel, the latter will be permitted to address the jury before the other makes his statement. *Reg.* v. *Hazell*, 2 Cox, C. C. 220.

Where one prisoner was indicted for stealing and the other for receiving, and the receiver was defended by counsel, but the principal felon was undefended, the court called upon the principal to make his statement to the jury before the counsel for the receiver was permitted to address them. *Reg.* v. *Martin*, 3 Cox, C. C. 56.

Where two are indicted, one for larceny, and the other as receiver of the stolen property, the latter of whom is defended by counsel, and the former not, the counsel for the receiver should make his defence first. *Reg.* v. *Belton*, 5 Jur. (N.S.) 276.

Where two were indicted for the same offence, with a second count charging one of them as accessory after the fact, the one named first in the indictment, though he had no counsel, was heard in his defence before the other, who was defended by counsel. *Reg.* v. *Thomas*, 3 Jur. (N.S.) 272.

Contents of Address.]—A prisoner's counsel, in addressing the jury, will not be allowed to state anything which he is not in a situation to prove, or which is not already in proof; nor will he be allowed to state the prisoner's story. *Reg.* v. *Beard*, 8 Car. & P. 142. S. P., *Reg.* v. *Butcher*, 2 M. & Rob. 228.

But on an indictment for murder, the death having been caused by shot from a gun in the hands of the prisoner, the prisoner's counsel was allowed to make a statement on the part of the prisoner to show that the trigger of the gun was pulled without the intention of firing it. *Reg.* v. *Weston*, 14 Cox, C. C. 346. See *Reg.* v. *Haines*, 1 F. & F. 86.

The jury should take the law from the judge, and therefore when cases had been cited to the judge in a legal argument and he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's counsel to them. *Reg.* v. *Parish*, 8 Car. & P. 94. But see now *Reg.* v. *Shimmin*, infra.

It is improper for counsel for a prisoner to suggest to a jury to recommend a prisoner to mercy. *Reg.* v. *McIntyre*, 2 Cox, C. C. 379.

Evidence incriminating one Prisoner given by other Prisoner—Practice.]—Two were indicted for manslaughter; the counsel for one of them having addressed the jury on his behalf, the counsel for the second prisoner did the same, and called witnesses, whose evidence tended to show negligence on the part of the first:—Held, that the counsel for the first prisoner had a right to cross-examine the witnesses for the second, and then to address the jury again, confining himself to comments on the testimony the second prisoner had adduced. *Reg.* v. *Wood*, 6 Cox, C. C. 224.

Where one prisoner calls a witness who gives evidence tending to criminate another prisoner, the counsel of the latter has a right to cross-examine the witness, and address the jury on his evidence. *Reg.* v. *Burdett*, Dears. C. C. 431; 3 C. L. R. 440; 24 L. J., M. C. 63; 1 Jur. (N.S.) 119; 3 W. R. 246; 6 Cox, C. C. 458.

A. and B. were indicted for manslaughter; the counsel of A. called a witness, who gave evidence which brought home the crime to B., whereupon his counsel was allowed to examine the witness and address the jury after A.'s counsel had closed his case and had summed up his evidence. *Reg.* v. *Copley*, 4 F. & F. 1097.

Whether Prisoner and his Counsel may Address Jury.]—If the prisoner's counsel has addressed the jury, the prisoner himself will not be allowed to address the jury also. *Reg.* v. *Boucher*, 8 Car. & P. 141. S. P., *Reg.* v. *Burrows*, 2 M. & Rob. 124.

But on the trial of a case of shooting, with intent to do grievous bodily harm, there having been no person present at the time of the offence but the prosecutor and prisoner, the latter was, under these special circumstances, allowed to make a statement before his counsel addressed the jury. *Reg.* v. *Malins*, 8 Car. & P. 242.

But the privilege is not to be considered as a precedent with respect to the general practice in such cases *Reg.* v. *Walking*, 8 Car. & P. 243.

Where the prisoner is defended by counsel, he will be permitted to make a statement in his defence, and afterwards his counsel may address the jury and comment upon the prisoner's statement, together with the evidence for the prosecution. *Reg.* v. *Dyer*, 1 Cox, C. C. 113. S. P., *Reg.* v. *Williams*, 1 Cox, C. C. 363.

A prisoner charged with felony, who is defended by counsel, ought not to be allowed to make a statement in addition to the defence of counsel, unless under very particular circumstances; and the general rule ought to be, that a prisoner defended by counsel should be entirely in the hands of his counsel; and that rule should not be infringed, except in very special cases. *Reg.* v. *Rider*, 8 Car. & P. 531.

On a trial for felony, a prisoner, if defended by counsel, ought not to be allowed to make a statement to the jury in his defence. *Reg.* v. *Manzano*, 8 Cox, C. C. 321; 2 F. & F. 64; 6 Jur. (N.S.) 406.

A prisoner will be allowed to make his own statement to the jury, but his counsel cannot be permitted afterwards to address the jury for him. *Reg.* v. *Taylor*, 1 F. & F. 535.

A prisoner on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statement, subject to this, that what he says will be treated as additional facts laid before the court, and entitling the prosecution to the reply. *Reg.* v. *Shimmin*, 15 Cox, C. C. 122.

A prisoner, defended by counsel, may make a statement to the jury, provided he does so before the speech of counsel for the defence. *Reg.* v. *Masters*, 50 J. P. 104.

The Prisoner's Counsel Act, 1837, does not deprive prisoners of the right of making a statement to the jury in cases of felony; they may, if they wish to do so, make a statement to the jury before the court is addressed by their counsel, which statement will, however, give the crown a right of reply. *Reg.* v. *Doherty*, 16 Cox, C. C. 306.

Upon the trial of a prisoner who is defended by counsel (in accordance with the opinion of the majority of the judges), the prisoner, after his counsel's address to the jury, will be allowed to make a statement of facts to the jury. But when it is proposed to call witnesses for the prisoner, it will not be competent for him to make any statement to the jury in addition to his counsel's address. *Reg.* v. *Mullhouse*, 15 Cox, C. C. 622.

The prisoners, who were defended by counsel, were indicted for maliciously shooting at the prosecutor, and at the conclusion of the evidence for the prosecution, without waiting for their counsel, they themselves addressed the jury in their defence. When they had concluded their observations, the judge permitted their counsel then to address the jury on their behalf. *Reg.* v. *Stephens*, 11 Cox, C. C. 669.

A foreigner, indicted for felony, being unable to speak English, the proceedings were explained to him by an interpreter. He was defended by counsel, who cross-examined the witnesses for the prosecution; at the close of which the judge, through the interpreter, acquainted the prisoner that he might choose whether he would make his defence himself or allow his counsel to make it for him, but that both could not be heard. *Reg.* v. *Teste*, 4 Jur. (N.S.) 244.

—— **Counsel arguing Points of Law.**]—On the trial of an indictment for perjury, the judge will allow the defendant to address the jury and cross-examine the witnesses, and his counsel to argue points of law, and suggest questions to him for the cross-examination of the witnesses. *Rex* v. *Parkins*, 1 Car & P. 548; R. & M. 166.

Where, on an information for a misdemeanour, the defendant conducts his own defence, counsel may be heard on any point of law which arises. *Rex* v. *White*, 3 Camp. 98; 13 R. R. 765.

But he cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury. *Ib.*

Number of Counsel for Defence.]—Not more than two counsel are entitled to address the court for a prisoner during the trial upon a point of law. *Reg.* v. *Bernard*, 1 F. & F. 240.

Objection to being Defended by Counsel—Writ of Error.]—On a trial for murder, the prisoner objecting to be defended by counsel, but, in the result, allowing counsel to act for him, he was not afterwards allowed to raise any objection to the proceeding, and a fiat for a writ of error was refused. *Reg.* v. *Southey*, 4 F. & F. 864.

3. Right of Reply and Summing Up Evidence.

Prosecution—Right to Sum Up when Prisoner calls no Witnesses.] — Counsel for the prosecution ought not to exercise their right of summing up the evidence where the prisoner calls no witnesses, unless, in their discretion, they deem it to be necessary for the purposes of justice. *Reg.* v. *Berens* 4 F. & F. 842.

Under 28 & 29 Vict. c. 18, s. 2, the counsel for the prosecution ought only, when the prisoner (though defended by counsel) calls no witnesses, to sum up the evidence in exceptional cases. *Reg.* v. *Webb*, 4 F. & F. 862. S. P., *Reg.* v. *Holchester*, 10 Cox, C. C. 226.

—— **Contents of Summing Up.**]—The counsel for the prosecution ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless at all events it has appeared that he might be fairly expected to be in a position to do so. Neither ought counsel to press it upon the jury that, if they acquit the prisoner, they may be considered to convict the prosecutor or prosecutrix of perjury. *Reg.* v. *Puddick*, 4 F. & F. 497. See *Reg.* v. *Rudland*, 4 F. & F. 495.

It is improper for counsel for the prosecution to make any comment by way of reproach upon the fact that the witnesses whom the prisoner calls were not examined before the magistrates. *Reg.* v. *Clark*, 5 Cox, C. C. 230.

—— **Reply before Evidence in Reply.**]—Where counsel for the prosecution, intending to put in evidence in reply, begins his reply to the jury before doing so per incuriam, he ought not, therefore, to be debarred from the right to put in his evidence in the usual course. *Reg.* v. *White*, 2 Cox, C. C. 192.

—— **Reply to Prisoner's Statement.**]—A prisoner on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statement, subject to this, that what he says will be

treated as additional facts laid before the court, and entitling the prosecution to the reply. *Reg.* v. *Shimmin*, 15 Cox, C. C. 122. S. P., *Reg.* v. *Doherty*, 16 Cox, C. C. 306.

—— **When Reply allowed.**]—A statement of facts not intended to be proved gives a reply to the counsel for the prosecution. *Reg.* v. *Butcher*, 2 M. & Rob. 228.

It is entirely at the discretion of the prosecutor's counsel, whether he will exercise his right of reply or not. *Rex* v. *Whiting*, 7 Car. & P. 771.

The prosecuting counsel ought not to reply where witnesses are called to character only. *Reg.* v. *Patteson*, 2 Lewin, C. C. 262.

A prosecutor's counsel has in strictness, the right of reply, though the counsel for the prisoner only calls witnesses to character. *Rex* v. *Stannard*, 7 Car. & P. 673. S. P., *Reg.* v. *Corfell*, 1 Cox, C. C. 123.

Witnesses merely called as to character do not give the counsel for the prosecution a reply. *Reg.* v. *Dowse*, 4 F. & F. 492. S. P., *Reg.* v. *Brooks*, 1 Cox, C. C. 6.

—— **Several Prisoners—Evidence Adduced by Some only.**]—A. was charged with feloniously carnally knowing and abusing a girl under ten B. was charged with being present, aiding and abetting. A.'s counsel called no witnesses; B., who had no counsel, called a witness to prove an alibi for A.:—Held, that the evidence was in effect evidence for A., and that, in strictness, the counsel for the prosecution had a right to reply on the whole case, but that it was summum jus, and ought to be exercised with great forbearance. *Reg.* v. *Jordan*, 9 Car. & P. 118.

Three were indicted for murder, and witnesses were called for the defence of one only.—Held, that the counsel for the prosecution was entitled to reply generally, and was not to be limited in his reply as against the prisoner for whom the witnesses were called, although the evidence adduced for the one did not affect the case as it respected the other two, but if the evidence against two affect them with different offences, such as larceny and receiving, and one calls witnesses, there is no right of reply against both. *Reg.* v. *Blackburn*, 3 Car. & K. 330; 6 Cox, C. C. 333. S. P., *Reg.* v. *Hayes*, 2 M. & Rob. 155.

Two being indicted for night poaching, the defence being on the question of identity, one of them calling witnesses to prove an alibi, the other calling no witnesses, the counsel for the prosecution was allowed a general reply on the whole case as against both. *Reg.* v. *Briggs*, 1 F. & F. 106.

The prisoners were indicted for obtaining goods by false pretences and conspiracy to defraud. At the close of the evidence for the prosecution, witnesses were called for the defendants Welham and Schneider only, whose evidence was applicable to their respective cases only, and did not affect the cases of the other defendants:—Held, that the counsel for the prosecution should confine his reply to the cases of Welham and Schneider. *Reg.* v. *Trevelli*, 15 Cox, C. C. 289.

Where there are several prisoners, and they sever in their defences, if one should call witnesses and the others not, the right of reply is in practice confined to the case against the prisoner who has called witnesses. *Reg.* v. *Burton*, 2 F. & F. 788.

A. and B. were indicted for manslaughter; the counsel of A. called a witness, who gave evidence which brought home the crime to B., whereupon his counsel was allowed to examine the witness and address the jury after A.'s counsel had closed his case and had summed up his evidence; the counsel for the prosecution being entitled to a general reply. *Rex* v. *Copley*, 4 F. & F. 1097.

Where several prisoners were indicted jointly, and some of them called witnesses, but others did not:—Held, that the crown had a right of reply to the counsel for those prisoners who called witnesses, but that the counsel for the prisoners who called no witnesses, had a right to address the jury last. *Reg.* v. *Burns*, 16 Cox, C. C. 195.

Four men were indicted for having assaulted the prosecutor with intent to do him grievous bodily harm; one of the prisoners called witnesses in his defence to prove an alibi; no witnesses were called on behalf of the other prisoners. Counsel for the prosecution claimed a general right of reply:—Held, that there was no general right of reply, and that the most convenient course would be for counsel for the prosecution to sum up the case generally, and reply on the evidence called by one prisoner, before the counsel for the other prisoners addressed the jury. *Reg.* v. *Kain*, 15 Cox, C. C. 388.

—— **By the Attorney- or Solicitor-General.**]—The attorney-general may reply with new matter in collateral issues, though no evidence is given for the prisoner. *Rex* v. *Ratcliffe*, 1 W. Bl. 3.

Where the attorney-general or a king's counsel states that he appears officially to conduct a prosecution on an indictment for misdemeanour, he is entitled to reply, though the defendant calls no witness. *Rex* v. *Marsden*, M. & M. 439.

Martin, B., intimated that he thought the right of reply on behalf of the crown a bad practice, and that he should confine the right to the attorney-general of England in person. *Reg.* v. *Christie*, 1 F. & F. 75.

The right of reply on behalf of the crown, in Mint cases, where no evidence is called for the defence, was not admitted. *Reg.* v. *Taylor*, 1 F. & F. 535.

In a prosecution by the post-office for a felony, it being stated by the counsel for the prosecution that he appeared as representative of the attorney-general; on the ground of his representing the attorney-general, he was entitled to reply without reference to the prisoner's having called witnesses or not. *Reg.* v. *Gardner*, 1 Car. & K. 628.

In conducting prosecutions for the post-office, where the solicitor-general appears on behalf of the attorney-general, he has, on the part of the crown, the right to reply on the whole case, although the prisoner calls no witnesses. *Reg.* v. *Toakley*, 10 Cox, C. C. 406. S. P., *Reg.* v. *Barrow*, 10 Cox, C. C. 407.

In a prosecution directed by the poor law board, counsel for the crown cannot claim the right to reply where the prisoner calls no witnesses. *Reg.* v. *Beckwith*, 7 Cox, C. C. 505.

—— **By Attorney-General for County Palatine.**]—The attorney-general for the county palatine, though prosecuting in person, has no right to reply. *Reg.* v. *Christie*, 7 Cox, C. C. 506.

Counsel for Defence.]—When a counsel for the prisoner sums up the evidence, he is not

restricted to the evidence for the defence but may sum up on the whole case. *Reg.* v. *Wainwright*, 13 Cox, C. C. 171.

—— **Reply when Evidence in Reply allowed.**]—Where the crown gave evidence in reply, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented on the evidence in reply, also before the second counsel for the prisoner addressed the jury. *Reg.* v. *Frost*, 9 Car. & P. 160.

—— **Reply—Witnesses called by some Prisoners.**]—On a joint indictment, some only of the prisoners called witnesses, which gave the crown a right to reply:—Held, that counsel for the prisoners who called no witnesses had a right to address the jury last. *Reg.* v. *Burns*, 16 Cox, C. C. 195. S. P., *Reg.* v. *Kain*, 15 Cox, C. C. 388.

VI. EVIDENCE.

1. *Confessions and Admissions.*
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11. *Previous Convictions and Records*, 1888.
12. *Number of Witnesses Necessary.*

See supra, TREASON, PERJURY.

1. CONFESSIONS AND ADMISSIONS.

a. Confessions, when Admissible.

Inducement—Hope of Benefit.]—On a trial for larceny, evidence was received of a confession made by the prisoner to the prosecutor in the presence of a police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you":—Held, that the confession was not admissible in evidence. *Reg.* v. *Fennell*, 50 L. J., M. C. 126; 7 Q. B. D. 147; 44 L. T. 687; 29 W. R. 712; 14 Cox, C. C. 607; 45 J. P. 666. S. P., *Reg.* v. *Bate*, 11 Cox, C. C. 686.

Z. was indicted for feloniously having in his possession a lithographic stone, on which was engraved a portion of a Dutch coupon. In the presence of an agent of the Dutch consulate, and of the person who signed the coupons, and after Z. had been told that if he had had anything to do with lithographing it, it would be better for him to tell it, he made a statement:—Held, that it was admissible against him. *Reg.* v. *Zeigert*, 10 Cox, C. C. 555. Sed quære.

The prisoner, while in the custody of a policeman on a charge of arson, said to her mistress, "If you forgive me I will tell you the truth." The mistress answered, "Ann, did you do it?" The prisoner thereupon made a statement:—Held, that the statement thus made was inadmissible. *Reg.* v. *Mansfield*, 14 Cox, C. C. 639.

The prisoners H. and C. were taken into their master's (the prosecutor) room, where there were two policemen. The prosecutor said, "I presume you know who these gentlemen are?" H. said "Yes." The prosecutor then said to H., "I know what has been going on between you and C. for some time; you had better speak the truth." H. then made a confession:—Held, that the confession was not admissible in evidence. *Reg.* v. *Hatts*, 49 L. T. 780; 48 J. P. 248.

A statement held inadmissible when made after a constable had said to a prisoner in his custody, "You are apprehended on a serious charge, take care that you say nothing to injure yourself; but if you can say anything in your defence, we are willing to hear it and to send to any person to assist you." *Reg.* v. *Hornbrook*, 1 Cox, C. C. 54.

The words, "I dare say you had a hand in it, you may as well tell me all about it," are sufficient inducement to exclude the confession. *Reg.* v. *Croydon*, 2 Cox, C. C. 67.

A confession induced by saying, "Tell me where the things are, and I will be favourable to you," cannot be given in evidence. *Rex* v. *Thompson*, 1 Leach, C. C. 291. S. P., *Rex* v. *Cass*, 1 Leach, C. C. 293, n.

If a prisoner is told, "You had better split, and not suffer for all of them"; this is such an inducement to confess as will exclude what the prisoner said in consequence of it. *Rex* v. *Thomas*, 6 Car. & P. 353.

So, where the witness said to the prisoner, "It would have been better if you had told at first." *Rex* v. *Walkley*, 6 Car. & P. 175.

The prosecutor in the presence of a constable said to the prisoner, "It will be better for you to tell the truth, as it will save the shame of a search-warrant in your house." This statement was rejected. *Reg.* v. *Collier*, 3 Cox, C. C. 57.

A girl was charged with administering poison with intent to murder. The surgeon said to her, "You are under suspicion of this, and you had better tell all you know." After this she made a statement to the surgeon:—Held, that that statement was not admissible. *Rex* v. *Kingston*, 4 Car. & P. 387.

—— **No use Denying it.**]—A constable said to a person charged with felony, "It is of no use

for you to deny it, for there is the man and boy who will swear they saw you do it" :—Held, that this was such an inducement as would exclude evidence of what the prisoner said. *Rex* v. *Mills*, 6 Car. & P. 140.

—— **If Handcuffs are Taken off.**]—A prisoner charged with felony, being in custody, handcuffed, in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said, "If the handcuffs are taken off, I will tell you where I put the property" :—Semble, that this statement was receivable, and could not be objected to, either as a confession made under a promise, or a statement obtained by duress. *Rex* v. *Green*, 6 Car. & P. 655.

—— **Promise not to Repeat Statement.**]—A witness stated, that a prisoner charged with felony asked him if he had better confess ; and the witness replied, that he had better not confess, but that the prisoner might say what he had to say to him, for it should go no further. The prisoner made a statement :—Held, that it was receivable on the trial. *Rex* v. *Thomas*, 7 Car. & P. 345.

A. was in custody on a charge of murder. B., a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split." A. replied, "Will you be upon your oath not to mention what I tell you ?" B. went upon his oath that he would not tell. A. then made a statement :—Held, that this was not such an inducement to confess as would render the statement inadmissible. *Rex* v. *Shaw*, 6 Car. & P. 372.

—— **Receiving Something to Drink.**]—Where a prisoner said to the officer in whose custody he was, "If you will give me a glass of gin, I will tell you all about it" :—Held, that a confession made in consequence of his having received some gin was inadmissible. *Rex* v. *Sexton*, 3 Russ. C. & M. 462.

—— **Seeing Wife.**]—A. and his wife were separately in custody on a charge of receiving stolen property. A person who was in the room with A. said, "I hope you will tell, because Mrs. G. (the prosecutrix) can ill afford to lose the money ;" and the constable then said, "If you will tell where the property is, you shall see your wife :"—Held, that a statement made by A. afterwards was admissible. *Rex* v. *Lloyd*, 6 Car. & P. 393.

—— **Under the Influence of a Reward or a Pardon.**]—The mere knowledge by a prisoner of a handbill, by which a government reward and a promise of a pardon are offered in a case of murder, are not sufficient ground for rejecting a confession of such prisoner, unless it appears that the inducements there held out were those which led the prisoner to confess. *Reg.* v. *Boswell*, Car. & M. 584.

Where a prisoner desired that any handbill that might appear concerning a murder, with which he stood charged, might be shown to him, and a handbill was shown to him by a constable, by which a reward and a free pardon were offered to any but the person who struck the blow, and the prisoner three days afterwards made a statement, this statement was held to be receivable in evidence. *Ib.*

But where it was afterwards proved by another constable that the prisoner, on the night before he made the statement, said to him, that he saw no reason why he should suffer for the crime of another, and that as the government had offered a free pardon to anyone concerned who had not struck the blow, he would tell all he knew about the matter :—The judge held, that the statement that had already been given in evidence was not properly receivable, and struck it out of his notes. *Ib.*

Several prisoners being in custody on a charge of murder, A., who was one of them, said to the chaplain of the prison, that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon. The chaplain said that there had ; but he hoped that A. would understand that he could offer him no inducement to make any statement, as it must be his own free and voluntary act. When A. saw the magistrate, he said that no person had held out any inducement to him to confess anything, and that what he was about to say was his own free and voluntary act and desire. A. then made a statement to the magistrate :—Held, that this statement was receivable against A. on his trial for the murder. *Reg.* v. *Dingley*, 1 Car. & K. 637.

A., a prisoner charged with murder, was visited by B., who was both a magistrate and a clergyman ; B. told him, that if he was not the person who struck the fatal blow, and he would tell all he knew, he (B.) would use his endeavours and influence to prevent anything from happening to him ; and that if he (A.) did not make a disclosure, some one else would probably do so. After this B. wrote to the secretary of state, who returned an answer that mercy could not be extended to A. ; which answer was communicated by B. to A. After this A. sent for the coroner and wished to make a statement. The coroner told him that if he did so it would be used in evidence against him. The prisoner made a confession. *Rex* v. *Clewes*, 4 Car. & P. 221.

Statements made by a prisoner with the knowledge of a reward and a pardon to any but the actual perpetrator of the offence, and under circumstances which led to the belief that such statements were made with the hope of receiving the reward, and being allowed to give evidence as a witness on the part of the crown, are inadmissible. *Reg.* v. *Blackburn*, 6 Cox, C. C. 333.

A printed copy of a reward offered for such private information and evidence as would lead to the detection and conviction of a murderer or the murderers, and a statement that the secretary of state would recommend the grant of a pardon to any accomplice, not having been the actual perpetrator of the murder, who should give such evidence, was hung up in the magistrate's room in a county gaol. A prisoner, who could read, made a statement to the governor of the gaol in this room, and before that statement inquired whether he could give evidence, but did not say that he made the statement in that expectation, or in the hope of getting the reward, and before making the statement, he was told it would be used against him :—Held, that such statement was inadmissible. *Ib.*

But statements made, and anonymous letters written by a prisoner before his apprehension, are not inadmissible merely on the ground of the prisoner's knowledge of the offer of the reward and pardon, or by reason of his having been employed by the police authorities and paid money

for his support, under the belief that he was an important witness for the crown. *Ib.*

Cp. *Reg.* v. *Gillis*, post, col. 1831.

—— **Benefit expected must be Temporal.**]—A prisoner charged with murder, being a few days short of fourteen, was told by a man who was present when he was taken up, but not by a constable, "Now you kneel down. I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty;" the prisoner, in consequence, made certain statements:—Held, strictly admissible. *Rex* v. *Wild*, 1 M. C. C. 452.

A constable who apprehended a prisoner, asked him what he had done with the tap he had stolen from the prosecutor's premises; and said, "You had better not add a lie to the crime of theft":—Held, that a confession made to the constable was not receivable. *Rex* v. *Sheppard*, 7 Car. & P. 579.

The mother of a little boy, in custody on a charge of attempting to obstruct a railway train, said to him and another little boy in custody also on the same charge, in the presence of the mother of the latter and of the policeman, "You had better, as good boys, tell the truth," whereupon both boys confessed:—Held, that the confession was clearly admissible. *Reg.* v. *Reeve*, 41 L. J., M. C. 92; L. R. 1 C. C. 362; 26 L. T. 403; 20 W. R. 631; 12 Cox, C. C. 179.

A daughter of the prosecutor (the prisoner's master), but who did not live with her father, and was not the prisoner's mistress, whilst she had temporary charge of the prisoner, who had been previously taken into custody, said to him, "I am very sorry for you, you ought to have known better. Tell me the truth, whether you did or no. Do not run your soul into more sin, but tell the truth;" when the prisoner made a full confession:—Held, that there was no threat or inducement held out to the prisoner. *Reg.* v. *Sleeman*, Dears. C. C. 249; 2 C. L. R. 129; 23 L. J., M. C. 19; 17 Jur. 1082; 2 W. R. 97; 6 Cox, C. C. 245.

The prosecutor called the prisoner to his room and said, "Jarvis, I think it is right I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." A letter was then produced, which Jarvis said he had not written, and the prosecutor then added, "Take care Jarvis; we know more than you think we know":—Held, that the answer of the prisoner in the nature of a confession was admissible. *Reg.* v. *Jarvis*, 37 L. J., M. C. 1; L. R. 1 C. C. 96; 17 L. T. 178; 16 W. R. 111; 10 Cox, C. C. 574.

A prisoner was before a magistrate on a charge of felony, and, after the examination of the witnesses against him, the magistrate said to him, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial":—Held, that this did not exclude the prisoner's statement from being given in evidence. *Reg.* v. *Holmes*, 1 Car. & K. 248; 1 Cox, C. C. 9.

On a prisoner being brought before a magistrate on a charge of forgery, the prosecutor said, in the hearing of the prisoner, that he considered the prisoner as a tool of G.; and the magistrate then told the prisoner to be sure to tell the truth; upon this the prisoner made a statement:—Held, that the statement was receivable. *Rex* v. *Court*, 7 Car. & P. 486.

A policeman asked the prisoner, a boy between eight and nine years old, various questions as to his going to school, knowing the Lord's Prayer, where he would go to if he told a lie, whether God knew everything; and then asked whether he thought God knew who set fire to the hay-stack. The boy not answering, and beginning to cry, the policeman asked him if he could give any information about the fire, and receiving no answer, he said he should apprehend him upon charge of setting fire to the hay-stack. The boy then made a statement:—Held, that it was not admissible. *Rex* v. *Day*, 2 Cox, C. C. 209.

—— **Held out by Chaplains.**]—A prisoner committed on a charge of murder sent for the chaplain to pray with him, who told him that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair as far as he could any injury he had done. The chaplain had two interviews with the prisoner, and considered he had made a great impression on him, but distinctly told him he did not wish him to confess. After this the prisoner made two confessions to the gaoler and the mayor, after having been warned of the consequences by both those persons:—Held, that these confessions were good evidence, and rightly received. *Rex* v. *Gilham*, Car. C. L. 51; 1 M. C. C. 186.

A chaplain to a workhouse had, in his spiritual capacity, frequent conversations there with the prisoner, who was charged with the murder of her child, but who was too ill to be removed from the workhouse. Semble, that these conversations ought not to be adduced in evidence at the trial. *Reg.* v. *Griffin*, 6 Cox, C. C. 219.

—— **Threats — What are Sufficient.**] — A policeman asked a prisoner, who was suspected of having made away with her illegitimate child, to tell him where it was. She refused to do so, upon which he said that if she did not tell she might get herself into trouble, and it would be the worse for her. Then she made a statement:—Held, that the statement was inadmissible. *Reg.* v. *Coley*, 10 Cox, C. C. 536.

The words, "I must know more about it," said by a police constable to a prisoner in the course of conversation between them respecting the subject-matter of the charge, immediately before apprehension, are not a sufficient inducement to exclude an admission. *Reg.* v. *Reason*, 12 Cox, C. C. 228.

The prosecutrix lost her purse containing 1*l.* 4*s.*, in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen anyone pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman, a short time afterwards, went in search of the prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, "Now is the time for you to take it back to her." He denied having it, and went with the policeman. As they went along he commenced making a statement, but the police-

man told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards, some conversation took place and the prisoner was searched, and on a half-sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her," and the prisoner's "that he would make it all up to her":—Held, that there was no inducement held out to the prisoner, and that his statement or confession (that he would make it all up to her) was admissible against him. *Reg.* v. *Jones*, 27 L. T. 765; 12 Cox, C. C. 241.

A person being in custody, and having been charged with setting fire to some bobbins of cotton in a mill, was shown a piece of paper (partially burnt) with writing on it, which had been found among the burnt property. Without receiving any caution whatever, he was then asked by the policeman whose writing it was, and what he had done with the remainder of it:—Held, that what he said in answer to the questions was receivable, as the questions did not amount to a threat. *Reg.* v. *Regan*, 17 L. T. 325.

The captain of a vessel said to one of his sailors, suspected of having stolen a watch, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted on your face":—Held, that a confession made by the sailor after this threat was not receivable on his trial for the felony. *Rex* v. *Parratt*, 4 Car. & P. 474.

A confession, induced by saying, "Unless you give me a more satisfactory account, I will take you before a magistrate," cannot be given in evidence. *Rex* v. *Thompson*, 1 Leach, C. C. 291.

Where the prosecutor asked the prisoner, on finding him, for the money which the prisoner had taken out of the prosecutor's pack, but before the money was produced said "he only wanted his money, and if the prisoner gave him that he might go to the devil if he pleased;" upon which the prisoner took 11*s.* 6½*d.* out of his pocket, and said "it was all he had left of it":—Held, that the confession could not be received. *Rex* v. *Jones*, R. & R. 142. S. P., *Rex* v. *Clarke*, Car. C. L. 59.

After an investigation before a magistrate on a charge of concealment of birth, and after the accused had been cautioned in the usual manner, and had stated that she had nothing to say, but before her actual committal, the presiding magistrate asked her what she had done with the body of the child:—Held, that her statement in answer was not admissible. *Reg.* v. *Berriman*, 6 Cox, C. C. 388.

A prosecutor said to the prisoner, "I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing":—Held, that this was such an inducement to confess, as would exclude what the prisoner said. *Rex* v. *Partridge*, 7 Car. & P. 551.

Inducement held out by Persons in Authority.]—Evidence of any confession is receivable, unless there has been some inducement held out by some person in authority. *Reg.* v. *Taylor*, 8 C. & P. 733.

Persons in Authority—Who are.]—Where, on the apprehension of a prisoner for larceny, persons having nothing to do with the apprehension, prosecution or examination of the prisoner, advised him to tell the truth and consider his family:—Held, that such admonition was no ground for excluding a confession made an hour afterwards to the constable in prison. *Rex* v. *Row*, R. & R. 153.

The confession of a girl fifteen years old, occasioned by many applications by the prosecutor's relations and neighbours, amounting to threats and promises, is not receivable. *Rex* v. *Simpson*, 1 M. C. C. 410.

So a confession obtained from a servant through hopes and threats held out by the wife of the master and prosecutor, is inadmissible. *Rex* v. *Upchurch*, 1 M. C. C. 465.

The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions. *Reg.* v. *Moore*, 2 Den. C. C. 522; 3 Car. & K. 153; 21 L. J., M. C. 199; 16 Jur. 621; 5 Cox, C. C. 555.

A solicitor engaged in the investigation of a crime, for the purpose of getting up a prosecution, is a person clothed with authority to offer an inducement. *Reg.* v. *Croydon*, 2 Cox, C. C. 67.

A daughter of the prosecutor (the prisoner's master), but who did not live with her father, and was not the prisoner's mistress, whilst she had temporary charge of the prisoner, who had been previously taken into custody, said to him, "I am sorry for you; you ought to have known better. Tell me the truth, whether you did it or no. Do not run your soul into more sin, but tell the truth;" when the prisoner made a full confession:—Held, that the confession was not made to a person in authority, and was therefore admissible. *Reg.* v. *Sleeman*, Dears. C. C. 249; 2 C. L. R. 129; 23 L. J., M. C. 19; 17 Jur. 1082; 2 W. R. 97; 6 Cox, C. C. 245.

On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible. *Reg.* v. *Warringham*, 2 Den. C. C. 447, n.; 15 Jur. 318.

A man and a woman being apprehended on a charge of murder, another woman, who had the female prisoner in custody, told her that she "had better tell the truth, or it would lie upon her, and the man would go free":—Held, that a declaration of the female prisoner made to this woman afterwards was not receivable. *Rex* v. *Enoch*, 5 Car. & P. 359.

A female, in custody on a charge of murder, desiring to go to the water-closet, was sent there by the police with a woman, who was impliedly authorised to prevent her escape. When alone together in the closet, the woman, an acquaintance of the prisoner, alluding to the crime said, "How came you to do it?" whereupon she made a statement in the nature of a confession:—Held, that the statement was not induced by any hope or fear caused by a person in authority, and was, therefore, admissible against her. *Reg.* v. *Vernon*, 12 Cox, C. C. 153.

A woman in custody, on a charge of murder, was, on arriving at the gaol, placed in a room alone with E., in order to be searched. E. was employed as searcher of female prisoners; but,

except in that capacity, had no other duties or authority in the gaol. Whilst the usual search was being made, the prisoner said, "I shall be hung, I shall be sure to be hung"; and shortly afterwards, "If I tell the truth, shall I be hung?" E., in order to soothe the prisoner, replied, "No, nonsense, you will not be hung; who told you so?"—Held, that a statement of the prisoner made to E. immediately afterwards was not receivable. *Reg.* v. *Windsor*, 4 F. & F. 360.

By Persons without Authority.]—If a person, not in office or in authority, holds out to an accused party an inducement to confess, this will not exclude a confession made to that person. *Reg.* v. *Taylor*, 8 Car. & P. 733.

There is a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable. *Rex* v. *Spencer*, 7 Car. & P. 776.

The confession of a prisoner is evidence, although previously to it an inducement to confess had been held out by another person, if that person had no authority to do so. *Rex* v. *Gibbons*, 1 Car. & P. 97.

So a confession by a prisoner to a constable, who had held out no inducement, is evidence, although an inducement had been previously held out by a person in no office or authority. *Rex* v. *Tyler*, 1 Car. & P. 129.

Any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to that person, although that person was not in any authority, as prosecutor, constable, or the like. *Rex* v. *Dunn*, 4 Car. & P. 543. S. P., *Rex* v. *Slaughter*, 4 Car. & P. 544.

—— **Authority supposed to Exist.**]—Semble, a confession is admissible that is induced by the promise of a person not in fact having authority to show favour to the accused, though the prisoner, from his knowledge of the promiser's position, may reasonably suppose he has such authority. *Reg.* v. *Frewin*, 6 Cox, C. C. 530.

Person in Authority not Dissenting from Inducement held out by Another.]—A married woman was apprehended on a charge of felony, and her husband, in the presence of a constable, held out an inducement to her to confess. She then made a statement:—Held, that it was not receivable, as an inducement held out in the presence of the constable was the same in effect as if it had been held out by him. *Reg.* v. *Laugher*, 2 Car. & K. 225; 2 Cox, C. C. 134. S. P., *Rex* v. *Pountney*, 7 Car. & P. 302.

The prosecutor and a policeman went into a room in the house of one of the prisoners, in which were assembled the two prisoners and W. The policeman then charged one of the prisoners and W. with stealing the prosecutor's hops, and the other prisoner with feloniously receiving them. W. then said, "Well, John, you had better tell Mr. Walker" (the prosecutor) "the truth." Neither the prosecutor nor the policeman dissented from or remarked upon this advice, but the prisoner John thereupon made a statement amounting to a confession; and subsequently, whilst being conveyed to prison, of his own accord made a further statement:—Held, that the statements were admissible. *Reg.* v. *Parker*, L. & C. 42; 30 L. J., M. C. 144; 7 Jur. (N.S.) 586; 4 L. T. 451; 9 W. R. 699; 8 Cox, C. C. 465.

A confession made by a prisoner at the request of his uncle in the audience of, and according to the advice of a police sergeant, is not admissible in evidence. *Reg.* v. *Jones*, 49 J. P. 728.

Where the house of Mr. L. had been on fire, and the prisoner, a female servant there, was sent for into the parlour, where Mr. W., a person not in authority, in the presence of Mrs. L., held out an inducement to the prisoner to confess respecting the fire, Mrs. L. expressing no dissent:—Held, that a confession made after this was not receivable, as the inducement must be taken as if it had been held out by Mrs. L., who was a person in authority over the prisoner. *Reg.* v. *Taylor*, 8 Car. & P. 733.

Upon the trial of an indictment for an unnatural crime with a mare, one of the witnesses, in the presence of T., the owner of the mare, threatened to give the prisoner in charge to the police if he did not tell what business he had in T.'s stable, where the mare was. At that moment the charge had not been made known to the prisoner, but was immediately afterwards, and then he confessed:—Held, that this confession was inadmissible, having been made under the influence of a threat held out to him in the presence of one who, being the owner of the mare, was likely to prosecute for the offence. *Reg.* v. *Luckhurst*, Dears. C. C. 245; 2 C. L. R. 129; 23 L. J., M. C. 18; 17 Jur. 1082; 2 W. R. 97; 6 Cox, C. C. 243.

A statement made by one of two prisoners to the other, after an inducement suggested by that other in the presence of the constable in whose custody they are, and uncontradicted by the constable, is inadmissible. *Reg.* v. *Millen*, 3 Cox, C. C. 507.

Confession relating to another Offence.]—A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the bed-rooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire:—Held, that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. *Reg.* v. *Hearn*, Car. & M. 109.

A. was indicted for stealing a shilling which had been previously marked and put into a till. A constable found the shilling in his possession, and asked him if he had any more money about him. The prisoner produced some half-crowns, and then made a statement:—Held, that this statement was not receivable, on the ground that it related to another and distinct felony. *Reg.* v. *Butler*, 2 Car. & K. 221.

Inducement to one Prisoner—Confession by Another.]—An inducement or a threat offered by a master to one of two apprentices jointly accused of larceny will not, though offered in the presence of the other, preclude the reception in evidence of a confession immediately made by the other. *Reg.* v. *Jacobs*, 4 Cox, C. C. 54.

—— **Statement of one Prisoner read and acknowledged by her in fellow Prisoner's Presence—Fellow Prisoner's Confession thereupon.**]—Where one of two prisoners in custody on a charge against them jointly has voluntarily made and signed a statement implicating the other,

and such statement is read over to the prisoner implicated, and the latter, after being cautioned, makes a confession, which is taken down in writing, and signs it when so written, the statement of the one prisoner and the admission of the other may be given in evidence on the trial of the latter. *Reg.* v. *Hirst*, 18 Cox, C. C. 374.

Confession obtained by Fraud.]—Where a prisoner in a gaol on a charge of felony asked the turnkey of the gaol to put a letter in the post for him, and after his promising to do so the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor:—Held, that the letter was admissible against the prisoner, notwithstanding the manner in which it was obtained. *Rex* v. *Derrington*, 2 Car. & P. 418.

A statement, made by a prisoner when he is drunk, is receivable in evidence; and semble, that if a constable gave him liquor to make him so, in the hope of his saying something, that will not render his statement inadmissible, but it will be matter of observation for the judge in his summing up. *Rex* v. *Spilsbury*, 7 Car. & P. 187.

When Inducement continues and renders subsequent Confession Inadmissible.]—A second confession made under the same influence as the first is not receivable. *Rex* v. *Meynell*, 2 Lewin, C. C. 122. S. P., *Reg.* v. *Sherrington*, 2 Lewin, C. C. 123.

The committing magistrate told a prisoner that he would do all that he could for him if he would make a disclosure; after this, the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess:—Held, that what the prisoner said to the turnkey could not be received, more especially as the turnkey had not given the prisoner any caution. *Rex* v. *Cooper*, 5 Car. & P. 535.

A girl, accused of poisoning, was told by her mistress that, if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not admissible. Next day a constable was sent for, and as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so:—Held, that this was receivable, as the former inducement ceased on her being put into the hands of the constable. *Rex* v. *Richards*, 5 Car. & P. 318.

A female servant being suspected of stealing money, her mistress, on a Monday, told her that she would forgive her if she told the truth. On the Tuesday she was taken before a magistrate, and was discharged, no one appearing against her. On the Wednesday the superintendent of police went with her mistress to the Bridewell, and told her in the presence of her mistress that she "was not bound to say anything unless she liked, and that if she had anything to say her mistress would hear her;" but the superintendent, not knowing that her mistress had promised to forgive her, did not tell her that if she made a statement it might be given in evidence against her. The prisoner made a statement:—Held, that this statement was not receivable, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that, if the mistress had not been then present, it might have been otherwise. *Reg.* v. *Hewitt*, Car. & M. 534.

Admissions by a prisoner, elicited by questions of a police officer, with an admonition to tell all she knew, are inadmissible. But a subsequent statement by the prisoner to another officer is not necessarily so far under the same influence as to exclude it. *Reg.* v. *Cheverton*, 2 F. & F. 833.

A female servant was questioned by the mother of a child who had been found dead in a ditch; and she was asked whether she had anything to do with its disappearance; upon which she cried, and said, "If you won't send for the police I will tell the truth," whereupon her mistress replied, "I will not hurt you if you tell the truth; you will be much happier if you tell the truth;" and she promised not to send for the police; whereupon the prisoner made a confession, which upon the trial was rejected as being made under an inducement. It further appeared that shortly after this confession, the mistress sent for a neighbour and informed him of the confession, whereupon he had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then made a similar confession:—Held, that the second confession was so connected under the circumstances with the first, that it was inadmissible. *Reg.* v. *Rue*, 34 L. T. 400; 13 Cox, C. C. 209.

The prosecutor, in the presence of the constable, said to the prisoner, "It will be better for you to tell the truth, as it will save the shame of a search-warrant in your house." The statement was rejected. The constable then took the prisoner into a loft, and, in the absence of the prosecutor, the prisoner made a statement. The evidence was rejected. Half-an-hour after, the constable took the prisoner to the station-house, and on the way cautioned him not to say anything, after which he made a statement:—Held, to be inadmissible, as the inducement was still operating. *Reg.* v. *Collier*, 3 Cox, C. C. 57.

A statement made after an inducement, may be rendered admissible if it is subsequently recognised and confirmed by the prisoner after being cautioned. *Reg.* v. *Horner*, 1 Cox, C. C. 364. See *Reg.* v. *Bate*, 11 Cox, C. C. 686.

A constable held out an inducement to the prisoner at 10 a.m.; after 6 p.m. the prisoner made a confession to another constable who had previously cautioned him:—Held, inadmissible. *Reg.* v. *Doherty*, 13 Cox, C. C. 23, 24.

Previous Caution or Warning by Magistrates.]—The 11 & 12 Vict. c. 42, s. 18, which requires a caution to be given by the magistrate to the prisoner, applies only to the concluding proceedings of the examination; and, therefore, a voluntary statement made by a prisoner in the course of an examination before a magistrate, and before all the witnesses have been examined, is admissible at the trial, although no caution has been given by the magistrate. *Reg.* v. *Stripp*, Dears. C. C. 648; 25 L. J., M. C. 109; 2 Jur. (N.S.) 452; 4 W. R. 489; 7 Cox, C. C. 97.

But a material observation thus interposed by the prisoner should be taken down, and if it is not the judge at the trial will not allow evidence of it to be given. *Reg.* v. *Weller*, 2 Car. & K. 223.

On an examination on a charge of felony before a magistrate, the prisoner was asked if he wished to put any question to a witness against him. Instead of asking anything, he made a statement, which was written down on the depositions, but not signed by the prisoner, who had received no caution:—Held, that this

statement was not evidence per se, but that anyone who heard the prisoner make it might give evidence of it, refreshing his memory from what was thus written down, but in such a case a prisoner ought to be told that that was not the proper time for him to make a statement. *Reg.* v. *Watson*, 3 Car. & K. 111.

A statement made by a prisoner before a committing magistrate, and signed by the prisoner and the magistrate, if taken in the form prescribed in the schedule to 11 & 12 Vict. c. 42, is admissible in evidence against him at his trial at common law. *Reg.* v. *Sansome*, 1 Den. C. C. 545; 4 New Sess. Cas. 152; T. & M. 260; 3 Car. & K. 332; 19 L. J., M. C. 143; 14 Jur. 466; 4 Cox, C. C. 203.

It will be prudent for justices always to give the prisoner the second caution as well as the first. *Ib.*

After taking the examination of the witnesses on a charge of felony against the prisoner, the magistrate cautioned the prisoner in the language prescribed by 11 & 12 Vict. c. 42, s. 18, but did not, as the proviso to that section requires, tell the prisoner he had nothing to hope from any promise of favour or to fear from any threat. The prisoner then made a statement, which was taken down, but was not signed by him or the magistrate. The prisoner, after a remand, being brought again before the magistrate, some questions were put to the witnesses by the prisoner's attorney, who then objected to the statement being treated as the prisoner's statement, as an addition had been made to the evidence, and the prisoner being then asked if he wished to make any statement, declined doing so:—Held, that the prisoner's statement was admissible as evidence against him at his trial. *Reg.* v. *Bond*, 4 New Sess. Cas. 143; T. & M. 242; 1 Den. C. C. 517; 3 Car. & K. 337; 19 L. J., M. C. 138; 14 Jur. 399; 4 Cox, C. C. 231.

A statement made by a prisoner before a magistrate, not signed either by the magistrate or the prisoner, is not excluded as evidence because the magistrate omits to inform him that he has nothing to hope or to fear from either promise or threat. *Ib.*

Semble, that before a statement made by a prisoner in the presence of, and duly signed by the committing magistrate, can be received in evidence against him, proof must be given that he was cautioned in the manner provided by 11 & 12 Vict. c. 42, s. 18, dehors any declaration to that effect contained in the caption of the statement itself. *Reg.* v. *Higson*, 2 Car. & K. 769.

When a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit; and the prisoner ought also to be told, that what he thinks fit to say will be taken down, and may be used against him on his trial. *Reg.* v. *Arnold*, 8 Car. & P. 621.

A prisoner ought to be told by the magistrate that if he makes any statement it may be used as evidence against him, and that he must not expect any favour if he confesses; but the magistrate ought not to dissuade him from confessing. *Rex* v. *Green*, 5 Car. & P. 312.

Where a person, who made a confession to a constable in consequence of a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned the prisoner against making any confession before him, but the prisoner, notwithstanding, did make a confession to the magistrate:—Held, that this second confession was receivable on the trial of the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he therefore might have acted under an impression that, having once acknowledged his guilt, it was too late to retract. *Rex* v. *Howes*, 6 Car. & P. 404.

Made in Answer to Questions—Examination before Magistrates.]—An examination of a prisoner charged with a felony taken without threat or promise, by questions put by the magistrate, is notwithstanding admissible. *Rex* v. *Ellis*, R. & M. 432. S. P., *Rex* v. *Bartlett*, 7 Car. & P. 832; *Rex* v. *Merceron*, 2 Stark. 366. Contra, *Reg.* v. *Pettit*, 4 Cox, C. C. 164.

—— **Interrogations by Police.**]—The practice of questioning prisoners by policemen, and thus extracting confessions from them, though it does not render the evidence so obtained inadmissible, is one which is strongly reprehensible, and which ought not to be permitted. *Reg.* v. *Mick*, 3 F. & F. 822.

An answer by a prisoner after his arrest, to a question asked by a policeman, is inadmissible. *Reg.* v. *Bodkin*, 9 Cox, C. C. 403.

A policeman ought not, in general, to question prisoners who are in his custody; but if he does, the interrogation ought not to be confined to questions calculated to compromise the party. *Reg.* v. *Stokes*, 17 Jur. 192.

J., suspected of having committed felony, was followed and stopped by a constable in plain clothes. The constable having told J. what he was, and that she (J.) was charged with felony, proceeded to put several questions to her relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions the constable had not told J. that she was under arrest, but he would not let her go. He did not expressly hold out any threat or inducement to J., nor did he, before she answered him, give her any caution. J. having answered the questions, the constable then told her she was not bound to say anything that would criminate herself, and said he should bring her to the police office:—Held, that the conversation between J. and the constable was receivable in evidence. *Reg.* v. *Johnston*, 15 Ir. C. L. R. 60.

Where there is no clear evidence of an offence having been committed, a police officer is not justified, in consequence of mere rumours in a neighbourhood, in putting searching questions to a person for the purpose of eliciting the proof of a crime, as well as of that person's connection with it. *Reg.* v. *Berriman*, 6 Cox, C. C. 388.

A confession obtained without threat or promise from a boy fourteen years old, by questions put by a police officer in whose custody the boy was on a charge of felony, and when he had had no food for nearly a whole day, is rightly received. *Rex* v. *Thornton*, 1 M. C. C. 27.

Admissions by a prisoner, elicited by questions of a police officer, with an admonition to tell all she knew, are inadmissible. *Reg.* v. *Cheverton*, 2 F. & F. 833.

There is no rule excluding admissions made by a prisoner in answer to questions put by a policeman. A fortiori, when the accused has not been actually taken into custody. The ruling of

A. L. Smith, J., in *Reg.* v. *Gavin* (16 Cox, C. C. 656) not followed. *Reg.* v. *Brackenbury*, 17 Cox, C. C. 628.

On the arrest of a prisoner, a constable has no right to ask questions, and if the prisoner answers, the answers are not admissible against him. If a third party makes a statement which is taken down in writing, and read over by a constable to a prisoner, neither it nor the conversation induced by it are admissible in evidence, because it is an attempt by the constable to manufacture evidence, and that he has no right to do. *Reg.* v. *Male*, 17 Cox, C. C. 689.

—— **Previous Warning by Police.**]—A statement of a prisoner is admissible, although he has previously been told that whatever he said "would be used against him." *Reg.* v. *Chambers*, 3 Cox, C. C. 92. S. P., *Reg.* v. *Attwood*, 5 Cox, C. C. 322. Contrà, *Reg.* v. *Furley*, 1 Cox, C. C. 76; *Reg.* v. *Harris*, 1 Cox, C. C. 106.

Though there may be cases in which it will be proper, yet, as a general rule, it is better that a policeman should not question a prisoner in his custody, without cautioning him that his answers will be evidence against him. *Reg.* v. *Kerr*, 8 Car. & P. 177.

Where a police constable, who apprehended the prisoner, having told him the nature of the charge, said "he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him;" and the prisoner thereupon made a confession:—Held, receivable. *Reg.* v. *Baldry*, 2 Den. C. C. 430; 21 L. J., M. C. 130; 16 Jur. 599; 5 Cox, C. C. 523. Overruling *Reg.* v. *Drew*, 8 Car. & P. 140.

A constable ought not to caution a prisoner not to say anything. A constable is not to lead a prisoner to say anything; but if a prisoner chooses to say something, it is the duty of the constable to hear what it is he has to say. *Reg.* v. *Priest*, 2 Cox, C. C. 378.

When a prisoner is about to make a confession to a constable, he need not be cautioned by the latter as to the consequences of his so doing. *Reg.* v. *Watts*, 1 Cox, C. C. 75. S. P., *Reg.* v. *Dickinson*, 1 Cox, C. C. 27.

A prisoner was told not to say anything to prejudice himself, as what he said would be taken down and used for him or against him at his trial:—Held, an inducement, and the statement inadmissible. *Reg.* v. *Drew*, 8 Car. & P. 140.

Confession of Principal—Accessory.]—On an indictment against an accessory, a confession by the principal is not admissible to prove the guilt of the principal. *Rex* v. *Turner*, 1 M. C. C. 347.

b. Other Points relating to Confessions.

Confession Inadmissible—Facts resulting from, may be given in Evidence.]—Confessions, obtained in consequence of promises or threats, cannot be given in evidence; but evidence of facts resulting from such inadmissible confessions may be received. *Rex* v. *Warwickshall*, 1 Leach, C. C. 263; 2 East, P. C. 658. S. P., *Rex* v. *Mosey*, 1 Leach, C. C. 265, n.; and *Reg.* v. *Leatham*, 30 L. J., Q. B. 205; 8 Cox, C. C. 498.

Where a prisoner was charged with stealing a guinea and two promissory notes, and the prosecutor told him that it would be better for him to confess:—Held, that after this admonition, the prosecutor might prove that the prisoner brought him a guinea and a 5*l.* note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. *Rex* v. *Griffin*, R. & R. 152.

When a prisoner's confession had been rejected, the judge would not allow a witness to be asked whether in consequence of the confession, he did a particular thing. *Reg.* v. *Berriman*, 6 Cox, C. C. 388.

Where anything is found in consequence of a statement made by a prisoner, under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, and ought to be proved. *Reg.* v. *Gould*, 9 Car. & P. 364.

If a confession is improperly obtained, it is a ground for excluding evidence of the confession, and of any act done by the prisoner in consequence towards discovering the property, unless the property is actually discovered thereby. *Rex* v. *Jenkins*, R. & R. 492.

Confession, when Sufficient to Support Conviction.]—A prisoner's confession is sufficient ground for a conviction, although there is no other proof of his having committed the offence, or of the offence having been committed, if that confession was in consequence of a charge against the prisoner. *Rex* v. *Eldridge*, R. & R. 440. S. P., *Rex* v. *Falkner*, R. & R. 481.

The confession of a prisoner before a magistrate is a sufficient ground to warrant a conviction, although there is no positive proof aliunde that the offence was committed. *Rex* v. *White*, R. & R. 508. S. P., *Rex* v. *Tippet*, R. & R. 509.

The prisoner was convicted of a rape upon the prosecutrix, who was an apparent idiot. She proved the act done, and said that it was wrong, but that she said nothing to the prisoner, and that she did not do anything to him, and that she did not like to hurt nobody. The constable told the prisoner that he was charged with committing a rape upon the prosecutrix and against her will. The prisoner, in answer to that, said, "Yes, I did; and I am very sorry for it:"—Held, that there was evidence to sustain the conviction. *Reg.* v. *Pressy*, 17 L. T. 295; 16 W. R. 142; 10 Cox, C. C. 635.

Where a knowledge of any fact is obtained by means of a confession which cannot be received, the party should be acquitted; unless the fact would be sufficient to warrant a conviction without any confession leading to it. *Rex* v. *Harvey*, 2 East, P. C. 658.

A voluntary confession which enters into minute details of a crime, and states that the prisoner was one of the party concerned in its commission, is evidence to go to a jury when the corpus delicti is proved by evidence aliunde, although the witness proving such corpus delicti swears that the prisoner was not of the party engaged in the commission of the crime. *Reg.* v. *Sutcliffe*, 4 Cox, C. C. 270.

Proof of Circumstances before Reception.]—In order that a confession may be admissible in evidence, the onus lies upon the prosecution to prove that it was free and voluntary. Where an inducement to make a statement is held out to the prisoner by a person in authority, the prosecution must show clearly that the inducement has been removed before the confession is made. *Reg.* v. *Thompson*, 62 L. J., M. C. 93; [1893] 2 Q. B. 12; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox, C. C. 641; 57 J. P. 312.

A person charged with murder made a confession before the coroner. It appeared that, before he made this confession, B., who was both a clergyman and a magistrate, had had an interview with him:—Held, that the prosecutors were not bound to call B. before they put in the confession, but that it would be fair for them to do so; and if the prosecutors did not call B., the prisoner might call him before the confession was read, to prove that some inducement was held out. *Rex* v. *Clewes*, 4 Car. & P. 221.

A prisoner was in the custody of A., a constable; B., another constable, coming into the room, A. left it, and the prisoner immediately made a confession to B.:—Held, that if the prisoner was in custody as an accused party, A. must be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to B. is receivable; but if it appears that the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it will not be necessary to call A. *Rex* v. *Swatkins*, 4 Car. & P. 548.

In order to render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement; if this appears doubtful on the evidence the confession ought to be rejected. *Reg.* v. *Warringham*, 2 Den. C. C. 447, n.; 15 Jur. 318.

At the trial of a servant for attempting to poison her mistress, a medical man having denied that he had held out any inducement to the prisoner to confess, gave evidence of a confession, without which the prisoner could not have been convicted. Evidence was then given that before she made her confession he had said to her, in the presence of her mistress, "It will be better for you to tell the truth." The medical man was re-called, but did not admit this, and the judge left the evidence, including the confession, to the jury, but reported, that if the evidence had been given in the first instance he should have excluded the confession:—Held, that the confession ought to have been struck out, and that the conviction was wrong. *Reg.* v. *Garner*, 3 New Sess. Cas. 329; 1 Den. C. C. 329; T. & M. 7; 2 Car. & K. 920; 18 L. J., M. C. 1; 12 Jur. 944; 3 Cox, C. C. 175. S. P., *Reg.* v. *Boswell*, Car. & M. 584.

To render a confession admissible, it is not so much material to prove to whom or when it is made, as it is to ascertain the mind of the person making it, and see whether or not it is probable that it was made voluntarily. *Reg.* v. *Rue*, 34 L. T. 400; 13 Cox, C. C. 209.

c. Admissions other than Confessions.

In Private Conversations.]—What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself is receivable against him on a charge of felony; it is, however, a species of evidence to be acted on with caution, as it is very liable to be unintentionally misrepresented by the witnesses. *Rex* v. *Simons*, 6 Car. & P. 540.

A conversation between the prisoner and his mother, in which she made a statement to his prejudice, which he denied, is not admissible against him. *Reg.* v. *Welsh*, 3 F. & F. 275.

But a conversation between two persons in relation to the charge under investigation, made in the presence of the prosecutrix, but in the absence of the prisoner, was admitted in cross examination on behalf of the prisoner. *Reg.* v. *Arnall*, 8 Cox, C. C. 439.

By Wife, in Presence and Hearing of Prisoner.]—What the wife of a person charged with felony says in his presence and hearing is admissible on the trial. *Rex* v. *Bartlett*, 7 Car. & P. 671.

Before Suspicion attaches to Prisoner.]—A statement made by a prisoner before suspicion attaches to him, and before search made, in order to account for his possession of property, which he is afterwards charged with having stolen, is admissible as evidence for him. *Reg.* v. *Abraham*, 2 Car. & K. 550; 3 Cox, C. C. 430.

A statement relating to an offence, made upon oath by a person not at the time under suspicion, is admissible against him, if he is afterwards charged with the commission of it. *Rex* v. *Tubby*, 5 Car. & P. 530.

Statement not Denied by Prisoner.]—The court will not exclude a statement made in the prisoner's presence by another party to a third person, merely because some inducement has been held out to that party to make it; but very little weight out to be attached to the fact of no answer being given to such statement by the prisoner, as he would not know whether it would be better for him to be silent or not. *Reg.* v. *Jankowski*, 10 Cox, C. C. 365.

Statements Made in Presence of Accused—Admissibility.]—A statement made in the presence of an accused person is not necessarily evidence against him. Unless there is either an assent by him to the truth of the statement or no dissent where a dissent might reasonably be expected, such a statement is not admissible. *Reg.* v. *Smith*, 18 Cox, C. C. 470; 61 J. P. 120.

Prisoner's Answers to Constable's Questions—Consequential Evidence.]—Where a constable has put questions to a prisoner, and after he has answered them has taken him into custody, and charged him, and the constable has subsequently investigated the truth of the answers, evidence of the prisoner's answers, and of their untruthfulness, may be admissible. The question of the admissibility of such matters must be determined with reference to the whole circumstances of the particular case. *Reg.* v. *Miller*, 18 Cox, C. C. 54.

Sufficiency.]—A prisoner, indicted for stealing two heifers, said, "I drove away two heifers from 'the World's End Dolver'" (i.e. Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—Held, insufficient to warrant a conviction. *Rex* v. *Tuffs*, 5 Car. & P. 167.

Statement Made after being Sworn.]—A prisoner before a magistrate was sworn by mistake, but the deposition was afterwards destroyed and the prisoner cautioned. After this he made a statement:—Held, admissible. *Rex* v. *Webb*, 4 Car. & P. 564.

Depositions of Prisoner taken in another Case.]—The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consists of answers to ques-

tions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "Nemo tenetur seipsum accusare," but does not apply to answers given without objection, which are to be deemed voluntary. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553; 12 Cox, C. C. 557.

—— **Before Coroner.**]—On a trial for murder, the deposition on oath of the prisoner, taken before the coroner on the inquest held on the body of the deceased, is not receivable in evidence. *Reg.* v. *Owen*, 9 Car. & P. 238.

The deposition of a prisoner at a coroner's inquest, after a caution from the coroner, may be read. *Reg.* v. *Colmer*, 9 Cox, C. C. 506.

Upon a trial for manslaughter the prisoner's deposition on oath, taken by the coroner upon the inquest, is admissible against him. *Reg.* v. *Bateman*, 4 F. & F. 1064.

—— **When Receivable.**]—A. was charged with forgery, and B. was examined on oath before the magistrate as a witness against A.; after this B. was himself charged with a different forgery:—Held, that the deposition of B. was evidence against him on his trial for the forgery, notwithstanding it was taken on oath. *Rex* v. *Haworth*, 4 Car. & P. 254.

The examination of a person taken on oath as a witness before commissioners of bankruptcy, is admissible against him on a charge of forgery, he having been cautioned and allowed to elect what questions he would answer. *Reg.* v. *Wheater*, 2 Lewin, C. C. 157; 2 M. C. C. 45.

On a charge of threatening to accuse of an infamous crime, it appeared that one prisoner had made a charge against the prosecutor of endeavouring to excite another prisoner to the commission of an unnatural offence:—Held, that the depositions of the prisoners upon that occasion were admissible against them. *Reg.* v. *Braynell*, 4 Cox, C. C. 404.

When before the magistrate the prisoners were separately cross-examined as to their being together on the day when the offence was alleged to have been committed, how they had been occupied, &c., and their answers were so contradictory in themselves and so inconsistent with each other, that the magistrate dismissed the charge against the then defendant, and bound him over to prosecute the prisoner for endeavouring to extort money by threats:—Held, that the answers elicited on such cross-examination were not admissible. *Ib.*

Several persons, one of whom was the prisoner, were summoned before the committing magistrate touching the poisoning of A. No person was then specifically charged with the offence. The prisoner was sworn, and made a statement:—Held, that this statement was not receivable. *Rex* v. *Lewis*, 6 Car. & P. 161.

When before the committing magistrate one of the prisoners was examined as a witness against the other, and was afterwards charged with the offence:—Held, that what that prisoner said before the magistrate as a witness could not be given in evidence on the trial. *Rex* v. *Davis*, 6 Car. & P. 177.

Deposition of a witness taken before magistrates allowed to be read at the trial as evidence against him, although after his evidence was taken the magistrates committed him for trial, his evidence criminating himself. *Reg.* v. *Chidley*, 8 Cox, C. C. 365.

Admissibility for and against Prisoner.]—If the declaration of the prisoner, in which she asserts her innocence, is given in evidence on the part of the prosecution, and there is evidence of other statements confessing guilt, the judge will leave the whole of the conflicting statements to the jury for their consideration; but if there is in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the judge will direct an acquittal. *Rex* v. *Jones*, 2 Car. & P. 629.

If a prosecutor proves in evidence a declaration made by a prisoner, it becomes evidence for the prisoner as well as against him, but like all other evidence, the jury may give credit to one part of it and not to another. *Rex* v. *Higgins*, 3 Car. & P. 603.

If a prosecutor gives in evidence a declaration made by a prisoner exculpatory of himself, the jury is not bound to take this to be true merely because the prosecutor gives it in evidence; but they ought to consider how far it is consistent with the rest of the evidence, and whether they believe it to be really true. *Rex* v. *Steptoe*, 4 Car. & P. 397.

In an indictment for highway robbery, accompanied by violence, witnesses were called for the prisoner, to show that he had received certain marks of blood on his coat before the robbery:—Held, that it was competent to the prosecution to put in the prisoner's statement before the magistrate, wherein he gave a different account of the same matter. *Reg.* v. *White*, 2 Cox, C. C. 192.

An incidental observation made by a prisoner in the course of his examination before a magistrate, which is not taken down as part of the prisoner's statement, is not admissible in evidence against him at the trial if it relates to any matter which formed part of the judicial inquiry then being conducted before the magistrate. *Reg.* v. *Carpenter*, 2 Cox, C. C. 228.

A confession, admission, or statement, although extra judicial, if made by a person charged with a crime is sufficient without independent proof of the commission of the crime to sustain a conviction. Where, therefore, it was a crime to publish with a view to promote the objects of an illegal association, a notice of the calling together of any meeting of such association, or of the members of it as such members, or of the proceedings at such meeting, and in proceedings before a magistrate against the proprietor and publisher of a newspaper, a copy of his paper, containing a report of proceedings at a meeting, together with statements which tended to show that the meeting was a meeting of members of the illegal association as such members, was put in evidence, and the magistrate was satisfied that the report and the statement were published with a view to promote the objects of the association:—Held, that the newspaper was sufficient evidence against the proprietor and publisher in itself from which the magistrate might infer that such a meeting had been held, and upon which he would have been justified in convicting the defendant. *Reg.* v. *Sullivan*, 16 Cox, C. C. 347.

Incriminating Evidence given under Compulsion.]—If a witness claims the protection of the court, on the ground that his answer would tend

to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given afterwards in evidence against him. *Reg.* v. *Garbett*, 2 Car. & K. 474; 1 Den. C. C. 236; 2 Cox, C. C. 448.

Informer Refusing to Prosecute.]—Where an informer makes a confession expecting to be received as queen's evidence, the confession is inadmissible against him on his subsequently refusing to prosecute. *Reg.* v. *Gillis*, 14 W. R. 845; 11 Cox, C. C. 69. *Cp. cases*, ante, cols. 1813, 1814.

Admissions as to Marriage in Cases of Bigamy.]—*See* ante, col. 1689.

Admissibility of, against Fellow Prisoner.]—Where A. and B. were charged with the joint commission of a felony, and A., on his examination before a magistrate, stated, in the hearing of B., that he and B. jointly committed such felony, which B. did not deny:—Held, that these circumstances were not admissible as evidence against B. *Rex* v. *Appleby*, 3 Stark. 33.

Upon the trial of an indictment in which two persons were charged, the one, a bankrupt, with disposing of goods with intent to defraud his creditors, and the other, the bankrupt's brother-in-law and manager, with aiding and abetting him therein:—Held, that statements made by the bankrupt at the time he obtained the goods were admissible as evidence against both the prisoners, although such statements were made in the absence of the other prisoner:—Held, also, that the jury might infer from the relationship proved to have existed between the parties that the prisoner who had received the goods from the bankrupt, and who was therefore charged with aiding and abetting, was at the time he received such goods aware of the fact that the goods had not been paid for by the bankrupt. *Reg.* v. *Chapple*, 66 L. T. 124; 17 Cox, C. C. 455; 56 J. P. 360.

If two are taken before a magistrate on a charge of felony, what the first says in his statement before the magistrate cannot be given in evidence against the second, because when before the magistrate the second is only called upon to answer the statement in the depositions on oath, and not what any other prisoner may have said on his examination. *Reg.* v. *Swinnerton*, Car. & M. 593.

If a witness gives evidence of a conversation with a prisoner, in which that prisoner says something implicating another prisoner, the witness, in giving his evidence, must not omit the name of such other prisoner, and say "another person," but must give the conversation exactly as it occurred, and the judge will tell the jury that is not evidence against such other prisoner. *Rex* v. *Hearne*, 4 Car. & P. 215. S. P., *Rex* v. *Walkely*, 6 Car. & P. 175.

d. Proof of.

Made before Magistrates—Confession Written and Signed.]—On the trial of a prisoner who has made before a magistrate a voluntary confession of his guilt, previously to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk, the proper course is for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper. *Rex* v. *Bell*, 5 Car. & P. 162. S. P., *Reg.* v. *Sansome*, and other cases, ante, col. 1823.

A prisoner charged with felony made a statement before the committing magistrate, which was taken down and signed by the prisoner, but there was nothing on the face of the paper to show that at the time the prisoner made the statement he was under examination on a charge of felony.—Held, that this examination could not be used as such, but that the clerk to the magistrate might state what the prisoner said, using the paper to refresh his memory. *Rex* v. *Tarrant*, 6 Car. & P. 182

Where a prisoner sent for a magistrate to make a statement to him, and the magistrate took down the conversation which passed between him and the prisoner, and wrote it immediately under the usual heading of a prisoner's statement, and read this over to the prisoner before the prisoner signed his statement which followed it, the judge directed this memorandum of the conversation to be read before he decided on the admissibility of the statement, instead of the magistrate stating orally what passed between him and the prisoner. *Reg.* v. *Dingley*, 1 Car. & K. 637.

—— **When unsigned by Prisoner.**]—A magistrate may give evidence of what a prisoner said at examination before him, although much of what he said was in answer to questions put by the magistrate, no threat or promise being used, and although the prisoner had refused to sign the magistrate's notes of the examination, on the ground that they were an incorrect account of the transaction. *Rex* v. *Jones*, Car. C. L. 13.

And the magistrate may refresh his memory from the notes. *Ib.*

A voluntary confession of felony made by a prisoner on his examination before a magistrate, and reduced by the magistrate into writing, may be given in evidence on the trial, though the magistrate has neglected, and the prisoner has refused to sign it. *Rex* v. *Lambe*, 2 Leach, C. C. 552.

A prisoner charged with felony made a statement before the committing magistrate, which was taken down in writing, but not signed by the prisoner:—Held, that the magistrate's clerk might give evidence of what the prisoner said, using that which was taken down to refresh his memory. *Rex* v. *Pressly*, 6 Car. & P. 183. S. P., *Reg.* v. *Watson*, 3 Car. & K. 111, *and cases*, ante, col. 1823.

After the examination of a prisoner before a magistrate in a charge of felony had been taken down and read over to him, and he was told that he might sign it or not, but he declined to do so:—Held, that it could not be read in evidence against him. *Rex* v. *Telicote*, 2 Stark. 483.

—— **By whom Proved.**]—It is not necessary to call either the magistrate or his clerk to prove the due taking in writing of a prisoner's confession. *Rex* v. *Hopes*, 7 Car. & P. 136.

A prisoner's statement, on his examination before a magistrate, may be given in evidence (if neither the magistrate nor his clerk is in court), on proof by a witness who was at the examination of the handwriting of the magistrate to the depositions returned to the court, and also that it was taken down in writing, and read over to the prisoner. *Rex* v. *Reading*, 7 Car. & P. 649.

S. P., *Rex* v. *Rees*, 7 Car. & P. 568; *Rex* v. *Chappel*, 1 M. & Rob. 395.

The prosecutor proved that when the prisoner was before the magistrate, she was duly cautioned and that she made a statement, which was taken down and read over to her, and to which she made her mark, the magistrate also signing it. The prosecutor identified the paper by his own signature to his own deposition, being on the same sheet of paper:—Held, that the prisoner's statement might be given in evidence without examining either the magistrate or his clerk. *Reg.* v. *Hearn*, Car. & M. 109.

Where a magistrate has signed the examination of a prisoner under 7 Geo 4, c. 64, in order to allow it to be read on the trial, it is sufficient to prove the handwriting of the magistrate, and to show that the examination is that of the particular prisoner. *Rex* v. *Foster*, 7 Car. & P. 148.

Minutes taken by the solicitor for a prosecution, on the examination of a prisoner before a magistrate, and by his direction, may be read in evidence at the trial, though not signed either by the prisoner or the magistrate. *Rex* v. *Thomas*, 2 Leach, C. C. 637. S. P., *Rex* v. *Bradbury*, 2 Leach, C. C. 639, n.

—— **Purporting to have been Made on Oath.**]—If a prisoner's examination before a magistrate concludes "taken and sworn before me," and under that is the magistrate's signature, it is not receivable; and the judge will neither allow the magistrate's clerk to prove that, in fact, it was not sworn, nor will he receive parol evidence of what the prisoner said. *Rex* v. *Rivers*, 7 Car. & P. 177.

Where a magistrate returns with the depositions, that the prisoner was sworn and made a statement, the statement cannot be received in evidence against him, although a witness states that he was not in fact sworn. *Reg.* v. *Pikesley*, 9 Car. & P. 124.

A party, who was charged with a murder, made a statement before the coroner at the inquest, which was taken down. The paper purported that the statement was made on oath.—Held, that, on the trial of the party for murder, this statement was not receivable: and that parol evidence was not admissible to show that no oath in fact had been administered to the prisoner. *Reg.* v. *Wheeley*, 8 Car. & P. 230.

—— **Contained in Depositions.**]—A statement made by a prisoner before the committing magistrates, is receivable, if it appears to have been duly taken, and is transmitted with the deposition of the witnesses. *Reg.* v. *Harris*, 4 Cox, C. C. 147.

Statements made by a prisoner when cross-examining a witness before the magistrates and reduced to writing as part of the depositions must be proved by the depositions and not by the witness so cross-examined. *Reg.* v. *Taylor*, 13 Cox, C. C. 77.

—— **Explanation by Parol Evidence.**]—Where, on the examination before the magistrate of persons charged with felony, the magistrate's clerk, in taking down the prisoners' statements, had left a blank where either of the prisoners had mentioned the name of another of the prisoners, the judge at the trial would not allow these blanks to be supplied by parol evidence. *Reg.* v. *Morse*, 8 Car. & P. 605.

A prisoner before the committing magistrate made a statement, which by mistake was written in the information book, and headed "The information and complaint of R. B.":—Held, that it was not receivable, although the mistake could have been explained by the magistrate's clerk. *Rex* v. *Bentley*, 6 Car. & P. 148.

—— **Addition to by Parol Evidence.**]—Parol evidence may be given to add to the written examination of a prisoner taken by a magistrate. *Rex* v. *Harris*, 1 M. C. C. 338.

It is not necessary to be clearly shown that statements, made by a prisoner on his examination before a magistrate, were reduced to writing, in order to exclude parol evidence of such statements. *Reg.* v. *McGovern*, 3 Cox, C. C. 306.

If a prisoner, during the examination of witnesses against him before the magistrate, makes an observation, parol evidence may be given of such observation, if the magistrate's clerk proves that he only took down the evidence of the witnesses and the statement of the prisoner, after the evidence against him was concluded. *Rex* v. *Spilsbury*, 7 Car. & P. 187.

The magistrate returned at the end of the depositions against a prisoner in a case of felony:—"The prisoner being advised by his attorney, declines to say anything." It appeared at the trial, that the depositions had been taken and signed by the witnesses on the 14th of November; but that, on the 10th of November, minutes had been taken of the evidence, and the prisoner had made a statement, which was taken down in writing by the magistrate's clerk:—Held, that this statement might be proved on the part of the prosecution by the clerk who took it down; as, whatever a prisoner has said is evidence, though the magistrate may have neglected his duty in not returning it with the depositions. *Reg.* v. *Wilkinson*, 8 Car. & P. 662.

A magistrate returned with the depositions taken before him, that the prisoner said, "I decline to say anything":—Held, that a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which he stated the prisoner made in the presence of the magistrate, and while under examination. *Rex* v. *Walter*, 7 Car. & P. 267.

A prisoner being under examination before a magistrate on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which the witness called to prove it said he believed had been taken down in writing:—Held, that parol evidence of the statement was not admissible on the trial of such prisoner. *Rex* v. *Hollingshead*, 4 Car. & P. 242.

It is to be presumed that what is stated on oath before a magistrate is taken down in writing, and therefore parol evidence of such a statement is not receivable, unless it is first shown that it was not so taken down. *Phillips* v. *Winburn*, 4 Car. & P. 273. S. P., *Rex* v. *Fearshire*, 1 Leach, C. C. 202; *Rex* v. *Jacobs*, 1 Leach, C. C. 309.

—— **Parol Evidence when nothing Written.**]—A. gave a mortal blow to B., his master, who took out a warrant against A. for an assault. The charge of assault was heard under this warrant before Mr. D. and another magistrate, who summarily convicted A. of the assault. What was said by A. and B. before the magistrates was not taken down in writing. B. died:—Held, that on the trial of A. for the murder of B., Mr. D. might give evidence of what B. said in the presence of A. at the hearing before the

magistrates of the charge of assault, and what A. said in answer to it. *Rex* v. *Edmunds*, 6 Car. & P. 164.

—— **Depositions referred to may be Read.**]—If a prisoner, when examined before a magistrate, says that the deposition of F. T. is true, the deposition of F. T. may be read at the trial as a part of the prisoner's statement, although F. T. has been examined at the trial as a witness for the prosecution. *Rex* v. *John*, 7 Car. & P. 324.

Confession to Police Constable.]—If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the court. *Rex* v. *Swatkins*, 4 Car. & P. 548.

Statement of Prisoner at Coroner's Inquest.]—Written notes made by the coroner of a statement made in his presence during an inquest by the prisoner may be used by him at the trial, in order to refresh his memory as to what that statement was. *Reg.* v. *Wiggins*, 10 Cox, C. C. 562.

The reading of such notes does not entitle the prisoner to have the depositions of other witnesses taken in the course of the same inquest read. *Ib.*

Where the examination of a prisoner by a coroner was inadmissible on account of an irregularity in the mode of taking it, the coroner was allowed to give parol evidence of what the prisoner said on the occasion of his examination. *Rex* v. *Reed*, M. & M. 403.

2. DEPOSITIONS.

a. Form and Contents.

Person of Weak Intellect—Question and Answer.]—It would be always desirable, when a person of weak intellect is examined before a magistrate in a felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, and the answers given by the witness as to the witness's capacity to take an oath. *Reg.* v. *Painter*, 2 Car. & K. 319; 2 Cox, C. C. 244.

Everything that is Material should be Included.]—Everything that occurs before a magistrate, on the examination of a person on a charge of felony, should be taken down in the depositions, if it is material. *Reg.* v. *Weller*, 2 Car. & K. 223. See *Reg.* v. *Hendy*, 4 Cox, C. C. 243.

Where, during the examination of a witness before a magistrate in support of a charge of felony, the prisoner interposes an observation which is material, such observation should be taken down in the depositions; and if it is not, the judge at the trial will not allow any evidence of it to be given. *Ib.*

A magistrate is not bound by law to return all that is stated by the witnesses on a charge of felony, but only all that is material to the case; and though, since the act allowing a prisoner a copy of the depositions, they ought to contain what was stated, that he may know what he has to answer, there is a difference between a witness at the trial adding to his deposition, and his contradicting it. *Rex* v. *Coveney*, 7 Car. & P. 667. S. P., *Rex* v. *Thomas*, 7 Car. & P. 817.

The magistrate ought to return all that was said by the witnesses with respect to the charge, as the object of the legislature was to enable prisoners to know what they have to answer on their trial. *Rex* v. *Grady*, 7 Car. & P. 650.

A., who was a witness for the prosecution, against B. on a charge of arson, had first been examined by the magistrate before any specific charge was made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this, B. was charged with the offence, and A. examined as a witness, when A.'s statement made at that time was taken down, B. being then committed for trial:—Held, that all these statements of A. ought to be returned to the judge, and not merely the statement made when B. was committed. *Rex* v. *Simons*, 6 Car. & P. 540.

It is the duty of a magistrate to return to the judge, not only the depositions of witnesses, but also any confession taken down as made by the prisoner; and it is no excuse for not doing so, that the confession was wanted to be sent before the grand jury. *Rex* v. *Fallows*, 5 Car. & P. 508. S. P., *Rex* v. *Fuller*, 7 Car. & P. 269.

Not Framed to Meet Enacting Words in Statute.]—Magistrates should not allow depositions to be framed so as to meet the enacting words of a statute. *Mills* v. *Collett*, 6 Bing. 85; 3 M. & P. 242; 7 L. J. (o.s.) M. C. 97; 31 R. R. 355.

Regular on Face.]—The deposition of a witness absent from illness, to be admissible must be regular, and appear to have been regularly taken upon the face thereof, and cannot be proved by extraneous evidence to have been properly taken in fact. *Reg.* v. *Miller*, 4 Cox, C. C. 166.

Of Marksman.]—To the deposition of a marksman, the magistrates' clerk attached the prisoner's name, so that it appeared to have been signed by the prisoner's mark:—Held, that the deposition was properly received in evidence against him. *Reg.* v. *Mullen*, 9 Cox, C. C. 339.

Caption, Form of.]—The title or caption of the written deposition of a witness, taken before a committing magistrate, need state no more than that it is the deposition of the witness, and that the examination had reference to the particular charge upon which the prisoner is being tried. *Reg.* v. *Langridge*, T. & M. 146; 1 Den. C. C. 448; 3 New Sess. Cas. 645; 2 Car. & K. 975; 18 L. J., M. C. 198; 13 Jur. 545; 3 Cox. C. C. 465. See *Reg.* v. *Galvin*, 10 Cox, C. C. 198.

In order to make the deposition of a deceased witness admissible against a prisoner charged with felony, such deposition need not have a separate caption. If there is a caption at the head of the body of depositions taken in the case, that is sufficient. *Reg.* v. *Johnson*, 2 Car. & K. 355.

In felony the depositions had one caption which mentioned the names of all the witnesses, and at the end had one jurat which also contained the names of all the witnesses, and to which was the signature of the magistrate, and each witness signed his own deposition:—Held, to be correct. *Reg.* v. *Young*, 3 Car. & K. 106.

Deposition of Deceased Person attached to.]—An examination of a man, touching injuries

which he has received from the prisoner, if, subsequently on the death of the injured man from the injuries he has received, appended to a caption, charging the prisoner with his murder, is inadmissible on that charge, although it may be admissible as a dying declaration. *Reg.* v. *Clarke*, 2 F. & F. 2.

A woman having had a rape committed upon her by two, the next day, in distress of mind, cut her throat, and being likely to die, a magistrate was sent for, and, in the presence of the prisoners, her deposition was properly taken. She was told she was likely to die, and she died a few days afterwards. Subsequently other witnesses gave evidence against the prisoners before a different magistrate, and to these latter depositions the deposition of the deceased was attached, without any separate caption:—Held, that the deposition of the deceased, having no caption, showing on what charge it was taken, was inadmissible; nor was it admissible as a dying declaration, as it did not relate to the offence which caused the death. *Reg.* v. *Newton*, 1 F. & F. 641.

Signing by Magistrates or Coroners.]—It is not necessary that each deposition should be signed by the justice taking it; and therefore where a number of depositions taken at the same hearing on several sheets of paper were fastened together and signed by the justice taking them, once only at the end of all the depositions in the form given in schedule M. to the 11 & 12 Vict. c. 42, one of these depositions will be admissible after the death of the witness making it, although no part of it is on the sheet signed by the justice. *Reg.* v. *Parker*, 39 L. J., M. C. 60; L. R. 1 C. C. 225; 21 L. T. 724; 18 W. R. 353; 11 Cox, C. C. 478. S. P., *Reg.* v. *Carrol*, 11 Cox, C. C. 322.

It was proved by the magistrate's clerk, that the deposition of a prosecutor was taken before the magistrate, in the presence of the prisoner, who had a full opportunity of cross-examining. The deposition was taken on the same sheet of paper with those of the other witnesses, and at the end of that last deposition were the words, "Sworn before me," and the magistrate's signature. The prosecutor had died before the trial:—Held, that, on the above facts being proved, the deposition was receivable on the trial, although the magistrate had not put his signature to this particular deposition. *Reg* v. *Osborne*, 8 Car. & P. 113.

It is the duty of the magistrate to complete and sign the depositions as soon as they are taken. *Fletcher, Ex parte*, 1 New Sess. Cas. 40; 1 D. & L. 996; 13 L. J., M. C. 67; 8 Jur. 269. *S. C.*, nom. *Reg.* v. *London Corporation*, D. & M. 486; 5 Q. B. 555.

A magistrate must sign a deposition of a witness at the foot of such deposition. *Reg.* v. *Richards*, 4 F. & F. 860.

Depositions taken before the coroner on an inquisition of murder, cannot be read in evidence on the trial of the indictment, though the deponents are dead, if they are not signed by the coroner, or, if signed, his handwriting cannot be proved. *Rex* v. *England*, 2 Leach, C. C. 770.

A deposition had been made by a deceased person in the presence of a justice and the prisoner, and in expectation of death. It appeared that the several sheets of paper upon which the clerk wrote down the deposition had not been fastened together at the time the justice signed the last sheet, which was the only one he signed:—Held, that though it might not be either a dying declaration or a deposition, the clerk might give the statement in evidence. *Reg.* v. *Mann*, 49 J. P. 743.

Statement of Prisoner, when made.]—If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, and he should then be asked if he has anything to say in answer to the charge. *Rex* v. *Fagg*, 4 Car. & P. 566.

b. Duties of Magistrates.

What Witnesses to be Bound over.]—In a case of felony the committing magistrate is not bound to bind over all the witnesses who have been examined before him in support of the charge, but only those whose evidence is material to the charge; but it is very desirable that all that has been given in evidence before the magistrate should be transmitted to the judge. *Reg.* v. *Smith*, 2 Car. & K. 207.

Witnesses for prisoner.]—Where a prisoner charged with felony has witnesses in attendance at the time of the examination before the magistrate, Lord Denman, C.J., recommended that they should be then examined, if the prisoner wishes it, and if their evidence is believed, and answers the charge, no further proceedings need be taken. *Anon.*, 2 Car. & K. 845.

But if these witnesses contradict those for the prosecution in material points, the case should be sent to a jury, and the depositions of the prisoner's witnesses should be taken, and signed by them, and transmitted to the judge, together with the depositions in support of the charge. *Ib.*

Completing Depositions.]—It is the duty of the magistrate to complete the depositions as soon as they are taken. *Fletcher, Ex parte*, 1 New Sess. Cas. 40; 1 D. & L. 996; 13 L. J., M. C. 67; 8 Jur. 269. *S. C.*, nom. *Reg.* v. *London Corporation*, D. & M. 486; 5 Q. B. 555.

c. When Admissible in Evidence.

On another Charge against prisoner.]—A deposition properly taken under 11 & 12 Vict. c. 42, before a magistrate, against a prisoner on a charge of assault, is not receivable in evidence against him on a trial for feloniously wounding, although on both charges the transaction is the same, and the witness is too ill to attend the trial for the felony. *Reg.* v. *Ledbetter*, 3 Car. & K. 108.

Such a deposition is only receivable in evidence where the indictment is for the same identical offence as that charged before the justice, and upon which such deposition was taken. *Ib.*

A. was charged before a magistrate with wounding B. with intent to do him grievous bodily harm, and B.'s deposition was taken. B. afterwards died of the wound, and A. was indicted for his murder:—Held, that on the trial for murder the deposition might be read in evidence; as although it was not on the same technical charge, it was taken in the same case, and A. had full opportunity of cross-examination. *Reg.* v. *Beeston*, Dears. C. C. 405; 3 C. L. R. 82; 24 L. J., M. C. 5; 18 Jur. 1058; 3 W. R. 56; 6 Cox,

C. C. 425. See *Reg.* v. *Shippey*, 12 Cox, C. C. 161.

In order to prove malice or motive against the accused, the deposition of the deceased against him, taken before the magistrates on another charge, and for which he was afterwards convicted, was tendered in evidence, and it was admitted. *Reg.* v. *Buckley*, 13 Cox, C. C. 293.

When a person is charged before magistrates with obtaining money by false pretences and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction, and being in fact identical:—Held, that the deposition of a witness taken at such hearing is admissible on the trial for uttering the forged note. *Reg.* v. *Williams*, 12 Cox, C. C. 101.

The rule that the written deposition taken under 7 Geo. 4, c. 64, s. 3, was the evidence of what had been stated by a witness before a magistrate on a charge of misdemeanour, was not limited to the individual case, with the view to which the evidence was taken down, but extended to all subsequent proceedings, civil as well as criminal. *Leach* v. *Simpson*, 5 M. & W. 309; 7 D. P. C. 513; 3 Jur. 654.

Before Grand Jury.]—Depositions of a witness so ill as to be unable to travel, are admissible in evidence before the grand jury. *Reg.* v. *Clements*, 2 Den. C. C. 251; T. & M. 579; 20 L. J., M. C. 193; 15 Jur. 407; 5 Cox, C. C. 191.

—— **Proof of Illness of Witness.**] — The deposition of a witness who has travelled to an assize town, but is too ill to attend court for examination, may be read before the grand jury, after the illness of the witness and the due taking of the deposition have been proved to the satisfaction of the judge. *Reg.* v. *Wilson*, 12 Cox, C. C. 622. S. P., *Reg.* v. *Beever*, 10 Cox, C. C. 274.

It is not essential that proof of the deposition having been duly taken should be given by the clerk to the committing magistrate. *Ib.*

When a witness is unable to attend a trial through illness, his deposition may be presented to the grand jury without any preliminary proof that the witness is ill and that such deposition was regularly taken. In such case the grand jury should be told that the court permits them to look at the deposition, and to act upon it if they think proper. *Reg.* v. *Gerrans*, 34 L. T. 145; 13 Cox, C. C. 158.

Upon a bill of indictment being presented, the grand jury made an application for the deposition of an absent witness:—Held, that the grand jury were entitled to peruse the deposition without formal proof that the witness was too ill to travel. *Reg.* v. *Bullard*, 12 Cox, C. C. 353.

Depositions of an absent witness are not admissible before the grand jury without medical evidence of his illness. *Reg.* v. *Philips*, 1 F. & F. 105.

—— **Refusal of Witness to give Evidence.**]—A material witness refused to give any evidence whatever to the grand jury:—Held, that the grand jury could not read the deposition of such witness as evidence, to enable them to find a bill. *Reg.* v. *Rendle*, 11 Cox, C. C. 209.

Prisoner understanding Proceedings Imperfectly.]—A deposition taken under 11 & 12 Vict. c. 42. s. 17, was admitted in evidence, though it appeared that the proceedings had been conducted in the English language, and that the prisoner and the deceased understood English imperfectly. *Reg.* v. *Jones*, 49 J. P. 728.

Taken before different Magistrates from Magistrate committing for Trial.]—A deposition taken by virtue of 11 & 12 Vict. c. 42, s. 17, may be read in evidence against a prisoner, although taken before two magistrates who acted only upon that occasion, and the prisoner was afterwards committed for trial by another magistrate. *Reg.* v. *De Vidil*, 9 Cox, C. C. 4.

Must be Taken in Presence of Magistrate and Prisoner.]—On a charge of felony, the witnesses who make the depositions on which the prisoner is committed should be examined in the prisoner's presence, and he should hear all the questions put and answered; and if the magistrate's clerk, before the arrival of the magistrates and of the prisoner, examines the witnesses and takes down what they state, and when the magistrates and prisoner arrive the depositions so taken are read over to the witnesses in the presence of the magistrates and the prisoner, and the latter is asked whether he has any question to put to any of them, this is wrong. *Reg.* v. *Johnson*, 2 Car. & K. 394.

In order to render depositions taken before a magistrate admissible in evidence upon the trial of a prisoner, they must be taken in his presence and in that of the magistrate, and the prisoner must have an opportunity of cross-examining the witnesses in the presence of the magistrate. *Reg.* v. *Watts*, L. & C. 339; 33 L. J., M. C. 63; 9 L. T. 453; 12 W. R. 112; 9 Cox, C. C. 395.

A deposition of a deceased witness partly taken from the examination of the witness in the presence of the party accused on a previous day, and not then read over, but read over on a subsequent examination of the witness in the presence of the party accused, the witness then being further examined, and cross-examined on behalf of the party accused, and the notes of the magistrates' clerk of the whole being subsequently fairly copied in an adjoining room, and then read over to the witness in the presence of the party accused, and signed by the witness and the magistrate, is admissible. *Reg.* v. *Bates*, 2 F. & F. 317.

The depositions of a deceased witness, though not taken wholly in the prisoner's presence, are admissible, if the party was resworn, and the depositions read and signed in his presence. *Rex* v. *Smith*, 2 Stark, 208; Holt, 614; R. & R. 339. See *Reg.* v. *Walsh*, 5 Cox, C. C. 115.

But a deposition not taken in his presence will be rejected. *Reg.* v. *Rigg*, 4 F. & F. 1085.

Taken after Notice to Accused.]—Q. was charged on an indictment with the wilful murder of his wife. The injuries which resulted in her death were inflicted by the prisoner on the 18th December, 1867; she died on the 23rd December; but the prisoner was not taken into custody till the 3rd January, 1868. On the 22nd December, 1867 (the day before she died), she being then in the hospital, and having been told by the medical attendant that "he thought there were little hopes of her living, and that he thought she was going to die," and she herself saying, "I know I shall never get better; what will become of my poor children?" made a statement which was taken

down in writing in the presence of the magistrate. At the trial it was proposed on behalf of the prosecution to give this statement in evidence under 30 & 31 Vict. c. 35, s. 6 :—Held, that the statement could not be read in evidence without proof of notice having been given to the accused before it was taken : and that the statute could have no operation in the case of a deposition taken while the accused person was keeping out of the way, as the notice was required to be given to the accused before the taking of the statement, and not simply before the reading of it. *Reg.* v. *Quigley*, 18 L. T. 211.

—— **Notice of Intention to take.**]—Section 6 of the 30 & 31 Vict. c. 35, provides in cases of indictable offences for the taking of the statements on oath or affirmation of persons dangerously ill and not likely to recover, and for the reading of the same in evidence under certain circumstances, "provided it be proved to the satisfaction of the court (inter alia) that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence :—Held, that the notice intended by the section is a notice in writing, and that such a statement was inadmissible against a prisoner where he had only oral notice of the intention to take the same, although he was present when the statement was made. *Reg.* v. *Shurmer*, 55 L. J., M. C. 153 ; 17 Q. B. D. 323 ; 55 L. T. 126 ; 34 W. R. 656 ; 50 J. P. 743—C. C. R.

Prisoner must have had full Opportunity of Cross-Examining.]—When it is proved that the prisoner was present when the depositions of the deceased were taken, although the law will presume that, as he was present, he had a full opportunity of examining the deceased within 11 & 12 Vict. c. 42, s. 17, evidence may nevertheless be offered to prove that he had not a full opportunity within s. 17, so as to render the depositions inadmissible. *Reg.* v. *Peacock*, 12 Cox, C. C. 21 ; S. P., *Reg.* v. *Watts*, supra.

Before a deposition of a person who is dead, or so ill as not to be able to travel, can be read, it must be proved affirmatively on the part of the prosecution that the deposition was taken in the presence of the accused person, and that he or his counsel or attorney had a full opportunity of cross-examining the witness. *Reg.* v. *Day*, 6 Cox, C. C. 55.

To give the accused a full opportunity within the meaning of the statute, the examination must be taken, question by question, in his presence, and in the presence of the magistrate, and it is not sufficient to read over the statement of the witness, previously taken and committed to writing, in the absence of the magistrate. *Ib.*

The accused must also be asked whether he has any question to put with reference to the statement of the individual witness. *Ib.*

Nothing should be returned as a deposition unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the person making the deposition. *Reg.* v. *Arnold*, 8 Car. & P. 621.

The depositions taken before the magistrate against a prisoner cannot be read against him, where the witness has died since the examination, unless the depositions in cross-examination have been correctly taken and returned to the court. Depositions taken in cross-examination, at a subsequent time to those in chief, and not signed by the committing magistrates, are so irregular as to prevent the whole depositions from being read against the prisoner ; and this, although both are proved by one of the committing magistrates to have been accurately taken. *Reg.* v. *France*, 2 M. & Rob. 207.

The examination of a witness was taken in the prisoner's absence and signed by the magistrate. The next day the deposition was read in the presence of the prisoner, and an opportunity was given him for cross-examination of the witness : —Held, admissible on the death of the witness. *Reg.* v. *Hake*, 1 Cox, C. C. 226.

—— **Stoppage of Cross-Examination—Admissibility as Statement made in Prisoner's presence.**]—During the taking of the deposition of a person dangerously ill under 30 & 31 Vict. c. 35, s. 6, before the prisoner's solicitor had concluded his cross-examination, the witness became so ill that the presiding magistrate stopped the cross-examination :—Held, that it was not sufficient that the prisoner should have had such opportunity of cross-examination as the circumstances permitted, and that, as the prisoner had not had full opportunity of cross-examination, the deposition was, in the absence of any proof that the prisoner was asking vaxatious questions in order to defeat the statute, inadmissible in evidence ;—Held, also, that it was inadmissible in evidence as a statement made in the presence of the prisoner, the ground of the admission of such statements in evidence being that where a charge is made against a person in his presence, and he does not deny it, the absence of denial is some evidence of the truth of the charge, whereas where evidence is being formally taken, and the prisoner is represented by a solicitor, it is not to be expected that he will at once deny the statements made, and therefore no presumption arises from the absence of denial. *Reg.* v. *Mann* (49 J. P. 743) dissented from. *Reg.* v. *Mitchell*, 17 Cox, C. C. 503.

Deponent must be Sworn—Children.]—On a charge preferred under s. 4 of the Criminal Law Amendment Act, 1885, for carnally knowing a girl under the age of thirteen years, the magistrates before whom the preliminary investigation took place, being of opinion that the prosecutrix did not understand the nature of an oath, received as evidence her unsworn statement (as provided for by s. 4 of the act), and signed and returned her statement so made, with the depositions, to the assizes. At the trial it was proposed, after proving that the prosecutrix was so ill as to be unable to travel or to attend to give evidence at the assizes, to tender in evidence her statement so made before the magistrates, as being a deposition within the meaning of s. 17 of the 11 & 12 Vict. c. 42 :—Held, that s. 17 of the 11 & 12 Vict. c. 42, only applies to depositions taken upon oath or affirmation, and that, although a false statement made under the circumstances of this case might subject the prosecutrix to a prosecution for perjury (as provided for by s. 4 of the Criminal Law Amendment Act, 1885), it was not a deposition "taken as aforesaid," i.e. on oath or affirmation within the meaning of s. 17 of the 11 & 12 Vict. c. 42—so as to render it admissible as evidence in the absence of the prosecutrix. *Reg.* v. *Pruntey*, 16 Cox, C. C. 344.

In an indictment for a rape, the deposition of a

girl taken before the committing magistrate, and signed by him, may, after her death, be read in evidence at the trial of the prisoner, although it was not signed by her, and she was under twelve years of age, provided she was sworn, and appeared competent to take an oath: and all the facts necessary to complete the crime may be collected from her testimony so given in evidence. *Rex* v. *Flemming*, 2 Leach, C. C. 854; 1 East, P. C. 440.

Witness absent Abroad at Time of Trial.]—The fact that a witness, whose deposition has been taken before the committing magistrate, is at the time of the trial residing abroad, does not render such deposition admissible in evidence against the prisoner at the trial, under the 11 & 12 Vict. c. 42, s. 17. *Reg.* v. *Austin*, Dears. C. C. 612; 25 L. J., M. C. 48; 2 Jur. (N.S.) 95; 4 W. R. 237; 7 Cox, C. C. 55.

Taken Abroad by British Consul—Absence of Witness.]—A witness whose evidence had been taken abroad by the British consul, under 17 & 18 Vict. c. 104, s. 270, was the captain of a British sailing vessel, which was stated, after examination of the official records by an officer of the board of trade, never to have been in this country. When some of the witnesses left the captain, he was in charge of the vessel at Bordeaux, but it was not known where she was then bound for, or whether she had since sailed: —Held, that it was sufficiently proved that the witness was not in the United Kingdom, and his deposition was accordingly admitted. *Reg.* v. *Anderson*, 11 Cox, C. C. 154. S. P., *Reg.* v. *Conning*, 11 Cox, C. C. 134.

Witnesses whose evidence have been duly taken at New York by the British consul-general, under 17 & 18 Vict. c. 104, s. 270 (The Merchant Shipping Act, 1854), were seamen of a British sailing vessel, which was proved by affidavits to be still at sea, and none of the witnesses were likely to be in the United Kingdom for many months:—Held, that the affidavits sufficiently proved that the witnesses were out of the United Kingdom, their depositions were read, and the prisoner convicted. *Reg.* v. *Stewart*, 13 Cox, C. C. 296.

Semble, that depositions taken by a counsel abroad under 7 & 8 Vict. c. 112, ss. 58, 59, and returned to this country, and certified under the consular seal to have been duly taken, are admissible under the Mercantile Marine Act, 1850 (13 & 14 Vict. c. 93, s. 115), without further proof, although it appears from extrinsic evidence that the witnesses gave their evidence in a foreign language, which was translated into English to the prisoner, and inserted in the depositions by the consul. *Reg.* v. *Russell*, 6 Cox, C. C. 60.

In Case of Illness of Witness.]—Depositions of a witness so ill as to be unable to travel are admissible in evidence before the grand jury as well as before the petty jury. *Reg.* v. *Clements*, 2 Den. C. C. 251; T. & M. 579; 20 L. J., M. C. 193; 15 Jur. 407; 5 Cox, C. C. 191. S. P., *Reg.* v. *Scaife*, 2 Den. C. C. 281; 17 Q. B. 238; 20 L. J., M. C. 229; 15 Jur. 607; 5 Cox, C. C. 243.

On the trial of a felony, where the prosecutor is bedridden, and not likely to be able to attend the assizes, his deposition, taken by the committing magistrate in the presence of the prisoner, may be given in evidence. *Reg.* v. *Wilshaw*, Car. & M. 145.

—— **Unable to Travel.**]—To render the deposition of an absent person admissible, it is not necessary that he should be absolutely unable to travel, it is sufficient if his attendance would place his life in jeopardy. *Reg.* v. *Day*, 6 Cox, C. C. 55.

When a person is charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction, and being in fact identical, and having had the opportunity of cross-examination before the magistrate:—Held, that the deposition of a witness taken at such hearing, and who was afterwards unfit to travel to give evidence, was admissible and might be read at the trial for uttering the forged note. *Reg.* v. *Williams*, 12 Cox, C. C. 101.

A witness, who had been examined before the committing magistrate, came to the assize town where the trial of the accused was to take place, and into the building where the court was sitting, but before the trial came on returned to his home by the advice of a medical man, who deposed that in his judgment it would have been highly dangerous for the witness to remain. While the trial was going on, the witness was on his way home:—Held, that the witness was unable to travel, within 11 & 12 Vict. c. 42, s. 17, and consequently that his deposition before the committing magistrate, might be read in evidence. *Reg.* v. *Wicker*, 18 Jur. 252.

A witness who had been examined before the magistrate, and whose deposition was returned, was, at the trial, said to be too ill to give evidence, though not too ill to be able to travel. The deposition was read, the court being of opinion that the words of the statute, "so ill as not to be able to travel," were applicable to a case where the witness is so ill as not to be able to travel for the purpose of giving evidence. *Reg* v. *Wilson*, 8 Cox, C. C. 453.

If a witness has had an attack of paralysis, and is unable to hear or speak, or give evidence, and his physician does not permit him to go about, his depositions may be read, though it would not endanger his life to travel, or to be brought into court. *Reg.* v. *Cockburn*, Dears. & B. 203; 26 L. J., M. C. 136; 3 Jur. (N.S.) 447, 570; 7 Cox, C. C. 265.

—— **Taken before Coroners.**]—A deposition taken before a coroner on an inquest is admissible where the witness is so ill as to be unable to attend at the trial, in the same manner as a deposition taken before a magistrate. *Reg.* v. *Hazell*, 8 Cox, C. C. 443. S. P., *Reg* v. *Mooney*, 9 Cox, C. C. 411.

—— **Proof of, by whom—What Sufficient.**]—Where a witness is ill, and is attended by a surgeon, the judge at the trial will not receive the witness's depositions in evidence unless the surgeon attends at the trial to prove that the witness is unable to travel; but where a witness is permanently disabled, and is not attended by a surgeon, other evidence that the witness is unable to travel may be sufficient; but where the witness is attended by a surgeon, and a person proves at the trial that he on the 18th March saw the witness in bed, and that he appeared ill, the commission-day being the 21st, and the trial the 23rd, this is not sufficient proof of the illness of the witness to render his

deposition admissible. *Reg.* v. *Riley*, 3 Car. & K. 116.

Upon the trial of a prisoner it was proposed to put in evidence the deposition of a witness absent through illness. The evidence that he was unable to travel was that of a medical man, who last saw the witness on the Monday previous to the trial, which took place on Wednesday :—Held, that this was not sufficient, and the deposition was rejected. *Reg.* v. *Bull*, 12 Cox, C. C. 31.

In the absence of medical evidence, a deposition will not be allowed to be read. *Reg.* v. *Welton*, 9 Cox, C. C. 296.

Delivery of a dead child is primâ facie evidence of illness, and the deposition of the party is admissible. *Reg.* v. *Wilton*, 1 F. & F. 309.

A superintendent of police, having seen a policeman, a material witness, in bed two days before the trial, and stating that he appeared ill and so weak that he could not get out of bed :—Held, that this, without medical evidence as to the nature of the illness, was not sufficient to admit the policeman's depositions. *Reg.* v. *Williams*, 4 F. & F. 515.

A witness, who had been examined before the magistrate, came up five miles from the country and gave her evidence before the grand jury. She went back at night and returned in the morning for two days, during which she was waiting for the trial to come on. At the trial, on the third day, it was proved that she had been attacked that morning with a bowel complaint, and that when the policeman left her residence early on that day she was unable to travel :—Held, that her deposition was not admissible. *Reg.* v. *Harris*, 4 Cox, C. C. 442.

—— **Sufficiency of Proof is a Matter of Discretion.**]—It is a question for the judge to determine whether the proof of a witness being so ill as not to be able to travel, within the 11 & 12 Vict. c. 42, s. 17, is sufficient for the purpose of admitting his deposition before the committing magistrate. *Reg.* v. *Stephenson*, L. & C. 165 ; 31 L. J., M. C. 147 ; 8 Jur. (N.S.) 522 ; 6 L. T. 334 ; 10 W. R. 546 ; 9 Cox, C. C. 156. S. P., *Reg.* v. *Croucher*, 3 F. & F. 285.

Therefore, when a deposition was admitted upon evidence that the prosecutrix was daily expecting her confinement and otherwise poorly, and therefore too ill to travel, the court declined to interfere with the exercise of the discretion of the judge. *Ib.*

Where a witness for the prosecution is so ill as not to be able to travel, the judge may, at his discretion, permit the deposition to be read. *Reg.* v. *Tait*, 2 F. & F. 553.

—— **Pregnancy.**]—Pregnancy alone may be a ground for the admission of a deposition. *Reg.* v. *Goodfellow*, 14 Cox, C. C. 326.

Pregnancy may create an illness within 11 & 12 Vict. c. 42, s. 17, so as to give the judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness duly taken, who owing to pregnancy is proved to be unable to travel. *Reg.* v. *Wellings*, 47 L. J., M. C. 100 ; 3 Q. B. D. 426 ; 38 L. T. 652 ; 26 W. R. 592 ; 14 Cox, C. C. 105. Contra, *Reg.* v. *Omant*, 6 Cox, C. C. 466.

—— **Proof of Pregnancy.**]—It was proposed to read, on the trial at the assizes, the deposition of a witness called before the magistrates on a charge of murder, absent by reason of pregnancy. Evidence given by a medical man on February 5th, that he had last seen the witness on the 29th day of January, and that she then was daily expecting her confinement, but which had not yet taken place, was held sufficient to entitle the deposition to be read at the trial on the 5th of February. *Reg.* v. *Heesom*, 14 Cox, C. C. 40.

—— **Through Old Age.**]—At the trial of an indictment it was proposed to read the deposition of a witness on the ground that the witness was so ill as not to be able to travel. The evidence upon that point was as follows :—The medical attendant of the witness was called and said : "I know M. L. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court." The witness whose deposition it was proposed to read lived not far from the court :—Held, that the deposition was not admissible. *Reg.* v. *Farrell*, 43 L. J., M. C. 94 ; L. R. 2 C. C. 116 ; 30 L. T. 404 ; 22 W. R. 578 ; 12 Cox, C. C. 605.

When a medical man testifies that the attendance of a witness aged eighty-seven, who had given evidence before the coroner, will be dangerous to her life, and that he will not answer for the consequences if she is required to appear in court, but that she is suffering from no illness beyond great nervousness which may bring on a fit of apoplexy if she is publicly to give her evidence, her deposition taken before the coroner will not be admissible. *Reg.* v. *Thompson*, 13 Cox, C. C. 181.

—— **Insanity of Witness.**]—If a witness is actually insane at the time of the trial of an indictment for a misdemeanor, his deposition taken before the committing magistrate is receivable the same as if the witness was dead, although the insanity of the witness may be only temporary ; but if it appears that the witness is not insane, but that the witness has been suffering from delirium and depression of spirits in consequence of a blow on the head, and that his intellect is affected by the injuries he has received, and it is the opinion of his physicians that he will recover, then the deposition is not receivable. *Reg.* v. *Marshall*, Car. & M. 147.

—— **Witness kept away by Procurement of Prisoner.**]—If it is proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoners, the judge will allow her deposition before the magistrate to be given in evidence. *Reg.* v. *Guttridge*, 9 Car. & P. 471.

If the deposition of a witness on a charge of an indictable offence has been regularly taken before a magistrate, and at the time of the trial it is proved that the witness is kept away by the prisoner's procurement, the deposition may be read as evidence against the prisoner. *Reg.* v. *Scaife*, 17 Q. B. 238 ; 2 Den. C. C. 281 ; 20 L. J., M. C. 229 ; 15 Jur. 607 ; 5 Cox, C. C. 243.

But such deposition is not admissible on the ground merely that the prosecutor, after using

every possible endeavour, cannot find the witness. *Ib.*

If procurement of the absence is shown, and there are several prisoners, the deposition is evidence against those only who are proved to have procured the absence. *Ib.*

d. Copies.

Right to Copies of Depositions.]—Under 6 & 7 Will. 4, c. 114, s. 3, persons committed to prison for re-examination on charges of felony, were not entitled to demand copies of the depositions. *Fletcher, Ex parte*, 1 New Sess. Cas. 40; 1 D. & L. 996; 13 L. J., M. C. 67: 8 Jur. 269; *S. C.*, nom. *Reg.* v. *London Corporation*, D. & M. 486; 5 Q. B. 555.

The right to copies does not attach until the prisoner is held to bail, or committed to prison for trial. *Ib.*

A prisoner had been committed on a charge of high treason, and afterwards the grand jury returned a true bill against him with others for feloniously demolishing a house under 7 & 8 Geo. 4, c. 30, s. 8. He pleaded to the indictment and wished to be tried after the other prisoners who were indicted with him for feloniously demolishing the house on the ground that he had had no copy of any depositions as to that charge. This was not allowed, as the prosecution might have been commenced without going before any magistrate, and then there would have been no depositions at all. *Reg.* v. *Simpson*, Car. & M. 669.

A party applying to the queen's bench for a rule, calling upon the justices to furnish copies of the depositions taken against him, must show a right existing at the time of his application to the court, as well as at the time of the refusal by the justices to grant the copies. *Reg.* v. *Herefordshire JJ.*, 1 L. M. & P. 323. *S. C.*, nom. *Humphreys, Ex parte*, 4 New Sess. Cas. 179; 19 L. J., M. C. 189; 15 Jur. 608.

The 11 & 12 Vict. c. 42, s. 27, applies only to the case of a person committed to prison or admitted to bail for the purpose of being tried. *Ib.*

—— **Depositions taken before Coroner.**]—Depositions taken before a coroner were within 6 & 7 Will. 4. c. 114, s. 3, which required copies of depositions to be furnished on application to prisoners at the rate of charge therein provided; and a coroner who demands more is guilty of extortion in his office. *Reg.* v. *White*, 5 Cox, C. C. 562.

A coroner's jury, on the investigation of a case of homicide, returned a verdict of wilful murder against some person or persons unknown. The coroner returned the deposition he had taken to the central criminal court:—Held, on application by the counsel for the prisoner indicted for the murder of the same person, for a copy of such depositions, that, although the coroner could not in such a case have been compelled to return them, under 7 Geo. 4, c. 64, s. 4, yet that having done so, the judges had power, by their general authority as a court of justice, to order a copy to be given if they thought it material to the interests of justice. *Reg.* v. *Greenacre*, 8 Car. & P. 32.

—— **Copy of Prisoner's Statement.**]—A prisoner was not entitled, under 6 & 7 Will. 4, c. 114, s. 3, to a copy of his own statement returned by the magistrate, as made before him, but only to a copy of the depositions of the witnesses against him. *Reg.* v. *Aylett*, 8 Car. & P. 669.

e. Examination on—Putting in, &c.

Counsel allowed to see Depositions in another Case.]—A. was committed for having received stolen iron. B. was admitted as a witness for the crown against A. The counsel of A. applied to the judge for a sight of the depositions which had been returned against B., which was granted. *Reg.* v. *Walford*, 8 Car. & P. 767.

Effect of Putting in Prisoner's Statement.]—The reading, on the part of the prosecution, of the prisoner's statement, returned by the magistrate at the end of the depositions, does not give the prisoner the right to consider the depositions as in evidence on the part of the prosecution, though it appears that they were all taken before the statement was made; but if the prisoner wishes to have the whole or any particular part of the depositions read, he must read it as his evidence. *Rex* v. *Pearson*, 7 Car. & P. 671.

Refreshing Memory of Witness.]—Where a witness for the prosecution gives a different answer on examination in chief to that which was expected, his deposition may be put in his hands for the purpose of refreshing his memory, and the question then put to him. If the witness persists in giving the same answer after his memory has been so refreshed, the question may be repeated to him from the deposition in a leading form. *Reg.* v. *Williams*, 6 Cox, C. C. 343.

The deposition made by a witness was allowed to be put into his hands to refresh his memory, and he was then asked what he said about a fact which he had answered before in the negative, and answered the question affirmatively. *Reg.* v. *Quin*, 3 F. & F. 818.

Where an accomplice who could not read had made a statement before the committing magistrate, and at the trial gave evidence falling very short of what he said before the magistrate, the judge allowed his deposition to be shown to him, but would not allow the deposition to be read to him by the officer of the court, that the counsel for the prosecution might examine upon it. *Reg.* v. *Beardmore*, 8 Car. & P. 260.

Where, on cross-examination, a witness is asked, with permission of the judge, to look at his deposition before the committing magistrate, and say whether he still adheres to his present statement, and it appears the witness is unable to read, the depositions cannot be read to the witness for the same purpose without being put in as evidence. *Reg.* v. *Matthews*, 4 Cox, C. C. 93.

Cross-examination upon.] — The practice of putting the depositions into the hands of a witness on cross-examination, telling him to read over the evidence which he has given before the magistrates, and then asking him whether he adheres to his present statement, without putting the depositions in evidence, or giving the jury an opportunity of knowing their contents, is inexpedient, and contrary to principle. *Reg.* v. *Ford*, 2 Den. C. C. 245; 3 Car. & K. 113; T. & M. 573; 20 L. J., M. C. 171; 15 Jur. 406; 5 Cox C. C. 184. S. P., *Reg.* v. *Stokes*, 4 Cox, C. C. 453.

The proper course is to read the deposition to him at the time, and to cross-examine upon it,

or to put it in afterwards as evidence for the prisoner. *Ib.* S. P., *Reg.* v. *Palmer*, 5 Cox, C. C. 236; *Reg.* v. *Brewer*, 9 Cox, C. C. 409.

A prosecution cannot use or refer to the depositions without putting them in. *Reg.* v. *Muller*, 10 Cox, C. C. 43.

If upon a trial a witness makes a statement which does not appear in his deposition, he may be asked, on cross-examination, without his deposition being put in, whether he ever made such a statement before. *Reg.* v. *Moir*, 4 Cox, C. C. 279. See *Reg.* v. *Price*, 7 Cox, C. C. 405.

In a case of felony, in order to prove that a witness did not state a particular fact before the magistrate, his deposition must be put in, and a witness cannot be questioned as to what he either did or did not state before the magistrate, without first allowing him to read, or to have read to him, his deposition taken before the magistrate. *Reg.* v. *Taylor*, 8 Car. & P. 726.

In cross-examining a witness who has been examined before the magistrate, although it is admissible to ask him, referring to the depositions, whether he has not said so-and-so, his answer must be taken, unless the depositions are put in to contradict him, and it is not admissible to state that the depositions do contradict the witness without thus putting them in. *Reg.* v. *Riley*, 4 F. & F. 964.

On the trial of a prisoner his counsel may ask a witness for the prosecution whether he did not make a certain statement whilst under cross-examination before the magistrates, although the depositions contain no note of such cross-examination. *Reg.* v. *Curtis*, 2 Car. & K. 763.

A witness cannot be cross-examined as to his statements made before the committing magistrate, until his depositions have been read over to him; such questions may, however, be put by the court personally, and by the prisoner's counsel, as the mouthpiece of the court, by its permission. *Reg.* v. *Peel*, 2 F. & F. 21.

M., who was an officer of the Royal Irish Constabulary, accompanied by a force of constables, having attempted to execute a warrant of arrest, the party were attacked by a mob of persons, and the officer was killed. Upon the trial of C., who was indicted for the murder of the officer, one of the constables deposed that C. was known to him, and that he was present at the attack, and that he saw him actually striking the police officer. Upon cross-examination, this witness said that he believed that he had stated on an information before a magistrate, made upon the 29th March, 1889, the names of all the persons present at the attack whom he knew, but added that he made a mistake. The deposition of the 29th March, 1889, was then put in evidence for the defence, and it appeared that C. was not referred to in it. The crown then tendered in evidence another and earlier information of the 14th February, in which the same witness did mention C. by name as present at, and taking part in, the attack. On objection by C.'s counsel, the learned judge at the trial rejected this evidence, but permitted the following general question to be put, subject to objection:—"Did witness, on the 14th February, 1889, state on oath that he saw C. on the 3rd February throw stones at M. whilst lying on the ground near the door of the dwelling house of the Rev. Father M'Fadden, and did he mention C. by name?" The answer was, "I did." C. was found guilty of manslaughter. C.'s counsel did not at the trial object to the question on the ground that it was parol evidence of a written statement, but did so in the court for crown cases reserved. Upon a case reserved as to whether this evidence was legally admissible:—Held (by a majority of the judges), that the evidence was admissible, and that the conviction should be upheld. *Reg.* v. *Coll*, 24 L. R., Ir. 522—C. C. R.

It appeared that the prisoner had been taken before the mayor of N., charged with rape; and that the prosecutrix was sworn, and her statement taken down by the mayor, who asked her some further questions, the answers to which were taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates:—Held, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N., without the production of that which was taken down on that examination. *Reg.* v. *Griffiths*, 9 Car. & P. 746.

On her cross-examination a prosecutrix cannot be contradicted from the depositions unless they are put in. *Reg.* v. *Wright*, 4 F. & F. 967.

—— **Depositions Lost—Copy.**]—If it is shown, that depositions were regularly returned by the magistrates to the proper officer, and it is proved by the latter that they cannot be found after diligent search, the prisoner's counsel may cross-examine from copies of them, those copies being proved to be correct by the magistrates' clerk. *Reg.* v. *Shelburn*, 9 Car. & P. 277.

—— **Statement not in Depositions.**]—Where witnesses were sworn and examined before a magistrate, in the presence of the prisoner, and minutes of the evidence were written down by the clerk to the magistrates, and afterwards the depositions were written out from the minutes and the statements of the witnesses, by a clerk in the magistrates' clerk's office, after which the depositions so written out were read over, and signed in the presence of the magistrate and the prisoner:—Held, that an answer given by a witness to the clerk in the magistrate's clerk's office, in the course of writing out the depositions, was properly receivable in evidence, without the production of the depositions. *Reg.* v. *Christopher*, 4 New Sess. Cas. 139; 2 Car. & K. 994; 1 Den. C. C. 536; T. & M. 225; 19 L. J., M. C. 103; 14 Jur. 203; 4 Cox, C. C. 76.

—— **Depositions before Coroner.**]—There is no distinction between depositions before a coroner and before a magistrate with reference to the modes of cross-examination upon them. A witness cannot therefore be asked on cross-examination as to what he said before the coroner. But the deposition may be put into the witness's hands to read over to himself and refresh his memory. *Reg.* v. *Barnet*, 4 Cox, C. C. 269.

A witness may be asked by prisoner's counsel as to what he said before the coroner, without putting in the depositions. *Reg.* v. *Maloney*, 9 Cox, C. C. 26.

How Proved.]—In a case affecting the life of a party, it is very desirable that a magistrate who took the depositions against the prisoner with his own hand should be called as a witness, before the depositions are read, to prove the cor-

rectness of what he took down; but it is not absolutely necessary in point of law, that he should be called. and the depositions may be read on proof of his handwriting. *Reg.* v. *Pikesley*, 9 Car. & P. 124.

If upon the trial of a prisoner a witness gives evidence of facts of which no mention is made in his deposition as taken before the committing magistrate, the clerk to the magistrate may be called for the purpose of stating that such facts were stated by the witness when he made his deposition, but were not taken down by him, the clerk. *Reg.* v. *Moore*, 20 L. T. 987.

Depositions may be proved by a person who was present, without calling the magistrate or his clerk. *Reg.* v. *Wilshaw*, Car. & M. 145.

Proof of Prisoner's Statement.] — *See* ante, col. 1831.

Power of Judge to read Depositions when Summing up Case.] — Upon the trial of a prisoner at assizes or quarter sessions it is competent for the presiding judge to lay before the jury, when summing up the case to them, matter which, though not put in evidence previously, would have been admissible in evidence had it been tendered. Upon the cross-examination of one of a prisoner's witnesses in a trial before a court of quarter sessions, such witness admitted that her evidence differed materially from the evidence she had given when before the committing magistrates. The depositions of the witness were not put in by the counsel for the prosecution, nor by the counsel for the prisoner. But the chairman, in the course of his summing up of the case to the jury, at the request of one of the jurors read the depositions. The prisoner having been found guilty, upon a case reserved: —Held, that it was competent for the chairman to read the depositions when he did read them, inasmuch as they would have been admissible in evidence had they been tendered by either the counsel for the prosecution or the counsel for the prisoner at any time previously. That it being the duty of a presiding judge at a criminal trial to decide what evidence, within reasonable bounds, should be placed before the jury, the mere fact that the depositions had not been put in previously to the summing up did not prevent their being put in subsequently; and that the reading of them by the chairman to the jury when he was summing up the case, did not amount to a misreception of evidence. *Reg.* v. *Garner*, 61 L. T. 699; 54 J. P. 424—C. C. R.

Putting in Prisoner's Statement to contradict Defence.]—The prisoner's statement contained in the depositions not having been put in at the trial by the prosecution, the court refused to allow it to be read to contradict the defence made by the prisoner that was repugnant to his former statement. *Reg.* v. *Powell*, Car. & M. 500. Contra, *Reg.* v. *White*, 2 Cox, C. C. 192.

3. Dying Declarations. *See* ante, col. 1528.

4. Presumptions or Probabilities of Guilt.

In a criminal case the jury, in order to convict, ought to be satisfied by the evidence, affirmatively, as a conviction created in their minds beyond all reasonable doubt, that the guilt of the prisoner is established; and if there is only an impression of probability, they ought to acquit him. *Reg.* v. *White*, 4 F. & F. 383.

So far as the case rests on direct testimony, the jury should, if there are any circumstances to impeach the credibility of the witnesses, look carefully to those circumstances as elements of doubt in the case. *Ib.*

A mere scintilla of evidence not sufficient to justify a verdict ought not to be left to the jury. *Reg.* v. *Smith*, L. & C. 607.

5. Accomplices.

Corroboration—Rule of Practice not of Law.] —It is not a rule of law, but of practice only, that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the conviction cannot be quashed as bad in law. *Reg.* v. *Stubbs*, Dears. C. C. 555; 25 L. J., M. C. 16; 1 Jur. (N.S.) 1115; 4 W. R. 85; 7 Cox, C. C. 48.

The better practice is for the judge to advise the jury to acquit, unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction, and when several parties are charged, it is not sufficient that the accomplice should be confirmed as to one or more of the prisoners to justify a conviction of those prisoners with respect to whom there is no confirmation. *Ib.*

The rule that the evidence of an accomplice requires corroboration is not a rule of law, but a rule of general and usual practice; the application of which is for the discretion of the judge by whom the case is tried; and in the application of the rule much depends on the nature of the offence, and the extent of the complicity of the witness in it. *Reg.* v. *Boyes*, 1 B. & S. 311; 30 L. J., Q. B. 301; 9 Cox, C. C. 32.

Before admitting a person as an approver, it is the duty of the magistrate to inquire into the case and see how far such approver is mixed up with the transaction, or to what extent he would be criminally liable for his acts. Though an accomplice, who has been admitted as an approver, may give evidence, no matter how great his own criminality, it is a wise observation that, without corroboration, a jury should be slow to convict on such evidence. *Reg.* v. *Dunn*, 5 Cox, C. C. 507.

A prisoner ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *Rex* v. *Noakes*, 5 Car. & P. 326.

A person indicted for a misdemeanor may be legally convicted upon the uncorroborated evidence of an accomplice. *Rex* v. *Jones*, 2 Camp. 131; 11 R. R. 680. S. P., *Rex* v. *Hastings*, 7 Car. & P. 152; *Reg.* v. *Avery*, 1 Cox, C. C. 206.

Although all persons present at and sanctioning a prize-fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as to require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter. *Rex* v. *Hargrave*, 5 Car. & P. 170.

The spectators of a sparring match are not participes criminis, their evidence therefore touching what occurred at the match requires no corroboration. *Reg.* v. *Young*, 10 Cox, C. C. 371.

A married woman who consents to her

husband's committing an unnatural offence with her, is an accomplice in the felony, and, as such, her evidence requires confirmation, although consent or not consent is quite immaterial to the offence. *Reg.* v. *Jellyman*, 8 Car. & P. 604.

Evidence Corroborated as to some Prisoners.]—On an indictment against principal and accessories, the case against the principal was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal. The jury was directed to acquit the prisoners. *Rex* v. *Wells*, M. & M. 326.

If the testimony of an accomplice is confirmed so far as it relates to one prisoner, but not as to another, the one may be convicted on the testimony of the accomplice, if the jury deems him worthy of credit. *Rex* v. *Dawber*, 3 Stark. 34, 35, n.

What Corroboration Sufficient.]—An accomplice does not require a confirmation as to the person he charges, if he is confirmed as to the particulars of his story. *Rex* v. *Birkett*, R. & R. 251.

And the corroboration of the evidence of an accomplice need not be on every material point, but must be so confirmed as to convince the jury that his statement was correct and true. *Rex* v. *Barnard*, 1 Car. & P. 88.

There is a great difference between confirmation of an accomplice as to the circumstances of the felony, and those which apply to the individual charged. The former only show that the accomplice was present at the commission of the offence, but the others show that the prisoner was connected with it. Confirmation of an accomplice as to the commission of the felony, is really no confirmation at all, and though a jury may legally convict on the evidence of an accomplice only, the judges advise them not to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence. *Rex* v. *Wilkes*, 7 Car. & P. 272. S. P., *Rex* v. *Webb*, 6 Car. & P. 595; *Rex* v. *Moores*, 7 Car. & P. 270; *Reg.* v. *Jenkins*, 1 Cox, C. C. 177; *Reg.* v. *Andrews*, 1 Cox, C. C. 183.

The evidence of an approver may be acted on by the jury if they think it true, but the practice is to require some corroboration of his evidence. It is not necessary that he should be corroborated in every particular, for if so it would not be necessary to call him as a witness, but there must be a certain amount of confirmation sufficient to satisfy the jury. *Reg.* v. *Gallagher*, 15 Cox, C. C. 291.

On an indictment for causing a person to take excessive quantities of a noxious thing, there being no other evidence but that of the woman that the prisoner incited her to take the excessive doses except that her father accused him of giving his daughter such things "to produce abortion," and that he did not deny it:—Held, that this was some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration. *Reg.* v. *Cramp*, 14 Cox, C. C. 390.

In a case of felony the testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of the statement of the accomplice. *Rex* v. *Neal*, 7 Car. & P. 168.

On a charge of stealing two sheep, an accomplice stated that the prisoner himself stole them; and, to confirm him, evidence was given that a quantity of mutton was found in the house in which the prisoner resided, which corresponded with parts of the stolen sheep:—Held, a sufficient confirmation of the accomplice to be left to the jury; but that if the confirmation had merely gone to the extent of confirming the accomplice as to a matter connected with himself only, it would not have been sufficient. *Reg.* v. *Birkett*, 8 Car. & P. 732.

The confirmation of an accomplice ought to be as to some matter which goes to connect the prisoner with the transaction, and it would be highly dangerous to act on the evidence of an accomplice unconfirmed with respect to the party accused. *Reg.* v. *Dyke*, 8 Car. & P. 261.

The confirmation of an accomplice should be as to some circumstance affecting the party accused, as by showing the party and accomplice together under such circumstances as were not likely to have occurred, unless there was concert between them. *Reg.* v. *Farlar*, 8 Car. & P. 106.

In a case of night-poaching, the only confirmation was, that, on the evening of the offence, the accomplice and the prisoner were drinking together at a public-house, commonly frequented by the prisoner, and that they both left the house together, when it was shut up for the night. This was considered no sufficient confirmation. *Ib.*

Evidence for Crown.]—A person employed by government to mix with conspirators, and pretending to aid their designs for the purpose of betraying them, does not require corroboration as an accomplice. *Reg.* v. *Mullins*, 3 Cox, C. C. 526.

Evidence of Prisoner pleading Guilty when Received.] — One prisoner who has pleaded guilty will not be allowed to be called as a witness against another, until the judge has heard the evidence necessary to corroborate that of an accomplice. *Reg.* v. *Sparks*, 1 F. & F. 388.

Acts of Accomplice Evidence against Prisoner.]—An indictment charged K. & W. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did sell to him, and thereby obtained money from him. The evidence was, that K. and another person, P., acting together, were the chief parties by whom the false pretences had been made:—Held, that the acts of P. were the acts of K., and admissible against him upon the indictment. *Reg.* v. *Kerrigan*, L. & C. 383; 33 L. J.. M. C. 71; 9 L. T. 843; 12 W. R. 416; 9 Cox, C. C. 441.

Before Grand Jury.]—An accomplice may give evidence before a grand jury to support an indictment against a particeps criminis. *Rex* v. *Dodd*, 1 Leach, C. C. 155.

Information of Dead Accomplice.] — The information of a dead accomplice may be read in evidence against a prisoner. *Rex* v. *Westbeer*, 1 Leach, C. C. 12.

Exemption from Prosecution.]—An accomplice, who is a witness for the crown, is not entitled as a matter of right to be exempt from being pro-

secuted for other offences at the same assizes, at which he has been such witness. *Rex* v. *Lee*, R. & R. 361. S. P., *Rex* v. *Brunton*, R. & R. 454.

An accomplice, who in a case out of the statutes, is, under the practice allowed, admitted by the justices of peace as a witness, and is afterwards prosecuted, has only a claim to the mercy of the crown, founded on an express or implied promise of the magistrate on a condition performed: and it depends on his conduct fully and fairly disclosing the joint guilt of himself and his companions, whether the court will admit him to bail, that he may apply for a pardon. *Rex* v. *Rudd*, Cowp. 331; 1 Leach, C. C. 115.

6. Competency of Witnesses.

Person Charged—Criminal Proceeding—What is.]—An information against a party, under 1 & 2 Will. 4, c. 32, s. 23, for unlawfully using snares for taking game, he not being authorised so to do for want of a game certificate, is a criminal proceeding for an offence punishable on summary conviction within s. 3 of the 14 & 15 Vict. c. 99, and therefore the party charged is not rendered a competent witness by that statute. *Cattell* v. *Ireson*, El. Bl. & El. 91; 27 L. J., M. C. 167; 4 Jur. (N.S.) 560; 6 W. R. 469.

When articles of the peace are exhibited against any person, the person against whom they are exhibited may not give evidence before the justices in contradiction of the facts stated in the articles. *Lort* v. *Hutton*, 45 L. J., M. C. 95; 34 L. T. 730.

Upon a proceeding under 9 Geo. 4, c. 61, s. 21, against an alehouse-keeper, for unlawfully and knowingly permitting divers persons of notoriously bad character to assemble and meet together in his house and premises against the tenure of his licence, such alehouse-keeper is not a competent witness, and cannot give evidence in his own behalf. *Parker* v. *Green*, 2 B. & S. 299; 31 L. J., M. C. 133; 8 Jur. (N.S.) 408; 6 L. T. 46; 10 W. R. 316; 9 Cox, C. C. 169.

—— **Alibi—Admissibility.**]—Where evidence is given that persons previously convicted of an offence which is now charged to have been committed by the prisoner at the bar, were in fact the guilty parties, the evidence of such convicted persons, though establishing only their own alibi, is admissible. *Reg.* v. *Dytche*, 17 Cox, C. C. 39.

Prisoner "a competent but not compellable Witness"—Refusal to give Evidence.]—Where a prisoner is by act of parliament "competent but not compellable" to give evidence on his own behalf and refuses to do so, it depends upon the circumstances of the particular case whether the judge is or is not justified in commenting to the jury upon his refusal. *Kops* v. *Reg.*, 64 L. J., P. C. 34; [1894] A. C. 650; 6 R. 522; 70 L. T. 890; 58 J. P. 668—P. C.

The word "compellable" must be taken in the sense of "compellable by process of law," and not in the more extended meaning of compellable by fear of the effect which the judge's comments will have upon the jury. *Ib.*

Witnesses for Crown—Self-Incrimination.]—The persons who are supposed to have been the seconds at a duel may refuse to give evidence on the trial of the principals. But their testimony may be received as the testimony of persons admitted witnesses for the crown. And if once sworn, they must disclose the whole truth, although they may involve themselves in the guilt of the transaction. *Rex* v. *England*, 2 Leach, C. C. 767.

Competency, how Tried.]—The competency of a witness may be tried by examining him on the voir dire or by evidence aliunde. *Rex* v. *Wakefield*, 2 Lewin, C. C. 279.

Witness Insane—Duty of Judge.]—A lunatic patient, who had been in confinement in a lunatic asylum, and who laboured under the delusion, both at the time of the transaction and of the trial, that he was possessed by 20,000 spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath, and to believe in future rewards and punishments, was called as a witness on a trial for manslaughter:—Held, that his testimony was properly received in evidence; and that where a person under an insane delusion is called as a witness, it is for the judge, at the time, to say whether he is competent to be a witness, and it is for the jury to judge of the credit that is to be given to his testimony. *Reg* v. *Hill*, 2 Den. C. C. 254; T. & M. 582: 15 Jur. 470; 5 Cox, C. C. 259.

If upon his examination upon the voir dire, he exhibits a knowledge of the religious nature of an oath, it is a ground of his admission. *Ib.*

It is the duty of the judge presiding at a trial to decide as to the competency of a witness; and if he has admitted a witness to give evidence, but upon proof of subsequent facts affecting the capacity of the witness and of observations of his subsequent demeanor, the judge may stop the examination of the witness, strike his evidence out of the notes, and direct the jury to consider the case exclusively with reference to the evidence of the other witnesses. *Reg.* v. *Whitehead*, 35 L. J., M. C. 186; L. R. 1 C. C. 33; 14 L. T. 489; 14 W. R. 677; 10 Cox, C. C. 234.

Guilty Party not Indicted.]—If two are guilty of a murder, and one is indicted and the other not, the party not indicted is a good witness for the crown. *Rex* v. *Tinckler*, 1 East, P. C. 354.

Persons Jointly Indicted—After Conviction.]—A prisoner convicted of an offence, who was jointly indicted with another afterwards put upon his trial, is an admissible witness for the prisoner on trial, though individually named in the record. *Reg.* v. *Archer*, 3 Cox, C. C. 228.

—— **Before Conviction.**]—Three were jointly indicted for felony. They pleaded not guilty and were tried together. Two of them were allowed before conviction to be called as witnesses on the behalf of the third. *Reg.* v. *Deeley*, 23 L. T. 168; 11 Cox, C. C. 607.

A., B., C. and D. were indicted together. After plea, and before they were given in charge to the jury, the court allowed C. to be removed from the dock, and examined as a witness against his associates. *Reg.* v. *Gerber*, T. & M. 647.

Where two prisoners are jointly indicted for a felony and plead not guilty, but only one is

given in charge to the jury, the other is an admissible witness, although his plea of not guilty remains on the record undisposed of. *Winsor* v. *Reg.*, 7 B. & S. 490; 35 L. J., M. C. 161; L. R. 1 Q. B. 390; 12 Jur. (N.S.) 561; 14 L. T. 567; 14 W. R. 695; 10 Cox, C. C. 327—Ex. Ch.

On an indictment of three persons jointly for publishing blasphemous libels, one was tried separately:—Held, that the defendant, thus tried first and separately, was entitled to call the other defendants as witnesses on his behalf, though they could not be called as witnesses for the prosecution without taking a verdict of acquittal against them, the trial being separate. The observations of Cockburn, C. J., in *Reg.* v. *Winsor*, held not applicable, as there the fellow-prisoner was called for the crown. *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 217.

When two are indicted and tried together, one is not a competent witness for the other. *Reg.* v. *Payne*, 41 L. J., M. C. 65; L. R. 1 C. C. 349; 26 L. T. 41; 20 W. R. 390; 12 Cox, C. C. 118.

—— **One Pleading Guilty.**]—A. and B. being indicted for stealing, and C. for receiving, B. pleaded guilty, and was tendered as a witness against A. and C. He was objected to by the counsel for the prisoners, as inadmissible:—Held, an admissible witness at common law. *Reg.* v. *Hunks*, 1 Den. C. C. 84; 2 Car. & K. 462; S. P., *Reg.* v. *King*, 1 Cox, C. C. 232; *Reg.* v. *Williams*, 1 Cox, C. C. 289; *Reg.* v. *Gallagher*, 13 Cox, C. C. 61.

A. and B. were jointly charged in the same indictment with breaking into a house and stealing goods. A. pleaded guilty, and B. pleaded not guilty, and was tried. A.'s plea of guilty was recorded, but no sentence had been passed on him. B. wished to call A. as a witness for him:—Held, that he might do so. *Reg.* v. *George*, Car. & M. 111.

A prisoner who pleads guilty to an indictment, and who has been previously convicted of felony, is a competent witness against other prisoners charged in the same indictment. *Reg.* v. *Drury*, 3 Car. & K. 190. S. P., *Reg.* v. *Arundel*, 4 Cox, C. C. 260.

Where one prisoner pleads guilty, semble, he ought to be sentenced before he is called as a witness for another prisoner jointly indicted with him. *Reg.* v. *Jackson*, 6 Cox, C. C. 525.

—— **Corroboration—Accomplice.**]—One prisoner who has pleaded guilty will not be allowed to be called as a witness against another, until the judge has heard the evidence necessary to corroborate that of an accomplice. *Reg.* v. *Sparks*, 1 F. & F. 388.

—— **Acquittal of One.**]—Where a prisoner jointly indicted with others has by the direction of the court been acquitted, he may be examined as a witness for the prosecution. *Reg.* v. *O'Donnell*, 7 Cox, C. C. 337.

Prisoner Sentenced to Death.]—A convict under sentence of death is incapable of being called as a witness. *Reg.* v. *Webb*, 11 Cox, C. C. 133.

Husband and Wife—In what Cases.]—In all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other. *Rex* v. *Jagger*, 1 East, P. C. 455. S. P., *Reg.* v. *Pearce*, 9 Car. & P. 667.

On a charge of abduction, the wife is a witness as well for as against her husband, although she has cohabited with him from the day of the marriage. *Rex* v. *Perry*, 3 Russ. C. & M. 666, 669.

A wife is not a competent witness against her husband, charged under the Vagrant Act (5 Geo. 4, c. 83, s. 3), with neglecting to maintain her, whereby she became chargeable to the parish. *Reere* v. *Wood*, 5 B. & S. 364; 34 L. J., M. C. 15; 11 Jur. (N.S.) 201; 11 L. T. 449; 13 W. R. 154; 10 Cox, C. C. 58.

A reputed first wife, on a charge of bigamy, cannot give evidence in favour of her supposed first husband. *Reg.* v. *Peat*, 2 Lewin, C. C. 111.

Quære, whether a woman who has gone through the ceremony of marriage with a man can be allowed to prove the invalidity of the marriage, and that she is not his wife. *Reg.* v. *Peat*, 2 Lewin, C. C. 288.

The offence of feloniously causing grievous bodily harm, where the person alleged to have been injured is a child under sixteen, is not an "offence involving bodily injury to a child under sixteen," within the meaning of the Prevention of Cruelty to Children Act, 1894, and in such a case the prisoner and his or her wife or husband are not competent witnesses. *Reg.* v. *Roberts*, 18 Cox, C. C. 530.

S., a wife, was licensed to sell liquors, and her husband told the constable that he took some spirits away to B.'s house, where they were raffled for and then were consumed, and he brought back the proceeds, and put the money in S.'s room, and she duly received it. The justices having convicted S. of selling at B.'s house, not being licensed to do so:—Held, that as S. being a competent witness, did not contradict the husband's account, there was some evidence to support the conviction. *Seagar* v. *White*, 48 J. P. 436.

—— **Statement of Wife in presence of Husband.**]—Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which the prisoner, who was a marine store dealer, had bought, was received in evidence, in order to show that he had bought at an under value. The circumstances under which the list was written were as follows:—A police-constable asked the prisoner to consider when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife, in her husband's presence, handed to another constable the list tendered in evidence saying in her husband's hearing, "This is a list of what we bought, and what we gave for them." The question reserved was whether such list was properly admitted in evidence:—Held, by the court, that the list was clearly admissible in evidence. *Reg.* v. *Mallory*, 33 L. J., M. C. 134; 13 Q. B. D. 33; 50 L. T. 429; 32 W. R. 721; 15 Cox, C. C. 456; 48 J. P. 487—C. C. R.

—— **Mere Cohabitation.**]—A woman cohabiting with the prisoner and passing as his wife, is a competent witness for him. *Reg.* v. *Young*, 2 Cox, C. C. 291.

—— **Wife of Person Convicted—Joint Offence.**]—A. being tried for sheep stealing, it was proposed to call the wife of B. to prove that A. and B. had jointly stolen the sheep, B. having been convicted

of it at the previous quarter sessions :—Held, that she was a competent witness. *Reg.* v. *Williams*, 8 Car. & P. 284.

—— **Wife or Husband not Indicted.**]—On an indictment for larceny the wife of a receiver who is not indicted cannot be compelled to give her evidence against the prisoner. *Rex* v. *Ast*, Car. C. L. 66.

The prisoner was indicted for obtaining money from the trustees of a savings bank, by falsely pretending that a document produced by the wife of D. had been filled up by D.'s authority; and in another count for conspiring with the wife of D. to cheat the bank. D.'s wife presented the document, which had been fraudulently filled up at the instance of the prisoner, and obtained the money, and afterwards eloped with the prisoner. D.'s evidence was necessary to show that he had given no authority, but it was objected to on the ground that it implicated his wife :—Held, that D.'s evidence was admissible, as the wife was not charged upon the indictment. *Reg.* v. *Halliday*, Bell, C. C. 257; 29 L. J., M. C. 148; 6 Jur. (N.S.) 514; 2 L. T. 254; 8 W. R. 423; 8 Cox, C. C. 298.

—— **Joint Indictment**]—Upon the trial of a married woman, jointly with another person, for larceny of the property of her husband, the husband was called as a witness against his wife :—Held, that the evidence of the husband was improperly received, and that the conviction which had taken place founded upon it was bad as against both prisoners. *Reg.* v. *Brittleton*, 53 L. J., M. C. 83; 12 Q. B. D. 266; 50 L. T. 276; 32 W. R. 463; 15 Cox, C. C. 431; 48 J. P. 295. —C. C. R.

The wife of one of several persons on their trial at the same time on a joint indictment cannot be called as a witness for or against any of them, notwithstanding that the indictment contains more counts than one respectively charging distinct offences. *Reg.* v. *Thompson*. 41 L. J., M. C. 112; L. R. 1 C. C. 377; 26 L. T. 667; 20 W. R. 728; 12 Cox, C. C. 202.

On an indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry, W. S. is not a competent witness for the prosecution. *Rex* v. *Serjeant*, R. & M. 352.

The wife of one of several prisoners is inadmissible as a witness. *Rex* v. *Hood*, 1 M. C. C. 281. S. P., *Rex* v. *Smith*, 1 M. C. C. 289. Contra, *Reg.* v. *Moore*, 1 Cox, C. C. 59; *Reg.* v. *Bartlett*, 1 Cox, C. C. 105.

Even to prove an alibi by the other. *Reg.* v. *Denslow*, 2 Cox, C. C. 230.

The wife of one defendant cannot be called on behalf of a co-defendant, though the parties appear and defend separately. *Rex* v. *Locker*, 5 Esp. 107.

A. & B. were indicted for burglary and stealing. A part of the stolen property was found in the house of each of them :—Held, that the wife of A. was a competent witness to prove that she took to B.'s house the stolen property that was found there. *Reg.* v. *Sills*, 1 Car. & K. 494.

Where several defendants were indicted for conspiring to carry away a girl under the age of sixteen from her father's custody and to cause her to marry one of the defendants :—Held, that assuming the girl to be at the time the lawful wife of one of the defendants, she was a competent witness for the prosecution. *Rex* v. *Wakefield*, 2 Lewin, C. C. 279.

Where two persons are jointly indicted and one pleads guilty, the wife of the latter is admissible as a witness against the other. *Reg.* v. *Thompson*, 3 F. & F. 824.

—— **Marriage Invalid.**]—One of two prisoners had married his deceased wife's sister :—Held, that she was a competent witness against him upon his trial. *Reg.* v. *Young*, 5 Cox, C. C. 296.

A witness for the prosecution was examined on the part of the prisoners on the voir dire, and deposed that she was married to one of them :—Held, that she might be further examined on the voir dire, on the part of the prosecution, to prove that the same prisoner had been previously married to her sister. The witness stated, on such further examination, that she and her sister, who was seven years older than herself, had always lived together with their parents, and that she always believed her to be her sister :—Held, sufficient proof of the relationship. *Ib.*

Deaf and Dumb.]—A witness though deaf and dumb, may be sworn and give evidence on an indictment for felony, if intelligence can be conveyed to, and received by him, by means of signs and tokens. *Rex* v. *Ruston*, 1 Leach, C. C. 408. S. P., *Rex* v. *Jones*, 1 Leach, C. C. 452, n.

The testimony of a deaf and dumb person, who although intelligent and capable of communicating and receiving information by signs, yet cannot be made to understand the nature of an oath, is not admissible. *Reg.* v. *O'Brien*, 1 Cox, C. C. 185.

7. Mode of Giving and Practice at Trial.

a. Compelling Attendance.

Payment of Expenses Refused.]—Where a witness was subpœnaed by a defendant indicted for a conspiracy, and before he was examined requested to have his expenses paid, and stated that no money was paid to him at the time he was served, he was obliged to give evidence, although the defendant refused to pay such expenses, and although the indictment was removed by certiorari, and came down for trial at the assizes as a civil record. *Rex* v. *Cooke*, 1 Car. & P. 322.

Attachment for not Obeying Subpœna.]—A subpœna may be issued from the crown office, requiring a witness to attend at the assizes in the country, to give evidence in support of an intended prosecution for a felony; and the court will grant an attachment against him for not attending in obedience to the subpœna. *Rex* v. *Ring*, 8 Term Rep. 585; 5 R. R. 478.

Person present may be Called though not Subpœnaed.]—In a criminal case, a person, who is present in court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpœnaed. *Rex* v. *Sadler*, 4 Car. & P. 218. S. P., *Blackburn* v. *Hargreave*, 2 Lewin, C. C. 259.

At what Court.]—Where a witness is bound over to appear at the "next assizes and general gaol delivery" that means the ordinary assizes and general gaol delivery, and does not apply to a special commission of gaol delivery. *Reg.* v. *Walker*, 1 Cox, C. C. 14.

b. Administering Oath or Affirmation.

Affirmation—Inquiry as to.]—It is the duty of a judge, before permitting a witness to affirm under s. 1 of the Oaths Act, 1888, to inquire into his ground of objection to being sworn, and to ascertain whether he objects because he has no religious belief, or because the taking of an oath is contrary to his religious belief. *Reg.* v. *Moore*, 61 L. J., M. C. 80; 66 L. T. 125; 40 W. R. 304; 17 Cox, C. C. 458; 56 J. P. 345—C. C. R.

—— **Admissibility—Time for taking Objection.**]—Upon a criminal trial an objection to the admissibility of the evidence of a witness permitted to affirm without having been so questioned is not taken too late although taken after verdict. *Ib.*

Witness must be Sworn when Affirmation not Allowed.]—No one can give evidence in a court of justice without being sworn, unless he belongs to one of the classes for whom special provision has been made by the legislature. *Maden* v. *Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118; 7 Jur. (N.S.) 1107; 5 L. T. 288; 10 W. R. 112.

Witness—How Sworn.]—A Scotch covenanter may give evidence in a criminal prosecution, on being sworn according to the custom of his sect, without kissing the book. *Rex* v. *Mildrone* 1 Leach, C. C. 412; 3 R. R. 708.

So a Mahometan may be sworn on the Koran in a prosecution for a capital offence. *Rex* v. *Morgan*, 1 Leach, C. C. 54.

Mode of swearing Chinese witnesses. *Reg.* v. *Entrehman*, Car. & M. 248.

A Chinese, who is sworn according to a form which is obligatory upon his conscience, is a good witness in a court of law. *Ib.*

Who may be Sworn.]—A negro, who was called as a witness, stated, before he was sworn, that he was a Christian, and had been baptised:—Held, that he ought to be sworn, and that no further questions could be asked him before he was so. *Reg.* v. *Serva*, 2 Car. & K. 53.

A witness cannot be sworn to give evidence unless he has a religious belief. *Maden* v. *Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118; 7 Jur. (N.S.) 1107; 5 L. T. 288; 10 W. R. 112.

In the case of Infants.]—An infant cannot, under any circumstances, be admitted to give evidence, except upon oath. *Rex* v. *Powell*, 1 Leach, C. C. 110.

In cases of carnal knowledge of children, the infant witness, though under seven years of age, if apprised of the nature of an oath, must be sworn. *Rex* v. *Brasier*, 1 Leach, C. C. 199; 1 East, P. C. 443.

Before a child is examined as a witness, the judge must be satisfied that the child feels the binding obligation of an oath for a general course of religious education; and the effect of the oath on the conscience of the child should arise from religious feelings of a permanent character and not from instruction recently communicated for the purposes of the trial. *Rex* v. *Williams*, 7 Car. & P. 320.

—— **Postponing Trial to Instruct Witness as to Oath.**]—Where a bill for rape on a child under the age of ten has been ignored by the grand jury, in consequence of the judge refusing to allow the child to be sworn as a witness, on the ground of her want of knowledge of the obligation of an oath, the prisoner was ordered to be detained in custody until the child could be properly instructed. *Reg.* v. *Baylis*, 4 Cox, C. C. 23.

A person who has no notion of eternity, or of a future state of rewards and punishments, cannot be examined as a witness, but the trial may be postponed until the witness is instructed in the nature of this obligation. *Rex* v. *White*, 1 Leach, C. C. 430.

In a case of carnally knowing and abusing a girl under ten years of age, it appeared on an application on the part of the prosecution to postpone the trial, that the girl was only six years old, and by reason of her age quite incompetent to take an oath:—Held, that the trial ought not to be postponed in order that the child might be instructed as to the nature of an oath; but that there might be cases of children of more matured intellect, e.g. of ten or twelve years old, who might be from neglected education incapable of being sworn, in which such a postponement might be proper. *Reg.* v. *Nicholas*, 2 Car. & K. 246; 2 Cox, C. C. 136.

Witness by Mistake not Sworn.]—If on an indictment for felony, after the jury has delivered a verdict of guilty, it is discovered that one of the witnesses for the prosecution has given his evidence without having been previously sworn; the proper course to pursue is to direct the jury to reconsider the case, dismissing from their minds the evidence of that particular witness. *Reg.* v. *James*, 6 Cox, C. C. 5.

By whom Witnesses Sworn.]—Witnesses are sworn by the court through the instrumentality of some of its officers, and it is not material whether the oath is administered by the crier or clerk of the peace, so that it is done in open court. *Reg.* v. *Tew*, Dears. C. C. 429; 24 L. J., M. C. 62; 3 W. R. 178.

c. Ordering to Leave Court.

Right to Order.]—It is almost a matter of right for a party to have a witness go out of court while a legal argument is going on as to his evidence. *Reg.* v. *Murphy*, 8 Car. & P. 297.

Disobedience to Order—Effect of.]—Where a witness for a prosecution remains in court after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observations on his conduct for disobeying the order. *Rex* v. *Colley*, M. & M. 329.

The witnesses had been ordered out of court, but the attorney remained in court:—Held, that he could not be examined as a witness. *Rex* v. *Webb*, 3 Stark. L. of Ev. 1733.

On a trial for arson, a witness for the prisoner had left the court, on an order being given for the witnesses to go out of court; but he had afterwards come into court again, and heard a part of the evidence: he was allowed to be examined. *Rex* v. *Brown*, 4 Car. & P. 588, n.

But on the trial of an indictment for perjury, all the witnesses were ordered out of court. After this order a witness for the prosecution remained in court: the judge would not allow him to be examined. *Rex* v. *Wylde*, 6 Car. & P. 380.

d. Calling Witnesses on Back of Indictment.

Duty of Prosecution.]—Counsel for the prosecution is not bound to call all the witnesses on the back of an indictment. He may use his own discretion, but must have the witnesses in attendance. If the prisoner wishes to have a witness called, when not called for the prosecution, the witness becomes his witness, and the counsel for the prosecution will have the right to reply. *Reg.* v. *Cassidy*, 1 F. & P. 79. S. P., *Reg.* v. *Woodhead*, 2 Car. & K. 520.

Where there are witnesses on the back of the indictment who have not been called, the prisoner may insist on their being put into the box as the witnesses for the crown, in order that they may be cross-examined in his behalf. *Reg.* v. *Barley*, 2 Cox, C. C. 191.

It is, in general, a matter entirely within the discretion of counsel for the prosecution, whether all the witnesses at the back of the bill should be called on behalf of the crown or not; and although the judge has the power to interfere, he will only exercise it in extreme cases. *Reg.* v. *Edwards*, 3 Cox, C. C. 82. S. P., *Reg.* v. *Thompson*, 13 Cox, C. C. 181.

Although the counsel in a prosecution for felony is not bound to call every witness whose name is on the back of the indictment; yet the judge may do so, to allow the prisoner's counsel an opportunity of cross-examining them. *Rex* v. *Simmonds*, 1 Car. & P. 84.

If counsel for the prosecution calls a witness whose name is on the back of the indictment, but does not examine him, and such witness is examined by the prisoner's counsel, any question put by the prosecutor's counsel after this must be considered as a re-examination, and therefore the prosecutor's counsel cannot ask anything that does not arise out of the previous examination by the prisoner's counsel. *Rex* v. *Beezley*, 4 Car. & P. 220. See *Rex* v. *Harris*, 7 Car. & P. 581.

Though the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet it is better that he should be examined, whether his evidence is favourable to the prosecution or not, as the only object of the investigation is to discover the truth. *Reg.* v. *Bull*, 9 Car. & P. 32.

If the counsel for the prosecution declines to call a witness whose name is on the back of the indictment, it is in the discretion of the judge who tries the case, whether the witness shall or shall not be called, for the prisoner's counsel to examine him before the prisoner is called on for his defence. *Rex* v. *Bodle*, 6 Car. & P. 186.

If the witness is so called, the judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witnesses to contradict him. *Ib.*

The calling of a witness, whose name is on the back of the indictment for the other side, to cross-examine him, is by no means of course. It is discretionary, even in felony, but it is a discretion always exercised. *Reg.* v. *Vincent*, 9 Car. & P. 91.

Calling Witnesses not in Depositions.]—Material evidence may be given against a prisoner on his trial in addition to what appears from the depositions to have been given against him before the magistrates. *Reg.* v. *Ward*, 2 Car. & K. 759.

If at the trial it is proposed to call witnesses who were not examined before the magistrates, the prosecution should give notice to the prisoner of their names and the substance of what they are expected to prove. *Reg.* v. *Stiginani*, 10 Cox, C. C. 552. See *Reg.* v. *Connor*, 1 Cox, C. C. 233.

A witness whose evidence is relevant may be called by the prosecution, although he has not been before the magistrates, and although his name and the substance of his evidence have not been given to the prisoner or to his attorney. *Reg.* v. *Greenslade*, 11 Cox, C. C. 412.

Defendant not entitled to Names and Addresses.]—The court has no power to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. *Reg.* v. *Gordon*, 2 D. (N.S.) 417; 12 L. J., M. C. 81; 6 Jur. 996.

A prisoner indicted for felony is not entitled to a list of the names and addresses of the witnesses on the back of the indictment, but he will be allowed to inspect the indictment for the purpose of seeing the names of such witnesses. *Reg.* v. *Lacey*, 3 Cox, C. C. 517.

Nisi Prius Record.]—Where an indictment is tried at nisi prius, the nisi prius record does not shew what names were on the back of the indictment. *Rex* v. *Smith*, 5 Car. & P. 201.

e. Examining and Cross-Examining Witnesses.

When Court calls Witness.]—The court refused, on the application of the prisoner's counsel, to call a witness who had been examined before the coroner, but had not been called by the prosecution. *Reg.* v. *Wiggins*, 10 Cox, C. C. 562. *See also cases* ante, col. 1863.

Calling Witnesses after Close of Case.]—After the cases for the prosecution and prisoner are closed, the judge will not, at the suggestion of the counsel for the prosecution, examine a witness not before called. *Reg.* v. *Haynes*, 1 F. & F. 666.

Where after the close of the case for the prosecution a defect in the case is pointed out by the defence, the judge is at liberty to put what questions he likes to the witnesses to answer the objection. *Rex* v. *Remnant*, R. & R. 136.

Conversations to Explain Conduct.]—Conversations in the absence of the prisoner, that explain a man's conduct are admissible, and therefore where directions were given by one witness to another, which directions were necessary to explain the latter's conduct, the terms of these directions are admissible from either or both the witnesses. *Reg.* v. *Gandfield*, 2 Cox, C. C. 43.

Hearsay—Rumour no Evidence of Knowledge.]—Evidence of A. that B. had told him that C. had committed an offence, is inadmissible as any evidence whatever of the knowledge of B. as to the fact of C. having committed the offence; and it is therefore inadmissible as evidence of an offence, disclosed by a bankrupt in his examination in bankruptcy, having been disclosed previously to such examination, so as to

disentitle the bankrupt to the protection of the proviso to s. 85 of the 24 & 25 Vict. c. 96. Evidence of the fact of a rumour is no evidence of the knowledge of a particular individual, and is not within any of the exceptions to the rule which excludes the reception of hearsay evidence. *Reg.* v. *Gunnell*, 55 L. T. 786 ; 16 Cox, C. C. 154 ; 51 J. P. 279—C. C. R.

Adverse Witness—Cross-Examination.]—The situation in which a witness stands towards either party, does not give the party calling the witness a right to cross-examine him unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one. *Reg.* v. *Ball*, 8 Car. & P. 745. S. P., *Reg.* v. *Chapman*, 8 Car. & P. 558.

Trial on Admissions.]—A judge will not allow a criminal case upon the crown side of the assizes to be tried on admissions, unless they are made at the trial by the defendant or his counsel. *Reg.* v. *Thornhill*, 8 Car. & P. 574.

Prisoner not understanding English.]—On the trial of a prisoner who did not understand English, the evidence of such witness was completed before any portion was interpreted ; it was then read over to him by the judge. *Reg.* v. *Ysenado*, 6 Cox, C. C. 386.

Second Trial—Evidence given at First.]—A prisoner for felony was tried, but the jury was discharged, owing to being unable to agree. On being put on trial before a second jury, the judge, at the prisoner's request, instead of having the witnesses examined, simply called and swore them, and read over his notes, allowing liberty to examine and cross-examine each witness thereafter :—Held, that this was an irregular practice, whether the prisoner assented to it or not. *Att.-Gen. (New South Wales)* v. *Bertrand*, 4 Moore, P. C. (N.S.) 460 ; 36 L. J., P. C. 51 ; L. R. 1 P. C. 520 ; 16 L. T. 752 ; 16 W. R. 9 ; 10 Cox, C. C. 618.

Where there are two prosecutions against the same person for felony, the evidence at the first trial cannot, even by consent, be taken as given in the second trial, but the witnesses may be resworn in the second case, and their evidence read over to them from the judge's notes. *Rex* v. *Foster*, 7 Car. & P. 495.

Evidence for Defence.]—Where a witness for the prosecution has given an account of what was said by the defendant, and a witness for the defence is called to give a different account, the latter witness should first be asked to give his version of the matter, and may then be asked whether his account or that of the prosecution is the correct one. *Reg.* v. *Fussell*, 3 Cox, C. C. 291.

Refreshing Memory of Witnesses.] — The prisoner was a timekeeper, and C. was pay clerk, in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time book. At pay time it was the duty of the prisoner to read out from the time book the number of days worked by each workman to C., who paid the wages accordingly. And C. saw the entries in the time book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences :—Held, that C. might refresh his memory by referring to the entries in the time book in order to prove the sums paid by him to workmen. *Reg.* v. *Langton*, 46 L. J., M. C. 136 ; 2 Q. B. D. 296 ; 35 L. T. 527 ; 13 Cox, C. C. 345.

A person used to report matters within two hours of their occurrence to a police inspector who took down the report from dictation but not in the very words used. The documents were either read over by or to the witness, and were all signed by him :—Held, admissible for the purpose of refreshing his memory. *Reg.* v. *Mullins*, 3 Cox, C. C. 526.

Cross-Examination—Witnesses for Prosecution.]—A witness for the crown cannot, in cross-examination, be compelled to state through what channel he made a disclosure to government, either immediately or mediately. *Rex* v. *Watson*, 2 Stark. 116.

A witness for the prosecution in felony may be asked in cross-examination whether he has not stated certain facts before the grand jury, and the witness is bound to answer that question. *Reg.* v. *Gibson*, Car. & M. 672.

A witness cannot be asked on cross-examination whether, when he was examined before the magistrate, he recollected such and such a particular fact. *Reg.* v. *Newton*, 4 Cox, C. C. 262.

Upon an indictment for murder, a sergeant in the police, after stating in cross-examination that he attended a debating society where political subjects were discussed, by the direction of the commissioners of police, for the purpose of noticing and reporting, and that he went in private clothes, was asked if he was a spy :—Held, that the question could not be put, as it required the witness to draw an inference from facts ; but that he might be asked under what directions, and for what purpose he went, and what he did when there. *Reg.* v. *Bernard*, 1 F. & F. 240.

If a paper is put into a witness' hands on cross-examination, the opposite party has only a right to examine the paper if anything comes of the questions asked. *Reg.* v. *Duncombe*, 8 Car. & P. 369.

On a witness for the prosecution being recalled, the prisoner's counsel has a right to cross-examine again. *Rex* v. *Watson*, 6 Car. & P. 653.

—— **Prisoner giving evidence on his own behalf.**]—A prisoner on his trial for an offence in which he may and does give evidence, may be cross-examined to the same extent as any other witness. *Reg.* v. *Gawthrop*, 59 J. P. 377.

—— **Joint Indictment—Incriminating Evidence.**]—Where two are jointly indicted, and a witness called by one of them gives evidence incriminating the other, the latter has a right by himself or his counsel to cross-examine that witness and to reply. *Reg.* v. *Burdett*, Dears. C. C. 431 ; 3 C. L. R. 440 ; 24 L. J., M. C. 63 ; 1 Jur. (N.S.) 119 ; 3 W. R. 246 ; 6 Cox, C. C. 458. S.P., *Reg.* v. *Woods*, 6 Cox, C. C. 224.

Re-examination.] — Evidence of a distinct felony may be given in re-examination where it will serve to explain an apparently contradictory fact elicited by cross-examination. *Reg.* v. *Chambers*, 3 Cox, C. C. 92.

Rebutting Case in Reply—Witness Contra-

dicted.]—In a trial for murder, a witness who swore he identified the prisoner as one of the persons who committed the murder, was cross-examined on behalf of the prisoner, as to an alleged conversation which he had shortly after the commission of the crime, in which he was alleged to have stated that the prisoner was not the guilty party. The witness denied that he made such a statement, and the prisoner, as a substantial part of his defence, produced A. and B., who were present at the alleged conversation, to contradict the witness. At the close of the prisoner's case the prosecution were allowed to examine C. and D., who were present at the alleged conversation, to corroborate the statement of the witness and contradict A. and B. *Reg.* v. *Whelan*, 8 L. R. Ir. 314; 14 Cox, C. C. 595.

A witness who gave evidence to identify the prisoner as one of the persons who committed the murder, had a conversation with E., a police constable, shortly after the commission of the crime. E., who was examined on behalf of the prisoner, deposed that the witness stated to him that he could not recognise any of the murderers, as they were masked. On cross-examination, E. said that he had made a report to his superior officers of this statement of the witness. The crown were not allowed to examine E.'s superior officers for the purpose of contradicting him as to the fact of his having made such a report to them. *Ib.*

On the second trial of an indictment for perjury, fresh witnesses for the defence were called to prove facts confirming the prisoner's alleged false statement. A witness called by the prosecutor to contradict a fact deposed to by them was allowed to prove that in the former trial a particular question was put to him on his cross-examination by the prisoner's counsel, in order to show that at that time the prisoner's counsel had notice of the testimony now given, but did not venture to call the witnesses. *Reg.* v. *Coyle*, 7 Cox, C. C. 74.

Evidence as to Credit—What Admissible.]—In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon oath. *Reg.* v. *Brown*, 36 L. J., M. C. 59; L. R. 1 C. C. 70; 16 L. T. 364; 15 W. R. 795; 10 Cox, C. C. 453.

It is not essential that witnesses, who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character and conduct as enables them conscientiously to say that it is impossible to place any reliance on any statement that such person may make. *Rex* v. *Bispham*, 4 Car. & P. 392.

Where in an indictment for rape a witness to whom the prosecutrix had made a statement shortly after the commission of the alleged offence, being asked on cross-examination as to the particulars of such statement gave an answer which was different from that which the prosecuting counsel was instructed she had made:—Held, that it was competent for the counsel for the prosecution in re-examination, to ask the witness whether she had not at other times made a different statement, and one inconsistent with her present testimony, to certain persons named; and also to call such persons to give evidence of the statements so made to them, under 28 & 29 Vict. c. 18, s. 3. *Reg.* v. *Little*, 15 Cox, C. C. 319.

The sole witness to the commission of an offence having sworn that she did not know the prisoner at the time, evidence was admitted for the defence that she had in fact known him for years. *Reg.* v. *Dennis*, 3 F. & F. 502.

A witness for the prosecution having denied on cross-examination that he had had a quarrel with the prisoner, and had threatened to be revenged on him, evidence in contradiction was allowed to be given. *Rex* v. *Yewin* (2 Camp. 638) followed. *Reg.* v. *Shaw*, 16 Cox, C. C. 503.

—— **Rebutting Evidence of Prosecution by Letters not Proved to have been Received by them.**]—A schoolmaster was charged with indecently assaulting a female pupil. Letters relating to the charge written by one of the scholars who was examined as a witness for the prosecution, may, on her denial of the handwriting, be proved and given in evidence on the part of the defendant for the purpose of affecting the witness's credit, and showing the capacity of the scholars to conspire to make a false charge against him, although the prosecutrix is not proved to have received the letters, or had any knowledge of their contents. *Reg.* v. *McGavaran*, 6 Cox, C. C. 64.

—— **Collateral Matter.**]—A witness for the defence professed his inability to understand English and was sworn and his evidence interpreted; he denied in cross-examination that he had spoken to two persons then present in English, their evidence being collateral was held inadmissible. *Reg.* v. *Burke*, 8 Cox, C. C. 44. See *Reg.* v. *Cracknell*, 10 Cox, C. C. 408. *Rex* v. *Watson*, 2 Stark. 149.

—— **Proof of Previous Conviction.**]—A party to a cause who gives evidence in support of his case may be cross-examined as to whether he has been ever convicted of a felony or misdemeanor, and if he denies or refuses to answer it, the opposite party may prove such conviction under s. 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), although the fact of such conviction be altogether irrelevant to the matter in issue in the cause. *Ward* v. *Sinfield*, 49 L. J., C. P. 696; 43 L. T. 252.

Effect of Misreception of, at Trial.]—In a criminal trial, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad; and this notwithstanding that there was other evidence before them properly admitted, and sufficient to warrant a conviction. *Reg.* v. *Gibson*, 56 L. J., M. C. 49; 18 Q. B. D. 537; 56 L. T. 367; 35 W. R. 411; 16 Cox, C. C. 181; 51 J. P. 742—C. C. R. See *Reg.* v. *Brittleton*, ante, col. 1859.

Semble, where a judge who tries a case reserves for the opinion of the court the question whether evidence was improperly admitted, and the court comes to the conclusion that it was not legally admissible, the court cannot affirm the conviction even though it is of opinion that there was sufficient other evidence to support it, and that the prisoner was in fact rightly convicted. *Makin* v. *Att.-Gen. for New South*

Wales, 63 L. J., P. C. 41 ; [1894] A. C. 57 ; 6 R. 373 ; 69 L. T. 778 ; 17 Cox, C. C. 704 ; 58 J. P. 148.

f. Evidence to Character.

Obtained in Cross-Examination—Proof of Previous Conviction.]—If a prisoner's counsel elicits, by his cross-examination of the witnesses for the prosecution, a statement that the prisoner has borne a good character, evidence may be given of a previous conviction, just the same as if witnesses to character had been called on his behalf. *Reg.* v. *Gadbury*, 8 Car. & P. 676.

On a trial for a felony after a previous conviction, if the prisoner's counsel obtains evidence of good character on cross-examination, this entitles the prosecutor to go into evidence of the previous conviction before the jury finds a verdict on the new charge, the same as if the prisoner had obtained evidence of good character by calling a witness. *Reg.* v. *Shrimpton*, 3 Car. & K. 373 ; T. & M. 628 ; 2 Den. C. C. 319 ; 21 L. J., M. C. 37 ; 5 Cox, C. C. 387.

Rebutting Evidence for Defence.]—If evidence of good character is given on behalf of a prisoner, evidence of bad character may be given in reply. *Reg.* v. *Rowton*, L. & C. 520 ; 34 L. J., M. C. 57 ; 11 Jur. (N.S.) 325 ; 11 L. T. 745 ; 13 W. R. 436 ; 10 Cox, C. C. 25. S. P., *Reg.* v. *Hughes*, 1 Cox, C. C. 44. Contra, *Reg.* v. *Burt*, 5 Cox, C. C. 284.

What Evidence Admissible.]—The evidence must be confined to the prisoner's general reputation ; and the individual opinion of the witness as to his disposition founded upon his own experience and observation, is inadmissible. *Reg.* v. *Rowton*, supra.

Evidence of particular facts cannot be given upon the question of character. *Ib.*

Evidence of character must be evidence of general reputation only, and a witness's individual opinion respecting the character and disposition of the prisoner, with reference to the charge, is inadmissible. *Ib.*

A man was indicted for an indecent assault, and upon the trial called witnesses, who gave him a good character as a moral and well-conducted man. A witness was then called by the prosecution, who was asked, "What is the prisoner's general character for decency and morality?" and in answer said, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him ; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality" :—Held, that the answer was not admissible in evidence. *Ib.*

Upon an indictment for assaulting a peace officer in the execution of his duty, where the assault was committed by the prisoner in resisting his arrest by the officer on a charge of felony, the officer cannot, upon his examination in chief, be questioned as to his knowledge of the prisoner's character for the purpose of showing that he had reasonable cause to suspect the prisoner of having committed the felony for which he was arrested. *Reg.* v. *Tuberfield*, L. & C. 495 ; 34 L. J., M. C. 20 ; 10 Jur. (N.S.) 1111 ; 11 L. T. 385 ; 13 W. R. 102 ; 10 Cox, C. C. 1.

The proper course under such circumstances is, to ask the officer generally whether he had reason to suspect the prisoner, leaving the prisoner's counsel to inquire into the grounds of suspicion, if he thinks fit to do so. *Ib.*

On the trial of an indictment for perjury the witnesses to character were asked, "What is the character of the defendant for veracity and honour?"—and "Do you consider him a man likely to commit perjury?" *Rex* v. *Hemp*, 5 Car. & P. 468.

Cross-examining Witnesses to Character.]—It is not usual to cross-examine witnesses to character except the counsel cross-examining has some distinct charge on which to cross-examine them. *Rex* v. *Hodgkiss*, 7 Car. & P. 298.

A witness to character cannot be cross-examined as to circumstances of suspicion against the prisoner which occurred upon the same day as the alleged offence was committed. *Reg.* v. *Rogan*, 1 Cox, C. C. 291.

Time for.]—In general, witnesses to character cannot be examined after verdict and before sentence, where the defendant might have examined them upon the trial. *Reg.* v. *Mullins*, 3 Cox, C. C. 526.

g. Evidence of Identity.

Person against whom Bill Ignored.]—A person indicted with others for an offence, but against whom the bill has been thrown out, may, if he is in custody at the time of the trial of the others, be placed at the bar to be identified as one who was in their company. *Rex* v. *Deering*, 5 Car. & P. 165.

Form of Question.]—A witness, called to prove that he had seen a prisoner at a particular spot at a certain time, added that he had since seen a number of men in gaol, and had pointed out one :—Held, that the following was a proper form of question to put to the witness—"Who did you point him out as being?" *Reg.* v. *Blackburn*, 6 Cox, C. C. 333.

It becoming necessary, on the part of the crown, to identify three other prisoners, charged in the same indictment with the party tried :—Held, that the counsel for the prosecution might ask in the most direct terms whether any of the prisoners was the person meant by the witness. *Rex* v. *Watson*, 2 Stark. 116.

8. Privilege of Witnesses.

a. Tendency to Criminate.

At what Stage Privilege Claimed.]—It makes no difference in the right of the witness to protection, that he had before answered in part, as he is entitled to claim the privilege at any stage of the inquiry ; and no answer forced from him by the presiding judge (after such a claim) can be afterwards given in evidence against him. *Reg.* v. *Garbett*, 2 Car. & K. 474; 1 Den. C. C. 236 ; 2 Cox, C. C. 448.

Question answered without objection.]—If a witness does not object to answer questions that may incriminate him, his statement is voluntary and may be given in evidence against him on a criminal charge. *Reg.* v. *Sloggett*, Dears. C. C. 656 ; 25 L. J., M. C. 93 ; 2 Jur. (N.S.) 764 ; 4 W. R. 487 ; 7 Cox, C. C. 139.

Refusal to Answer—When Justified.]—If a

witness claims the protection of the court, on the ground that his answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer. *Reg.* v. *Garbett*, supra.

The persons who are supposed to have been the seconds at a duel may refuse to give evidence on the trial of the principals. *Rex* v. *England*, 2 Leach, C. C. 767.

A witness who has received a pardon is not privileged from answering questions, the replies to which may criminate him, on the ground that actions for penalties under the Corrupt Practices Prevention Act are pending against him. *Reg.* v. *Kinglake*, 22 L. T. 316. Ruling upheld in banco, 22 L. T. 335; 18 W. R. 805; 11 Cox, C. C. 499.

A witness is not only not bound to answer that which will criminate him, but he is not bound to answer anything that tends to criminate him. In a prosecution for libel, a witness is not bound to answer whether he has written a particular paragraph in a newspaper, but he must answer whether he knew whose writing it was, but he is not bound to name the person whose writing he knew it to be. *Rex* v. *Slaney*, 5 Car. & P. 213.

On the trial of an information for bribery at a parliamentary election, filed by the attorney-general, in pursuance of a resolution of the House of Commons, a person, alleged in the indictment to have been bribed, was called as a witness; he refused to answer any question, on the ground that the answer would tend to criminate him. A pardon under the great seal was then handed to the witness, but he still refused to answer, upon which the judge compelled him to answer, and on his evidence the defendant was convicted:—Held, that the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the crown was concerned; and that, though the witness might still be liable to an impeachment by the House of Commons, notwithstanding the pardon, by reason of the 12 & 13 Will. 3, c. 2, yet that was so unlikely to happen that the witness could not be said to be in any real danger, and he was therefore rightly compelled to answer. *Reg.* v. *Boyes*, 1 B. & S. 311; 2 F. & F. 157; 30 L. J., Q. B. 301; 7 Jur. (N.S.) 1158; 5 L. T. 147; 9 W. R. 690; 9 Cox, C. C. 32.

To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger is once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency. *Ib.*

L. being called as a witness on the trial of a criminal information against K. was compelled to answer, notwithstanding his objection that such answer would tend to criminate him in certain actions for penalties, under the Corrupt Practices Acts, which were then pending against him:—Held, that it was immaterial to inquire whether he was or was not compelled to answer, as such issue could not affect a party in the cause. *Reg.* v. *Kinglake*, 18 W. R. 805; 22 L. T. 335; 11 Cox, C. C. 499.

Witness's Knowledge of Law presumed.]—The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed on the maxim Ignorantia juris non excusat. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553; 12 Cox, C. C. 557.

The 11 & 12 Vict. c. 42, s. 18, requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them. *Ib.*

Privilege is that of Witness.]—The privilege of refusing to answer is that of the witness alone. *Reg.* v. *Kinglake*, supra. S. P., *Boyle* v. *Wiseman*, 10 Ex. 647; 3 C. L. R. 482; 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

Counsel supporting Claim.]—If a witness objects to answer questions on the ground that they tend to criminate him, counsel cannot argue in support of the witness's objection. *Rex* v. *Adey*, 1 M. & Rob. 94. S. P., *Thomas* v. *Newton*, M. & M. 48, n.

Compare cases sub tit. EVIDENCE.

b. Solicitor and Client.

Solicitor—When not Retained.]—A prisoner was in custody on a charge of forgery, and was not allowed even to see his wife; he wrote to a friend "to ask Mr. G., or some other solicitor, whether the punishment was the same whether the names forged were those of real or fictitious persons." Mr. G. was not the prisoner's attorney, though he was an attorney:—Held, that this was not a privileged communication. *Rex* v. *Brewer*, 6 Car. & P. 363.

The wife of A. went to B., an attorney, and produced a forged will to him, and asked him to advance money to A. on the property mentioned in it. B. was not then the attorney of A., or in any way acting as his solicitor. A.'s wife left the forged will with B., who made a copy of it. A. afterwards called on B., who told all that had occurred and returned him the forged will, declining to advance any money:—Held, that the conversation between A.'s wife and B. was not a privileged communication; and that, on the trial of A. for forgery, evidence might be given of it. *Reg.* v. *Farley*, 2 Car. & K. 313; 1 Den. C. C. 197; 2 Cox, C. C. 82.

—— **When Retained.**]—Indictment for forging the will of W. T., first, with intent to defraud the heir-at-law of the said W. T.; second, with intent to defraud some person or persons unknown. Quære, whether (under the circumstances) a valid objection could be taken to the will being produced in evidence by an attorney, at the trial, on the ground of its being a privileged communication. *Reg.* v. *Tylney*, 1 Den. C. C. 319; 18 L. J., M. C. 36; 3 Cox, C. C. 160.

The solicitor of a bank is an admissible witness against the directors, of transactions of which he became cognizant in that character, although any communications to or by him, as their attorney, were privileged. *Reg.* v. *Brown*, 7 Cox, C. C. 442. *S. C.*, sub nom. *Reg.* v. *Esdaile*, 1 F. & F. 213.

H., who was tried for forging the will of S. J., had sent the forged will to his attorney, Mr. M., with some deeds of S. J., ostensibly for the purpose of asking his advice, but really that he might find the will and act on it. It was afterwards produced by Mr. M. before the magistrates, when H. was charged before them of forging it. At the trial of H. for the forgery Mr. M. was called to produce the will, which he did, without any objection being taken. The officer of the court was proceeding to read it, when the prisoner's counsel objected to the reading of it, as being privileged in the hands of Mr. M. The judge directed it to be read in evidence:—Held, that it was properly so read, it not having been put into the hands of Mr. M. in professional confidence, even if that would have made a difference. *Reg.* v. *Hayward*, 2 Car. & K. 234; 2 Cox, C. C. 23.

A prisoner was indicted for forging a will. The forged instrument had been given by the prisoner to his attorney, ostensibly for professional purposes, but, in the opinion of the judge, with some very different object. On objection that it was a privileged communication, and therefore could not be read:—Held, invalid. *Reg.* v. *Jones*, 1 Den. C. C. 166.

A., an attorney, was employed by B. as his solicitor, to put out money upon mortgage. C. applied to A. to procure him the advance of money on mortgage, and to act as his solicitor in procuring it. C. stated to A. that he was the owner of certain freehold lands, and produced a forged will in proof of his title, which he placed in the hands of A. B. advanced the money, A. acting as his solicitor by preparing the mortgage deeds:—Held, that on the trial of C. for uttering the forged will, A. was bound to produce the will and also to give evidence of what C. said to him as to the advance of the money. *Reg.* v. *Avery*, 8 Car. & P. 596.

A solicitor for a prisoner is bound to produce a document, when the prisoner is charged with an offence in respect of such document. *Reg.* v. *Brown*, 9 Cox, C. C. 281.

The rule which prohibits an attorney who has received documents from a client in a professional character from producing them in evidence against that client, applies to documents which are the subject-matter of the charge. The rule extends to cases where the attorney has a lien upon the documents. *Reg.* v. *Hankins*, 3 Cox, C. C. 434.

—— **Letter written by Solicitor for Client.**]—A letter written by a solicitor for a client making a claim for a lost parcel, alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case. But in order to make a client criminally responsible for a letter written by his solicitor it must be shown that the letter was written in pursuance of the instructions of the client. A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. *Reg.* v. *Downer*, 43 L. T. 445; 14 Cox, C. C. 486; 45 J. P. 52.

—— **Letters written by Client to Solicitor.**]—The real prosecutrix had communications with her attorney in reference to certain dealings with the prisoner. The attorney was called as a witness for the prosecution:—Held, that the letters written by the client to her attorney could not be put in by the prisoner's counsel. *Reg.* v. *Leverson*, 11 Cox, C. C. 152.

—— **Statements made to Counsel.**]—Held, that the prosecutrix and her attorney might be cross-examined in reference to any privileged communications as to which they had given answers to questions addressed to them by the counsel for the prosecution, but not in respect to such matters about which the attorney had volunteered information unasked. *Ib.*

—— **In Presence of Prisoner.**]—Held, also, that matters which transpired during interviews at which the prisoner was present were not privileged. *Ib.*

c. In other Cases.

Clergyman or Priest.]—A Roman Catholic priest, called as a witness, is bound to answer the question from whom he received the property (a watch) alleged to be stolen, although delivered to him by a party in connection with the confessional. *Reg.* v. *Hay*, 2 F. & F. 2.

A chaplain who in his spiritual capacity had frequent conversations with the prisoner should not be allowed to give evidence of them at the trial. *Reg.* v. *Griffin*, 6 Cox, C. C. 219.

Wife incriminating Husband.]—On an indictment for larceny the wife of a receiver who is not indicted cannot be compelled to give evidence against the prisoner. *Rex* v. *Ast*, Car. C. L. 66.

The wife of a person who has been committed for trial and has absconded may refuse to answer a question as to the whereabouts of her husband. *Reg.* v. *Hamp*, 6 Cox, C. C. 167.

9. Admissibility of Evidence of other Offences.

Where several Offences so connected as to form one Transaction.]—Where several felonies are so connected together as to form part of one entire transaction, evidence of them all may be given in order to prove a party indicted guilty of one. *Rex* v. *Ellis*, 6 B. & C. 145; 9 D. & R. 174; 5 L. J. (o.s.) M. C. 1.

Upon a trial for breaking into a booking-office of a railway station, evidence was admitted that the prisoners had, on the same night, broken into three other booking-offices belonging to three other stations on the same railway, the four cases being all mixed up together. *Reg.* v. *Cobden*, 3 F. & F. 833.

A prosecutor will not be permitted to give in evidence several distinct offences, involving different transactions, under one indictment. *Rex* v. *Young*, R. & R. 280, n.

But several offences connected with each other may be so given. *Ib.* And see *Rex* v. *Thomas*, 2 East, P. C. 934.

A prisoner was indicted for night-poaching, and it was proposed to show that on the occasion in question one of the prosecutor's gamekeepers had lost his coat, and that it was found in the prisoner's house. There was another indictment against the prisoner for stealing the coat:—Held, that this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny. *Rex* v. *Westwood*, 4 Car. & P. 547.

A. and B. when riding in a gig together, were robbed at the same time, A. of his money, B. of his watch, and violence used towards both. There was an indictment for the robbing of A. and another indictment for the robbing of B. :—Held, that on the trial of the first indictment, evidence might be given of the fact of the loss of the watch by B.. and that it was found on one of the prisoners, but that no evidence ought to be given of any violence offered to B. by the robbers. *Rex* v. *Rooney*, 7 Car. & P. 517.

On an indictment for a rape on a child under ten, evidence was admitted of subsequent perpetrations of the same offence on different days previous to complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion :—Held, that in such a case it was virtually one continuous offence. *Reg.* v. *Rearden*, 4 F. & F. 76. *See also cases* ante, col. 1555.

Neither upon an indictment for stealing nor receiving can evidence be given that the prisoner had at the time, or previously, other stolen goods in his possession. *Reg.* v. *Oddy*, T. & M. 593 ; 2 Den. C. C. 264 ; 20 L. J., M. C. 198 ; 15 Jur. 517 ; 5 Cox, C. C. 210. *See now* 34 & 35 Vict. c. 112, s. 19, as to evidence of other cases on a charge of receiving.

A prisoner was indicted for stealing three articles. Having taken the first article, he returned in about two minutes and took the second, and then returned in half an hour and took the third :—Held, that the last taking was a distinct felony, and could not be given in evidence with the other two ; but that the interval of time between the first and second taking was so short that they must be considered as parts of the same transaction. *Rex* v. *Birdseye*, 4 Car. & P. 386.

Z. was indicted for feloniously having in his possession a lithographic stone, on which was engraved a portion of a Dutch coupon. A second lithographic stone was found in his lodgings, in respect of which another indictment had been preferred against him :—Held, that it was competent for the prosecution to give evidence on the trial of the first indictment of what was on the second stone. *Reg.* v. *Zeigert*, 10 Cox, C. C. 555.

A. was charged with having conspired with J. and others unknown to raise insurrections and obstruct the laws. It was proved that A. and J. were members of a Chartist lodge, and that A. and J. were at the house of the latter on a certain day, on the evening of which A. directed the people assembled at the house of J. to go to the racecourse at P., whither J. and other persons had gone :—Held, on the trial of A. that evidence was receivable that J. had at an earlier part of the day directed other persons to go to the racecourse ; and it being proved that J. and an armed party of the persons assembled, went from the New Inn :—Held, that evidence might be given of what J. said at the New Inn, it being all one transaction. *Reg.* v. *Shellard*, 9 Car. & P. 277.

An indictment contained three counts ; the jury found the prisoner guilty on the first two and not guilty on the third :—Held, that the jury might, in finding their verdict, take into consideration the evidence given in support of any one of the charges, though they had acquitted the prisoner on one of them. *Reg.* v. *Stephens*, 58 L. T. 776 ; 16 Cox, C. C. 387 ; 52 J. P. 823.

Upon the trial of an indictment for murder by stabbing, it appeared that the prisoner when arrested about an hour after the alleged crime, had in his possession a blood-stained knife :—Held, that evidence was admissible to show that the prisoner immediately before his arrest had stabbed another person. *Reg.* v. *Crickmer*, 16 Cox, C. C. 701.

Evidence of res gestæ.]—The false denial of the husband by the wife, though not directly proved to have been by his authority, or in his hearing, to custom house officers, coming to his house to search for uncustomed goods, immediately after discovered by them on his premises, is admissible, as a part of the res gestæ, on the trial of an information for penalties against the husband, for possessing the goods with a guilty knowledge. *Att.-Gen.* v. *Good*, M'Clel. & Y. 286.

See also cases ante, col. 1524.

When Evidence shows another Felony.]—Although evidence offered in support of an indictment for felony may be proof of another felony, that circumstance does not render it inadmissible, if the evidence is otherwise receivable. *Reg.* v. *Dossett*, 2 Car. & K. 306; 2 Cox, C. C. 243.

It is no objection to evidence on an indictment for felony, that it also goes to show the prisoner guilty of another felony. *Rex* v. *Moore*, 2 Car. & P. 235. Contrà, *Reg.* v. *Butler*, 2 Cox, C. C. 132.

Evidence of another felony is admissible, when it is necessary to establish the charge on which the prisoner is being tried. *Reg.* v. *May*, 1 Cox, C. C. 236.

Evidence of a distinct felony may be given in re-examination where it will serve to explain an apparently contradictory fact elicited by cross-examination. *Reg.* v. *Chambers*, 3 Cox, C. C. 92.

A prisoner was to be tried on three indictments : for receiving stolen tin, and stealing iron, and for receiving stolen brass. A constable went with a search warrant to search the prisoner's premises for stolen iron, and, having read the warrant to the prisoner, the latter made a statement :—Held, on the trial of the first indictment, that the whole of the statement was receivable, although part of it related to the charge respecting the iron. *Reg.* v. *Mansfield*, Car. & M. 140.

A. was indicted for stealing a shilling which had been previously marked and put into a till. A constable found the shilling in his possession, and asked him if he had any more money about him. The prisoner produced some half-crowns, and then made a statement :—Held, that this statement was not receivable, on the ground that it related to another and distinct felony. *Reg.* v. *Butler*, 2 Car. & K. 221.

In answer to an alibi set up on a trial for felony, the prosecutor may show the circumstances under which the prisoner was seen near the spot in question ; though those circumstances involve the commission of another felony by him. *Reg.* v. *Briggs*, 2 M. & Rob. 199.

—— **Limit of Time.**]—Where the prosecution is bound by statute to be commenced within three months of the offence charged, evidence of similar prior offences by the prisoner is not

admissible either in chief or to rebut the prisoner's denial of those prior offences on cross-examination. *Reg.* v. *Beighton*, 18 Cox, C. C. 535.

To Show Guilty Knowledge or Intent.]—On an indictment for forgery, if a second uttering is made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *Rex* v. *Smith*, 2 Car. & P. 633. *And see cases* ante, col. 1303.

Upon an indictment charging A. with uttering a forged order and B. as accessory before the fact, evidence of other orders of the same character and in the same handwriting having been previously uttered by some person unknown, is not admissible against either prisoner, although the handwriting was proved to be that of the accessory. *Reg.* v. *Sullivan*, 2 Cox, C. C. 80.

The prisoner was charged with uttering a bill of exchange purporting to be drawn by M.:—Held, that statements made by the prisoner with reference to M. on a previous occasion when he applied to get a bill discounted were admissible. *Reg.* v. *Nisbett*, 6 Cox, C. C. 320.

Having a large quantity of counterfeit coin in possession, many of each sort being of the same date, and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit, and intended to utter it. *Reg.* v. *Jarvis*, Dears. C. C. 552; 25 L. J., M. C. 30; 1 Jur. (N.S.) 1114; 4 W. R. 85; 7 Cox, C. C. 532.

Possession of bad money five days after, may be given in evidence to show guilty knowledge. *Rex* v. *Harrison*, 2 Lewin, C. C. 118.

Having in possession a large quantity of base coin is evidence of having procured it with intent to utter it, unless there are other circumstances to induce a belief that the defendant was the maker. *Rex* v. *Fuller*, R. & R. 308.

On an indictment for uttering counterfeit coin, to prove a guilty knowledge, evidence may be given of a subsequent uttering by the prisoner of counterfeit coin of a different denomination to that mentioned in the indictment. The difference in the denomination of the coin goes to the weight of evidence, but not to its admissibility. *Reg.* v. *Forster*, Dears. C. C. 456; 3 C. L. R. 681; 24 L. J., M. C. 134; 1 Jur. (N.S.) 407; 3 W. R. 411; 6 Cox, C. C. 521.

On an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection, resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the proposed object of which meeting was to fix the meeting mentioned in the indictment, are admissible to show the intention of such defendant in assembling and attending the meeting in question, at which he also presided. *Rex* v. *Hunt*, 3 B. & Ald. 566; 22 R. R. 485.

If persons who formed part of a mob obtain money from a person by advising him to give money to the mob, and are indicted for this as a robbery, the prosecutor, to show that this was not bonâ fide advice, may give evidence of demands of money made by the same mob at other places, before or afterwards in the course of the same day, if any of the prisoners were present on those occasions. *Rex* v. *Winkworth*, 4 Car. & P. 441.

On the trial of an indictment for threatening to accuse the prosecutor of an infamous crime with intent to extort money, it was proved that the prisoner had gone up to the prosecutor and said to him, "If you do not give me a sovereign, I will charge you with an indecent assault":—Held, that inasmuch as, if the jury believed that such language had been used by the prisoner, the intent was manifest, evidence for the prosecution tending to show that the prisoner had made a similar charge two years before ought not to be admitted. *Reg.* v. *M'Donnell*, 5 Cox, C. C. 133.

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money—the prisoner being a soldier, and the accusation having been made while he was on duty as sentry—evidence of declarations made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime, is admissible. *Reg.* v. *Cooper*, 3 Cox, C. C. 547.

It cannot be shown on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offence as that charged against him; therefore an admission by a prisoner, charged with an infamous crime, that he had committed the same offence at another time, and with another person, and that he had a tendency to such practices, was rejected. *Rex* v. *Cole*, Phil. Evid. 170.

In cases of receiving stolen property, see ante, col. 1424.

Where a prisoner was indicted in one count for stealing coal from the mine of H. J. G., and in the same count for stealing from the mines of thirty other proprietors, and it appeared that all the coal so alleged to have been stolen, had been raised at one shaft:—Held, that proof of such charges might be relied on, in order to show a felonious intent. *Reg.* v. *Bleasdale*, 2 Car. & K. 765.

On an indictment for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which in the opinion of the witnesses was not so. This ring was not produced:—Held, that the evidence was properly admitted. *Reg.* v. *Francis*, 43 L. J., M. C. 97; L. R. 2 C. C. 128; 30 L. T. 503; 22 W. R. 663; 12 Cox, C. C. 612.

A. was indicted for obtaining a specific sum of money from B. by false pretences. He was employed by his master to take orders, but not to receive moneys, and he was proved to have obtained the specific sum from B. by representing that he was authorised by his master to receive it. Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the purpose of proving the intent when he committed the acts charged in the indictment. *Reg.* v. *Holt*, Bell, C. C. 280; 30 L. J., M. C. 11; 6 Jur. (N.S.) 1121; 3 L. T. 310; 9 W. R. 74; 8 Cox, C. C. 411.

C. was indicted in four counts for obtaining money by false pretences. It was shown, that

he had inserted an advertisement in a newspaper containing statements found to be false, an address and "Trial Paper and Instructions, 1*s*." Six envelopes were found in his possession, each directed to the address given and containing an answer to the advertisement and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk which had been stopped by the postal authorities. Each letter contained twelve stamps, but no proof was adduced that they were written by the persons from whom they purported to come:—Held, that they were receivable in evidence. *Reg.* v. *Cooper*, 45 L. J., M. C. 15; 1 Q. B. D. 19; 33 L. T. 754; 24 W. R. 279; 13 Cox, C. C. 123. See also *Reg.* v. *Stenson*, 25 L. T. 666; 12 Cox, C. C. 111.

On an indictment for an assault with intent to commit a rape, evidence that the prisoner on a previous occasion had taken liberties with the prosecutrix is not receivable to show the prisoner's intent. *Rex* v. *Lloyd*, 7 Car. & P. 318.

On an indictment for administering sulphuric acid to eight horses, with intent to kill them, the prosecutor may give evidence of administering at different times to show the intent. *Rex* v. *Mogg*, 4 Car. & P. 363.

The intent with which poison is administered for the purpose of procuring abortion may be shown by evidence of similar medicines administered subsequently to the felony charged. *Reg.* v. *Calder*, 1 Cox, C. C. 348.

Upon the trial of an indictment under 24 & 25 Vict. c. 100, s. 58, for "feloniously and unlawfully using a certain instrument, to wit, a quill, with intent to procure a miscarriage," it is relevant, in order to prove the intent, to show that at other times, both before and after the offence charged, the prisoner had caused miscarriages by similar means. *Reg.* v. *Dale*, 16 Cox, C. C. 703.

To show that Act not done Accidentally or by Mistake.]—The question being whether A. murdered B. (an infant), adopted permanently by him on certain representations in consideration of a fee of 3*l*., and the body of the infant being subsequently found buried in a garden belonging to A.:—Evidence of previous permanent adoptions with similar representations and on similar inadequate terms is relevant to the issue. Evidence that the bodies of other infants had been found buried in a similar manner to that of B. in gardens belonging to A. is relevant to the issue. *Makin* v. *Att.-Gen. for New South Wales*, 63 L. J., P. C. 41; [1894] A. C. 57; 6 R. 373; 69 L. T. 778; 17 Cox, C. C. 704; 58 J. P. 148—P. C.

F. and H. were jointly charged upon an indictment for the murder of the husband of H., with causing his death by the administration of arsenic. Evidence having been given that the deceased had died from arsenic, and had been attended by the prisoners:—Held, that it was competent for the prosecution to tender evidence of other cases of persons who had died from arsenic, and to whom the prisoners had access, exhibiting exactly similar symptoms before death to those of the case under consideration, for the purpose of showing that this particular death arose from arsenical poisoning—not accidentally taken, but designedly administered by someone. Such evidence, however, is not admissible for the purpose of establishing motives; though the fact that the evidence offered may tend indirectly to that end is no ground for its exclusion. The true principle on which the admissibility of all such evidence rests is that laid down in *Reg.* v. *Geering* (18 L. J., M. C. 215). *Reg.* v. *Winslow* (8 Cox, C. C. 397) commented on and disapproved. *Reg.* v. *Flannagan*, 15 Cox, C. C. 403.

Upon an indictment for maliciously shooting, it appeared that there were two shootings; but it being questionable whether the first shooting was by accident or design:—Held, that proof of the prisoner having intentionally shot at the person the second time, was evidence to show that the first was wilful. *Rex* v. *Voke*, R. & R. 531. *See also cases* ante, col. 1526.

Evidence of another felony is admissible to show the animus of the prisoner, or if the act done was wilful or accidental. A. was indicted for setting fire to a rick on the 29th of March by discharging a gun close to it. Evidence was admitted of his having been seen near the same rick with a gun on the 28th, when it had been also set on fire. *Reg.* v. *Dossett*, 2 Car. & K. 306; 2 Cox, C. C. 243.

Under an indictment for arson, where the prisoner is charged with wilfully setting fire to her master's house, the previous and abortive attempts to set fire to different portions of the same premises, are admissible, though there is no evidence to connect the prisoner with any of them. *Reg.* v. *Bailey*, 2 Cox, C. C. 311.

Upon an indictment for arson it is not competent for the prosecutor to show that other fires, of which notice was given by the prisoner, were of a similar nature to the one in question, and different from those of which notice was given by other parties. *Reg.* v. *Regan*, 4 Cox, C. C. 335.

Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred previously, and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. *Reg.* v. *Gray*, 4 F. & F. 1102.

On a charge of arson (the case turning on identity) evidence was rejected that, a few days previously to the fire, another building of the prosecutor was found on fire, and the prisoner was seen standing by, with a demeanor which showed indifference or gratification. *Reg.* v. *Harris*, 4 F. & F. 342.

Upon a trial for felony, other felonies, which have a tendency to establish the scienter, may be given in evidence for that purpose. *Reg.* v. *Weeks*, L. & C. 18; 30 L. J., M. C. 141; 7 Jur. (N.S.) 472; 4 L. T. 373; 9 W. R. 553; 8 Cox, C. C. 455.

On an indictment for arson in setting fire to a rick, the property of A., evidence may be given of the prisoner's presence and demeanour at fires of other ricks, the property respectively of B. and C., occurring the same night, although those fires are the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A.'s rick; but evidence is not admissible of threats, statements or particular acts pointing alone to the other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to that fire. *Reg.* v. *Taylor*, 5 Cox, C. C. 138.

An indictment charged the prisoner with having embezzled three sums of 21*l*., the moneys of

his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended that the sums charged in the indictment were subjects of a mistake in keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion :—Held, that such evidence was admissible. *Reg.* v. *Richardson*, 2 F. & F. 343 ; 8 Cox, C. C. 448.

A member of a friendly society was employed to receive weekly payments made by other members, and appropriated certain sums thus paid. Upon the trial, the books of the society were tendered generally in evidence, and received, although it was objected that the evidence ought to be confined to the entries forming the subject of the indictment :—Held, that they were rightly admitted. *Reg.* v. *Proud*, L. & C. 97 ; 31 L. J., M. C. 71 ; 8 Jur. (N.S.) 142 ; 5 L. T. 331 ; 10 W. R. 62 ; 9 Cox, C. C. 22.

10. Documents.

a. Admissibility Generally.

Letters found upon Prisoner or in his Possession.]—On a charge of conspiring to murder, after it had been proved that the grenades by which the death in question had been caused had been ordered by A., but when there was no evidence to connect A. with the prisoner, it was proved that a letter in A.'s handwriting, bearing a memorandum in the hand of the prisoner, was found at his residence after his arrest upon the present charge :—Held, that such letter was admissible against him, not upon the ground that A. was a co-conspirator, but upon the ground that it was found in the possession of the prisoner, and was relevant to the inquiry. *Reg.* v. *Bernard*, 1 F. & F. 240.

On an indictment for forging a bank note, a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction, at the prisoner's lodgings, after he was apprehended and during his confinement, but never actually in his custody, cannot be read in evidence against him on his trial. *Rex* v. *Huet*, 2 Leach, C. C. 820.

On an indictment for a conspiracy, the letters of one of the defendants to the other are, under certain circumstances, admissible in evidence in his favour, to show that he was the dupe of the other, and was not himself a participator in the fraud. *Rex* v. *Whitehead*, 1 Car. & P. 67.

A prisoner was taken into custody at the house of his brother on a charge of abduction ; when he was taken, a letter was found in a writing desk in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about :—Held, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Reg.* v. *Barratt*, 9 Car. & P. 387.

In a case of forging and uttering a forged bill, a letter written by the prisoner to a third person, saying that such person's name is on another bill, and desiring him not to say that that bill is a forgery, is receivable in evidence to show guilty knowledge. *Rex* v. *Forbes*, 7 Car. & P. 224.

Though a letter found upon a prisoner may be read, it is no evidence of the facts it states : they must be proved by other evidence. *Rex* v. *Plumer*, R. & R. 264 ; 15 R. R. 741.

Letters Intercepted.]—Letters which have never been in the custody of a prisoner, or any way adopted by him (being intercepted at the post office), although directed to him, cannot be read in evidence against him. *Rex* v. *Hevey*, 1 Leach, C. C. 232, 285.

A prisoner in custody wrote a letter to his wife, he was told that it would be read before being posted ; the police kept the letter and sent a copy to the wife :—Held, that the original was not admissible. *Reg.* v. *Pamenter*, 12 Cox, C. C. 177.

Letter of one Prisoner—Joint Indictment.]—If a letter, written by one of several prisoners, is read in evidence, and in this letter the names of the other prisoners are mentioned, these names must not be omitted in the reading of the letter but the judge will tell the jury to pay no attention to the letter, except so far as it affects the writer. *Rex* v. *Fletcher*, 4 Car. & P. 250.

Document partly in Prisoner's Writing found in Box not Proved to belong to Prisoner.]—In a portmanteau not proved to belong to a prisoner on trial was found a paper folded like a letter, and containing in the inside what purported to be an inventory of goods pawned at different times. The inventory was not in his handwriting ; but on the outside of the paper his name, and the word "private," both in his handwriting, were indorsed :—Held, that the contents of the paper were not admissible against him. *Reg.* v. *Hare*, 3 Cox, C. C. 247.

For sake of Comparison.]—Copy books found at the prisoner's house containing writing by the prisoner, and produced by a policeman, cannot be received in order to compare with the forged cheque. *Reg.* v. *Harvey*, 11 Cox, C. C. 546.

On an indictment for forgery, it appeared that the prisoner, on the discovery of the forgery, being suspected, was asked to write his name, for the purpose of comparison, and did so :—Held, that the signature was not admissible on the part of the prosecution for that purpose *Reg.* v. *Aldridge*, 3 F. & F. 781.

The defendant was indicted for perjury alleged to have been committed by him on a trial of an action by swearing that the signature to a document was not in his handwriting. The judge made the defendant write his name in court and impounded the two documents :—Semble, the jury might compare the two signatures. *Reg.* v. *Taylor*, 6 Cox, C. C. 58.

Card of Prosecutor to prove his Name.]—Where an indictment charged that a person shot at one Harvey Garnett Phipps Tuckett :—Held, that Tuckett's card, though given to one of the witnesses in the presence of the party charged, could not be given in evidence against him on the trial to prove the name, as its contents were not shown to have been communicated to him *Reg.* v. *Douglas*, Car. & M. 193.

Maps and Plans—Form of.]—A map or a plan prepared for the purpose of a trial ought not to contain any reference to transactions and occur-

rences which are the subject-matter of the investigation before the court, and not existing when the survey was made; and if it does, and the objection is taken, the court will not allow the jury to look at it. *Reg.* v. *Mitchell*, 6 Cox, C. C. 82.

Infancy, how Proved.]—On an indictment against a defendant for obtaining goods by falsely pretending that he was of full age, a plea of infancy in an action brought against him is not admissible for the purpose of proving that he was a minor. *Reg.* v. *Simmonds*, 4 Cox, C. C. 277.

Unstamped Documents.]—On an indictment for forging a bill of exchange, the bill may be given in evidence although it is not stamped. *Rex* v. *Hawkeswood*, 1 Leach, C. C. 257; 2 East, P. C. 955; 2 Term Rep. 606. n. S. P., *Rex* v. *Morton*, 2 East, P. C. 955; 1 Leach, C. C. 259, n.

O. was indicted for embezzlement, and for the purpose of proving his identity as the person receiving certain things from S. & Co. for the prosecutor, an entry in a book of S. & Co. was read in evidence. The account was kept in four columns, in the first of which were entered the dates; in the second the name of the person on whose behalf the money was received; in the third the signature of the person receiving; and in the fourth the amount of the particular payment made by S. & Co.:—Held, that the entry, as explained by the evidence, amounted to a receipt; and that even for the purpose of proving identity, the whole entry could not be read without a stamp, and that therefore the conviction was wrong. *Reg.* v. *Overton*, Dears. C. C. 308; 23 L. J., M. C. 29; 18 Jur. 134; 6 Cox, C. C. 277.

In the course of proving a conspiracy to defraud, carried into effect by prevailing upon the prosecutor to accept bills, a warrant of attorney, given to him for the purpose of inducing him to accept, reciting the acceptance, may be given in evidence, though unstamped. *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B., 121; 11 Jur. 204.

See now 54 & 55 Vict. c. 39, s. 14.

Privilege of Solicitor.]—*See* ante, col. 1872.

Original Entry must be Produced.]—Upon an indictment for forging a cheque for 60*l.* 10*s.*, evidence of the number of the notes in which it was paid was rejected in consequence of the original entry not being forthcoming at the trial. *Reg.* v. *Harvey*, 11 Cox, C. C. 546.

—— **Telegram sent by Prisoner.**]—Where in a criminal case it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, it is absolutely necessary that the original message handed to the post-office should be produced, or proof given that it is destroyed, and the copy received by a witness cannot be given in evidence until it is proved that the original cannot be produced. *Reg.* v. *Regan*, 16 Cox, C. C. 203.

—— **Directions on Hamper.**]—On an indictment for larceny and receiving, parol evidence of the directions upon certain hampers sent by the principal to the receiver is not admissible without notice to produce them, unless from the facts the presumption is stronger that they have been destroyed than that they are in existence. *Reg.* v. *Hinley*, 1 Cox, C. C. 12

—— **Deed—Sporting Rights.**]—A landowner by deed granted the right of shooting to G. over land of which B. afterwards became occupier. Upon an information against B. for entering and being in the daytime upon land in search of game, G. deposed that he had the exclusive right of shooting over the same, and that he had given no authority to B. to shoot; the deed was not put in evidence:—Held, that the conviction, unsupported by the production of the deed, was wrong. *Barker* v. *Davis*, 34 L. J., M. C. 140; 11 Jur. (N.S.) 651.

b. Notice to Produce.

In what cases Necessary.]—On an indictment against A. and B. for burglary one of the articles stolen was a ring, which was described particularly by the prosecutor and proved to have had an inscription upon it, and to have been just like one he produced; one of the prisoners being proved to have shown, soon after the burglary, a ring which in the opinion of the witnesses was just like the one produced and had an inscription upon it, but of which no notice to produce had been given:—Held, that the contents of the inscription on the prosecutor's ring could not be proved, and that as there had been no notice given to the prisoner to produce the ring shown by him to the witness, the contents of the inscription upon it could not be proved. *Reg.* v. *Furr*, 4 F. & F. 396.

A man was indicted for forging a bank note of a banking company. The note was not produced nor had there been a notice to produce the original:—Held, that secondary evidence was not admissible. *Reg.* v. *Fitzsimons*, Ir. R. 4 C. L. 1; 18 W. R. 763.

A solicitor was indicted for perjury in having sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce this draft had been given to the solicitor, and upon his trial it was proved to have been last seen in his possession. Secondary evidence having been given of its contents:—Held, that in the absence of such notice, secondary evidence was inadmissible. *Reg.* v. *Elworthy*, 37 L. J., M. C. 3; L. R. 1 C. C. 103; 17 L. T. 293; 16 W. R. 207; 10 Cox, C. C. 579.

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said that he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words; yet held that parol evidence of what he in fact said, was sufficient without giving him notice to produce the paper. *Rex* v. *Moors*, 6 East, 419.

On an indictment for arson on the prosecution of an insurance company, their books are not evidence of the insurance without notice to produce the policy. *Rex* v. *Doran*, 1 Esp. 127.

Upon an indictment for arson with intent to defraud an insurance company, the nature of the proceedings does not give notice to the prisoner to produce the policy, so as to dispense with actual notice to produce it. *Reg.* v. *Kitson*, Dears. C. C. 187; 22 L. J., M. C. 118; 17 Jur. 422; 6 Cox, C. C. 159.

Where there has been a written agreement between master and servant, in which the nature

of the service is defined, on an indictment for embezzlement against the latter, parol evidence of the service is not admissible; unless notice has been given to produce the agreement. *Reg.* v. *Clapton*, 3 Cox, C. C. 126.

In order to prove the service of the copy of an order of sessions, a witness was called, who stated, that the order having been drawn up from the minutes of the sessions on paper, and signed by the clerk of the peace, was read over by him to each of the defendants, whom he at the same time served with a true copy of it:—Held, sufficient; and that it was not necessary to give notice to produce the copy served in order to let in such evidence. *Reg.* v. *Mortlock*, 7 Q. B. 459; 2 New Sess. Cas. 108; 14 L. J., M. C. 153; 9 Jur. 621.

An indictment alleged that the prisoner, being in the employ of the post-office, stole a post-letter, to wit, a post-letter directed and addressed as follows, that is to say (setting out the address), which contained property. At the trial, a witness having deposed that he employed a man to post a letter containing the property in question:—Held, that he might be asked how that letter was addressed, although no notice to produce the letter had been given. *Reg.* v. *Clube*, 3 Jur. (N.S.) 698. See also *Reg.* v. *Hinley*, supra.

—— **On Postponement of Trial.**]—Where a trial has been postponed from one session to another, a notice to produce served on the prisoner in time for the first session is available for the subsequent one without any fresh service. *Reg.* v. *Robinson*, 5 Cox, C. C. 183.

Service—Length of Time before Trial.]—If a forged deed is in the possession of a prisoner, who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has a reasonable time before the commencement of the assizes, given the prisoner notice to produce it. A notice given to the prisoner during the assizes is too late. *Rex* v. *Haworth*, 4 Car. & P. 254.

A prisoner tried at the assizes for arson, on Wednesday, the 20th of March, was on Monday, the 18th, served at the prison with a notice to produce a policy of insurance. The commission day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—Held, that the notice was served too late. *Rex* v. *Ellicombe*, 5 Car. & P. 522; 1 M. & Rob. 260.

Notice to produce a document served on the defendant's solicitor the day before the trial, but after the commencement of the assizes, is sufficient. *Reg.* v. *Hawkins*, 3 Cox, C. C. 434.

A notice to produce, served on the 23rd, on the prisoner in custody after the grand jury were discharged, the commission day being the 16th, is too late. *Reg.* v. *Allison*, 1 Cox, C. C. 24.

Notice to produce a cheque at the trial in London, that was served on the London agents, for the country solicitor at 3 p.m., the day before the trial, is sufficient. *Reg.* v. *Hamp*, 6 Cox, C. C. 167.

Notice to produce policies of insurance, served on the prisoner's attorney on Tuesday evening, the prisoner then being in Maidstone and the policies twenty miles off, is sufficient when the trial takes place on Thursday. *Reg.* v. *Barker*, 1 F. & F. 326.

Where notice to produce a policy of insurance was given to the prisoner in the middle of the day preceding the trial, the prisoner's residence being thirty miles from the assize town:—Held, that secondary evidence of the policy could not be given. *Reg.* v. *Kitson*, Dears. C. C. 187; 22 L. J., M. C. 118; 17 Jur. 122; 6 Cox, C. C. 159.

Service on whom.]—Service of notice to produce on an attorney who had served a notice on behalf of the prisoner, as to an application to bail him upon the charge, is sufficient. *Reg.* v. *Boucher*, 1 F. & F. 486.

Service of a notice to produce on the prisoner in gaol is sufficient. *Reg.* v. *Robinson*, 5 Cox, C. C. 183.

A notice to produce a document delivered to an attorney, suggested to be the prisoner's attorney, is (in the absence of evidence that he was so) not a valid notice, so as to enable secondary evidence to be given; and the attorney was not allowed to be asked whether he had shown the notice to his client. *Reg.* v. *Downham*, 1 F. & F. 386.

c. Secondary Evidence.

When Admissible—Documents Lost or Destroyed.]—When a false pretence is contained in a letter which is lost, the prisoner may be convicted, if parol evidence is given of the contents of the letter. *Rex* v. *Chadwick*, 6 Car. & P. 181.

Where perjury is assigned upon a written instrument, subsequently lost, secondary evidence is admissible. *Reg.* v. *Milnes*, 2 F. & F. 10.

If a prisoner has said that he has destroyed a deed which he is charged with forging, no notice to produce it will be necessary. *Rex* v. *Haworth*, 4 Car. & P. 254.

Where perjury is alleged as having been committed before justices at petty sessions on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction proved, before secondary evidence of its contents can be given on the trial of an indictment for perjury. *Reg.* v. *Dillon*, 14 Cox, C. C. 4.

O. ordered animals, bought at a market in the county of S., to be forwarded to T., in the county of C. A form of certificate was there given to the drover, who showed it in course of the journey to railway porters and others at two places in the county of C., but it was destroyed by order of O. On O. being charged for uttering a false certificate, and notice to produce the original being served:—Held, that the justices at T. were right in receiving secondary evidence of the certificate. *Oakey* v. *Stretton*, 48 J. P. 709.

In order to give secondary evidence of the contents of a written document, on the ground of its being lost, search must have been made in the places where the document might have been placed. *Reg.* v. *Rastrick*, 2 Cox, C. C. 39.

If the forged instrument is not produced at the trial, the best proof that can be given of its loss or destruction must be adduced before a copy may be used as secondary evidence. *Reg.* v. *Hall*, 12 Cox, C. C. 159.

—— **Subpœna duces tecum.**]—On an indictment for the larceny of a bill of exchange, obtained from the prosecutor, under a pretence of discounting it, parol evidence of the bill may be given after proof of a subpœna duces tecum given to the person in whose possession it was shown to be previously to the trial, but who did

not attend. *Rex* v. *Aickles*, 1 Leach, C. C. 294; 2 East, P. C. 675.

—— **Notice to Prisoner's Solicitor.**]—On an indictment for uttering a forged deed, it appeared that the deed alleged to have been forged was produced in evidence by the prisoner's attorney on the trial of an ejectment, in which the prisoner was lessor of the plaintiff; and that after the trial it was returned to the prisoner's attorney:—Held, that if the prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling his attorney to prove what he had done with the deed. *Rex* v. *Hunter*, 4 Car. & P. 128.

Draft Deed—Abbreviations.]—If, as secondary evidence of the contents of a deed, the draft is given in evidence, and, in the draft, words are abbreviated which in the setting out of the deed in the indictment are put in words at length, it will be for the jury to say whether they think that the words abbreviated in the draft were inserted at length in the deed itself. *Ib.*

d. Inspection before Trial.

When Ordered.]—On an indictment in the Central Criminal Court, for obtaining money by a false pretence, that a parcel contained certain letters of the prosecutrix to the prisoner, which he had promised, for a valuable consideration, to give up, and which had been seized under a search warrant, a judge on the rota for the session, after the session had opened, made an order in favour of the prisoner for an inspection of the letters. *Reg.* v. *Colucci*, 3 F. & F. 103.

e. Proof of.

That Action Pending.]—On the trial of an indictment alleging perjury upon the hearing of a civil action, the production of a copy of the writ and pleadings from the record and writ clerk's office is evidence that an action was pending. *Reg.* v. *Scott*, 26 L. J., M. C. 259; 2 Q. B. D. 415; 36 L. T. 476; 25 W. R. 697; 13 Cox, C. C. 594.

That Indictment Found.]—An allegation in an indictment, "that at the general quarter sessions of the peace holden at U., in and for the county of M., on Monday, the 10th of July, 1826, before certain of his majesty's justices of the peace assigned, &c., a certain bill of indictment against S. H. G. was duly preferred and found," is only proved by a regular record of the indictment and caption; and an examined copy of the mere indictment without any caption, together with the minute-book of the sessions, produced by the deputy clerk of the peace, and from which he reads entries in his own handwriting showing the time and place of holding the sessions, is not sufficient, although no record has in fact been drawn up. *Rex* v. *Smith*, 8 B. & C. 341; 6 L. J. (o.s.) M. C. 99.

Letter of Instruction from Lords of Treasury.]—A letter of instruction from the lords of the Treasury, signed by three lords of the Treasury, is admissible upon proof of the handwriting of the three persons whose names were subscribed to it, without producing the commission. *Rex* v. *Jones*, 2 Camp. 131; 11 R. R. 680.

Notices in the London Gazette — Cuttings from the Gazette.]—A petition in bankruptcy having been presented against the prisoner in the D. County Court, the court made an order that the publication of a notice of the petition in the London Gazette should be deemed service of the petition on the prisoner. The prisoner did not appear according to this notice, and there was no evidence that it had come to his knowledge. The prisoner was adjudicated bankrupt in his absence, and divers proceedings in the bankruptcy took place. Subsequently thereto the prisoner was arrested, and afterwards examined in court touching his affairs by the trustee in the bankruptcy, and the result was that he was indicted and convicted for various offences under the Bankruptcy Act. On the trial, in proof of the publication of the order of the county court in the Gazette, the file of the proceedings in the Bankruptcy Court was produced, containing a cutting from the Gazette of the advertisement of the order of the county court and notice to appear:—Held, that this cutting from the Gazette was improperly received as evidence of the publication of the notice in the London Gazette, and that the conviction could not be sustained. *Reg.* v. *Lowe*, 52 L. J., M. C. 122; 48 L. T. 768; 15 Cox, C. C. 286; 47 J. P. 535.

Detaining Public Documents.]—Public documents in the hands of the court will be detained until the purpose for which they are produced is fully satisfied. *Reg.* v. *Richards*, 1 Cox, C. C. 62.

Letters—Proof by Post-marks.]—The post-office marks, in town or county, proved to be such, are evidence that the letters on which they are were in the office to which those marks belong at the time those marks specify. *Rex* v. *Plumer*, R. & R. 264; 15 R. R. 741.

Proof of Handwriting — By whom.] — A prisoner's handwriting may be proved by witnesses who have seen him write. *Rex* v. *Hensey*, 2 Ld. Ken. 366; 1 Burr. 642.

A person who has received letters purporting to come from a party, and has acted on those letters, may prove the handwriting of such party. *Rex* v. *Slaney*, 5 Car. & P. 213.

A policeman who has only once seen a prisoner write, and that since suspicion has been excited against him with reference to the charge upon which he is tried, and upon an opportunity taken by the policeman with the view of being able to speak to his handwriting, is not an admissible witness to prove that a document, the foundation of the charge against a prisoner, is in his handwriting. *Reg.* v. *Crouch*, 4 Cox, C. C. 163.

Any person who is "skilled" in handwriting may give evidence as to the handwriting of a document, although he may not be "skilled" in the way of his business or profession. *Reg.* v. *Silverlock*, 63 L. J., M. C. 233; [1894] 2 Q. B. 766; 10 R. 431; 43 W. R. 14; 58 J. P. 788.

11. Previous Convictions and Records.

How Proved.]—The 14 & 15 Vict. c. 99, s. 13, which allows a criminal record to be proved by a certificate of the officer having custody of the record omitting the formal parts, applies to proof in civil as well as in criminal proceedings. *Richardson* v. *Willis*, 42 L. J., Ex. 15; L. R. 8 Ex. 69; 27 L. T. 828; 12 Cox, C. C. 298.

If a plaintiff, in an action for a malicious prosecution, offers to prove at the trial the original record of the indictment and acquittal, or a true copy thereof, such evidence must be received, though there was no order of the court, or fiat of the attorney-general, allowing the plaintiff a copy of such record; but the officer, who without such authority produces the record, or gives a copy of it to the party, is answerable for the contempt of court in so doing; and the judge at nisi prius will not compel him to produce the record in evidence, without such authority. *Legatt* v. *Tollervey*, 14 East, 303; 12 R. R. 518.

Where a party suing for a malicious prosecution had obtained a copy of the indictment by virtue of the attorney-general's fiat, granted under a misstatement as to the view entertained by the judge before whom the indictment was tried, the court refused to stay the proceedings, or to prevent the plaintiff from using on the trial the copy so obtained. *Browne* v. *Cumming*, 5 M. & Ry. 118; 10 B. & C. 70; 8 L. J. (O.S.) K. B. 89.

On an indictment on the prosecution of a private individual for keeping a common gaming-house, the solicitor of the treasury was allowed to have a new record of nisi prius engrossed, and the postea and verdict indorsed from the judge's notes, on an affidavit that the postea could not be found, and that the solicitor of the treasury was instructed by the secretary of state to ask for the judgment of the court. *Rex* v. *Oldfield*, 3 B. & Ad. 659, n.

The proper proof that a prisoner was in lawful custody, under a sentence of imprisonment passed at the assizes, is, by the proof of the record of his conviction; and neither the production of the calendar of the sentences signed by the clerk of the assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient for this purpose. *Reg.* v. *Bourdon*, 2 Car. & K. 366.

—— **Of Conviction and Identity.**]—A previous summary conviction, which, under 14 & 15 Vict. c. 99, s. 13, is required to be proved by a certified copy, also requires proof of the prisoner's identity as under 7 & 8 Geo. 4, c. 28, s. 11, which remains in this respect as it stood before. The identity may be proved by evidence from which a jury may draw the conclusion that he is the same person named in the certificate, although no witness saw him convicted at his trial. *Reg.* v. *Leng*, 1 F. & F. 77.

—— **Identity, how proved.**]—In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates; it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate. *Reg.* v. *Crofts*, 9 Car. & P. 219.

It is sufficient evidence of a previous summary conviction, to show that the certificate of conviction and the warrant agree, and that the prisoner was received into custody under the warrant, without further proving identity. *Reg.* v. *Levy*, 8 Cox, C. C. 73.

—— **Certificate, when Admissible.**]—A certificate of a conviction, made at the quarter sessions for a borough, purporting to be signed by a person described therein as deputy clerk of the peace of the borough, and having the custody of the records of the quarter sessions, is admissible in evidence, as purporting to be made by an officer having the custody of the records of the court where the conviction was made, within 5 Geo. 4, c. 84, s. 24, although the 5 & 6 Will. 4, c. 76, gave no power to appoint a deputy clerk of the peace for a borough within that act. *Reg.* v. *Parsons*, 35 L. J., M. C. 167; L. R. 1 C. C. 24; 12 Jur. (N.S.) 436: 14 L. T. 450; 14 W. R. 662; 10 Cox, C. C. 243.

A person de facto filling an office, carrying with it the custody of the records of the court, may lawfully give such a certificate, although he may not hold such office de jure. *Ib.* S. P., *Reg.* v. *Jones*, 2 Car. & K. 524.

As Proof of Guilty Knowledge.]—On an indictment for uttering a counterfeit coin after a previous conviction, such previous conviction for uttering false coin cannot be put in evidence for the purpose of proving guilty knowledge. *Reg.* v. *Goodwin*, 10 Cox. C. C. 534.

Proof of Previous Conviction of Witness—Immaterial to Issue.]—A party to a cause who gives evidence in support of his case may be cross-examined as to whether he has been ever convicted of a felony or misdemeanor, and if he denies or refuses to answer it, the opposite party may prove such conviction under s. 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), although the fact of such conviction be altogether irrelevant to the matter in issue in the cause. *Ward* v. *Sinfield*, 49 L. J., C. P. 696; 43 L. T. 252.

"Conviction," What is.]—A person found guilty of a misdemeanor under s. 9 of the Coinage Act, and ordered to find a surety for his appearance to hear judgment when called upon, has been "convicted" of that offence, and a subsequent similar offence is felony under s. 112. *Reg.* v. *Blaby*, 63 L. J., M. C. 133; [1894] 2 Q. B. 170; 10 R. 227; 70 L. T. 879; 42 W. R. 511: 18 Cox, C. C. 5; 58 J. P. 576—C. C. R.

Committal at Petty Sessions—Trial at Quarter Sessions.]—The prisoner, being a person twice convicted of crime, had been convicted at quarter sessions under the Prevention of Crimes Act, 1871, s. 7, sub-s. 3, of being found under circumstances such as to satisfy the court before whom he was brought that he was about to commit an offence. The court before whom the prisoner was originally brought was the petty sessions, where the prisoner had claimed under the Summary Jurisdiction Act, 1879, s. 17, to be committed for trial by a jury:—Held, that the Court of Quarter Sessions was the court "before whom he was brought" within the meaning of s. 7, sub-s. 3, of the Prevention of Crimes Act, 1871. *Reg.* v. *Wilcox*, 37 W. R. 686.

Indictment—Form of.]—It is no objection to an indictment that a previous conviction is stated at the beginning of it, by way of introductory averment, instead of at the end in the form of a separate count. *Reg.* v. *Hilton*, Bell, C. C. 20; 28 L. J., M. C. 28; 5 Jur. (N.S.) 47; 7 W. R. 59; 8 Cox, C. C. 87.

C., with others, was charged in the first count of an indictment with larceny from the person. The indictment contained two other counts, each charging a previous conviction against C.:—Held, that any number of previous convictions may be alleged in the same indictment, and, if

necessary, proved against the prisoner. *Reg.* v. *Clark*, Dears. C. C. 198; 3 Car. & K. 367; 22 L. J., M. C. 135; 17 Jur. 582; 1 W. R. 439; 6 Cox, C. C. 210.

Mode of Conducting Case.]—On a trial for felony after a previous conviction the prisoner is to be arraigned on the whole indictment, and the jury is to have the new charge only stated to them, and if no evidence to character is given, nothing is to be said to the jury of the previous conviction till they have given their verdict on the new charge, and then, without being resworn, the jury is to hear the statement of the previous conviction, and the proof of it. *Reg.* v. *Shuttleworth*, 3 Car. & K. 375; T. & M. 626; 2 Den. C. C. 351; 21 L. J., M. C. 36; 15 Jur. 1066; 5 Cox, C. C. 369.

If, to prevent prejudice, the prisoner, at the request of his counsel, has not been arraigned on the charge of the previous conviction before the verdict has been given on the subsequent charge, he may afterwards be arraigned thereon, and the jury may afterwards inquire respecting it. *Reg.* v *Hilton*, supra.

Where a person is indicted for night poaching after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the facts of the case. *Reg.* v. *Woodfield*, 16 Cox, C. C. 314.

Upon the trial of an indictment for the felony of having committed a misdemeanour within either of ss. 9, 10 or 11 of 24 & 25 Vict. c. 99, relating to the unlawful possession and uttering of counterfeit coin after a previous conviction for a misdemeanour within those sections: the prisoner must be arraigned upon the subsequent offence, and evidence respecting it must first be submitted to the jury, and the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence. *Reg.* v. *Martin*, 39 L. J., M. C. 31; L. R. 1 C. C. 214; 21 L. T. 469; 18 W. R. 72.

Challenging Jury.]—Where a prisoner was found guilty on an indictment for larceny, which contained a count for a previous conviction, and, after conviction for the larceny, the court thought fit to swear the jury afresh to try the question of whether the prisoner had been previously convicted—Held, that he was not entitled to challenge the jury afresh. *Reg* v. *Key*, T. & M. 623; 2 Den. C. C. 347; 3 Car. & K. 371; 21 L. J., M. C. 35; 15 Jur. 1065.

VII. VERDICT.

1. *Generally*, 1891.
2. *Attempts to Commit Offences*, 1893.

1. GENERALLY.

Vacating after being Recorded.]—Though a verdict is recorded, yet if it appears promptly, that it is not according to the intention of the jury, it may be vacated and set right. *Rex* v. *Parkin*, 1 M. C. C. 45.

Power to enter.]—F. was charged with stealing milk. After the jury had been absent some time the judge sent for them. In answer to questions put by him they said they had not agreed upon their verdict, but that they believed the only witness for the prosecution. The judge thereupon caused a verdict of "guilty" to be entered:—Held, that he had no power to do so, it being the function of the jury, and not of the judge, to say whether there was any felonious intent (animus furandi), without which a verdict of guilty could not be entered. *Reg.* v. *Farnborough*, 64 L. J., M. C. 270; [1895] 2 Q. B. 484: 15 R. 497; 73 L. T. 351; 44 W. R. 48; 18 Cox, C. C. 191; 59 J. P. 505—C. C. R.

Where a misdemeanour is tried in the queen's bench division, and a verdict of guilty has been found, the court has power on motion to enter a verdict for the defendant. *Reg.* v. *Platts*, 28 W. R. 915.

Validity—Good Finding on bad Count and vice versâ.]—A good finding on a bad count in an indictment, and a bad finding on a good count, stand on the same footing, both being nullities. *O'Connell* v. *Reg.*, 11 Cl. & F. 155; 9 Jur. 25; 1 Cox, C. C. 413.

—— **Different Counts.**]—A verdict of not guilty can be entered on one count, and of guilty on another. *Reg.* v. *Craddock*, 14 Jur. 1031.

Where a count contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge. *O'Connell* v. *Reg.*, 11 Cl. & F. 155, 9 Jur. 25: 1 Cox, C. C. 413.

—— **Misdemeanour—Indictment for Felony.**]—On an indictment for felony there cannot be a conviction for a misdemeanour except under the express provisions of a statute. *Reg.* v. *Thomas*, 44 L. J., M. C. 42; L. R. 2 C. C. 141; 31 L. T. 849; 23 W. R. 344; 13 Cox, C. C. 52.

—— **Recommendation to Mercy.**]—A jury returned a verdict of guilty on an indictment, but recommended the defendant to mercy on the ground that perhaps he did not know that he was acting contrary to law:—Held, that the conviction was not invalidated by this addition to the verdict. *Reg.* v. *Crawshaw*, Bell, C. C. 303; 30 L. J., M. C. 58; 3 L. T. 510; 9 W. R. 38; 8 Cox, C. C. 375.

Refusal to Receive.]—Indictment for murder. Defence that deceased committed suicide. Verdict guilty, the jury adding that they believed the act was committed without premeditation. The judge refused to receive such a verdict, and directed the jury to say guilty or not guilty. *Reg.* v. *Maloney*, 9 Cox, C. C. 6.

Effect of Abandonment of Counts.]—A first count charged the prisoners under 9 Geo. 4, c. 69. s. 2, with being found on land at night armed with a gun for the purpose of taking game, by A. and B., who had lawful authority to apprehend them, and that they, being about to apprehend them, the prisoners with a weapon assaulted and wounded them; a second count charged an unlawful wounding; and the third and fourth counts charged a common assault. The counsel for the prosecution abandoned the last three counts, and elected to stand on the first count. The jury returned a verdict of guilty of night poaching and a common assault. Upon a question raised whether the prisoners could be convicted of a common assault upon the first count:—Held, that the prosecuting counsel having withdrawn the counts for common assault from the jury, the question ought not to be entertained. *Reg.* v. *Day*, 22 L. T. 452; 11 Cox, C. C. 505.

Reconsideration of—Alteration in Book.]—At sessions the jury gave a special verdict of not guilty, and it was entered in the book of the clerk of the peace. Afterwards, the chairman told the jury they must reconsider their verdict; and they gave a verdict of guilty generally, but recommended the defendant to mercy on account of his not doing the act with a malicious intent; and the verdict was then altered in the book of the clerk of the peace. The court refused to interfere by mandamus to cancel the alterations. *Rex* v. *Suffolk JJ.*, 5 N. & M. 139; 1 H. & W. 313; 6 L. J., M. C. 37.

Where a jury returns what the judge considers to be an improper verdict, he may direct them to reconsider it, and is not bound to record it unless they insist upon his doing so. Where the jury reconsider their verdict and alter it, the second is the real verdict of the jury. *Reg.* v. *Meany*, L. & C. 213; 32 L. J., M. C. 24; 8 Jur. (N.S.) 1161; 7 L. T. 393; 11 W. R. 41; 9 Cox, C. C. 231. See *Reg.* v. *Yeadon*, L. & C. 81; 31 L. J., M. C. 70; 7 Jur. (N.S.) 1128; 5 L. T. 329; 10 W. R. 64; 9 Cox, C. C. 91.

One of the jury pronounced a verdict of not guilty, which was entered by the clerk of the peace in his minute book, and the prisoner was discharged. Other jurymen then interfered, and said their verdict was guilty; whereupon the prisoner was brought back, and the jury was again asked for their verdict, when they all said it was guilty, and that they had been unanimous. A verdict of guilty was then recorded.—Held, that the verdict was properly amended; and the conviction must stand. *Reg.* v. *Vodden*, Deans. C. C. 229; 23 L. J., M. C. 7; 17 Jur. 1014; 2 W. R. 55; 6 Cox, C. C. 226.

Amendment.]—An erroneous entry of the verdict in criminal cases may be amended from the judge's notes, but not from the recollection of the judge. *Reg.* v. *Verrier*, 12 A. & E. 317; 4 P. & D. 161; 9 L. J., M. C. 120. See *Rex* v. *Hazel*, infra.

Special Verdict.]—The jury may in a criminal case find a special verdict setting out the facts. *Reg.* v. *Dudley*, 54 L. J., M. C. 32; 14 Q. B. D. 273, 560; 52 L. T. 107; 33 W. R. 347; 15 Cox, C. C. 624; 49 J. P. 69.

A special verdict in murder may be amended by the minutes taken at the trial. *Rex* v. *Hazel*, 1 Leach, C. C. 368, 382.

2. Attempts to Commit Offences.

When Jury may Find.]—The jury, under s. 9 of 14 & 15 Vict. c. 100, can only convict the prisoner of an attempt which is a misdemeanour, and not of an attempt which is made felony by statute. *Reg.* v. *Connell*, 6 Cox, C. C. 178.

A. was indicted for breaking and entering a dwelling-house, and stealing certain specified goods, and it appeared that, at the time of the breaking and entering, the goods named in the indictment were not in the house, but there were other goods there belonging to the prosecutor. Under 14 & 15 Vict. c. 100, s. 9, the defendant can only be convicted of the attempt to commit the very offence with which he is charged. Where, therefore, the jury found that he was not guilty of the felony charged, but that he was guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein:—Held, that there was no attempt to commit felony charged within the meaning of the above section, and therefore the verdict could not be sustained. *Reg.* v. *M'Pherson*, Dears. & B. 197; 26 L. J., M. C. 134; 3 Jur. (N.S.) 523; 5 W. R. 525; 7 Cox, C. C. 281.

On an indictment under 24 & 25 Vict. c. 96, s. 57, for feloniously breaking and entering a shop with intent to commit a felony, a prisoner may be found guilty of misdemeanour in attempting to commit that felony. *Reg.* v. *Bain*, L. & C. 129; 31 L. J., M. C. 88; 8 Jur. (N.S.) 418; 5 L. T. 647; 10 W. R. 236; 9 Cox, C. C. 98.

An attempt to commit a burglary may be established on proof of a breaking with intent to rob the house, although there is no proof of an actual entry. *Reg.* v. *Spanner*, 12 Cox, C. C. 155.

If Offence Committed, Jury cannot find Guilty of Attempt only.]—On an indictment for an assault with intent to commit rape, if penetration is proved, the prisoner cannot be convicted of the attempt. *Reg.* v. *Nicholls*, 2 Cox, C. C. 182

Before 14 & 15 Vict. c. 100, s. 12, a defendant would be acquitted on an indictment for an assault with intent to ravish, if the evidence amounted to proof of an actual rape. *Rex* v. *Harmwood*, 1 East, P. C. 411.

Full Offence rendered Impossible.]—A conviction for an attempt to commit an offence may be supported, although the attempt could not possibly have culminated in the full offence in the manner intended. *Reg.* v. *Collins* (L. & C. 471) overruled. *Reg.* v. *Brown*, 59 L. J., M. C. 47; 24 Q. B. D. 357; 61 L. T. 594; 38 W. R. 95; 16 Cox, C. C. 715; 54 J. P. 408—C. C. R.

And therefore, if a person tries to pick a pocket, he is guilty of an attempt to steal, without proof of there being anything in the pocket. *Reg.* v. *Ring*, 61 L. J., M. C. 116; 66 L. T. 300; 17 Cox, C. C. 491; 56 J. P. 552.

If a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. *Reg.* v. *Collins*, L. & C. 471; 33 L. J., M. C. 177; 10 Jur. (N.S.) 686, 10 L. T. 581; 12 W. R. 886; 9 Cox, C. C. 497.

In order to commit an assault with intent to commit a rape the jury must be satisfied not only that the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Rex* v. *Lloyd*, 7 Car. & P. 318. S. P., *Reg.* v. *Wright*, 4 F. & F. 967.

Attempts to Steal.]—C. was in the employ of a contractor for the supply of meat to a camp, and the course of business was for the meat to be sent down to the camp, there weighed out to the different messes, and the surplus, if any, returned to the contractor. C., whilst employed upon this duty by the contractor, during the weighing out, substituted a false weight for the true one, his intention being to carry away and steal the difference between the just surplus, for which he would have to account to his master, and the apparent surplus actually remaining after the first weighing. Nothing remained upon his part to complete his scheme except to carry away and dispose of the meat, which he would have done had the fraud not been detected:—

Held, properly convicted of attempting to steal the meat. *Reg.* v. *Cheeseman*, L. & C. 140; 31 L. J., M. C. 89; 8 Jur. (N.S.) 143; 5 L. T. 717; 10 W. R. 255; 9 Cox, C. C. 100.

Prisoners were charged with an attempt to commit a larceny. The evidence was that they, with another boy, were seen by a policeman to sit together on some doorsteps near a crowd, and when a well-dressed person came up to see what was going on, one made a sign to the others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of a man's coat, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, and to place a hand against a woman's dress, but no actual attempt to insert the hand into the pocket was observed:—Held, not to be evidence of an attempt to steal. *Reg.* v. *Taylor*, 25 L. T. 75.

To Obtain by False Pretences.]—The prisoner wrote a begging letter to the prosecutor, in which, by certain false statements, he attempted to obtain money. The prosecutor sent the prisoner five shillings, but stated at the trial that he knew the pretences were false:—Held, that he might be convicted of an attempt to obtain money by false pretences. *Reg.* v. *Hensler*, 22 L. T. 691; 19 W. R. 108; 11 Cox, C. C. 570.

A., employed in a tannery, clandestinely removed certain skins of leather from the warehouse to another part of the tannery, for the purpose of delivering them to the foreman and getting paid for them as if they had been his own work:—Held, that this amounted to an attempt to commit the misdemeanour of obtaining money by false pretences. *Reg.* v. *Holloway*, 1 Den. C. C. 370; T. & M. 40; 3 New Sess. Cas. 410; 2 Car. & K. 942; 18 L. J., M. C. 60; 13 Jur. 86; 3 Cox, C. C. 241.

The defendant had contracted with the guardians of a poor law union to deliver loaves of a specified weight to any poor persons bringing a ticket from the relieving officer. The tickets were to be returned by the defendant at the end of the week, with a statement of the number of tickets sent back, whereupon he would be credited with the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the specific weight, returned the tickets with a note of the number sent, and obtained credit in account for the loaves so delivered; but before the time for payment had arrived the fraud was discovered:—Held, that the defendant could properly be convicted of attempting to obtain money by false pretences, for although he had obtained credit in account, yet he had done all that was depending on himself towards the payment of the money. *Reg.* v. *Eagleton*, Dears. C. C. 515; 24 L. J., M. C. 158; 3 C. L. R. 1145; 1 Jur. (N.S.) 940; 4 W. R. 17; 6 Cox, C. C. 559.

A man went to a pawnbroker's shop and laid down eleven thimbles on the counter, saying, "I want 5*s.* for them." The pawnbroker's assistant asked the man if they were silver, and he said they were. The assistant tested them, and found them not to be silver; he gave the man no money but sent for a policeman and gave him in custody:—Held, that the conduct of the man who presented the thimbles amounted to an attempt to commit the offence of obtaining money by false pretences. *Reg.* v. *Ball*, Car. & M. 249.

A collier placed certain "tallies" in a tub, whereby in the ordinary course of business the tallies would have been hung on a "tally-board," and he would have received payment as if for having raised as many tubs of coal as the number of the tallies:—Held, that this constituted a complete attempt to obtain money by false pretences. *Reg.* v. *Rigby*, 7 Cox, C. C. 507.

To commit Rape.]—An indictment charged H. with rape, and W. with aiding and abetting in the rape. The jury found H. and W. guilty of misdemeanour; H. of attempting to commit a rape, and W. of aiding H. in the attempt. It was contended that this verdict amounted to an acquittal of W., as the case did not fall within 14 & 15 Vict. c. 100, s. 9:—Held, that the conviction was right. *Reg.* v. *Hapgood and Wyatt*, 39 L. J., M. C. 83; L. R. 1 C. C. 221; 21 L. T. 678; 18 W. R. 356; 11 Cox, C. C. 471.

Setting Fire to Stack—Overt Act.]—It was a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack, under 9 & 10 Vict. c. 25, s. 7, if he went to the stack with the intention of setting fire to it and lighted a lucifer match for that purpose, but abandoned the attempt because he found that he was being watched. *Reg.* v. *Taylor*, 1 F. & F. 511.

Attempt to commit Misdemeanour.] — The moment a man takes one necessary step towards the completion of a misdemeanour, he commits a misdemeanour. Every step towards a misdemeanour, by an act done, is punishable as a misdemeanour. *Reg.* v. *Chapman*, 2 Car. & K. 846; 1 Den. C. C. 432; T. & M. 90; 18 L. J., M. C. 152; 13 Jur. 885.

Any one act of fraud upon a public officer, with intent to deceive, whereby a matter required by law for the accomplishment of an act of a public nature is illegally obtained, amounts to an indictable misdemeanour; and it need not be alleged or proved either that the act was in fact accomplished, or that the party, at the time of committing the fraud, intended that it should be. *Ib.*

A false oath taken before a surrogate, with intent to deceive such surrogate, and to obtain from him a licence for a marriage, is punishable as a misdemeanour, although it is not alleged in the indictment, nor proved in evidence, that the marriage was in fact celebrated, and although the party found guilty was not the person about to be married. *Ib.*

Every attempt (not every intention, but every attempt) to commit a misdemeanour is a misdemeanour. *Reg.* v. *Martin*, 9 Car. & P. 215. S. P., *Reg.* v. *Martin*, 9 Car. & P. 213; 2 M. C. C. 123.

An attempt to commit a misdemeanour is a misdemeanour, whether the offence was created by statute, or was an offence at common law. *Rex* v. *Roderick*, 7 Car. & P. 795; *Rex* v. ——, R. & R. 107; *Rex* v. *Butler*, 6 Car. & P. 368.

Attempt to commit Suicide.]—An attempt to commit suicide is a misdemeanour at common law. *Reg.* v. *Doody*, 6 Cox, C. C. 463.

Attempts to Murder.]—*See* ante, col. 1541.

Indictment.]—An indictment for an attempt to commit larceny, which charges the prisoner with attempting to steal "the goods and chattels of A.," without further specifying the goods

intended to be stolen, is sufficiently certain. *Reg.* v. *Johnson*, L. & C. 489; 34 L. J., M. C. 24; 10 Jur. (N.S.) 1160; 11 L. T. 389; 13 W. R. 101; 10 Cox, C. C. 13.

An indictment which merely charges the defendant with unlawfully attempting and endeavouring, fraudulently, falsely and unlawfully, to obtain from A. a large sum of money with intent to cheat and defraud him, is bad in arrest of judgment. *Reg.* v. *Marsh*, 1 Den. C. C. 505; T. & M. 192; 19 L. J., M. C. 12; 3 Cox, C. C. 571.

A count in an indictment alleging that the prisoners by divers false and fraudulent pretences, unlawfully knowingly and designedly did attempt and endeavour feloniously to steal take and carry away from A. a large sum of money, to wit, the sum of 20*l.* of the moneys of the said A. is good. *Reg.* v. *Bullock*, Dears. C. C. 653; 25 L. J., M. C. 92.

VIII. NEW TRIAL.

In what Cases.]—No new trial can be granted in cases of felony. *Rex* v. *Mawbey*, 6 Term Rep. 638; 3 R. R. 282.

But with respect to misdemeanours, it is entirely discretionary in the court whether it will grant or refuse a new trial. *Ib.*

A new trial was granted on the ground of the improper reception of depositions in a case of felony removed by certiorari. *Reg.* v. *Scaife*, 17 Q. B. 238; 2 Den. C. C. 281; 20 L. J., M. C. 229.

But according to the common law there is no power to grant a new trial in a case of felony. *Att.-Gen.* (*New South Wales*) v. *Bertrand*, 4 Moore, P. C. (N.S.) 460; 36 L. J., P. C. 51; L. R. 1 P. C. 520; 16 L. T. 752; 16 W. R. 9; 10 Cox, C. C. 618.

In a charge of felony where the indictment is good and the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn, and a verdict has been returned and judgment given, the proceedings are final, and a venire de novo will not lie. *Reg.* v. *Murphy*, 6 Moore, P. C. (N.S.) 177; 38 L. J., P. C. 53; L. R. 2 P. C. 535; 21 L. T. 598; 17 W. R. 1047; 11 Cox, C. C. 372.

When a verdict is so imperfect that no judgment can be given upon it, a venire de novo can be awarded even in felonies. *Campbell* v. *Reg.*, 2 New Sess. Cas. 297; 11 Q. B. 799; 17 L. J., M. C. 89; 12 Jur. 117; 2 Cox, C. C. 463—Ex. Ch.

—— **Where Defendant is Acquitted.**]—No new trial can be granted on an indictment for perjury, where the defendant is acquitted. *Rex* v. *Brice*, 2 B. & Ald. 606; 1 Chit. 352.

On an indictment for non repair of a highway after a verdict for the defendant, the court will order a new trial on the ground of misdirection. *Reg.* v. *Brailsford*, 2 L. T. 508.

After a verdict for a defendant, upon an indictment for the non-repair of a highway, the court refused an application for a new trial, on the ground of the improper rejection of evidence; but suspended the judgment in order that another indictment might be preferred. *Rex* v. *Sutton*, 5 B. & Ad. 52; 2 N. & M. 57; 2 L. J., M. C. 75. S. P., *Rex* v. *Wandsworth*, 1 B. & Ald. 63; 2 Chit. 282; 18 R. R. 434; *Reg.* v. *Challicombe*, 6 Jur. 481; *Reg.* v. *Southampton County*, 56 L. J., M. C. 112; 19 Q. B. D. 590; 57 L. T. 261; 16 Cox, C. C. 271; 52 J. P. 52.

A new trial will not be granted, after an acquittal upon an indictment for obstructing a highway, on the ground that the verdict is against the evidence. *Reg.* v. *Johnson*, 2 El. & El. 613; 29 L. J., M. C. 133; 6 Jur. (N.S.) 553; 8 W. R. 236.

Upon the trial of an indictment for obstructing a highway the defendant was acquitted:—Held, that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted. *Reg.* v. *Duncan*, 50 L. J., M. C. 95; 7 Q. B. D. 198; 44 L. T. 521; 30 W. R. 61; 14 Cox, C. C. 571; 45 J. P. 456.

A new trial was refused after a verdict of not guilty, upon an indictment for not repairing a road, when the verdict did not bind the right. *Rex* v. *Burbon*, 5 M. & S. 392; 17 R. R. 369.

The court refused to grant a rule nisi for a new trial after a verdict for the defendant upon an indictment for non-repair of a churchyard fence, which was moved for on the ground of the verdict being against evidence. *Rex* v. *Reynell*, 6 East, 315; 2 Smith, 406; 8 R. R. 493.

Not granted even for a misdirection, after an acquittal on an indictment for a misdemeanour. *Rex* v. *Cohen*, 1 Stark. 516.

Where in an indictment not charging an offence for which the defendant, if guilty, might suffer fine and imprisonment, a civil right comes in question, and the right would be bound by the verdict, a new trial might be granted after a verdict for defendant. *Reg.* v. *Russell*, 3 El. & Bl. 942; 23 L. J., M. C. 173; 18 Jur. 1022; 2 W. R. 555. See *Reg.* v. *Botfield*, 1 Jur. (N.S.) 594, n.

On what Grounds — Evidence received in absence of Judge.]—When it is alleged that the jury has received evidence in the absence of the judge and of the prisoner, it is for the court before whom the trial takes place to investigate the facts, and ascertain whether the alleged irregularity has occurred: but quære whether if such irregularity is so found to have occurred, the court has jurisdiction to order a venire de novo as for a mis-trial. *Reg.* v. *Martin*, 41 L. J., M. C. 113; L. R. 1 C. C. 378; 26 L. T. 778; 20 W. R. 1016; 12 Cox, C. C. 204.

—— **All Jury not present when Verdict given.**]—If all the jury were not present when a verdict of guilty was delivered against a defendant for the publication of a libel, and it is uncertain whether they all heard such verdict pronounced by the foreman, the court will, with the consent of the defendant, grant a new trial. *Rex* v. *Wooler*, 2 Stark. 111; 18 R. R. 402.

—— **Jurymen not all Summoned.**]—Upon the trial of an information for a libel by a special jury, only ten jurymen appeared, and two talesmen were sworn to make up the jury: it is no ground for a new trial, that two of the non-attending special jurymen named in the panel had not been summoned, though it appeared that this fact was unknown to the defendant until after the trial. *Rex* v. *Hunt*, 4 B. & Ald. 430; 23 R. R. 333.

—— **Juryman who served on Grand Jury.**]—After a special jury had been sworn on the trial of an indictment for a misdemeanour, it was discovered that one of them had sat on the grand jury who found the bill. It was proposed that he should leave the box, but the defendants

objected to this course: the trial proceeded, and they were found guilty. Under these circumstances, the court refused to grant a rule for a new trial on the ground of mis-trial. *Reg.* v. *Sullivan*, 1 P. & D. 96; 8 A. & E. 831; 1 W. W. & H. 610; 8 L. J., M. C. 3.

—— **Juryman with no Qualification—Answering to Name.**]—Where on the trial of an indictment for perjury, it was necessary to swear talesmen from the common jury panel, and one J. Williams being called, his son, R. H. Williams (at the request of his father, and without collusion) appeared for him, and was sworn and served on the jury, he not being of age, neither having a qualification, not being on the panel:—Held, that there was a mis-trial, and a rule obtained for a new trial was made absolute. *Rex* v. *Tremearne*, 7 D. & R. 684; 5 B. & C. 254; 4 L. J. (O.S.) K. B. 157; 29 R. R. 234.

Upon a trial of a prisoner for murder, the name of Joseph Henry Thorne was called from the jury panel as a juror to try him, when William Thornley, who was also upon the jury panel, by mistake answered to his name and went into the jury-box. He was sworn and the prisoner was convicted and sentenced. The mistake was discovered next day:—Held, that there had been no mis-trial, but quære whether the objection made would be matter of error. *Reg.* v. *Mellor*, Dears. & B. 468; 27 L. J., M. C. 121; 4 Jur. (N.S.) 214; 6 W. R. 322; 7 Cox, C. C. 454. S. P., *Reg.* v. *Metcalfe*, 3 Cox, C. C. 220.

—— **Of Surprise.**]—A new trial will be granted on an indictment for a misdemeanour on the ground of surprise, as in civil cases. *Reg.* v. *Whitehouse*, Dears. C. C. 1.

Where, upon trial of an indictment for a misdemeanour, a witness examined before the grand jury was not examined at the trial, and a witness not examined before the grand jury was:—Held, that it was not such a surprise upon the defendants as entitled them to a new trial. *Rex* v. *Hollingbery*, 6 D. & R. 345; 4 B. & C. 329; 3 L. J. (O.S.) K. B. 226.

—— **Jury separating for the Night in Misdemeanour.**]—Upon the trial of an indictment for a misdemeanour, which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night:—Held, that the verdict was not therefore void; and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communications having taken place. *Rex* v. *Kinnear*, 2 B. & Ald. 462.

Whether one of several Defendants entitled to.]—Where several defendants are tried at the same time for a misdemeanour, and some are acquitted and some convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. *Rex* v. *Mawbey*, 6 Term Rep. 619; 3 R. R. 282.

Where all of several defendants in an indictment for conspiracy are found guilty, if one of them shows himself entitled to a new trial, on grounds not affecting the others, the new trial will nevertheless be granted as to all. *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B. 121; 11 Jur. 204; 2 Cox, C. C. 145.

Practice on—Time to move.]—A defendant, convicted on a criminal prosecution, cannot move for a new trial after the first four days of the next term; though, if it appears to the court at any time before judgment, that injustice has been done by the verdict, they will interpose and grant a new trial. *Rex* v. *Holt*, 5 Term Rep. 486.

A motion for a new trial on behalf of a defendant in an indictment, must be made within the first four days of term, though the argument will be postponed till he is brought up for judgment. *Reg.* v. *Hetherington*, 5 Jur. 529.

Where a new trial is to be moved for by a defendant in a criminal case, intimation must be given to the court during the first four days of term that the party is prepared to move. *Reg.* v. *Newman*, 1 El. & Bl. 268; Dears. C. C. 85; 22 L. J., Q. B. 156; 17 Jur. 617.

—— **Affidavits.**]—Affidavits of new facts are not in general admissible in criminal cases, on a motion for a new trial, unless there was some surprise on the defendant at the trial: but affidavits of the death of a person may be received to account for his not having been examined as a witness. *Rex* v. *Bowditch*, 2 Chit. 278.

—— **Personal Attendance.**]—All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them. *Rex* v. *Teal*, 11 East, 307. S. P., *Rex* v. *Askew*, 3 M. & S. 9; 15 R. R. 380; *Rex* v. *Cochrane* (*Lord*), 3 M. & S. 10, n.; 15 R. R. 380, n.

Where a defendant convicted of a misdemeanour at the assizes was committed to the county goal to abide the judgment of the court, and was detained for no other cause; on a suggestion of his inability to pay the expense of bringing himself up, the court allowed a motion for a new trial to be made without his personal attendance. *Rex* v *Boltz*, 8 D. & R. 65; 5 B. & C. 334; 4 L. J. (O.S.) K. B. 262.

It seems that the consent of the counsel for the prosecution cannot dispense with the rule which requires the presence of defendants convicted upon a criminal proceeding, during a motion for a new trial. *Rex* v. *Fielder*, 2 D. & R. 46.

A defendant in the actual custody of the marshal upon criminal process, in consequence of an indictment in the king's bench, need not be present when a motion for a new trial is made on his behalf. *Rex* v. *Hollingbery*, 6 D. & R. 344; 4 B. & C. 329; 3 L. J. (O.S.) K. B. 226.

A defendant sentenced to transportation cannot move for a new trial without appearing in court, though the sentence has been passed at the assizes under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9. *Reg.* v. *Caudwell*, 17 Q. B. 503; 2 Den. C. C. 372, n.; 21 L. J., M. C. 48; 15 Jur. 1011.

Semble, that where there are several defendants, all need not be present in court in order to entitle one or more of such defendants to move for a new trial. *Ib.*

In moving for a new trial where the defendant has been found guilty of a nuisance in obstructing a public sewer, and where he is liable not to personal punishment but to a fine, it is not necessary that he should be present in court. *Reg.* v. *Parkinson*, 2 Den. C. C. 459; 15 Jur. 1011.

—— **Costs.**]—The rule as to payment of costs

on a motion for a new trial is the same in principle in civil and criminal cases. *Rex* v. *Ford*, 1 N. & M. 776.

Where a new trial, on an indictment removed into the queen's bench by certiorari at the instance of the defendant, is ordered on the ground of surprise, the court may, in its discretion, order the costs to await the event of the new trial. *Reg.* v. *Whitehouse*, Dears. C. C. 1.

—— **Appeal.**]—The 17 & 18 Vict. c. 125, s. 35 (C. L. P. Act, 1854), which gives an appeal on motions for new trials, does not apply to indictments. *Reg.* v. *Stephens*, 7 B. & S. 710.

—— **Jurisdiction of Court of Criminal Appeal.**]—It seems that the court of criminal appeal has no power on a mis-trial to set aside the verdict and judgment and to order a venire de novo. *Reg.* v. *Mellor*, Dears. & B. 468 ; 27 L. J., M. C. 121 ; 4 Jur. (N.S.) 214 ; 6 W. R. 322 ; 7 Cox, C. C. 454.

IX. JUDGMENT AND PUNISHMENT.

1. *Generally*, 1901.
2. *At Nisi Prius*, 1908.
3. *Bringing up for Judgment before Queen's Bench Division*, 1908.
4. *Arrest of Judgment*, 1910.
5. *Reversal of Judgment*, 1910.
6. *Imprisonment, Time of*, 1911.

1. GENERALLY.

Record—After New Trial had.]—The record of the proceedings in the queen's bench upon an indictment, containing several counts for perjury, after regularly setting forth all the proceedings, down to the finding of a verdict of guilty and the prayer of judgment, went on to state that "because it appears to the court here, that the verdict so given against O. W. K. was unduly given ; therefore, the verdict is by the court here vacated and made void ; and all other process ceasing against the jury before impanelled, the sheriff is commanded so that he cause a jury anew thereupon to come, &c., by whom the truth of the matter may be better known." And then, after regularly carrying down the further proceedings to the finding of a second verdict of guilty, and a second prayer of judgment, it concluded thus : "It is considered and adjudged and ordered that O. W. K., for the offence charged upon him in and by each and every count of the indictment, be imprisoned in the queen's prison for the space of eight calendar months" :—Held, that the record in terms contained a sufficient entry of the award of a new trial, it appearing that the form adopted was the same as the precedents used and approved of, and that the entry of the final judgment and sentence was sufficiently certain. *King* v. *Reg.*, 18 L. J., Q. B. 253 ; 13 Jur. 742 ; 3 Cox, C. C. 561—Ex. Ch.

The record at the quarter sessions, after stating that the defendants were indicted for stealing oats, to which they pleaded not guilty, and a verdict of guilty thereon, added, "that because it appeared to the justices, that, after the jury had retired, one of them had separated from the other jurors, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad," and it was therefore quashed, and a venire de novo awarded to the next sessions : and it then proceeded to set out the appearance of the parties at such sessions, and the trial and conviction by the second jury, "whereupon all and singular the premises being seen and considered, judgment was given" :—Held, on a writ of error, that such judgment was right. *Rex* v. *Fowler*, 4 B. & Ald. 273.

Mitigation of Punishment.]—Where a prisoner pleads guilty to a misdemeanor at sessions of oyer and terminer, he cannot be heard either by himself or his counsel in mitigation of punishment. The facts to be laid before the court should be on affidavit. *Reg.* v. *Gregory*, 1 Cox, C. C. 31 ; 1 Car. & K. 228.

The fact that the prisoner is a person of character and of a respectable position in life, is an aggravation of the offence, and is not a reason for mitigation of punishment. *Reg.* v. ——, 7 Cox, C. C. 4.

Judgment—Postponement of.]—A witness being indicted for perjury is not a reason for postponing judgment against the person convicted. *Rex* v. *Haydon*, 1 W. Bl. 404 ; 3 Burr. 1387.

—— **May be Given though Conspirator Untried.**]—Indictment against A., B., C. and D. for a conspiracy, charging that they conspired together, with divers other persons unknown. A. and B. were tried. A was found not guilty, and B. was found guilty of conspiring with C. C. had pleaded before the trial of A. and B., but neither he nor D. appeared to take their trials. On motion to arrest the judgment against B., or suspend it till C. should be tried :—Held, that the verdict was conclusive against B. as a general verdict of guilty, and that judgment might be given against him without reference to what the verdict might be on the trial of C. *Rex* v. *Cooke*, 7 D. & R. 673 ; 5 B. & C. 538.

—— **Punishment to commence in futuro.**]—A judgment of imprisonment against a defendant to commence in futuro, i.e. from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law. *Wilkes* v. *Rex*, 4 Bro. P. C. 367.

—— **Naming Day for Corporal Punishment.**]—It is not the practice of any court of criminal jurisdiction to make the day upon which execution of any corporal punishment is to be done a part of the original sentence The time of inflicting such punishment is usually left either to the discretion of the officer to whom the execution of the sentence belongs, or is appointed by a particular rule of the court (or statute 27 & 28 Vict. c. 44), which awards the punishment. *Atkinson* v. *Rex*, 3 Bro. P. C. 517.

—— **Pronounced in Prisoner's Absence.**]—A sentence of corporal punishment cannot be pronounced on a person in his absence. *Rex* v. *Harm*, 3 Burr. 1786. S. P., *Anon.*, Lofft, 400.

—— **Statute need not be Referred to.**]—It is not necessary, in recording sentence, to refer to the statute which gives the punishment. *Murray* v. *Reg.*, 7 Q. B. 700 ; 14 L. J., Q. B. 357 ; 9 Jur. 596.

Fine—Amount of.]—Where on conviction of

a corporation upon an indictment removed by certiorari into the crown side of the queen's bench division, a fine is to be imposed, the fine is only to be commensurate with the offence committed, and the court in apportioning the fine will not take into consideration the amount of the costs incurred by the prosecution. *Reg.* v. *L. & N. W. Ry.*, 58 L. T. 771 ; 52 J. P. 821 ; 16 Cox, C. C. 413.

Where a fixed fine by statute for a misdemeanour is miscalculated in the verdict and the judgment, the court, upon a rule served on all parties interested, will alter the rule for judgment against the prisoner, and the entry roll as to so much of the punishment, but they will not alter the judgment and verdict. *Rex* v. *Stephens*, 3 Smith, 366.

—— **Receipt of.**]—The king's coroner has authority to receive fines imposed on defendants convicted on indictments or on criminal informations in the king's bench. *Rex* v. *Shackell*, M'Cle. & Y. 514.

Judgment—Several Counts.]—A general judgment for the crown, on an indictment containing several counts, one of which is bad, and where the punishment is not fixed by law, cannot be supported. *O'Connell* v. *Reg.*, 11 Cl. & F. 155 ; 9 Jur. 25 ; 1 Cox, C. C. 413.

An indictment contained four counts for extortion, and three counts for uttering forged licences. The jury having returned a verdict of guilty upon all the counts, the court passed sentence of the same identical term of imprisonment upon each count separately. *Reg.* v. *Carter*, 9 Jur. 178.

The judgment, as entered on the record, being that, for the offences charged in each and every count of the indictment, the defendant be imprisoned in the queen's prison for six months now next ensuing :—Semble, that the judgment was, in form, a sentence of one term of six months' imprisonment upon the whole indictment, and would, therefore, be erroneous if any count was bad. *Gregory* v. *Reg.*, 15 Q. B. 957 ; 19 L. J., Q. B. 366 ; 15 Jur. 79—Ex. Ch.

An indictment at quarter sessions charged prisoners, in the first count, with stealing in the dwelling-house of A. the goods of A. above the value of 5*l.* ; in the second count, with simple larceny of moneys and goods (not "other" goods, &c.) of A., describing them precisely as in the first count, and not using the word "aforesaid." Not guilty. Jury process to try whether the prisoners are guilty of the felony aforesaid. Verdict that the prisoners are guilty of the felony aforesaid. Judgment, that they respectively be transported for ten years :—Held, that an indictment for felony containing several counts is bad in arrest of judgment, and on error, for duplicity, if it necessarily appears that two or more of the counts are for the same offence ; but that this did not necessarily appear on the present indictment. *Campbell* v. *Reg.*, 11 Q. B. 799 ; 2 New Sess. Cas. 297 ; 17 L. J., M. C. 89 ; 12 Jur. 117 ; 2 Cox, C. C. 463—Ex. Ch.

Held, secondly, that the word "felony" was not nomen collectivum, meaning felony generally, but pointed to one particular charge of felony. *Ib.* See *Ryalls* v. *Reg.*, 11 Q. B. 781 ; 17 L. J., M. C. 92.

Held, thirdly, that the verdict was bad for uncertainty, in not specifying the offence of which it found the prisoners guilty. *Ib.*

Held, fourthly, that the judgment was erroneous, the court not being at liberty to apply it to the first count only. *Ib.*

On error in the exchequer chamber :—Held, that whether or not the word "felony" was to be taken as nomen collectivum in the judgment at sessions, it could mean in the jury process one offence only, and therefore the process was here misawarded, and the judgment could not be sustained. *Ib.*

An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two different occasions, one in the progress of a trial the other in an affidavit in chancery. Both acts of perjury had the same object in view :—Held, that they were distinct offences, and a punishment might be inflicted in respect of each. *Castro* v. *Reg.*, 50 L. J., Q. B. 497 ; 6 App. Cas. 229 ; 44 L. T. 350 ; 29 W. R. 669 ; 14 Cox, C. C. 546 ; 45 J. P. 452—H. L. (E.)

If one count in an indictment removed from the quarter sessions to the queen's bench by writ of error is good, the court may, under 11 & 12 Vict. c. 78, s. 5, pronounce judgment, or direct the sessions to pronounce it, on the good count. *Holloway* v. *Reg.*, 17 Q. B. 319 ; 2 Den. C. C. 287 ; 15 Jur. 852.

—— **Charge of Joint Felony — Proof of Separate Felonies.**]—Two persons charged on indictment with a joint felony, ought not to be sentenced thereon on proof of two distinct felonies. If a verdict of guilty is given against both, judgment may be given against the party who is proved to have committed the first felony in order of time. *Reg.* v. *Dowey*, 2 Den. C. C. 87 ; T. & M. 411 ; 20 L. J., M. C. 105 ; 15 Jur. 230 ; 4 Cox, C. C. 428.

—— **Withdrawing Plea.**]—On an indictment for libel, the defendant suffered judgment by retraxit. The record of the judgment stated that the prosecutor and the defendant came, &c., and the defendant "withdrew his plea by him pleaded, whereby our lady the queen remaineth against him without defence in this behalf, whereupon" it was adjudged that he be convicted :—Held, sufficient ground for a judgment, though it was not expressly alleged that the defendant confessed the indictment. *Gregory* v. *Reg.*, 15 Q. B. 957 ; 19 L. J., Q. B. 366 ; 15 Jur. 79—Ex. Ch.

—— **Judgment or Order.**]—To the judgment of imprisonment was added "and that he" (defendant) "be placed in the first division of the fourth class of prisoners in the queen's prison" :—Semble, that, if this direction was not warranted by an order of the secretary of state, under 5 & 6 Vict. c. 22, it did not vitiate the judgment. *Ib.*

Held, by the queen's bench, that such direction, when warranted, is no part of the judgment of the court, but a mere order. *Ib.*

—— **Case standing over pending Application to Amend.**]—On an objection to the entry of a judgment, on the ground that it was a general judgment upon all the counts, and one of them was bad, the court ordered the case to stand over to allow the prosecutor to apply to the court below to amend. *Ib.*

Transportation—What is.]—By the word

transportation in 8 Geo. 3, c. 15, was meant not merely the conveying of the felon to the place of transportation, but his being so conveyed and remaining there during the term for which he was ordered to be transported; and, therefore, a felon attainted was not by that statute restored to his civil rights till after the expiration of the term for which he was ordered to be so transported. *Bullock* v. *Dodds*, 2 B. & Ald. 258; 20 R. R. 420.

—— **Judgment or Order.**]—Where a prisoner was convicted of perjury at the assizes at Chester, and the sentence of transportation was entered on the record as follows:—"Wherefore, all and singular the premises being seen by the justices here, and fully understood, it is therefore ordered that he the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years":—Held, on error, that this was no judgment, but merely an order. *Rex* v. *Kenworthy*, 3 D. & R. 173; 1 B. & C. 711.

A judgment entered upon the record, that J. M. "be transported beyond the seas for the term of ten years, from the 8th day of August instant," without specifying some place of transportation, "not in Europe," is correct and valid, notwithstanding. *Martin* v. *Reg.*, 3 Cox, C. C. 319.

Punishment before Penal Servitude need not be given.]—The 2 Geo. 2, c. 25, s. 2, authorises the judge before whom a person shall be convicted of perjury, to order such person to be sent to a house of correction for seven years, there to be kept to hard labour; "and thereupon judgment shall be given that the person convicted shall be committed accordingly, over and besides such punishment as shall be adjudged to be inflicted upon such person, agreeable to the laws now in being":—Held, that this statute did not impose on the court the necessity of awarding any punishment previous to that of penal servitude, so as to give the sentence of penal servitude the form of an additional punishment. *Castro* v. *Reg.*, 50 L. J., Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox, C. C. 546; 45 J. P. 452—H. L. (E.)

Sentence Presumed to be Passed by Court of Competent Jurisdiction.]—A return to a habeas corpus to bring up two prisoners detained in Millbank prison, set out an act of the royal court of Jersey, whereby they were convicted of burglary by that court (which was alleged to be a competent court to try and punish that crime), and sentenced to be transported to such place as her majesty in council should order. It also set out an order in council directing the place of their transportation, and a warrant of the secretary of state for their removal to Millbank prison, in order to carry the sentence into effect, and as authority to the keeper of that prison to receive them:—Held, that the court was bound to presume that the sentence being passed by a court of competent jurisdiction, and unreversed, was warranted by law and valid. *Reg.* v. *Brenan*, 10 Q. B. 492; 16 L. J., Q. B. 289; 11 Jur. 775.

Several Offences—Several Terms of Imprisonment.]—An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two different occasions, one in the progress of a trial, the other in an affidavit in chancery:—Held, that they were distinct offences, and a punishment might be inflicted in respect of each. *Castro* v. *Reg.*, supra.

That the full punishment of seven years' penal servitude might be inflicted for each offence, and that the second term of penal servitude was properly made to begin at the termination of the first term. *Ib.*

Where a defendant is charged with several offences at the same time of the same kind, he may be sentenced to several terms of imprisonment or penal servitude, one after the conclusion of the other. *Rex* v. *Williams*, 1 Leach, C. C. 536. S. P., *Reg.* v. *Cutbush*, 36 L. J., M. C. 70; L. R. 2 Q. B. 379; 16 L. T. 282; 15 W. R. 742; 10 Cox, C. C. 489. See *Rex* v. *Robinson*, 1 M. C. C. 413.

Concurrent Sentences—Penal Servitude Act, 1864.]—When the holder of a licence under the Penal Servitude Act, 1853, is convicted of a fresh offence, there is no power under the Penal Servitude Act, 1864, to make the sentence for such fresh offence run concurrently with the remanet sentence of penal servitude.—Per Hawkins, J. *Reg.* v. *King*, 66 L. J., Q. B. 87; [1897] 1 Q. B. 24; 75 L. T. 392; 18 Cox, C. C. 447; 61 J. P. 329.

Length of Sentence—Effect of Excess.]—A judgment of transportation for fourteen years, if bad for excess, is bad in toto, and cannot operate as a good judgment of transportation for seven years. *Rex* v. *Ellis*, 8 D. & R. 173; 5 L. J. (o.s.) M. C. 1.

Where a court of quarter sessions passed an erroneous judgment of transportation, the court would not send it back to be amended, but would reverse it on writ of error, before 11 & 12 Vict. c. 78, s. 5. *Ib.*

—— **Amendment of Sentence.**]—The prisoner was convicted on an indictment for obtaining goods by false pretences, and also pleaded guilty to a previous conviction for false pretences charged in the indictment. He was sentenced to seven years' penal servitude:—Held, that the sentence was wrong, and it was amended by reducing it to five years' penal servitude. *Reg.* v. *Horn*, 48 L. T. 272; 15 Cox, C. C. 344; 47 J. P. 344.

—— **Previous Conviction.**]—A prisoner had been convicted on an indictment charging a previous conviction and subsequent felony under 24 & 25 Vict. c. 96, s. 116, and sentenced by mistake to five years' penal servitude, seven years being the minimum under the statute. Upon a writ of error, by the crown, for the purpose of reversing the judgment and passing the proper sentence, it appeared from the record that the provisions of the statute, as to arraigning the prisoner, had been neglected:—Held, that these provisions were material, and the conviction was quashed. *Reg.* v. *Fox*, 15 W. R. 106; 10 Cox, C. C. 502.

A. was convicted of the misdemeanour of having done grievous bodily harm to B. The indictment did not charge a previous conviction of felony; but after the jury had found him guilty, it was proved on oath that he had been previously convicted of felony, but no record or certificate of such conviction was produced. He was sentenced

to penal servitude for five years, as for a misdemeanour only without any previous conviction of felony:—Held, that the sentence was correct under 27 & 28 Vict. c. 47, s. 2. *Reg.* v. *Summers*, 38 L. J., M. C. 62; L. R. 1 C. C. 182; 19 L. T. 799; 17 W. R. 384; 11 Cox, C. C. 248. See *Reg.* v. *Garland*, 11 Cox, C. C. 224.

Length of Sentences in particular Cases.]—Under 7 Will. 4 & 1 Vict. c. 90, s. 1, by which any person convicted of the offence of breaking and entering a dwelling-house, and stealing therein, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, there was no power to pass sentence of transportation for less than ten years. *Whitehead* v. *Reg.*, 7 Q. B. 582; 14 L. J., M. C. 165; 9 Jur. 594.

A person convicted of obtaining money by false pretences, after a previous conviction for felony (the previous conviction being charged in the indictment), could not be sentenced to penal servitude for a less term than seven years. *Reg.* v. *Deane*, 46 L. J., M. C. 155; 2 Q. B. D. 305; 36 L. T. 31; 13 Cox, C. C. 386.

To render a sentence of penal servitude for seven years obligatory under the Penal Servitude Act, 1864, which enacts in s. 2 (repealed), that "where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years"; the indictment must charge the previous conviction. *Reg.* v. *Willis*, 41 L. J., M. C. 102; L. R. 1 C. C. 363; 26 L. T. 485; 20 W. R. 632; 12 Cox, C. C. 192.

Therefore, when a man was convicted of unlawfully wounding on an indictment which charged a wounding with intent to do grievous bodily harm, and did not mention a previous conviction for felony, but such a previous conviction was proved against him:—Held, that the judge was not bound to pass a sentence of penal servitude for seven years, and that a sentence of penal servitude for five years was right. *Ib.*

An indictment contained three counts; first, a count stating a previous conviction, and a subsequent larceny; secondly, a count for larceny; thirdly, a count for receiving stolen goods. When the prisoner was arraigned, so much only of the first count as charged the subsequent felony was read to him, and he pleaded guilty thereto. He also pleaded guilty to the second count. Then so much of the first count was read as stated the previous conviction, and the prisoner pleaded guilty thereto. He was then sentenced to five years penal servitude on the second count; a nolle prosequi was entered on the third, and nothing was done on the first. These facts appeared on the record. The crown having brought the record upon writ of error for the purpose of having the sentence increased to seven years' penal servitude, under 27 & 28 Vict. c. 47, s. 2:—Held, that the first count was bad, and no sentence could be entered upon it; that, the second count being good, the sentence properly entered upon it was not affected by the first count: and, the crown entering a nolle prosequi on the first count, the judgment and sentence were affirmed; but the court recommended that, under the circumstances, the executive should discharge the prisoner after two years' imprisonment. *Reg.* v. *O'Brien*, Ir. R. 1 C. L. 166; 15 W. R. 519.

2. At Nisi Prius.

Application to amend Judgment.] — By 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, upon trials for felony or misdemeanour on a king's bench record, judgment may be pronounced at the assizes, and shall have the effect of a judgment in the court above, unless the court in the first six days of term grant a rule nisi for a new trial or for amending the judgment. A defendant on such record having been sentenced at the assizes, cannot apply to the court to amend the judgment by diminishing the punishment upon ordinary affidavits in mitigation, or without showing some specific defect in the sentence, or some matter which could not have been adduced at the assizes. *Rex* v. *Lloyd*, 4 B. & Ad. 135; 2 L. J., K. B. 214.

Where judgment on a record of the queen's bench is pronounced at the assizes under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, the court may, if they see fit, amend the judgment by ordering it to be arrested. *Reg.* v. *Nott*, 4 Q. B. 768; D. & M. 1; 12 L. J., M. C. 143; 7 Jur. 621.

Where a verdict has been given for the crown in such trial, and the defendant desires to have judgment pronounced at the assizes, it is the proper course for his counsel to state at the same time that he intends to avail himself of the provision of s. 9, by moving the court for a new trial on the ground of misdirection, or in arrest of judgment. *Ib.*

Upon the trial of an indictment at nisi prius, judgment was pronounced by the judge, under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9; but a rule nisi, to arrest the judgment, was afterwards granted by the court of queen's bench, within the first six days of term, and subsequently discharged. Upon writ of error brought, the record was made up without any notice of such rule:—Held, that the judgment could not be impeached upon the ground of such rule having been granted. *Dunn* v. *Reg.*, 12 Q. B. 1026; 18 L. J., M. C. 41; 13 Jur. 233; 3 Cox, C. C. 205—Ex. Ch.

Sentence—Commencement of.]—A sentence of imprisonment passed at nisi prius, the defendant not being present, may declare that the imprisonment shall commence on the day on which he shall be taken to and confined in prison. *King* v. *Reg.*, 7 Q. B. 782; 14 L. J., M. C. 172; 9 Jur. 833—Ex. Ch.

New Trial—Second Trial at Sessions.]—An indictment for felony had been removed from the quarter sessions, and tried at nisi prius. The prisoners were convicted, and the court of queen's bench ordered a new trial. Neither side brought down the record, but the prisoners applied to be tried there; this could not be done, as the record had not been brought down. A procedendo issued, and the prisoners were tried at the quarter sessions and convicted. *Reg.* v. *Scaife*, 3 Car. & K. 211.

3. Bringing up for Judgment before Queen's Bench Division.

Sentence passing in Absence or Presence of Defendant.]—The court cannot compel a prosecutor to be at the expense of bringing a defendant in custody up to receive judgment for a

misdemeanour; but if the defendant is too poor to come up at his own expense, they will pass judgment in his absence. *Rex* v. *Boltz*, 8 D. & R. 65; 5 B. & C. 334; 4 L. J. (o.s.) K. B. 262.

Where a defendant, convicted upon an indictment for a libel, was committed to prison at the instance of the prosecutor, who would not afterwards bring him up for judgment, the court, at the prayer of the defendant, passed judgment in his absence. *Ib.*

Where a defendant indicted for a nuisance judgment to go by default and is under no recognisances to appear in the queen's bench for judgment, the court will not, in his absence, give judgment that the nuisance be abated, though notice has been left at his residence of the intention of the crown to pray for judgment. *Reg.* v. *Chichester*, 2 Den. C. C. 458; 17 Q. B. 504; 15 Jur. 1131, n.

An indictment for perjury was removed by the defendant under 16 & 17 Vict. c. 30, ss. 4, 5. At the trial the defendant was convicted, but sentence was not passed upon her. Due notice was served upon her and her bail that she was to receive judgment on a particular day. She did not appear. The court refused to pronounce judgment in the absence of the defendant; but ordered the recognisances to be estreated. *Reg.* v. *Williams*, 18 W. R. 806.

But where a defendant had been convicted for a conspiracy to bribe, the attorney-general prayed judgment in the absence of the defendant, who produced affidavits showing that he was too ill too attend:—Held, that the court had a discretionary power whether or not judgment should be pronounced in the absence of a defendant. Had the sentence been that of imprisonment his attendance might have been insisted on; but as a fine was considered sufficient, sentence was passed in his absence. *Reg.* v. *Kinglake*, 18 W. R. 806.

A justice convicted of a misdemeanour in his office must attend in person to receive the judgment of the court; but upon an affidavit of age and infirmity the court will dispense with his personal attendance. *Rex* v. *Constable*, 7 D. & R. 663; 3 B. & Ad. 659, n.

Entering into Recognisances — Proof that Defendant has since Offended.]—Where, upon a trial of an indictment for libel, one of the defendants pleaded guilty, and entered into recognisances to appear and receive judgment, with a condition that if he ceased to publish libels he would not be called up; the court would not pass judgment unless the prosecutor produced an affidavit that he had published a libel since the trial. *Reg.* v. *Richardson*, 8 D. P. C. 511; 4 Jur. 104.

Practice—In what order Proceedings heard.]—When a defendant is brought up for judgment, after verdict, the defendant's affidavits will be first read, and then those for the prosecution; after which the defendant's counsel will be heard, and lastly, the counsel for the prosecution. *Rex* v. *Bunts*, 2 Term Rep. 683.

But where a defendant is brought up for sentence, after judgment by default, the prosecutor's affidavits will be first read, then the defendant's; after which the counsel for the prosecution will be heard, and lastly, the counsel for the defendant. *Ib.*

Where several defendants are brought up for sentence, some after judgment by default and others after verdict, the counsel of all must first be heard in mitigation, and then the counsel for the crown in aggravation. *Rex* v. *Despard*, 2 M. & S. 406.

Where a defendant, having pleaded guilty to an indictment, is brought up for judgment, the counsel for the crown is to be heard before the counsel for the defendant; and the affidavits in aggravation are to be read before the affidavits in mitigation. *Reg.* v. *Dignam*, 7 A. & E. 593.

Contra, where a verdict of guilty has been taken, though by consent, and without evidence. *Ib.*

Semble, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default and others are convicted on verdict; and in such case, where there was no affidavit in aggravation, but affidavits were offered in mitigation, the court heard the counsel for the defendants first. *Ib.* See *Rex* v. *Sutton*, 7 A. & E. 592, n.

Acts subsequent to Trial may be Considered.]—When a defendant is brought up for judgment his acts subsequent to the trial may be considered either by way of aggravating or mitigating the punishment, even though they are separate and distinct offences, for which he may be afterwards punished. But in such cases the court will take care not to inflict a greater punishment than the principal charge itself will warrant. *Rex* v. *Withers*, 3 Term Rep. 428.

Affidavits in Aggravation.]—Affidavits are not admissible in aggravation in a case of felony, although the record has been removed by certiorari. *Rex* v. *Ellis*, 9 D. & R. 174; 6 B. & C. 145; 5 L. J. (o.s.) M. C. 1.

Where Prosecutor has brought Action for same Offence.]—A defendant being brought up for judgment for an assault, and it appearing that the prosecutor had commenced an action, which was still depending for the same assault; the court refused to pass any judgment, except that the defendant should give security for his good behaviour, he having used violent language towards the prosecutor in addressing the court; and this, although, at the time of the defendant being brought up, the prosecutor offered to discontinue the action. *Rex* v. *O'Gorman Mahon*, 4 A. & E. 575.

4. Arrest of Judgment.

Presence in Court.]—If a defendant would move in arrest of judgment after conviction for a misdemeanour, he must be present in court. *Rex* v. *Spragg*, 2 Burr. 928.

5. Reversal of Judgment.

Discharge of Prisoner.]—Where a person has been erroneously sentenced at quarter sessions to imprisonment and hard labour, the court, after reversing the judgment in error, has no alternative but to discharge the prisoner. *Silversides* v. *Reg.*, 2 G. & D. 617; 3 Q. B. 406; 6 Jur. 805.

Upon a reversal of the judgment, the court has no power to order that the plaintiff in error should be discharged. *King* v. *Reg.*, 7

Q. B. 782 ; 14 L. J., M. C. 172 ; 9 Jur. 833—Ex. Ch.

Where a judgment of imprisonment was reversed upon error, the court granted a rule, directing that the plaintiff in error should be discharged out of the custody of the keeper of the queen's prison, where he had been kept by virtue of his commitment. *Holt* v. *Reg.*, 2 D. & L. 774 ; 14 L. J., Q. B. 98 ; 9 Jur. 538.

6. IMPRISONMENT, TIME OF.

How Computed.]—Where a term of one calendar month's imprisonment begins in one month and ends in another, the month must be calculated from the day on which the imprisonment commences to the day before the (numerically) corresponding day in the following month. If there be no such numerically corresponding day, the term will end on the last day of the following month. *Migotti* v. *Colville*, 48 L. J., C. P. 695 ; 4 C. P. D. 233 ; 40 L. T. 747 ; 27 W. R. 744 ; 14 Cox, C. C. 305—C. A.

Consecutive Sentences.]—*See* supra.

X. ERROR AND APPEAL.

1. *Writ of Error*, 1911.
2. *Appeal*, 1916.
3. *Court of Crown Cases Reserved*, 1917.

1. WRIT OF ERROR.

Jurisdiction to Review the Granting of.]—The granting of a writ of error is part of the prerogative of the crown. If, therefore, the attorney-general of England or the lord-lieutenant of Ireland refuses to grant it, the lord-chancellor has no jurisdiction to review that decision. *Piggott, In re*, 19 L. T. 114 ; 11 Cox, C. C. 311.

After Judgment—Only Means of Removing Record.]—After judgment the record can only be removed by a writ of error. *Rex* v. *Seton*, 7 Term Rep. 373. S. P., *Rex* v. *W. R. Yorkshire JJ.*, 7 Term Rep. 467.

Vexatious Indictments Act.]—Error will not lie for non-compliance with the Vexatious Indictments Act. *Boaler* v. *Reg.*, 57 L. J., M. C. 85 ; 59 L. T. 554 ; 16 Cox, C. C. 488.

On what Grounds.]—A return to a writ of error, directed to the commissioners of oyer and terminer of the city of London, set out the record of an indictment found against the defendant before the lord mayor and others, and stated that he was tried upon the indictment by a jury of the country at the next sessions holden before the lord mayor and several of the judges, aldermen, recorder and others, assigned by certain letters patent under the great seal directed to them, or any two or more of them, to inquire of certain offences ; and that he was, by the verdict of such jury, found guilty, and that thereunto judgment was given by the court against him. Upon this return the defendant assigned, as errors in law, that the judgment was insufficient, and should have been for the defendant ; and, as errors in fact, first, that when the jury gave their verdict there was but one of the justices named in the commission present in court ; and, secondly, that the verdict was not at the time it was so given entered on record. The king's coroner and attorney answered, in nullo est erratum, and prayed that the judgment might be affirmed :—Held, as to the first error in fact, that, as it appeared by the record that the verdict was given at a session holden before several of the commissioners and justices, the plaintiff in error could not be allowed to aver, in contradiction of the record, that only one of the justices was present when the jury gave their verdict, and the answer in nullo est erratum is no admission of the fact assigned for error, unless it could lawfully be assigned, and is well assigned in point of form :—Held, also, that the second error in fact assigned was no error, inasmuch as it was impossible that a verdict should be recorded at the time when it was given, the recording of it being necessarily an act subsequent to the delivery of the verdict by a jury. *Rex* v. *Carlile*, 2 B. & Ad. 362 ; 4 Car. & P. 415 ; 9 L. J. (O.S.) K. B. 250.

Error was brought upon a judgment at the Old Bailey, and one ground assigned was that a material fact stated on the record was not true. The court held such an averment inadmissible, and affirmed the judgment. The fact being as alleged by the defendant below, the court of oyer and terminer afterwards ordered the record to be amended, and their clerk, by a rule of the court of king's bench, came into the latter court and made the amendment there. Upon motion afterwards that the case might be again set down for argument :—Held, that the court of king's bench could not re-hear it, after the expiration of the term in which judgment was given, though the attorney-general consented, and that the only remedy was by writ of error to the house of lords. *Rex* v. *Carlile*, 2 B. & Ad. 971.

Where the court appears by the indictment to have had jurisdiction over the offence, it cannot be assigned as ground of error that the offence was committed out of the jurisdiction of the court. *Reg.* v. *Newton*, 4 El. & Bl. 869 ; 24 L. J., Q. B. 246 ; 1 Jur. (N.S.) 591 ; 3 W. R. 374. S. P. and *S. C.*, 16 C. B. 97 ; 3 W. R. 419.

When an indictment contains several counts, it is not ground of error that no verdict has been given on some of them, provided a verdict has been found on one good count, and judgment given accordingly. *Latham* v. *Reg.*, 5 B. & S. 635 ; 33 L. J., M. C. 197 ; 10 Jur. (N.S.) 1145 ; 10 L. T. 571 ; 12 W. R. 908 ; 9 Cox, C. C. 516.

A writ of error was sued out by a person convicted of a misdemeanour in the queen's bench, and judgment of reversal for non-joinder in error was entered up in the exchequer chamber. Subsequently the queen's bench, by rule, quashed the writ as having been improperly issued for the purpose of effecting a compromise. The writ, assignment of errors, and judgment of reversal remained upon the judgment roll and transcript, and below them an entry was made of the rule of the court, quashing the writ of error. The prisoner sued out a fresh writ of error, and assigned errors both in the indictment and in the rule of the queen's bench. The prosecutor obtained a rule nisi in the exchequer chamber to expunge the entry of the judgment :—Held, that the court of queen's bench having, in the exercise of its equitable jurisdiction, quashed the first writ of error for matter dehors the record, the writ and the judgment under it were

both void and gone, and ought not to remain on the record; that the rule of the queen's bench being for matter dehors the writ was not examinable in error, and ought not to appear on the record, and that the rule to expunge the judgment might be made absolute in its terms, as the writ of error, on which it was founded, was absolutely avoided; aliter, if the writ of error had been merely voidable, in which case the rule would have been misconceived as not embracing it. *Alleyne* v. *Reg.*, 5 El. & Bl. 392; Dears. C. C. 505; 24 L. J., Q. B. 282; 1 Jur. (N.S.) 869; 3 W. R. 556—Ex. Ch.

Previous Fiat of Attorney-General.]—It is in the discretion of the attorney-general to grant his fiat for a writ of error for a misdemeanour, and therefore, if he has exercised his discretion by refusing to grant his fiat, the court will not order him to grant it. *Reg.* v. *Newton*, 4 El. & Bl. 869; 24 L. J., Q. B. 246; 1 Jur. (N.S.) 591; 3 W. R. 374. S. P. and *S. C.*, nom. *Newton, In re*, 16 C. B. 97; 3 W. R. 419.

Where, in a colony, a person has been convicted of a criminal offence, and is in execution of a sentence passed for that offence, no writ of error will be granted to bring up the record of conviction, unless the attorney-general has first issued his fiat for a writ of error. Nor will a certiorari be granted in general to remove a record under such circumstances in order that a writ of error may afterwards be brought. Nor will a habeas corpus be granted under such circumstances to bring up the prisoner. *Reg.* v. *Lees*, El. Bl. & El. 828; 27 L. J., Q. B. 403.

Practice on—Presence in Court of Plaintiff in Error.]—The court dispensed with the attendance of a plaintiff in error, to crave oyer of the record of an indictment for bigamy, for the purpose of assigning errors, where it appeared that he was resident in Australia, where he had been for the last thirty years; that he was sixty-six years of age, and subject to paralytic attacks, and that he could not make the journey to this country without injury to his health, and without considerable pecuniary loss. *Murray* v. *Reg.*, 3 D. & L. 100; 7 Q. B. 700; 14 L. J., Q. B. 357; 9 Jur. 410.

Where a plaintiff in error is in custody, his personal attendance in court upon the argument of the writ of error is unnecessary and may be dispensed with notwithstanding that the Crown Office Rules, 1886, make no provision for his attendance being dispensed with. *Richards* v. *Reg.* 66 L. J., Q. B. 459; [1897] 6 Q. B. 574; 61 J. P. 389.

Upon a motion by a plaintiff in error under 16 & 17 Vict. c. 32, s. 3, for reversal of judgment upon an indictment for a misdemeanour, he must be personally present in court. *Howard* v. *Reg.* 11 L. T. 629; 13 W. R. 316; 10 Cox, C. C. 54.

—— **Service of Rule Nisi.**]—The rule is nisi only, and should be served on the officer of the court from which error is brought, and not on the prosecutor or his attorney. *Ib.*

Where the prosecutor and his attorney were both dead, the court directed service of the rule to join in error to be made by sticking it up in the crown office, and serving a copy on the solicitor to the treasury. *Murray* v. *Reg.*, 3 D. & L. 100; 7 Q. B. 700; 14 L. J., Q. B. 357; 9 Jur. 410.

—— **In Formâ Pauperis.**]—Quære, whether a writ of error in felony can be sued out in formâ pauperis. *Reg.* v. *Stokes*, 3 Car. & K. 189.

—— **Form of Præcipe and Petition.**]—Form of the præcipe and petition with the secretary of state's fiat necessary when a writ of error in a criminal case in the house of lords is sued out. *Reg.* v. *Lavey*, 2 Den. C. C. 512, n.

—— **Who may bring Error.**]—One of two persons convicted of conspiracy may bring error on the judgment of conviction without the other. *Wright* v. *Reg.*, 14 Q. B. 148; 16 L. J., Q. B. 10; 11 Jur. 103; 2 Cox, C. C. 91.

—— **Assigning Errors.**]—Upon a motion to quash a writ of error, under s. 5 of 8 & 9 Vict. c. 68, it is not necessary that the defendants should have been previously ruled to assign errors. *Reg.* v. *Broome*, 2 B. C. Rep. 259; 5 D. & L. 607; 17 L. J., Q. B. 208; 12 Jur. 838.

Where a writ of error issued on the application of a defendant to bring up a transcript of the record and proceedings on an indictment for perjury, with all things touching the same, and the writ was returned, and the plaintiff in error assigned errors, he could not afterwards object that the proceedings on a rule to arrest judgment, which had been discussed in the court below, were not mentioned in the return. *Reg.* v. *Dunn*, 12 Q. B. 1026; 18 L. J., M. C. 41—Ex. Ch.

Where judgment of non pros. has been signed by the defendant in error, in an indictment for a misdemeanour, because the plaintiff in error has not assigned errors in proper time, the defendant in error has a right to enter the proceedings and judgment of non pros. upon the judgment roll in the court below. *Reg.* v. *King*, 14 L. J., Q. B. 86; 9 Jur. 551.

—— **Joinder in Error.**—When error is brought on a judgment for felony, and the crown does not join in error, the defendant will be discharged. *Reg.* v. *Howes*, 7 A. & E. 60, n.; 3 N. & M. 462.

So in error upon a conviction for a misdemeanour. *Ib.*

—— **Error from Queen's Bench.**]—Where error is brought by a person convicted of felony, from the queen's bench to the exchequer chamber, the general rules for governing the proceedings in error, in civil cases, do not apply; but the prisoner must be brought up to the court, to pray oyer of the record, and to assign errors by delivering them in writing to the officer of the court, and must be present during the argument and the giving judgment. The counsel representing the attorney-general for the crown may, if he pleases, orally join in error, immediately on the assignment of errors being delivered in. *Mansell* v. *Reg.*, 8 El. & Bl. 54; Dears. & B. 375; 27 L. J., M. C. 4; 4 Jur. (N.S.) 432—Ex. Ch. See *O'Brien* v. *Reg.*, infra.

—— **Appearance by Separate Counsel.**]—Several defendants charged in an indictment with different illegal acts severed in their defence, and being convicted and sentenced to different punishments, brought separate writs of error:—Held, that they were entitled to appear by separate counsel, and that such counsel

were severally entitled to reply. *O'Connell* v. *Reg.*, 11 Cl. & F. 155; 9 Jur. 25; 1 Cox, C. C. 413.

—— **Crown's Right of Reply.**]—The counsel for the crown, where the crown is the defendant in a writ of error, is not necessarily entitled to the final reply, though the crown is the real litigant party. *O'Connell* v. *Reg.*, 11 Cl. & F. 155; 9 Jur. 25; 1 Cox, C. C. 413.

—— **Setting Aside when Sued Out to enable Person to Compromise.**]—Where a writ of error sued out upon a judgment of the queen's bench in a criminal prosecution, for the purpose of enabling the parties to effect a compromise of such prosecution, that court has the power, under the 12 & 13 Vict. c. 109, s. 39, to set aside such writ of error, and will exercise that power. *Reg.* v. *Alleyne*, Dears. C. C. 505; 4 El. & Bl. 186; 1 Jur. (N.S.) 372.

After the writ of error has been so set aside by the queen's bench, the court of exchequer chamber will set aside a judgment, signed thereon by order of a judge, for want of a joinder in error. *Alleyne* v. *Reg.*, Dears. C. C. 505; 5 El. & Bl. 392; 24 L. J., Q. B. 282; 1 Jur. (N.S.) 869; 3 W. R. 556—Ex. Ch.

—— **Powers of Court upon.**]—Writ of error to reverse a judgment of outlawry of the plaintiff for not appearing to receive judgment upon an indictment on which he had been convicted by his own confession, and which had been removed into the queen's qench by certiorari. Errors were assigned in the process of outlawry, and that the outlawry was founded on the judgment of conviction of the matters in the indictment, whereas certain of the counts were bad. Joinder in error, that neither in the outlawry nor in the pronouncing of the judgment of conviction is there error. Upon application on behalf of the prosecutor, that the outlawry, which was admitted to be bad, should be reversed, and that the plaintiff in error should be brought up for judgment:—Held, that the court could only reverse the outlawry, and could not entertain the question of error in the record of conviction. *Wright* v. *Reg.*, 14 Q. B. 148; 16 L. J., Q. B. 10; 11 Jur. 103; 2 Cox, C. C. 91.

Upon a writ of error on an indictment for felony, the judgment must be reversed, if an erroneous punishment is awarded. *Bourn* v. *Rex*, 2 N. & P. 248; 7 A. & E. 58; 6 L. J., M. C. 129; 1 Jur. 542. *See* 11 & 12 Vict. c. 78, s. 5.

—— **Sealing Writ of Error.**]—It is the duty of the clerk of the petty bag office in the court of chancery not to seal a writ of error in cases of misdemeanour until the attorney-general has issued his fiat. *Castro* v. *Murray*, 44 L. J., M. C. 70; L. R. 10 Ex. 213; 32 L. T. 675; 23 W. R. 596.

A person having been convicted of a misdemeanour, prepared a writ of error, and requested the clerk of the petty bag office to seal it in pursuance of 12 & 13 Vict. c. 109, s. 38. The clerk having refused on the ground that the attorney-general had not issued his fiat, the plaintiff brought an action against the clerk, claiming damages for the refusal, and a mandamus to compel the clerk to seal the writ:—Held, that the action must be stayed, as being frivolous and vexatious, and an abuse of the process of the court. *Ib.*

—— **Re-committal—Contents of.**]—A prisoner in custody, under a sentence of imprisonment for two years on a conviction for a misdemeanour, was discharged on bringing a writ of error and entering into a recognisance to prosecute the writ with effect. No notice was given to the prosecutor, nor was the recognisance duly filed in the crown office. He was therefore ordered to be recommitted. The judge's warrant, under which he was retaken, directed his apprehension and recommittal, stating it to be "in execution of the judgment in the prosecution":—Held, that the warrant was good, and that it was not necessary to state on the face of it how long the renewed imprisonment was to continue. *Dugdale* v. *Reg.*, 3 C. L. R. 74; 24 L. J., M. C. 55; 3 W. R. 24.

—— **Recognisance—Form of.**]—A defendant, being convicted and sentenced to imprisonment, at the sessions, for misdemeanour, brought error in the queen's bench, and afterwards in the exchequer chamber. In the latter court he entered into a recognisance, conditioned, in case of the affirmance of the judgment, to surrender himself personally, to be dealt with "as our Court of Exchequer Chamber may order." This recognisance was filed in the queen's bench. The defendant was discharged out of custody by a judge at chambers. On motion in the queen's bench to apprehend and recommit him:—Held, that the recognisance was before the court, although not appearing in the affidavits; and that the recognisance was not in conformity with 8 & 9 Vict. c. 68, s. 1, and that the rule must be made absolute. *Dugdale* v. *Reg.*, Dears. C. C. 254; 2 El. & Bl. 129; 17 Jur. 1097; 6 Cox, C. C. 161.

—— **Paper Books.**]—A defendant in error not having delivered paper books to two of the judges, in pursuance of rule 23 of the regulations in the crown office, and which rule concludes by saying that "judgment shall be given by the court against the party neglecting to deliver paper books to the judges, if the court shall so please"; the court nevertheless directed the argument to proceed. *Still* v. *Reg.*, 17 Jur. 208, n. S. P., 16 L. T. 494.

2. APPEAL.

Felony.]—It is contrary to the policy of the English law that there should be an appeal in cases of felony. *Eduljee Byramjee, Ex parte*, 5 Moore, P. C. 276; 11 Jur. 855.

Before Judicature Act.]—The 17 & 18 Vict. c. 125, s. 35 (C. L. P. Act, 1854) which gives an appeal on motions for new trials, does not apply to indictments. *Reg.* v. *Stephens*, 7 B. & S. 710.

The court of exchequer chamber has jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, to correct errors in judgments of the queen's bench in criminal cases. *Wright* v. *Reg.*, 3 N. & M. 892; 1 A. & E. 434.

Since Judicature Act—"Criminal Cause or Matter"—What is.]—*See cases*, sub tit. APPEAL.

Writ of Error.]—An appeal lies to the court of appeal from the judgment of the crown side

of the queen's bench division upon a writ of error; and the proceeding is by way of appeal, and not by writ of error. *O'Brien* v. *Reg.*, 26 L. R., Ir. 451—C. A.

Presence of Prisoner on Argument.]—When it becomes necessary to bring up a prisoner to be present at the argument of an appeal from the decision of the queen's bench division on a writ of error, application for a writ of habeas corpus should be made to the queen's bench division, and not to the court of appeal. *Ib.*

3. COURT OF CROWN CASES RESERVED.

Who may Reserve Questions.]—The recorder of a borough has power to reserve questions of law for the consideration of the judges. *Reg.* v. *Masters*, 3 New Sess. Cas. 326; 2 Car. & K. 930; T. & M. 1; 1 Den. C. C. 332; 18 L. J., M. C. 2; 12 Jur. 942; 3 Cox, C. C. 178.

The 11 & 12 Vict. c. 78, applies to points of law arising upon trials, under special commissions, and authorises the court to reserve points of law arising at the trial. *Reg.* v. *Bernard*, 1 F. & F. 240.

Jurisdiction—Indictment.]—The 11 & 12 Vict. c. 78, gives no jurisdiction to the court for crown cases reserved, to hear a case stated from a criminal court on the sufficiency of an indictment, after judgment on demurrer to the indictment. *Reg.* v. *Faderman*, 4 New Sess. Cas. 161; T. & M. 286; 3 Car. & K. 353; 1 Den. C. C. 565; 19 L. J., M. C. 147; 14 Jur. 377; 4 Cox, C. C. 361.

Objections arising on the face of an indictment cannot be reserved for the opinion of the judges. *Reg.* v. *Christey*, 1 Cox, C. C. 239.

The court has no jurisdiction to amend an indictment. *Reg.* v. *Garland*, 11 Cox, C. C. 224.

Where an amendment without which the indictment was bad, had been improperly made at the trial after verdict, the court ordered the record to be restored to its original state and a verdict of not guilty to be entered. *Reg.* v. *Larkin*, Dears. C. C. 365; 23 L. J., M. C. 125; 2 C. L. R. 775; 18 Jur. 539; 6 Cox, C. C. 377.

The court is bound to examine the validity of an indictment, though no question is reserved upon it. *Reg.* v. *Webb*, T. & M. 23; 1 Den. C. C. 338; 2 Car. & K. 933; 18 L. J., M. C. 39; 13 Jur. 42; 3 Cox, C. C. 183.

The court, for the purpose of assisting its judgment, will look at the indictment, although not set out in the case. *Reg.* v. *Williams*, T. & M. 382; 2 Den. C. C. 61; 20 L. J., M. C. 106; 14 Jur. 1052; 4 Cox, C. C. 356.

—— Question arising on the Trial.]—A question raised in the court below, in arrest of judgment, is a question arising on the trial, and properly reserved. *Reg.* v. *Martin*, 3 New Sess. Cas. 575; 1 Den. C. C. 398; T. & M. 78; 2 Car. & K. 950; 18 L. J., M. C. 137; 13 Jur. 368; 3 Cox, C. C. 447.

It is not a condition precedent to give jurisdiction to the court of crown cases reserved that a point of law existing "on the trial" should be formally taken at the trial. *Reg.* v. *Clark* (L. R. 1 C. C. 64) disapproved. *Reg.* v. *Brown*, 59 L. J., M. C. 47; 24 Q. B. D. 357; 61 L. T. 594; 38 W. R. 95; 16 Cox, C. C. 715; 54 J. P. 408.

The court has only jurisdiction, after a conviction, over what takes place during the trial. *Reg.* v. *Faderman*, supra.

The court will only consider questions of law which shall have arisen on the trial of a prisoner. *Reg.* v. *Clark*, 36 L. J., M. C. 16; L. R. 1 C. C. 54; 12 Jur. (N.S.) 946; 15 L. T. 190; 15 W. R. 48; 10 Cox, C. C. 338.

Where a man was indicted for a misdemeanour and pleaded guilty, the court declined to consider whether he ought to have been indicted for felony on the same facts. *Ib.*

—— In other Cases.]—The court will not answer questions that are merely hypothetical and not practical. And, therefore, the court will refuse to answer questions as to the course to be pursued on future occasions. *Reg.* v. *Whitehead*, 35 L. J., M. C. 186; L. R. 1 C. C. 33; 14 L. T. 489; 14 W. R. 677; 10 Cox, C. C. 234.

Nor can it decide any points beyond those reserved, although other points in the prisoner's favour appear on the face of the case. *Reg.* v. *Tysee* or *Tyrie*, 38 L. J., M. C. 58; L. R. 1 C. C. 177; 19 L. T. 657; 17 W. R. 334; 11 Cox, C. C. 241.

The court will not consider an objection which has not been reserved, even though it is fairly deducible from the case itself. *Reg.* v. *Smith*, infra.

The court will not go into any matter of evidence which occurred at the trial, if it is not stated in the case. *Ib.*

On a charge of murder on the high seas, on board a British ship afloat, the deceased having been thrown out of a foreign ship in a foreign port, the question whether all the facts must not be averred in each count of the indictment, in order to give a judge sitting under an ordinary commission of oyer and terminer and general gaol delivery jurisdiction to try the offence as it arose on the record, is a point not to be reserved. *Reg.* v. *Menhom*, 1 F. & F. 369.

What a jury says in recommending a prisoner to mercy ought not to be made the subject of a case reserved. *Reg.* v. *Trebilcock*, Dears. & B. 453; 27 L. J., M. C. 103; 4 Jur. (N.S.) 123; 6 W. R. 281; 7 Cox, C. C. 408.

On a trial for murder, the name of A., a juror on the panel, was called; B., another juror on the same panel, appeared by mistake, answered to the name of A., and was sworn as a juror. The prisoner was convicted. The circumstance that B. had answered for A. was not discovered till the next day, when the judge, being informed of it, reserved the question as to the effect of the mistake on the trial:—Held, that the conviction ought not to be set aside on the ground that there had been a mis-trial, and that the court had no jurisdiction over the case. *Reg.* v. *Mellor*, Dears. & B. 468; 27 L. J., M. C. 121; 4 Jur. (N.S.) 214; 6 W. R. 322; 7 Cox, C. C. 454.

The court cannot entertain questions of mere practice. *Reg.* v. *Stubbs*, Dears. C. C. 555; 25 L. J., M. C. 16; 1 Jur. (N.S.) 1115; 4 W. R. 85; 7 Cox, C. C. 48.

Bail on.]—Where a case has been reserved upon a conviction for an assault with intent to commit a felony, the court will not deem itself bound to admit the prisoner to bail until the decision of the point reserved, even although the offence is only a misdemeanor, and the prisoner was admitted to bail of right previously to the trial. *Reg.* v. *Bird*, 5 Cox, C. C. 11.

Where, after conviction by a jury at the assizes, questions of law have been reserved for the court of criminal appeal, the prisoner will not be admitted to bail without the assent of the judge before whom he was tried. *Reg.* v. *Harris*, 4 Cox, C. C. 21.

Form of Case.]—The court expects cases reserved to be submitted in a complete form, and will ordinarily refuse to send back a case for amendment. *Reg.* v. *Holloway*, 1 Den. C. C. 370; 3 New Sess. Cas. 410; T. & M. 40: 2 Car. & K. 942; 18 L. J., M. C. 60; 13 Jur. 36; 3 Cox, C. C. 241.

Cases are not to be lengthy narratives of the facts. *Reg.* v. *Stear*, T. & M. 11; 18 L. J., M. C. 30; 13 Jur. 41.

Counsel dissatisfied with Form of Case.]—If a counsel should think that any material point raised at the trial has been omitted in the statement of the case, it would be proper for him to communicate with the judge who reserved the case, and suggest any amendment that in his judgment may be necessary. *Reg.* v. *Smith*, T. & M. 214; 2 Car. & K. 882; 1 Den. C. C. 510; 14 Jur. 92; 4 Cox, C. C. 42.

Signing Case.]—Where the assizes are held before two judges, and the one of them who tries a criminal case, after reserving a point for the consideration of the court of criminal appeal, dies before the case is stated, the other judge may state and sign the case. *Reg.* v. *Featherstone*, Dears. C. C. 369; 2 C. L. R. 774; 23 L. J., M. C. 127; 18 Jur. 538; 2 W. R. 416; 6 Cox, C. C. 376.

Sending back Case.]—The court will not send a case back for amendment on the mere application of counsel; but will do so if on the argument it appears that it is imperfectly stated. *Reg.* v. *Hilton*, Bell, C. C. 20; 28 L. J., M. C. 28.

But the court will not send back a case to be restated upon an objection which is beside the merits. *Reg.* v. *Brammitt*, L. & C. 9; 3 L. T. 679; 9 W. R. 257; 8 Cox. C. C. 413. See also *Reg.* v. *Holloway*, supra.

Restatement of Case.]—Where a case reserved has been restated by order of the court, an application, supported by affidavit, to have it again restated will be refused. *Reg.* v. *Studd*, 14 L. T. 633; 14 W. R. 806; 10 Cox, C. C. 258.

Arguments.]—The judges will hear the argument of points reserved, although they appear on the record, and were taken in arrest of judgment. *Reg.* v. *Martin*, 2 Car. & K. 950; 1 Den. C. C. 398; T. & M. 78; 3 Cox, C. C. 447.

Where Court Differs.]—Where there is a difference of opinion amongst the judges upon a question of law, the case reserved will be argued before the fifteen judges; but where the court differs upon a question of fact only, judgment will be given according to the opinion of the majority that a conviction should be quashed. *Reg.* v. *Burrell*, L. & C. 354; 33 L. J., M. C. 54; 9 L. T. 426; 12 W. R. 149; 9 Cox, C. C. 368.

Who Commences.]—On the argument of a case reserved before the court of criminal appeal, the counsel for the defendant must begin. *Reg.* v. *Gate Fulford*, Dears. & B. 74; 7 Cox, C. C. 230.

Appearance by Counsel.]—Counsel will be heard in support of a conviction on a case reserved, though no one appears on behalf of the prisoner. *Reg.* v. *Martin*, 1 Den. C. C. 398; 3 New Sess. Cas. 575; T. & M. 78; 2 Car. & K. 950; 18 L. J., M. C. 137; 13 Jur. 368; 3 Cox, C. C. 447.

A counsel who has appeared for a prisoner at the trial, but has not been instructed to appear for him in the court of appeal, may as amicus curiæ cite authorities for the information of the court, but will not be allowed to argue. *Reg.* v. *Thomas*, 1 L. & C. 313; 33 L. J., M. C. 22; 9 L. T. 488; 12 W. R. 108.

Where prisoners had joined in their plea at the trial and were represented by counsel appearing for them jointly, they are not entitled to appear by separate counsel on the hearing of the case. *Reg.* v. *Bird*, 5 Cox, C. C. 20.

Costs.]—The judge who tries a prisoner has power under 7 Geo. 4, c. 64, s. 22, to allow the costs of the prosecution on the hearing of a case reserved for the court for consideration of crown cases; and the officer of that court will tax and ascertain such costs, and certify the amount to the officer of the court below. *Reg.* v. *Lewis*, Dears. & B. 326: 6 W. R. 41; 7 Cox, C. C. 406. S. P., *Reg.* v. *Cludroy*, 3 Car. & K. 205.

The court which has been directed to pass sentence on a prisoner, after a point reserved for the decision of the court of criminal appeal, has power to allow the costs incurred in the latter court, and upon taxation, under an order to that effect, the briefs and fees of two counsel will be allowed. *Reg.* v. *Woolley*, 4 Cox, C. C. 454.

The court having no taxing officer, the costs of proceedings in that court must be taxed in the court below. *Reg.* v. *Dolan*, Dears. C. C. 486; 3 C. L. R. 295; 24 L. J., M. C. 59; 1 Jur. (N.S.) 72; 3 W. R. 177; 6 Cox, C. C. 453, n.

The court will not entertain a question of costs which is not within their jurisdiction, although it is expressly agreed by a case reserved that the court should have the same power, with respect to such costs, as the judge could legally have exercised at the trial. *Reg.* v. *Hornsea*, Dears C. C. 291; 23 L. J., M. C. 59, 62, n.

XI. PARDON.

Limited to Particular Case.]—A. was, at the spring assizes of 1846, indicted for stealing a horse on the 26th day of February, 1841. He had, in 1842, been convicted of felony, and sent to the hulks, from which he was discharged in 1846. He produced a certificate of his discharge, which stated, that "J. H., who was convicted at Worcester, on the 22nd June, 1842, is this day discharged in consequence of having received a free pardon":—Held, that, if this pardon had been regularly proved, it would have been no bar to the charge of horse-stealing, as the pardon was expressly confined to another felony. *Reg.* v. *Harrod*, 2 Car. & K. 294; 2 Cox, C. C. 242.

Effect of.]—A "free pardon" places a person in the same position as to status and character as he was before his conviction. *Hay* v. *Tower Division JJ.* or *Middlesex JJ.*, 59 L. J., M. C. 79; 24 Q. B. D. 561; 62 L. T. 290; 38 W. R. 414; 54 J. P. 500.

—— **Attainder.**]—A convict sentenced to death for felony, which sentence was commuted to transportation for life, received a conditional free pardon in the penal colony:—Held, that such pardon did not alter the effect of the attainder in vesting his property in the crown. *Church, In re*, 16 Jur. 517.

The 5 Geo. 4, c. 84, s. 26, protects felons who have received a remission of their sentences in the enjoyment of all property acquired by them since their conviction, and not merely such property as has been acquired by their own industry. *Gough* v. *Davies*, 2 Kay & J. 623; 25 L. J., Ch. 677; 4 W. R. 618.

Terms substantially Complied with.] — The king's sign manual may be given in evidence by a prisoner, on an indictment for returning from transportation; and if not revoked, and the condition is literally, though not substantially, complied with, it will discharge the prisoner from that indictment. *Rex* v. *Miller*, 2 W. Bl. 797; 1 Leach, C. C. 74.

Pardon Promised.]—A proclamation promising a pardon cannot be pleaded as a pardon. But where such proclamation had been made the court, in their discretion, deferred the awarding of execution upon the sentence, until the prisoner should have had time to apply to the secretary of state for a pardon, according to the terms of the proclamation. *Rex* v. *Garside*, 4 N. & M. 33; 2 A. & E. 266; 4 L. J., M. C. 1.

Pleading.]—Semble, that a pardon after judgment may be pleaded ore tenus, and in bar of execution; and there may be a demurrer to such a plea ore tenus. *Ib.*

And see ante, col. 1138.

XII. APPREHENSION AND ARREST OF OFFENDERS.

1. *By Constables and Private Individuals*, 1921.
2. *Warrant of Justices*, 1926.
3. *Bench Warrants*, 1927.
4. *Conveying Prisoner to Prison*, 1927.
5. *Treatment and Confinement of Prisoners.* *See* PRISON.

1. BY CONSTABLES AND PRIVATE INDIVIDUALS.

Legality of Arrest—Murder or Manslaughter.] —*See* ante, MURDER (*Killing Officers of Justice*).

By Constables — Misdemeanours — Presence necessary.]—A constable is not justified in taking a person into custody for a mere assault, unless he is present at the time. *Coupey* v. *Henley*, 2 Esp. 540.

To justify a constable in apprehending a party without warrant for an affray, it is essential that the party should have been engaged in the affray and that the constable should have had view of the affray, while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension. *Cook* v. *Nethercote*, 6 Car. & P. 741.

Semble, a magistrate cannot arrest a person guilty of a misdemeanour before his eyes where there has been no breach of the peace, actual or apprehended. *King* v. *Poe*, 15 L. T. 37.

If a constable sees an assault committed, he may recently after that assault, and before all danger of further violence has ceased, apprehend the offender; and if in so doing he is resisted and assaulted, the person assaulting is liable to be convicted of assaulting a constable in the execution of his duty. *Reg.* v. *Light*, Dears. & B. 332; 27 L. J., M. C. 1; 3 Jur. (N.S.) 1130; 6 W. R. 42; 7 Cox, C. C. 389.

If a person is guilty of an assault and battery, a policeman who is present and sees the offence committed, is justified in taking the offender at once into custody without warrant, in order to take him before a magistrate to answer for the offence; and if such a person is so taken into custody, he cannot maintain an action against a bystander for directing the policeman so to take him into custody. *Derecourt* v. *Corbishley*, 5 El. & Bl. 188; 24 L. J., Q. B. 313; 1 Jur. (N.S.) 870; 3 W. R. 513.

In an action by A. against B. for false imprisonment, B. justified on the ground of A. having wilfully and without excuse, within view of the constable who apprehended her, annoyed and disturbed the defendant and his family by knocking and ringing at his door:—Held, that to support this plea, under ss. 54 and 63 of 2 & 3 Vict. c. 47 (Metropolitan Police Act), it was necessary to prove the offence to have been committed within view of the constable. *Simmons* v. *Millengen*, 2 C. B. 524; 15 L. J., C. P. 102; 10 Jur. 224.

A police constable of the city of London has no power under 2 & 3 Vict. c. xciv., to take a person into custody without a warrant, merely on suspicion that he has committed a misdemeanour. *Bowditch* v. *Balchin*, 5 Ex. 378; 19 L. J., Ex. 337.

A constable at common law, is not justified in imprisoning a person in the belief that he has committed a misdemeanour. *Griffin* v. *Colman*, 4 H. & N. 265; 28 L. J., Ex. 134.

—— **For what Offences.**]—Using loud words in the street, though disorderly, is not an offence for which a party should be taken into custody. *Hardy* v. *Murphy*, 1 Esp. 294.

If a party is turning towards the wall in a street on a particular occasion, a watchman is not justified in collaring him to prevent him so doing. *Booth* v. *Hanley*, 2 Car. & P. 288.

If a constable is preventing a breach of the peace, and any person stands in his way to hinder him from so doing, the constable is justified in taking such person into custody, but not in giving him a blow. *Levy* v. *Edwards*, 1 Car. & P. 40.

Watchmen may imprison any person who encourages prisoners in their custody to resist. *White* v. *Edmunds*, 1 Peake, 89.

A charge of an attempt to shoot may justify a policeman in arresting. *Osborn* v. *Veitch*, 1 F. & F. 317.

A person is justified in giving in charge, and a constable in arresting without warrant, a party who has been guilty of a breach of the peace, if there are reasonable grounds for apprehending its continuance or immediate renewal, but not otherwise. *Baynes* v. *Brewster*, 2 Q. B. 375; 1 G. & D. 669; 11 L. J., M. C. 5; 6 Jur. 392. S. P., *Timothy* v. *Simpson*, 1 C. M. & R. 757; 5 Tyr. 244; 6 Car. & P. 499; 4 L. J., M. C. 73.

A. went to a house at night, demanding to see the servant. He was told to depart, and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived, A. said that if a light appeared at the windows he would break them; upon which the

constable took him into custody:—Held, that the constable was not justified in so doing. *Rex* v. *Bright*, 4 Car. & P. 387. See *Jordan* v. *Gibbon*, 8 L. T. 391.

—— **In Case of Felony or Suspected Felony.**]—A peace-officer may justify an arrest on a reasonable charge of felony without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot. *Samuel* v. *Payne*, 1 Doug. 359.

Semble, that a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom—per Brett, L.J. *Reg.* v. *Weil*, 53 L. J., M. C. 74; 9 Q. B. D. 701; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 189—C. A.

A constable is not justified in shooting at a man whom he had seen stealing wood growing in a copse (which, if a first offence, is only a misdemeanour), although the constable has no means of arresting the man without firing, and although the stealing the wood in the particular instance amounted to felony, by reason of the man having been previously convicted several times for similar offences under 7 & 8 Geo. 4, c. 29, s. 39, these convictions being unknown to the constable at the time. *Reg.* v. *Dadson*, T. & M. 385; 2 Den. C. C. 35; 3 Car. & K. 148; 20 L. J., M. C. 57; 14 Jur. 1051; 4 Cox, C. C. 360.

A constable having reasonable cause to suspect a person of felony may arrest him, though it appears no felony was committed. *Beckwith* v. *Philby*, 6 B. & C. 35; 9 D. & R. 487; 5 L. J. (O.S.) M. C. 132. *Hobbs* v. *Branscomb*, 3 Camp. 420.

A constable is justified in apprehending a person charged on suspicion of felony, if he has reasonable or probable cause to believe that the party charged is the felon. *Davis* v. *Russell*, 2 M. & P. 590; 5 Bing. 354; 7 L. J. (O.S.) M. C. 52; 30 R. R. 637.

If a reasonable charge of felony is made against a person who is given in charge to a constable, the constable is bound to take him, and he will be justified in so doing, although the charge may turn out to be unfounded. *Cowles* v. *Dunbar*, 2 Car. & P. 565; M. & M. 37.

Watchmen and beadles have authority at common law to arrest and detain in prison, for examination, persons walking the streets at night whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. *Lawrence* v. *Hedger*, 3 Taunt. 14; 12 R. R. 571.

A constable is not justified in arresting a supposed offender for felony without a warrant at the instigation of a third party, unless there exists a reasonable charge and suspicion. *Hogg* v. *Ward*, 3 H. & N. 417; 27 L. J., Ex. 443; 4 Jur. (N.S.) 885; 6 W. R. 595. See *Staight* v. *Gee*, 2 Stark. 445.

A woman died after a very short illness; rumours were generally in circulation in the neighbourhood where she had lived that her husband had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody, and conveyed him before a magistrate, who detained him till medical men had reported the cause of death, and then discharged him:—Held, that, if the jury was of opinion that the constable had reasonable ground of suspicion to justify the apprehension, an action could not be maintained for the arrest. *Nicholson* v. *Hardwick*, 5 Car. & P. 495.

—— **Crime committed on High Seas.**]—Where the crew of a Dutch ship had mastered the vessel and run away with her, and brought her into Deal, it was held that they might be seized and sent back to Holland. *Mure* v. *Kay*, 4 Taunt. 43.

Assault on Constable in Execution of Duty.]—See ante, col. 1467.

Charge to Constable—Contents.]—A charge to a constable, on taking a person into custody, that he has a forged note in his possession, need not contain the same accurate description of the offence as an indictment. *Rex* v. *Ford*, R. & R. 329.

On whose Information.]—A constable is not justified in apprehending a person as a receiver of stolen goods on the mere assertion of the principal felon. *Isaacs* v. *Brand*, 2 Stark. 167; 19 R. R. 695.

Duty of Constable on Arresting Person.]—A constable arresting one on suspicion of felony, is bound to take him before a magistrate as soon as he reasonably can, and he cannot justify detaining him three days without going before a magistrate in order that evidence may be collected in support of the prosecution. *Wright* v. *Court*, 6 D. & R. 623; 4 B. & C. 596; 4 L. J. (O.S.) K. B. 17; 28 R. R. 418.

A constable has no right to charge a prisoner with an offence in respect of which he is not in possession of a warrant. *Reg.* v. *Male*, 17 Cox, C. C. 689.

—— **Right of Searching.**]—The right of searching persons in custody must depend on the circumstances; the mere fact that a person is drunk and disorderly will not justify a constable searching his person although he may have received general orders to search all persons in custody; but a person may so conduct himself by reason of violent language or conduct, that it may be prudent and right to search him as well for his own protection as for those intrusted with the duty. *Leigh* v. *Cole*, 6 Cox, C. C. 329.

—— **Right of Handcuffing.**]—The right of handcuffing persons in custody must depend on the circumstances, e.g. the nature of the charge, and the conduct and temper of the person in custody. No general rule will justify a constable in handcuffing a person in custody for a misdemeanour to a felon and walking them together through the streets. *Ib.*

A constable having taken a prisoner on suspicion of felony, has no right to handcuff him, except he has attempted to escape, or except it is necessary in order to prevent his escaping. *Wright* v. *Court*, 6 D. & R. 623; 4 B. & C. 596; 4 L. J. (O.S.) K. B. 17; 28 R. R. 418.

Handcuffing a prisoner is only justifiable when reasonable necessity for doing it exists, and if it be resorted to in the absence of such necessity, the party so treated has a right of action for damages. *Reg.* v. *Taylor*, 59 J. P. 393.

Private Individuals—In what Cases Arrest Justified.]—If a man is found attempting to commit a felony in the night, any one may apprehend and detain him until he can be carried before a magistrate. *Rex* v. *Hunt*, 1 M. C. C. 93.

A private individual cannot justify an arrest on a reasonable charge of felony, if it should afterwards appear that no felony had been committed. *Samuel* v. *Payne*, 1 Doug. 359. See *Reg.* v. *Price*, 8 Car. & P. 282.

When a private person apprehends another on suspicion of felony, he does it at his peril, and is liable to an action unless he can establish in proof that the party has actually been guilty of felony. *Adams* v. *Moore*, 2 Selw. N. P. 910. S. P., *Allen* v. *Wright*, 8 Car. & P. 522.

Suspicion that a party has on a former occasion committed a misdemeanour, is no justification for giving him in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanour and another, as breach of the peace and fraud. *Fox* v. *Gaunt*, 3 B. & Ad. 798; 1 L. J., K. B. 198.

A private person is not justified in arresting or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it. *Price* v. *Seeley*, 10 Cl. & F. 28. S. P., *Timothy* v. *Simpson*, 1 C. M. & R. 757; 5 Tyr. 244; 6 Car. & P. 499; 4 L. J., M. C. 73; *Baynes* v. *Brewster*, 2 Q. B. 375; 1 G. & D. 669; 11 L. J., M. C. 5; 6 Jur. 392.

A wilful trespass on another person's property, without doing any real damage, is not sufficient to justify the apprehension of the parties under 1 Geo. 4, c. 56, s. 3 (since repealed, but re-enacted by 7 & 8 Geo. 4, c. 30). *Butler* v. *Turley*, 2 Car. & P. 585; M. & M. 54.

To justify the apprehension of an offender under the Malicious Injuries Act, 7 & 8 Geo. 4, c. 30, the offender must be taken in the fact, or on a quick pursuit. *Hanway* v. *Boultbee*, 4 Car. & P. 350; 1 M. & Rob. 15.

By s. 103 of the Larceny Act, 1861, "any person found committing an offence under this act may be immediately apprehended without a warrant by any person":—Held, that it is a question for the jury in all cases whether or not the apprehension was immediate, and whether the exigency of the statute was satisfied, having regard to the facts of the case. *Griffiths* v. *Taylor*, 46 L. J., C. P. 152; 2 C. P. D. 194; 36 L. T. 5; 25 W. R. 196—C. A.

—— **Duty on Arrest.**]—A person justified, under the 7 & 8 Geo. 4, c. 30, in causing the arrest of another, must do it immediately, and he must send him by the direct road to the lock-up; for if he sent him extra viam, he would be a trespasser against the person so arrested. *Morris* v. *Wise*, 2 F. & F. 51.

Refusing to Assist Constable—Indictment.]—An indictment against a person for refusing to aid and assist a constable in the execution of his duty, and prevent an assault made upon him by prisoners in his custody on a charge of felony, with intent to resist their lawful apprehension, is sufficient, without stating how the apprehension became lawful; and it is enough if it states a refusal to assist, without the further allegation that he did not, in fact, aid and assist. *Reg.* v. *Sherlock*, 35 L. J., M. C. 92; L. R. 1 C. C. 20; 12 Jur. (N.S.) 126; 13 L. T. 623; 14 W. R. 288; 10 Cox, C. C. 170.

Obstructing Apprehension.]—An innkeeper in whose house was an escaped felon, told a constable (who informed him that he was harbouring a felon) that the constable had better go and find him, the constable went upstairs and saw the felon escape through a window:—Held, no evidence of obstructing the felon's apprehension. *Reg.* v. *Green*, 8 Cox, C. C. 441.

2. Warrant of Justices.

Form and Contents.]—General warrants are illegal and void. *Money* v. *Leach*, 1 W. Bl. 555.

A warrant to arrest the party "to the end that he may become bound, &c., at the next sessions," means the next sessions after the arrest; therefore the officer may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew* v. *Parker*, 8 Term Rep. 110; 2 Esp. 683; 4 R. R. 605.

A warrant issued by a magistrate for the apprehension of a party to answer a charge, should state the specific offence with which the party is charged, and that information thereof was duly made on oath before the magistrate. *Caudle* v. *Seymour*, 1 G. & D. 454; 1 Q. B. 889; 10 L. J., M. C. 130; 5 Jur. 1196.

A warrant directing police officers to apprehend a party, and in safe custody to keep, so as to have his body before her Majesty's justices of the peace at the next sessions, is ill, and such custody is illegal. *Nisbett, Ex parte*, 8 Jur. 107.

A warrant of committal contained the names of the defendants in the margin but not in the body, which was in blank:—Held, no answer to an action for false imprisonment. *Hodgins* v. *Poe*, 16 W. R. 224.

Arrest of British Subject Abroad.]—A British subject arrested abroad under a warrant upon an indictment for a misdemeanour, brought in custody to England, and there committed to prison, is not entitled to be discharged. *Scott, Ex parte*, 4 M. & Ry. 361; 9 B. & C. 446.

Warrant in Possession of Constables at Time of Arrest.]—A constable making an arrest under a justice's warrant in a civil proceeding, is bound to have the warrant in his possession at the time. *Galliard* v. *Laxton*, 2 B. & S. 363; 31 L. J., M. C. 123; 8 Jur. (N.S.) 642; 5 L. T. 835; 10 W. R. 353; 9 Cox, C. C. 127.

When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest. *Codd* v. *Cabe*, 45 L. J., M. C. 101; 1 Ex. D. 352; 34 L. T. 453; 13 Cox, C. C. 202. S. P., *Reg.* v. *Chapman*, 12 Cox, C. C. 4.

See cases ante, col. 1513 et seq.

Backing of Warrant.]—C. was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine, but not backed by any justice of and for

the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. C. was not pursued from the county, but found in the city :—Held, that the conviction was wrong, as the constables were not acting in the execution of their duty in so executing such warrant. *Reg.* v. *Cumpton*, 49 L. J., M. C. 41 ; 5 Q. B. D. 341 ; 42 L. T. 543 ; 28 W. R. 539 ; 44 J. P. 489.

Executing on a Sunday.]—The exception, in 29 Car. 2, c. 7, s. 6, that process may be executed on the Lord's day, in cases of treason, felony, or breach of the peace, extends to all indictable offences, and is not restricted to treason and felony, and such misdemeanours as involve an actual breach of the peace. *Rawlins* v. *Ellis*, 16 M. & W. 172 ; 16 L. J., Ex. 5 ; 10 Jur. 1039 ; 2 Cox, C. C. 96.

3. Bench Warrants.

When Granted.]—Bench warrants should not be granted unless it is necessary that the party charged should be at once taken into custody. *Reg.* v. *Whittaker*, 2 F. & F. 1.

The court will not issue a bench warrant to bring up a witness, although it is sworn that he is keeping out of the way collusively, and that his evidence is so material to the prosecution that the case cannot go on without him, but will postpone the trial to allow the witness's recognisances to be estreated on his non-appearance when called. *Reg.* v. *Crawford*, 6 Cox, C. C. 481.

How Obtained.]—A prosecutor of an indictment for misdemeanour may obtain the usual crown office certificate of his bill having been found, for the purpose of taking out a judge's warrant against the defendant, without obtaining an office copy of the indictment. *Rex* v. *Redfern*, 2 A. & E. 387 ; 4 N. & M. 198.

Form of.]—A warrant of a judge of the Queen's Bench issued, directed to the governor of a gaol, constables, &c., directing them to apprehend and take a party against whom a bill for a misdemeanour had been found at quarter sessions, and him safely keep, to the end that he may become bound and find sufficient sureties to answer the indictment, and be further dealt with according to law, is a bad warrant, for not directing that the party should be brought before some judge or justice to be bound. *Reg.* v. *Downey*, 7 Q. B. 281 ; 15 L. J., M. C. 29 ; 9 Jur. 1073.

4. Conveying Prisoner to Prison.

Expenses of, by whom Paid.]—A metropolitan police magistrate, having summarily convicted an offender and adjudged her to be imprisoned, made out a warrant for her commitment ; in obedience to which warrant the plaintiff, a police constable, duly conveyed her to prison. By reason of such conveyance the plaintiff incurred certain expenses which the prisoner had no means to defray. The magistrate subsequently made an order under 27 Geo. 2, c. 3, directed to the defendant, ordering him to pay to the plaintiff the amount of such expenses. The defendant refused to comply with the order, on the ground that the liability to pay the expenses of conveying prisoners to prison had been transferred from the county to the Secretary of State by s. 4 of the Prisons Act, 1877, which provides, that "After the commencement of the act all expenses incurred in respect of the maintenance of prisons to which the act applies and of the prisoners therein shall be defrayed out of moneys provided by parliament." A similar question arose with regard to the expenses of conveying from the police court to the prison a man committed to take his trial for felony :—Held, that the expenses of conveying prisoners to prison were by s. 4, transferred to the Secretary of State, and that the word "therein" in that section pointed to the class of prisoners to whose maintenance the act was intended to apply, not to the period of time from which the liability for such maintenance was to commence. *Mullins* v. *Surrey* (*Treasurer*), 51 L. J., Q. B. 145 ; 7 App. Cas. 1 ; 45 L. T. 625 ; 30 W. R. 157 ; 15 Cox, C. C. 9 ; 46 J. P. 276—H. L. (E.)

The expenses incurred by a metropolitan police constable in the conveyance under warrants, of persons charged with offences within or without the metropolitan police district are to be discharged out of the county rate, whether the warrants are under the hands of justices of the peace for the county or for the metropolitan district, and whether the warrants are directed to the parish constable or a police constable ; but not if such warrant is addressed to the keepers of the gaol. *Lercrick* v. *Mercer*, 14 Q. B. 759 ; 22 L. J., M. C. 81 ; 1 W. R. 180.

XIII. SEARCH WARRANTS.

When Granted.]—A positive oath that a felony is actually committed is not necessary to justify a magistrate in granting his warrant to search the premises and apprehend the person of a party suspected of felony. *Elsee* v. *Smith*, 1 D. & R. 97 ; 2 Chit. 304 ; 24 R. R. 639.

Mandamus to Justice.]—Mandamus does not lie to compel a justice who had signed a search warrant to produce the informations upon which it was issued. *Reg.* v. *Browne*, 4 Cox, C. C. 1.

Other Goods taken away—Trespass.]—Where a constable, having a warrant to search for certain specific goods alleged to have been stolen, found and took away those goods, and certain others also supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant :—Held, that the constable was liable to an action of trespass. *Crozier* v. *Cundy*, 6 B. & C. 232 ; 9 D. & R. 224 ; 5 L. J. (o.s.) M. C. 50 ; 30 R. R. 311.

Right of Officers to Possession of Warrant.]—Excise officers went with a search warrant, and, at the desire of the party gave it him to peruse, when he refused to return it :—Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. *Rex* v. *Mitton*, 3 Car. & P. 31 ; M. & M. 107.

How Executed.]—As to the proper mode of executing search warrants, see *Entick* v. *Carrington*, 19 St. Tr. 1067.

XIV. ARTICLES OF THE PEACE.

1. *Generally*, 1929.
2. *Justices*, 1932.

1. GENERALLY.

Where Exhibited.] — Articles of the peace ought to be exhibited in the neighbourhood, that the security may be given there. *Rex* v. *Waite*, 2 Burr. 780; 2 Ld. Ken. 511.

Controverting Facts Deposed to.]—Where a person exhibits articles of the peace, and swears that her life is in danger, the truth of the facts cannot be controverted. *Vane's (Lord) Case*, 13 East, 172, n.; 1 Term Rep. 697; 12 R. R. 317.

The facts stated in the articles are to be considered as true till the contrary appears upon a proper prosecution. *Ib.*

Affidavits are not admissible for the purpose of supplying facts said to have been suppressed by the complainant, as the contents of a correspondence alluded to in the articles. Nor is it an objection to the articles that such correspondence is not set out, if it does not contain any part of the menace relied upon. *Reg.* v. *Mallinson*, 16 Q. B. 367; 15 Jur. 746.

On habeas corpus bringing up a party committed by justices for not finding sureties of the peace, the court will not hear affidavits controverting facts alleged in the articles of the peace. *Reg.* v. *Dunn*, 12 A. & E. 599; 4 P. & D. 415; 1 Arn. & H. 21; 5 Jur. 721. S. P., *Reg.* v. *Stanhope*, 12 A. & E. 620, n.

One against whom articles of the peace are exhibited, is not entitled to read affidavits on his behalf, in contradiction of the facts sworn to against him in such articles. *Rex* v. *Doherty*, 13 East, 171; 12 R. R. 315.

In what Sense Words Used.]—A party gave information on oath before a magistrate, that from certain language used towards him, he was in bodily fear from another, and the magistrate, upon hearing the complaint, required the latter to enter into recognisances to keep the peace. On motion to discharge the recognisances, on the ground that the language was used in a metaphorical sense only, the court refused to interfere, because it was for the magistrate to judge in what sense the language was used. *Rex* v. *Tregarthen*, 5 B. & Ad. 678; 2 N. & M. 379.

What Sufficient Grounds.]—H. had written a letter to a young lady, a relative of T.: T. afterwards, in consequence of his writing the letters, violently assaulted H., and said, "If you write again, I will flog you within an inch of your life." On a subsequent occasion, T. meeting H., said to him, "Remember what I said to you; I am determined to put a stop to your proceedings." The court permitted H. to exhibit articles of the peace against T. *Hulse, Ex parte*, 21 L. J., M. C. 21.

It is sufficient ground for articles of the peace that the complainant has been accustomed to go to a particular place, rightfully, as he alleges, for the transaction of business, and has been threatened with violence if he goes there again. *Reg.* v. *Mallinson*, 16 Q. B. 367; 15 Jur. 746.

If it appears on oath to the satisfaction of the justices that the complainant has been threatened, it is their duty to require recognisances to be entered into to keep the peace. *Lort* v. *Hutton*, 45 L. J., M. C. 95; 33 L. T. 730.

There ought to be a reasonable foundation on the face of the articles, to induce a fear of personal danger, before the court will require sureties of the peace. *Vane's (Lord) Case*, 13 East, 172, n.; 1 Term Rep. 697; 12 R. R. 317.

Form of Recognisance.]—A recognisance, in the margin of which there was the name of the county of W., was stated to have been taken before "J. T., Esq., one of the justices for the county of W.":—Held, that it sufficiently appeared, that the recognisance had been taken in the county for which J. T. was a justice. *Reg.* v. *Hodgson*, Dears. C. C. 14; 7 Ex. 915; 21 L. J., M. C. 181.

Requiring Bail.]—Upon articles of the peace exhibited, the court has power of requiring bail for such a length of time as they think necessary for the preservation of the peace, and are not confined to a twelvemonth. *Rex* v. *Bowes*, 1 Term Rep. 696; 1 R. R. 363.

Staying Process.] —Where articles of the peace appeared malicious and untrue, the court stayed process on them, and committed the exhibitant for perjury. *Rex* v. *Parnell*, 2 Burr. 806.

Scire facias.]—A writ of scire facias upon a recognisance of the peace describing the justices by the initial letters of their christian names is good. *Reg.* v. *Dale*, 5 Cox, C. C. 171.

Surety—Who may be.] —A person who has been convicted of a crime by which he has become infamous cannot be a surety for one charged or suspected of an indictable offence. *Rex* v. *Edwards*, 4 Term Rep. 440; 2 R. R. 427.

Jurisdiction of Court.]—The court cannot interfere to reduce the amount of security which the magistrates require a party to give for the preservation of the peace. *Rex* v. *Holloway*, 2 D. P. C. 525.

The court will, if it sees ground, require sureties of the peace, although justices have refused to do so on the same complaint. *Reg.* v. *Mallinson*, 16 Q. B. 367; 15 Jur. 746.

Power of Judge at Trial.]—In all cases of misdemeanour punishable by imprisonment, the Queen's Bench, and, therefore, the judge at the trial, has power to adjudge that the defendant give security to keep the peace for a certain time, and that he be kept in prison until such security be given. *Dunn* v. *Reg.*, 12 Q. B. 1026; 18 L. J., M. C. 41; 13 Jur. 233; 3 Cox, C. C. 205—Ex. Ch.

Sureties—When taken—Sunday.]—If a person is required to give sureties for good behaviour or to be imprisoned in default, the taking sureties and committal on default are judicial acts, and are therefore void if done on Sunday. *Reg.* v. *Ramsay*, 16 W. R. 191.

—— No Period fixed for Entering into Recognisances.]—Quære, whether a judgment which directs that each of several defendants shall enter into recognisances to keep the peace for the space of seven years next ensuing the acknowledgment thereof, is good, as no period is fixed for entering

into the recognisances *O Connell* v *Reg*, 11 Cl & F 155, 9 Jur 25 1 Cox, C C 413

Detaining Prisoner after Acquittal]—If, after the grand jury is discharged a prisoner charged with maliciously shooting is acquitted, the judge will not order him to be detained while articles of the peace against him are prepared *Rex* v *Holt*, 7 Car & P 518

Attachment]—The court granted an attachment upon articles of the peace where the threat of further violence was conditional on the exhibitant writing again to a member of the defendant's family although it did not appear that the exhibitant had written again or was under any necessity of doing so *Reg* v *Rollmache* 2 L M & P 401

Certiorari — Applicant not in Custody]—Where a peer had been arrested by a warrant of two justices and bound by recognisances with two sureties to keep the peace the court refused an application for a certiorari to bring up the recognisances (on the ground of the justices having no jurisdiction) as the applicant was not in custody and in the event of its being necessary to enforce the recognisances their validity could be tried in another way *Gifford (Lord), Ex parte* 1 New Sess Cas 400

—— **Power to Examine Allegations in Articles**]—The Court of Queen's Bench has authority to examine the allegations contained in articles of the peace when they are brought up by certiorari, and to quash the articles if no sufficient offence is alleged to justify the justices in ordering the defendant to give sureties of the peace *Reg* v *Dunn* 12 A & E 599, 4 P & D 415, 1 Arn & H 21, 5 Jur 721

Upon a certiorari to bring up orders made by justices requiring persons to find sureties to keep the peace the Queen's Bench Division has jurisdiction to examine the evidence given before the justices and to quash the orders if the evidence is not sufficient to sustain them *Reg* v *Londonderry JJ* 28 L R Ir 440

Application to Discharge]—Where articles of the peace have been filed and an attachment issued for the purpose of bringing in the defendant to find sureties the court will not entertain an application to discharge the articles and to award costs under 21 Jac 1 c 8, s 2 on the ground of alleged insufficiency of the articles, though notice of such application has been given to the prosecutor *Reg* v *Vallinson*, 16 Q B 367, 15 Jur 746 S P *Reg* v *Graves*, 8 L T 311

A party, against whom articles of the peace have been exhibited in the court, cannot call upon the prosecutor to show cause why the articles should not be discharged *Ib*

Articles Exhibited on Oath—Proof]—Where articles of the peace were returned by certiorari, and affidavits made by others than the exhibitant were subjoined on the same parchment, and the whole ended with the following jurat—'sworn by the several deponents' &c—Held, that it sufficiently appeared that the articles had been exhibited on oath *Reg* v *Dunn*, 12 A & E 599, 4 P & D 415, 1 Arn & H 21, 5 Jur 721.

2 JUSTICES

Jurisdiction, whence Derived]—The power of justices to require sureties to keep the peace is derived from the commission of the peace, and it is confined to cases where a party makes it appear to the justices, that he goes in fear and in danger of personal violence from another, by reason of threats employed by him or by reason of looks, gestures and conduct but the party applying for protection must himself draw the inference that he is in fear of personal violence *Reg* v *Dunn* 1 Arn & H 21, 12 A & E 599, 4 P & D 415 5 Jur 721

Where a prize fight is expected the magistrates ought to cause the intended combatants to be brought before them and compel them to enter into securities to keep the peace till the assizes or sessions and if they refuse to enter into such securities to commit them *Rex* v *Billingham* 2 Car & P 234, 31 R R 665

Length of Time]—A justice of the peace is not authorised to require a party to find sureties to keep the peace for an unlimited time *Probert* v *Gratrex* 2 New Sess Cas 429, 8 Q B 1021 15 L J M C 145 10 Jur 566

Commitment—Mention of Sum]—It is not necessary that a commitment for want of sureties should mention the sum in which the party and his sureties are to be bound *Ib*

—— **Refusing to enter into Recognisances** — Articles of the peace were exhibited against A at the quarter sessions of the county of H and he was by that court ordered to enter into recognisances before one or more justices of H to keep the peace for six calendar months thence ensuing Under the warrant of two justices of H, A was brought before two justices of the same county to show cause why he should not enter into the recognisance and he then refused to do so whereupon the justices last mentioned committed him to the county gaol for the then residue of six calendar months from the date of the order of quarter sessions, unless he should in the meantime enter into the recognisance —Held that the justices had no power to commit and that the prisoner was entitled to be discharged on habeas corpus *Ashton or Aston, In re*, 1 New Sess Cas 561, 7 Q B 169, 14 L J, M C 99, 9 Jur 727

A justice of the peace may commit to the house of correction under 6 Geo 1, c 19 s 2, for want of sureties to keep the peace *Aston In re* and *Ex parte*, 1 New Sess Cas 73, 12 M & W 450 13 L J, M C 52 8 Jur 293

In a warrant of commitment for want of sureties to keep the peace, in consequence of having used language threatening bodily harm to an individual, it is not necessary that the warrant should show the nature of the bodily harm threatened, or when the language was used *Ib*

A warrant of commitment, in substance stated, that whereas the plaintiff had been brought before the defendant (who was a justice), charged on the oath of I P with having written on the pavement in a lane the offensive words reflecting on the character of R T W, "Donkey Watt, the railway jackass," and it having been stated to the defendant on the oath of T P that the continued writing for some time past of the offensive words was calculated to produce a breach of the

peace, and T P prayed that the plaintiff might be required to find sureties to keep the peace he, the defendant ordered and adjudged that the plaintiff should enter into his own recognisances in 20*l*, with two sufficient sureties in 15*l* each, to keep the peace for three calendar months The warrant stated that the plaintiff had refused to enter into such recognisance and find such sureties and commanded that the plaintiff should be conveyed to prison and there kept for the space of three months unless the plaintiff in the meantime entered into such recognisance with such sureties This warrant was afterwards quashed on motion and an action of trespass brought against the defendant who granted it —Held first, that the warrant put in by the plaintiff was evidence of the information recited in it *Haylock v Sparke*, 1 El & Bl 471 22 L J, M C 67 17 Jur 731

Held secondly that it must be taken that the defendant intended to require sureties for good behaviour notwithstanding the words sureties of the peace in the warrant *Ib*

—— **In Case of Libels**]—Held thirdly, that a justice of the peace has jurisdiction to require sureties for good behaviour in some cases of libels against private individuals and that therefore the defendant had jurisdiction in the matter out of which the cause of action arose, and within 11 & 12 Vict c 44 s 1 and consequently was not liable to an action of trespass *Ib*

XV BAIL

1 *Application, when Granted* 1933
2 *Application how Made*, 1936
3 *Other Points*, 1937

1 APPLICATION, WHEN GRANTED

Principles on which Bail Accepted or Refused]—The court in exercising its discretion of admitting a prisoner to bail will consider the seriousness of the charge the evidence in support of it, and the punishment which the law awards for the offence *Barronet, In re* and *Ex parte*, 1 El & Bl 1, Dears C C 51, 22 L J, M C 25, 17 Jur 184 1 W R 6

On an application to bail a prisoner charged with a criminal offence the test to govern the discretion of the court is the probability of the prisoner's appearing to take his trial but, in applying that test the court will not look to the character or behaviour of the prisoner at any particular time, but will be guided by the nature of the crime charged, the severity of the punishment that may be imposed and the probability of a conviction *Robinson, In re*, 23 L J, Q B 286, 2 W R 424

The principle on which a party committed to take his trial for an offence may be bailed, is founded on the probability of his appearing to take his trial, and not on his supposed guilt or innocence but the fact of a bill having been found against him is material in estimating that probability *Reg v Scarfe*, 9 D P C 553, 10 L J, M C 144, 5 Jur 700

It is a clear principle of law, that a person charged with a misdemeanour is entitled to be bailed on producing sufficient sureties *Reg v Badger*, D & M. 375, 4 Q B 468, 12 L J, M C 66, 7 Jur 216

A magistrate has no right to reject bail, on account of the character or political opinions of bail, if he is satisfied of their pecuniary sufficiency *Ib*

Where the defendants, who were members of an extensive organisation, were accused of a riot arising out of the agitation created by the said organisation, bail was refused by the local magistrates —Held, that the defendants should not be admitted to bail considering first the serious nature of the offence charged, secondly, the probability of the association, of which the defendants were members, furnishing them with funds to indemnify the bailsmen in case of default on the part of the defendants *Reg v Butler* 14 Cox, C C 530

Certiorari Issued to bring up Conviction]—Where a certiorari had issued to bring up a conviction under 4 Geo 4 c 34 for the purpose of being quashed for defects on the face of it the court admitted the defendant who was in prison under the conviction to bail *Lord, Ex parte*, 4 D & L 405, 1 B C Rep 222, 16 L. J M C 15

Confession of Guilt]—Upon an application to be admitted to bail by two Frenchmen, who had been committed on a coroner's inquest and by a warrant of justices for wilful murder in a duel their affidavits stated that they had acted as seconds of the deceased that the duel was fair that they were ignorant of the law of England, and that the part which they took in the duel was not considered in France any legal offence —Held that there being a confession of guilt the court was not justified in admitting them to bail *Barronet In re* 1 El & Bl 1, Dears C C 51, 22 L J, M C 25, 17 Jur 184, 1 W R 6

Danger to Life—Delay]—Bail refused in a case of treason felony though the prisoner was in ill health and an assize and two commissions had passed without proceeding with the trial, the crown accounting for the delay there being no evidence of danger of the prisoner's life from confinement or that he was suffering from organic disease *Reg v Nagle*, Ir R 2 C L 253

Facts showing Murder or Manslaughter]—A prisoner will not be admitted to bail on a charge of manslaughter where the circumstances warrant the belief that the death of the deceased was not purely accidental *Reg v Stokes*, 3 W R 10

A similar application was made on behalf of two other Frenchmen under the same circumstances, upon the production of verified copies of the depositions before the coroner and before the magistrates the prisoners made no affidavit The court refused the application on the ground that the depositions contained evidence to support the finding of the coroner's inquest *Barthelemy, In re*, Dears C C 60, 1 El & Bl 8, 22 L J, M C 25, 17 Jur 184 1 W R 53

The court refused to bail a prisoner, who was charged on a coroner's inquest with murder, and against whom a bill for the same crime had been found by the grand jury, although his trial had been postponed in consequence of the absence of witnesses for the prosecution and it was alleged, that, on the face of the depositions, as taken before the coroner, the charge of murder could not be sustained *Reg v Andrews*, 2 D.

& L. 10 ; 1 New Sess. Cas. 199 ; 13 L. J., M. C. 113 ; 8 Jur. 779.

—— **After True Bill Returned.**]—A judge will not admit a prisoner to bail after the grand jury has returned a true bill against him for murder. *Reg.* v. *Chapman*, 8 Car. & P. 556.

In Case of Accomplice.]—It is the duty of magistrates, in all cases, to commit an accomplice, and not to admit him to bail, notwithstanding it may be intended to call the accomplice as a witness on the trial. *Rex* v. *Beardmore*, 7 Car. & P. 497.

After Conviction.]—A defendant, brought up for judgment after conviction, stands committed, unless the prosecutor consents to bail. *Rex* v. *Waddington*, 1 East, 159 ; 6 R. R. 238.

Absence of Prosecutor.]—It is in the discretion of the judge to bail the prisoner or not, when his trial is postponed on account of the absence of the prosecutor. *Anon.*, 2 Lewin, C. C. 260.

When Procedendo Awarded.]—Where on error brought it was held that an entry by an inferior jurisdiction did not amount to a judgment, but was merely an order, the court awarded a procedendo to the court below commanding them to proceed to give the proper judgment, but in the meantime allowed the prisoner to be bailed. *Rex* v. *Kenworthy*, 3 D. & R. 173 ; 1 B. & C. 711.

Acquittal not Entered.]—The bail of one acquitted of perjury will be discharged, although the acquittal is not entered of record. *Rex* v. *Spencer*, 1 Wils. 315.

On Committal by House of Lords.]—When the House of Lords voted the defendant guilty of a breach of privilege, and committed him to prison, the court refused to discharge him out of custody. *Rex* v. *Flower*, 8 Term Rep. 314 ; 4 R. R. 662.

Commitment in Execution—What is.]—A commitment by a justice of the peace for a time certain, as for fourteen days, under the Vagrant Act, is a commitment in execution, and the party is not entitled to be bailed. *Rex* v. *Brooke*, 2 Term Rep. 190.

In Case of Libel.]—Semble, that a magistrate has the power of apprehending and of requiring bail of a libeller, and for want of it, of committing him. *Butt* v. *Conant*, Gow. 84 ; 21 R. R. 716. See *Haylocke* v. *Sparke*, 1 El. & Bl. 471 ; 22 L. J., M. C. 67 ; 17 Jur. 731.

Fresh Bail—Bankruptcy of One.]—Where an indictment for conspiracy had been removed by certiorari, and the ordinary bail had been given, but after trial and the conviction of the defendant, and before judgment, a motion was made to quash the indictment for insufficiency, and pending such motion one of the bail became insolvent, and offered a composition to his creditors ; the court refused to require the defendant to give fresh bail. *Reg.* v. *Johnson*, 1 D. & L. 132 ; 7 Jur. 1038.

On Case Reserved.]—*See* ante, col. 1918.

2. APPLICATION, HOW MADE.

Service of Rule Nisi.]—Where neither the husband of a feme covert, nor her next of kin, can be discovered, service of a rule nisi for bailing a prisoner on a charge of manslaughter, may be made on the coroner. *Reg.* v. *Williams*, 8 D. P. C. 301 ; 4 Jur. 654.

Notice of Bail.]—Where bills for misdemeanours are found under the commission of oyer and terminer at the Central Criminal Court, the defendant must give forty-eight hours' notice of bail, unless the application for process is made on a Friday, in any case in which there is reason to think that there is a desire to keep the party in custody over Sunday. *Rex* v. *Carlile*, 6 Car. & P. 628.

Right of Next of Kin of Deceased Person to be Heard.]—In a case of homicide the next of kin of the deceased have no legal right to be heard on an application for bail on a charge of murder, but, ex gratiâ, the court may hear them. *Reg.* v. *McNaughten*, 14 Cox, C. C. 576. See *Reg.* v. *Rumble*, Ir. R. 3 C. L. 271.

Increasing Bail.]—After defendants have been admitted to bail on a criminal charge, the court will not, on affidavit of aggravating facts, increase the bail. *Rex* v. *Salter*, 2 Chit. 109.

Number Required.]—Now it is an invariable rule to require four bail in cases of felony. *Rex* v. *Shaw*, 6 D. & R. 154.

Fresh Bail—Motion for.]—A motion for fresh bail ought to be made at chambers and not in court. *Reg.* v. *Johnson*, 1 D. & L. 132 ; 7 Jur. 1038.

In the Country or in London.]—An attachment upon articles of the peace is bailable before justices of the county. *Rex* v. *Bomaster*, 1 W. Bl. 233.

A party indicted for a misdemeanour at York, may put in bail in London. *Rex* v. *Swaile*, 1 Lewin, C. C. 19.

Where the court thinks that a prisoner ought to be bailed for felony, if he is unable to defray the expense of being brought to Westminster for that purpose, they will grant a rule to show cause why he should not be bailed by a magistrate in the country. *Rex* v. *Jones*, 1 B. & Ald. 209.

The court will not allow a defendant who is out of custody, to be bailed before a magistrate in the country ; he must surrender in court, in order to be bailed. *Rex* v. *Wren*, 5 D. P. C. 222.

In order to entitle a defendant on a charge of felony to be bailed before a magistrate in the country, it is not necessary to produce an affidavit of poverty, if it appears from the other affidavits in the case that he is in a humble situation of life. *Rex* v. *Brooker*, 2 D. P. C. 446.

The court will grant a rule nisi for bailing in the country a party charged with a felony, without the production of an affidavit of his poverty. *Reg.* v. *Gregory*, 9 D. P. C. 129.

In order to a party being bailed in London for an offence committed in the country, the depositions should be removed by certiorari, and notice served on the committing magistrates and

on the prosecution. *Rex* v. *Braithwaite*, 2 Lewin, C. C. 55.

Costs of Notices.]—The court will not require a defendant indicted for a misdemeanour to pay the costs of giving several notices of bail, before they allow the bail to justify. *Rex* v. *Clifford*, 2 L. J. (O.S.) K. B. 210.

3. Other Points.

Duty of Magistrate.]—It is the duty of a magistrate to ascertain the sufficiency of the bail who tender themselves on behalf of an accused party, but he ought not to interfere in any way to dissuade them from becoming bound as bail. *Reg.* v. *Saunders*, 2 Cox, C. C. 249.

—— **Action against, for Refusing.**] — The power of a magistrate to accept or refuse bail in cases of misdemeanour is a judicial duty, and an action will not lie against him for refusing to take bail in such cases without proof of express malice, even though the sureties tendered are found by the jury to have been sufficient. *Linford* v. *Fitzroy*, 3 New Sess. Cas. 438; 13 Q. B. 240; 18 L. J., M. C. 108; 13 Jur. 303.

Recognisances — "Forthwith," Construction of.]—The word forthwith in a notice to a party charged criminally, and out on bail, to appear on pain of forfeiting his recognisance, means, "within a reasonable time from the service," and not from the date of the notice. *Reg.* v. *Price*, 8 Moore, P. C. 203.

—— **To Whom Rendered.**]—A recognisance to render to the keeper of the Queen's prison is satisfied by a render to the gaol of the county in which the defendant was arrested. *Mainwaring* v. *Milner*, 38 L. J., Q. B. 49; L. R. 4 Q. B. 149; 19 L. T. 559; 17 W. R. 608.

Indemnification of Bail.]—On the removal into the Queen's Bench of an indictment for a conspiracy against the defendant, the plaintiff became one of his bail in 40*l.*, the condition of the recognisance being, that the defendant should plead, and at his own costs cause the indictment to be tried, and appear personally, and not depart till discharged by the court. The defendant appeared, and was tried and convicted; and the costs of the prosecution not having been paid, pursuant to 5 Will. & M. c. 11, the recognisances were estreated, and the plaintiff was compelled to pay the 40*l.* The plaintiff having brought an action for money paid against the defendant to recover the 40*l.*:—Held, that as an express promise by a defendant in a misdemeanour to indemnify his bail against the consequences of not paying the cost of the prosecution would not be illegal, the law would imply a promise to that extent, and the plaintiff could therefore recover. *Jones* v. *Orchard*, 16 C. B. 614; 24 L. J., C. P. 229; 1 Jur. (N.S.) 936; 3 W. R. 554.

—— **Whether Writing Necessary.**]—Where B. promised verbally to indemnify A. against all liability if he would become bail for the appearance of C. to answer a charge of misdemeanour, and A., in consequence, became bail for C., the agreement need not be in writing, as the promise is a mere promise to indemnify, and not a promise to answer for the debt or default of another, since no debt or legal duty was owing from C. to A. in consequence of his having become bail. *Cripps* v. *Hartnoll*, 32 L. J., Q. B. 381; 10 Jur. (N.S.) 200; 8 L. T. 765; 11 W. R. 953—Ex. Ch.

—— **Validity of Contract.**]—A contract to indemnify bail against the consequences of the non-appearance of an accused person is contrary to public policy, and therefore illegal. The defendant became bail in 100*l.* for the appearance of M. upon a charge of embezzlement. M. paid 100*l.* to the defendant to indemnify him for becoming bail, and then absconded:—Held, that the plaintiff, the trustee in bankruptcy of M., was entitled to recover that sum from the defendant; for although the contract to indemnify the defendant was against public policy, yet it remained executory, in the absence of any evidence to show that the liability of the defendant, as bail, had been discharged. *Wilson* v. *Strugnell*, 50 L. J., M. C. 145; 7 Q. B. D. 548; 45 L. T. 218; 14 Cox, C. C. 624; 45 J. P. 831.

A contract is illegal, whereby a defendant in a criminal case, who had been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned. *Herman* v. *Jeuchner* or *Zeuchner*, 54 L. J., Q. B. 340; 15 Q. B. D. 561; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A. Reversing, 1 Cab. & E. 364.

XVI. COSTS.

1. *Expenses of Prosecution*, 1938.
2. *Rewards for Extraordinary Exertions or Diligence*, 1942.
3. *Costs in other Cases*, 1942.
4. *After Removal by Certiorari*, 1943.
5. *Taxation*, 1949.
6. *Enforcing Payment*, 1950.

1. Expenses of Prosecution.

In What Offences.]—On an application for costs under 14 & 15 Vict. c. 55, s. 3, in a case of assault the judge must be satisfied that the defendant was taken before magistrates for their summary decision of the case, and by them sent for trial at the assizes; but the production of the summons granted by one of the magistrates for the defendant to appear before such magistrates as should then be there, to answer the complaint, and be further dealt with according to law, is sufficient for this purpose. *Reg.* v. *Gavaron*, 3 Car. & K. 320; 6 Cox, C. C. 64.

An indictment under 8 & 9 Vict. c. 109, which enacts that every person who by fraud or unlawful device or ill practice in playing cards, shall win from any other person any sum of money or valuable thing, "shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof, shall be punished accordingly," is within 7 Geo. 4, c. 64, s. 23, which empowers the court to order the costs of prosecutions in indictments, for knowingly and designedly obtaining any property by false pretences. *Reg.* v. *Gardner*, 5 Cox, C. C. 140.

An indictment for an indecent assault and exposure of the person to A. with intent to incite

him to unnatural practices is not within 7 Geo. 4, c. 64, s. 23, and therefore the prosecutor is not entitled to his costs from the county. *Reg.* v. *John*, 7 L. J., M. C. 92.

The court has power to make an order under s. 77 of the Offences against the Person Act, 1861, for the payment of the costs of the prosecution on an indictment for common assault, as well as on an indictment for assault occasioning actual bodily harm. *Reg.* v. *Waldron*, 18 Cox, C. C. 373.

In frivolous cases of felony a judge will not allow the prosecutor's expenses, although he may be bound over to prosecute by a magistrate. *Rex* v. *Powell*, 1 Car. & P. 96.

Binding over to Prosecute.]—A prosecutrix and witnesses were bound by recognisance to appear against a prisoner at the assizes on a charge of felony. By the advice of counsel, instead of an indictment for felony, an indictment was preferred for a misdemeanour at common law, on which no costs could be allowed. The judge made an order for the expenses of the attendance of the prosecutrix and witnesses. *Reg.* v. *Hanson*, 2 Car. & K. 912.

A prosecutor and his witnesses were bound by recognisances to prosecute and give evidence at the assizes. They attended there and preferred an indictment which was found. The prisoner had been by mistake discharged by proclamation at an adjourned sessions which preceded the assizes, and had absconded. The judge allowed the expenses. *Rex* v. *Bobey*, 5 Car. & P. 552.

A party who is bound over to prosecute at a superior court by a court of quarter sessions, is entitled to his expenses. *Rex* v. *Paine*, 7 Car. & P. 135.

The prosecutor, in a case of perjury, who has included his name in a subpœna, is entitled to his costs as prosecutor, though he is not bound over to prosecute by a magistrate, and he is not limited to his expenses incurred as a witness only. *Rex* v. *Sheering*, 7 Car. & P. 440.

Where a prosecutor on a charge of misdemeanour is not bound over to prosecute at the assizes, quære whether the court has any power under 7 Geo. 4, c. 64, s. 23, to grant him his expenses. In such a case if the witnesses be subpœnaed, the court may grant him their expenses under that section. *Rex* v. *Joyes*, 3 A. & E. 416; 5 N. & M. 101.

Under 7 Geo. 4, c. 64, s. 22, the court may, in case of felony, allow the costs of the prosecutor and witnesses, though they are not under recognisances. *Reg.* v. *Butterwick*, 2 M. & Rob. 196.

Removal by Certiorari.]—Where an indictment on 7 & 8 Geo. 4, c. 30, s. 16, is removed by certiorari into the King's Bench, and is tried on a record issuing out of that court, the expenses of prosecution cannot be allowed under 7 Geo. 4, c. 64, s. 22. *Rex* v. *Kelsey*, 2 D. P. C. 481.

Prosecution at Expense of County.]—Where the clerk of the peace, authorised to prosecute at the expense of the county, had not prosecuted, the expenses of prosecution were not allowed. *Reg.* v. *Cook*, 1 F. & F. 389.

Justices of the peace at the quarter sessions have no authority to order the costs of a prosecution for a misdemeanour, carried on under the direction of magistrates, to be allowed out of the county rates. *Rex* v. *W. R. Yorkshire*, 7 Term Rep. 377.

Prosecution by Individual—Independent Prosecution by Police.]—Where the principal person interested in prosecuting a prisoner is desirous of conducting the prosecution, he is entitled to do so, and to be allowed the costs of the prosecution. In a case of aggravated assault by a prisoner on his wife, the wife retained a solicitor to prosecute her husband. In pursuance of this retainer, the solicitor prepared and delivered a brief to counsel at the assizes with instructions to conduct the prosecution. A constable of the county had been bound over by recognisances to prosecute, and the clerk to the magistrates, as was the usual custom, prepared and delivered a brief to counsel to prosecute:—Held, that the conduct of the prosecution should not be taken out of the hands of the person principally interested if that person wished to undertake it. *Reg.* v. *Yates* (7 Cox, C. C. 361), distinguished. *Reg.* v. *Bushell*, 16 Cox, C. C. 367; 52 J. P. 136.

In a case of manslaughter the father of the deceased retained a solicitor to prosecute. A constable had been bound over to prosecute and two briefs had been delivered, one by the solicitor, the other by the police:—Held, that the court could not order that the solicitor should be allowed the costs of preparing his brief under 7 Geo. 4, c. 64, s. 22. *Reg.* v. *Yates*, 7 Cox, C. C. 361.

Plea of Guilty—No Judgment.]—Where to an indictment at the assizes for a misdemeanour the defendants consented to plead guilty, upon an understanding that they were not to be brought up for judgment, and no stipulation or agreement having been then expressly made by the prosecutor for the payment of his costs:—Held, that he was not afterwards entitled to a rule on the crown side to have his costs taxed. *Rex* v. *Rawson*, 4 D. & R. 124; 2 B. & C. 598.

Liability of Director of Public Prosecutions.]—A prosecutor entered into recognisances to carry on a prosecution for alleged conspiracy at the Central Criminal Court, but gave no security for costs. A true bill having been found, the Director of Public Prosecutions undertook the case, and upon the trial of the indictment, the persons accused were acquitted:—Held, that as the original prosecutor had given no security for costs, the Director of Public Prosecutions was not, upon the true construction of s. 7 of 42 & 43 Vict. c. 22, liable to pay the costs of the accused persons. *Stubbs* v. *Director of Public Prosecutions*, 59 L. J., Q. B. 201; 24 Q. B. D. 557; 62 L. T. 399; 38 W. R. 607; 17 Cox, C. C. 1; 55 J. P. 69.

Mandamus to enforce Payment.]—On a conviction of forgery, the trial taking place in the county of S., but the material acts appearing to have been done partly in the county of D., and partly in the borough of O., in the county of S., which borough had its own rate in the nature of a county rate, the judge of assize made an order upon the borough treasurer, under 7 Geo. 4, c. 64, s. 25, for payment of the prosecutor's costs. The order was not disputed during the assizes. The borough afterwards contesting it, and a mandamus being moved for:—Held, that the judge's order was conclusive, and that a mandamus might issue to enforce the payment. *Reg.* v. *Oswestry* (*Treasurer*), or *Reg.* v. *Hayward*, 12 Q. B. 239; 17 L. J., Q. B. 223; 12 Jur. 744.

The entire order of a court to pay the costs of

the prosecution under 7 Geo. 4, c. 64, s. 26, must be served on the county treasurer, and therefore where the order made was to pay an aggregate sum, the details being annexed, the treasurer is justified in refusing to pay if the details are torn off. *Reg.* v. *Jones*, 2 M. C. C. 171; 9 Car. & P. 401.

What Sums included in Costs.]—On a trial for manslaughter a surgeon will only be allowed for his attendance at the trial and not for his fee for opening the body by order of the coroner. *Rex* v. *Taylor*, 5 Car. & P. 301.

The judge on a trial for murder has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest. *Rex* v. *Rees*, 5 Car. & P. 302.

Where the evidence of an infant witness is necessary to support a prosecution, such infant witness should be subpœnaed to appear and give evidence at the trial, and the costs of such subpœna should be allowed. *Reg.* v. *Smith*, 17 Cox, C. C. 601.

The court has no power to make an order on the treasurer for the interlocutory costs of a prosecution, and will not make any till the trial has actually taken place. *Young, In re*, 2 Cox, C. C. 280.

The court has no power to order payment, as part of the expenses of a prosecution, of the costs incurred by the warders of Millbank prison, in bringing down to Wells a prisoner in custody at Millbank, as an escaped convict, to be tried at Wells, on a charge of larceny from the person. *Reg.* v. *Waters*, 8 Cox, C. C. 350.

Under the words, "in otherwise carrying on such prosecution," in 7 Geo. 4, c. 64, s. 22, extra expenses which had been incurred in getting up a prosecution, ordered to be reimbursed. *Rex* v. *Lewen*, 2 Lewin, C. C. 161.

On Postponement of Trial.]—Upon the postponement of a trial for the recovery of a witness who is ill, the prosecutor may then be allowed the costs of the prosecution incurred up to the date of the postponement. *Reg.* v. *Wilson*, 12 Cox, C. C. 622.

If the trial of an indictment for felony is postponed at the instance of the prisoner on account of the illness of a witness, the prisoner is never required to pay the costs of the prosecutor. *Rex* v. *Hunter*, 3 C. & P. 591.

Where the trial of a case of felony is postponed, the court will not make any order for the expenses till after the trial has actually taken place. *Ib.*

Treasury Prosecution—Local Solicitors—Liability to Account.]—When local solicitors are retained by the treasury, to conduct prosecutions on their behalf, such local solicitors are agents for the treasury, and are therefore bound to account to the treasury for any sums of money received in respect of costs, and to pay over to the treasury the difference between the sums so received as costs and the sum allowed them on taxation. *Parkinson, In re*, 56 L. T. 715.

Order on Prisoner—Bankruptcy after Apprehension.]—After a conviction for felony an order was made under s. 3 of 33 & 34 Vict. c. 23, for the payment of the costs of the prosecution out of the moneys found on the prisoner at the time of his apprehension:—Held, that the order was good though the prisoner had been adjudicated a bankrupt between the date of his apprehension and that of his conviction. *Reg.* v. *Roberts*, 43 L. J., M. C. 17; L. R. 9 Q. B. 77; 29 L. T. 674; 22 W. R. 60; 12 Cox, C. C. 574.

2. Rewards for Extraordinary Exertions or Diligence.

When Granted.]—On an indictment for an attempt to murder by suffocating, the allowance of extra expenses for apprehending the prisoner is within the spirit and intention of the 7 Geo. 4, c. 64, s. 28, though not within the words. *Rex* v. *Durkin*, 2 Lewin, C. C. 163.

Stealing from the person is not within 7 Geo. 4, c. 64, s. 28, so as to enable the court to award the constable extra costs. *Reg.* v. *Thompson*, 1 Cox, C. C. 43.

Under the word "exertions," in 7 Geo. 4, c. 64, s. 28, a gratuity was awarded to a prosecutor for his courage in apprehending the prisoner. *Rex* v. *Womersly*, 2 Lewin, C. C. 162.

A person residing in a house broken into by burglars, and who, by fastening them in a room, detains them there until assistance is obtained, and the capture of the offenders effected, is within 7 Geo. 4, c. 64, s. 28. *Reg.* v. *Dunning*, 5 Cox, C. C. 142.

A judge has no power to order payment of the expenses incurred in the apprehension of a prisoner who has left England. *Reg.* v. *Barrett*, 6 Cox, C. C. 78.

Rewards, under 7 Geo. 4, c. 64, s. 28, are not confined to cases where the person apprehending has had a loss of time or has been at any expense. *Rex* v. *Barnes*, 7 Car. & P. 166.

Affidavit Required.]—An application under 7 Geo. 4, c. 64, s. 28, must be founded on an affidavit of the amount actually expended. *Reg.* v. *Haines*, 5 Cox, C. C. 114.

Where a reward is applied for under 7 Geo. 4, c. 64, s. 28, and the facts on which the application is grounded are not in evidence, the judge requires an affidavit of them. *Rex* v. *Jones*, 7 Car. & P. 167.

3. Costs in Other Cases.

What Costs Prosecutor must Pay.]—Costs for not going to trial shall be paid to a defendant, by the course of the court, on informations for misdemeanours, where the prosecutor does not countermand his notice of trial in time. *Rex* v. *Heydon*, 3 Burr. 1304.

But a prosecutor is not to pay costs for not going to trial according to his notice, if it is not occasioned by his own default. *Rex* v. *Righton*, 3 Burr. 1694.

Rule for Costs Absolute.]—A rule for the costs of the day for not proceeding to trial on an indictment for perjury pursuant to notice, is absolute in the first instance. *Reg.* v. *Hazard*, 1 W. W. & H. 417; 2 Jur. 1067.

On Information.]—On a defendant's acquittal on an information, he is not entitled under 4 & 5 Will. & M. c. 18, s. 2, to costs, beyond the extent of the recognisance entered into by the prosecutor in 20*l.* under that act. *Rex* v. *Filewood*, 2 Term Rep. 145.

The court on granting an information will not require the prosecutor to give security for costs, in case the defendant should be acquitted, beyond

the extent of the recognisance in 20*l.* required by 4 & 5 Will. & M. c. 18, s. 2. *Rex* v. *Brooke*, 2 Term Rep. 190.

4. After Removal by Certiorari.

Form of Recognisance.]—An indictment was removed into the Queen's Bench by certiorari obtained at the instance of the prosecutor, who entered into a recognisance, with two sureties, conditioned that he should there prosecute with effect and perform all such orders and things as the court should direct. The defendants having been acquitted:—Held, that as the recognisance was not in the form prescribed by 16 & 17 Vict. c. 30, s. 5, i.e. conditioned to pay the defendants' costs on acquittal, they were not entitled to costs. *Reg.* v. *East Stoke*, 6 B. & S. 536; 34 L. J., M. C. 190; 11 Jur. (N.S.) 809; 13 W. R. 737.

When Costs may be Awarded.]—The 38 Geo. 3, c. 52, s. 12, providing that no indictment shall be removed into the next adjoining county, except the persons applying for such removal shall enter into a recognisance in 40*l.* for the extra costs, does not relate to indictments sent by K. B. to be tried in the next adjoining county, after a removal thither by certiorari. *Rex* v. *Nottingham*, 4 East, 208; 1 Smith, 51.

Where the prosecutor of an indictment for a misdemeanour found at sessions removes it into the Queen's Bench by certiorari, he is not entitled to costs under 7 Geo. 4, c. 64, s. 23. *Rex* v. *Richards*, 2 M. & Ry. 405; 8 B. & C. 420; 6 L. J. (O.S.) M. C. 104. S. P., *Rex* v. *Johnson*, 1 M. C. C. 173; *Reg.* v. *Exeter*, 5 M. & Ry. 167.

In the case of an indictment removed by certiorari, the court has no power to order the payment of costs incurred before the removal. *Rex* v. *Pasman*, 3 N. & M. 730; 1 A. & E. 643; 3 L. J., M. C. 111.

Where an indictment against a corporation, for non-repair of a highway, is removed by certiorari, at the instance of the prosecutor, the prosecutor is not required by 16 & 17 Vict. c. 30, s. 5, to enter into recognisances to pay the defendant's costs, in case of acquittal; indictments against corporations being excepted from the operation of the act. *Reg.* v. *Manchester Corporation*, 7 El. & Bl. 453: 26 L. J., M. C. 65; 3 Jur. (N.S.) 839; 5 W. R. 373.

A public body at its own expense preferred an indictment for a libel upon A., one of its officers, in the name of A. as prosecutor. The defendant removed the indictment by certiorari, and was convicted:—Held, that no costs could be awarded under 5 & 6 Will. & M. c. 11, s. 3. *Rex* v. *Dewhurst*, 2 N. & M. 253; 5 B. & Ad. 405; 2 L. J., M. C. 92.

The provisions of the 5 & 6 Will. & M. c. 11, ss. 2 and 3, attach only upon a defendant being convicted by judgment; and therefore if, after a verdict of guilty, the judgment is arrested, no costs can be taxed for the prosecutor. *Rex* v. *Turner*, 15 East, 570.

The prosecutor of an indictment removed by certiorari is only entitled under 5 & 6 Will. & M. c. 11, s. 3, to the costs of the counts on which the defendant is convicted. *Reg.* v. *Hawdon*, 3 P. & D. 44; 11 A. & E. 143.

Where a defendant who removes an indictment by certiorari is convicted, he shall not pay costs under 5 & 6 Will. & M. c. 11, to the prosecutors. *Rex* v. *Ingleton*, 1 Wils. 139.

—— **16 & 17 Vict. c. 30, s. 5.**]—Two defendants being indicted jointly in the Central Criminal Court for conspiracy, one of them applied to a judge for a certiorari, who granted it on his entering into a recognisance for the payment of the prosecutor's costs, in case either defendant should be convicted:—Held, that such terms were reasonable, and within the discretion of the judge; and that the 16 & 17 Vict. c. 30, s. 5, made no difference in this respect. *Reg.* v. *Jewell*, 7 El. & Bl. 140; 26 L. J., Q. B. 177; 3 Jur. (N.S.) 689; 5 W. R. 202.

By 16 & 17 Vict. c. 30, s. 5, after reciting that it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench, it is enacted, whenever any writ of certiorari to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs, incurred subsequent to the removal of such indictment, &c.:—Held, that the prosecutor is entitled to his costs in the case of an indictment removed by certiorari under this section, though he is not "the party grieved or injured" to whom costs are limited by 5 & 6 Will. & M. c. 11, s. 3. *Reg.* v. *Oastler*, 43 L. J., Q. B. 42; L. R. 9 Q. B. 132; 29 L. T. 830; 22 W. R. 490; 12 Cox, C. C. 578.

An indictment containing several counts, charging different misdemeanours, was removed into the high court by certiorari, the prosecutors entering into a recognisance, under 16 & 17 Vict. c. 30, s. 5, upon condition to pay to the defendant, in case she should be acquitted upon the indictment, her costs incurred subsequent to the removal. The defendant was convicted on some of the counts and acquitted on others. On a rule to tax the costs to be paid by the prosecutors to the defendant in respect of the counts on which she had been acquitted:—Held, that the defendant had not been "acquitted upon the indictment," within the meaning of the recognisance, and therefore was not entitled to costs. *Reg.* v. *Bayard*, [1892] 2 Q. B. 181; 67 L. T. 313; 40 W. R. 525; 17 Cox, C. C. 572; 56 J. P. 650.

Who are Parties Grieved.]—Where a prosecution had been carried on by subscription, and it did not appear that the persons in whose name it was carried on had incurred any personal expense or liability, they are not entitled to costs as prosecutors under 5 W. & M. c. 11, s. 3. Whether the relatives of a deceased person whose body has been disinterred for the purpose of dissection and who prosecute the offender, are parties grieved under that statute, quære. *Rex* v. *Cook*, 1 M. & Ry. 526; 6 L. J. (O.S.) M. C. 52.

Rated inhabitants of a parish, who were prevented by rioters from entering the vestry-room to attend a meeting called for the purpose of imposing a church-rate, and who afterwards prosecuted the offenders, are parties grieved within 5 & 6 Will. & M. c. 11, s. 3; and therefore entitled to costs on conviction of the defendants after removal of the indictment by certiorari. *Rex* v. *Thompkins*, 2 B. & Ad. 287.

Persons dwelling near a steam-engine, which emitted volumes of smoke, affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for it, are parties grieved, and entitled to have their costs taxed

under 5 & 6 Will. & M. c. 11, s. 3, upon removal of the indictment by certiorari from the sessions into the court by the defendants, and their subsequent conviction. *Rex* v. *Dewsnap*, 16 East, 194.

A defendant was convicted of perjury on an indictment removed at his instance, by certiorari:—Held, that the prosecutors, who were executors of a deceased person, were entitled to costs under 5 & 6 Will. & M. c. 11, as persons grieved or injured, although the perjury occasioned them no actual damage, it being sufficient to bring the case within the statute that the perjury might have caused them damage, and the false oath of the defendant having put a difficulty in their way, which they were compelled to remove. *Reg.* v. *Major*, Dears. C. C. 13; 1 B. C. C. 68; 21 L. J., M. C. 221.

If the metropolitan police commissioners appointed under 10 Geo. 4, c. 44, s. 1, direct an indictment for assaulting one of the police constables in the execution of his duty, and the defendant removes such indictment by certiorari and is convicted, the commissioners are entitled to costs under 5 & 6 Will. & M. c. 11, s. 3, as justices of the peace and civil officers whom it concerned to prosecute. *Reg.* v. *Waldegrave (Earl)*, 2 Q. B. 341; 1 G. & D. 615; 11 L. J., M. C. 19; 6 Jur. 502.

Where an indictment has been removed by certiorari, and a conviction obtained, the person who, being a party grieved, retained and is liable to the attorney for the prosecution, is entitled, under 5 & 6 Will. & M. c. 11, s. 3, to the costs of such prosecution, though other aggrieved parties, after the attorney was retained and the indictment removed, agreed to contribute part of the costs, and they are not joined in the application. *Reg.* v. *Williams*, 6 Q. B. 273; 15 L. J., Q. B. 98, n.; 8 Jur. 559. S. P., *Reg.* v. *Fox*, 2 L. T. 281.

An indictment for a libel on a political dinner, alleged to have a tendency to produce a riot, was, at the instance of the defendants, removed by certiorari:—Held, that a person injured at a riot which took place at that dinner was not a person grieved within 5 & 6 Will. & M. c. 11, s. 3, and therefore, although the defendants were convicted on the indictment, he was not entitled to costs. *Reg.* v. *Caldecott*, 1 D. (N.S.) 556; 11 L. J., M. C. 61; 6 Jur. 344.

Where the defendants remove an indictment by certiorari, a merely nominal prosecutor is not entitled to costs under the 5 & 6 Will. & M. c. 11, s. 3, as a party grieved or injured. *Reg.* v. *Barnard Castle*, 1 Q. B. 246; 10 L. J., M. C. 53; 5 Jur. 799.

A child, six years old, was found wandering in a parish, within a union in London. It appeared to be destitute, and to have been assaulted and very ill-used. It was received into the union workhouse, and there maintained. On its being taken before two aldermen, they urged the guardians of the union to undertake the prosecution of the person who appeared to have ill-used the child. The guardians did so. The defendant removed the case by certiorari, and was convicted:—Held, that the guardians were entitled to the costs of the prosecution, under 5 & 6 Will. & M. c. 11, s. 3, having prosecuted as officers, on account of a fact that concerned them as officers to prosecute. *Reg.* v. ——, 15 Q. B. 1060; 20 L. J., M. C. 53; 15 Jur. 55; 4 Cox, C. C. 345.

Where an indictment has been removed by certiorari, under 5 & 6 Will. & M. c. 11, s. 3, if the party grieved or injured is, in point of fact, the prosecutor, he will be entitled to costs, although not bound over to prosecute, and although another person, not a party grieved or injured, was bound over to prosecute, and was at the trial in pursuance of his recognisance. *Reg.* v. *Bishop*, 6 D. & L. 499; 18 L. J., M. C. 63; 13 Jur. 538.

A society of attorneys of a county had prosecuted an indictment against a defendant for practising as attorney at the quarter sessions of the city and borough, in the county, without being qualified. The defendant removed the indictment by certiorari, and was convicted:—Held, that the society was entitled to costs, under 5 & 6 Will. & M. c. 11, s. 3, as parties grieved. *Ib.*

A defendant was committed by the lord mayor of London for trial for an indecent assault. An indictment found at the Central Criminal Court was removed into the Queen's Bench by certiorari at the instance of the defendant. The defendant was convicted. The prosecution was conducted by the city solicitor, in obedience to the directions of the lord mayor given at the time he committed the defendant; and the expenses were defrayed out of the city funds:—Held, that the case was not within 5 & 6 Will. & M. c. 11, s. 3, inasmuch as the lord mayor was not personally liable for the expenses, and could not be considered as a prosecutor. And a side-bar rule taken out to tax the costs was set aside. *Reg.* v. *Wilson*, 1 El. & Bl. 597; Dears. C. C. 79; 22 L. J., M. C. 53; 17 Jur. 460; 1 W. R. 150; 6 Cox, C. C. 176.

A side-bar rule for costs having been obtained by the prosecutors of an indictment for an obstruction to a highway as parties grieved, within 5 & 6 Will. & M. c. 11, s. 3, the court refused to discharge it on the ground that the expenses of the prosecution had been paid out of the funds of a society, of which some of the prosecutors were members, and that money had been raised by public subscription towards paying those expenses; or on the ground that all the prosecutors were not parties aggrieved; or on the ground that the certiorari for removing the indictment had been obtained at the instance of one only of the defendants. *Reg.* v. *Dobson*, 9 Q. B. 302; 15 L. J., Q. B. 97; 10 Jur. 283; 1 Cox, C. C. 251.

When Sureties Liable for.]—The sureties of a defendant, on the removal of an indictment for a misdemeanour by certiorari from the quarter sessions, where the defendant has been convicted, are liable to pay the prosecutor's costs, although there is no such undertaking in the condition of the recognisance, or direct provision to that effect in 5 & 6 Will. & M. c. 11, s. 3. *Reg.* v. *Hodgson*, 7 Ex. 915; 21 L. J., M. C. 181. S. P., *Reg.* v. *Hague*, 10 L. J., M. C. 123.

Where a defendant removes an indictment by certiorari, and recognisances are entered into under 5 & 6 Will. & M. c. 11, s. 2; 8 & 9 Will. 3, c. 33, s. 1; and 5 & 6 Will. 4, c. 33, s. 2, conditioned only for the defendant's appearing, pleading and trying at his expense, and the defendant is convicted, such recognisances will be estreated for non-payment of the costs of the prosecution, under 5 & 6 Will. & M. c. 11, s. 3, though the condition expressed in the recognisances is performed. *Reg.* v. *Hawdon*, 1 Q. B. 464; 1 G. & D. 135; 9 D. P. C. 1009; 5 Jur. 1008.

Where a defendant removes an indictment by certiorari, and enters into recognisances with two sureties, under 5 & 6 Will. & M. c. 11, ss. 2 & 3, and 8 & 9 Will. 3, c. 33, and is convicted, the sureties are liable to pay the prosecutor his costs. *Reg.* v. *Besant*, 7 D. P. C. 680; 2 W. W. & H. 113; 3 Jur. 579.

Bail only Liable if Defendant Convicted—New Trial.]—A defendant had removed an indictment by certiorari, and had entered into the usual recognisances with two sureties. After a verdict of guilty at the assizes he obtained a rule for a new trial on payment of costs. Without paying the costs he gave notice of trial for the next assizes to the prosecutor, who obtained a judge's order, by which, if the costs were paid by a certain day, the notice of trial was to stand good, but otherwise to be set aside. The defendant did not pay the costs, did not try the indictment, and died within a few weeks. The prosecutor obtained a side-bar rule to tax his costs, to be paid by the defendant or his bail:—Held, that the bail were not liable to pay the prosecutor's costs, because they are only liable when the principal has been convicted; and that after the granting the rule for a new trial it could not be said that there had been a conviction within the true meaning of the recognisance, and that neither the defendant's default in paying the costs, nor the judge's order setting aside the notice of the trial, did away with the rule for the new trial, or restored the original verdict. *Reg.* v. *Bowen*, 7 D. & L. 312; 19 L. J., Q. B. 63.

—— **Death before Judgment.**]—Where a defendant had removed an indictment from the sessions by certiorari, and was convicted, but died before he could be brought up for judgment:—Held, that his bail was liable to pay the taxed costs of the prosecution, under 5 & 6 Will. & M. c. 11, s. 3. *Rex* v. *Turner*, 4 D. & R. 816: 3 B. & C. 160; 2 L. J. (o.s.) K. B. 222. S. P., *Rex* v. *Finmore*, 8 Term Rep. 509.

Who is Prosecutor.]—Where the order of a town council, being brought up by certiorari, is quashed, on motion, with costs, the court should decide who is to be charged with costs as prosecutor of the order, and the party should be named in the rule. *Reg.* v. *Dunn*, 5 Q. B. 959; D. & M. 737; 13 L. J., Q. B. 237; 8 Jur. 773.

Indictment noticed without Affidavit.]—Where an indictment has been removed by certiorari, and judgment given upon it, the court will notice the contents of such indictment on a motion respecting costs of the prosecution, without having the record brought before them by affidavit. *Reg.* v. *Waldegrave (Earl)*, 2 Q. B. 341; 1 G. & D. 615; 11 L. J., M. C. 19; 6 Jur. 502.

Certiorari Granted—Application by one Defendant.]—Where an application was made to remove an indictment by certiorari by one of several defendants, the court granted it upon his entering into recognisances to pay the costs, not only if he was, but if either of the other defendants was, convicted. *Reg.* v. *Foulkes*, 1 L. M. & P. 720; 20 L. J., M. C. 196.

Where one of several defendants obtained a certiorari for the removal of an indictment into the Queen's Bench, and a procedendo was moved for on the ground that the certiorari improvide emanavit, inasmuch as the other defendants had not joined in the application for the writ, and had not, under 5 & 6 Will. & M. c. 11, s. 3, entered into recognisances to pay the costs of the prosecution in case of their conviction:—Held, that the defendant, on whose application the certiorari was granted (being a person to whose responsibility there appeared no objection), might enter into recognisances to pay costs in case of the conviction of himself or of the other defendants, or of either of them, and that under these circumstances the procedendo would not be ordered. *Reg.* v. *Probert*, Dears. C. C. 30.

One of three defendants jointly indicted for misdemeanour at the Central Criminal Court, obtained a certiorari from a judge at chambers, to remove the indictment into the Queen's Bench, and entered into recognisances, conditioned to pay the costs of the prosecution if he was convicted, to appear, plead, and try. The other defendants concurred, but entered into recognisances only to appear, plead, and try. On motion for a procedendo, it was suggested that this course created hardship on the prosecutor, as, if the party removing were acquitted, but the other convicted, the prosecutor would have no security for costs:—Held, nevertheless, that the judge had a discretion, the exercise of which the court would not review, and the procedendo was refused. *Reg.* v. *Wilks*, 5 El. & Bl. 690; 25 L. J., Q. B. 47; 1 Jur. (N.S.) 1166; 4 W. R. 86.

If an indictment against several defendants is removed by certiorari without the consent of one, he cannot be compelled to pay the costs of the trial, although he may have appeared and pleaded to the indictment and been tried on it. *Rex* v. *Hassell*, 5 D. P. C. 531; 2 H. & W. 321.

Representatives of Prosecutor entitled to.]—Under 5 & 6 Will. & M. c. 11, s. 3, the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him. *Rex* v. *Chamberlayne*, 1 Term Rep. 103.

Deduction of Fine from.]—Where a defendant had removed an indictment, entered into a recognisance, been convicted and fined, and the prosecutor received one-third thereof, so much was deducted out of the sum for costs. *Rex* v. *Osborne*, 4 Burr. 2125.

Side-bar Rule—Mention of Bail.]—The defendant had removed an indictment by certiorari, and had entered into the usual recognisances with two sureties. The prosecutor obtained a side-bar rule to tax the costs of the first trial, to be paid by the defendant or his bail:—Held, that whether liable or not, the bail ought not to have been mentioned in the side-bar rule for the taxation of costs. *Reg.* v. *Bowen*, 7 D. & L. 312; 19 L. J., Q. B. 63.

Reasonable Costs—What are.]—Where an indictment was removed by certiorari at the instance of a defendant, and he was found guilty, the costs of conveying him to gaol, on his receiving sentence of imprisonment, are reasonable costs within 5 & 6 Will. & M. c. 11, s. 3, to be allowed to the prosecutor on taxation. *Rex* v. *Gilbie*, 5 M. & S. 520; 2 Chit. 159.

What Costs Recoverable.]—An indictment removed by the defendant and made a special jury cause by the prosecutor, came on to be

tried, and was immediately referred. The order of reference stated, that if the arbitrator should be of opinion that the defendant was guilty, and the prosecutor entitled to costs, the defendant agreed to pay the costs. The arbitrator did so find:—Held, that the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs pursuant to 6 Geo. 4, c. 50, s. 34; and the order of reference did not expressly give a power of doing so to the arbitrator. *Rex* v. *Moate*, 3 B. & Ad. 237; 1 L. J., K. B. 78.

When a prosecutor has removed the record by certiorari, if the trial is put off by reason of the act of God, the defendant is not liable to the costs of the day. *Rex* v. *Burrett*, 2 Lewin, C. C. 263.

Upon an indictment for perjury, removed by certiorari, if the prosecutor gives notice of trial to the defendant, and withdraws his record, countermanding his notice in time, he shall pay costs to the defendant. *Rex* v. *Bartrum*, 8 East, 269.

If a prosecutor, having removed an indictment by certiorari, gives notice of trial for the assizes, and brings down the record, and withdraws it after it has been entered for trial, the judge at the assizes cannot order the prosecutor to pay the defendant the costs of the day; but a motion must be made in the Court of King's Bench. *Rex* v. *Watton*, 4 Car. & P. 229.

At what Stage Payable.]—Where a judge at the assizes refused to try an indictment for a misdemeanour (perjury), manifestly bad on the face of it, but did not order it to be quashed, and the prosecutor preferred another indictment for the same offence, and removed it into K. B., the court would not call upon the prosecutor to pay the costs of the first prosecution, before he proceeded with the second. *Rex* v. *Tremaine*, 5 D. & R. 413; 3 B. & C. 761; R. & M. 147; 3 L. J. (O.S.) K. B. 57.

Discharging Recognisance.]—Where on removing an indictment from the sessions, by certiorari, a recognisance is given by two in 20*l.* each, under 5 & 6 Will. & M. c. 11, ss. 2, 3, to secure the costs, such recognisance will not be discharged till all the costs are paid, though they exceed 40*l.* *Rex* v. *Teal*, 13 East, 4; 10 R. R. 516.

5. Taxation.

Jurisdiction of Queen's Bench to Review.]—The Court of Queen's Bench has no jurisdiction to review the taxation, by the clerk of assize, of the costs of an indictment for libel on the crown side at the assizes. *Reg.* v. *Newhouse*, 1 B. C. C. 129; 22 L. J., Q. B. 127.

Power of Treasury to Tax.]—The accounts of costs of prosecutions in the county of Lancaster, after having been duly taxed by the proper officers, and paid out of the county rates, were re-taxed by officers of the Treasury, and part of them was disallowed. The justices of the county obtained a rule for a mandamus to compel the Lords of the Treasury to pay the disallowed balance to their treasurer:—Held, that the Lords of the Treasury had no right to tax these costs after they had been allowed by the proper officers; but that the Court of Queen's Bench had no jurisdiction to issue a mandamus to compel the Lords of the Treasury to pay the balance. *Reg.* v. *Lords of the Treasury*, 41 L. J., Q. B. 178; L. R. 7 Q. B. 387; 26 L. T. 64; 20 W. R. 336; 12 Cox, C. C. 277.

6. Enforcing Payment.

Attachment—Affidavit.]—Where a side-bar rule is issued under 5 & 6 Will. & M. c. 11, s. 3, and an attachment is moved for by the prosecutor for non-payment of the costs, it is not necessary to have an affidavit that the prosecutors are the parties grieved. *Reg.* v. *Hills*, 22 L. J., Q. B. 322; 17 Jur. 714; 6 Cox, C. C. 174.

—— **Defendant a Bankrupt—Proof.**]—Where costs of the prosecution of an indictment removed by certiorari have been proved as a debt under the defendant's bankruptcy, the court will not issue an attachment against him, or estreat his recognisance for non-payment, although they were not taxed in the regular course until after the bankruptcy; but such proof is no discharge of the bail. *Reg.* v. *Hills*, 2 El. & Bl. 176; 1 C. L. R. 575; 22 L. J., Q. B. 322; 6 Cox, C. C. 174.

—— **Poverty of Defendant.**]—On the removal by certiorari of an indictment for disobedience of an order of sessions, the defendant and two sureties entered into the usual recognisance under 5 & 6 Will. & M. c. 11, s. 2, which made no mention of costs. The defendant was convicted and attached for non-payment of the costs, and the recognisance was estreated into the Exchequer. On the petition of the defendant and his sureties, the court stayed the proceedings on the recognisance as regarded the defendant, on account of his poverty, but without prejudice to the liability of the sureties. *Reg.* v. *Thornton*, 4 Ex. 820; 19 L. J., M. C. 113.

—— **Against one Defendant.**]—Several defendants were found guilty of a nuisance. The prosecutor being entitled to costs, as a party grieved, under 5 & 6 Will. & M. c. 11, s. 3, obtained a rule for taxing the costs as against all:—Held, that, upon non-payment of the costs, an attachment against one was regular. *Reg.* v. *Dobson*, 9 Q. B. 302; 15 L. J., Q. B. 376; 10 Jur. 905.

Mandamus to Treasurer.]—*See* ante, col. 1940.

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CROPS.

Tenants' Rights.] — *See* Landlord and Tenant.

Taking in Execution.]—*See* Distress—Execution.

Bills of Sale.]—*See* Bills of Sale.

END OF VOLUME IV.

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